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June 2, 2025

Honorable Marc C. Lemieux, A.J.S.C.
Monmouth County Courthouse
71 Monument Park, 3rd Floor
Freehold, NJ 07728

Re: **State v. Paul Caneiro**
Case No. 18-004915 / Indictment No. 19-02-283-I

Motion to Suppress DVR Evidence – Defense Response

Dear Judge Lemieux:

Please accept this letter brief in lieu of a more formal brief in support of the defense's Motion to Suppress the DVR system that was illegally seized and subsequently searched without a warrant on November 19, 2018. This brief is also submitted in response to the State's brief, filed on May 27, 2025.

PRELIMINARY STATEMENT

This case presents an unlawful, warrantless search of Mr. Caneiro's garage on November 20, 2018 at approximately 5:40 AM, which resulted in the unlawful seizure of Mr. Caneiro's DVR system without his consent. Contrary to the State's position, the exigency exception does not apply.

Additionally, at the outset, the defense notes that it does not dispute that fire personnel and law enforcement were entitled to enter the garage if needed to extinguish the fire. The defense is not suggesting that police officers could not enter the garage to aid in firefighting or live saving efforts. However, here, this was not the reason or purpose that police entered into the garage. Rather, here, police entered the garage – a separate, distinct area undisturbed by the fire on the opposite end of the house – for the sole purpose of performing a search and seizure of evidence pursuant to their criminal investigation. As seen on BWC footage, there is no fire in the garage, there are no firefighters in the garage, and there is no 'exigent' reason for police to be in the garage, let alone searching the garage, at the time they seized the DVR. Accordingly, there was no "objectively reasonable basis to believe that prompt action [was] needed to meet an imminent danger." (Sb4) (quoting State v. Miranda, 253 N.J. 461, 480 (2023)).

RELEVANT FACTS

On November 19, 2018, at approximately 5:00 AM, a fire was reported at 27 Tilton Ave., the home of Paul Caneiro. Fire personnel and law enforcement responded immediately, with first responders arriving only minutes after 5:00 AM.

Weinkofsky and Redmond, two of the first responding officers, activated their BWC upon arrival shortly after 5 AM. Upon their arrival, it was evident that the back right corner of the house was on fire. Approx. 4 minutes after their arrival (approx. 5:08 AM), they located a small fire near the garage – located on the opposite side of the main fire – and put it out immediately using a small fire extinguisher. They reported the fire to their Sergeant, Sgt. Malone, who responded "All right, just stay away from it." By the time Malone arrived on scene at 5:10 AM, that fire was already put out. Thereafter, no additional fire is observed in that location.

However, over the next 30-40 minutes, officers continued to discuss their observations regarding the extinguished small fire, which also included a small gas can nearby with a burnt nozzle and a burn mark on the hood of a vehicle parked in the driveway. Due to these suspicious observations, along with the general belief that the fire was set intentionally, at approx. 5:30 AM, the area of the garage was taped off and considered 'a crime scene.' (T:113-1 to 14).[1] Officers also made sure to 'maintain a presence' in this area to make sure that nothing in that area, such as the gas can, was disturbed. (T:112-3 to 14).

Interestingly, however, Fire Marshal Flannigan, who arrived on scene at approx. 5:30 AM to perform a fire investigation, testified previously that he did not suspect the fire was arson nor did he find the fire suspicious whatsoever. (T:38-7 to 39-5). In fact, when asked about whether the two separate fires that 'weren't consistent' with each other, Flannigan still maintained that nothing about that was suspicious. (T:39-14 to 17). Likewise, when asked about the burnt gas can, the burn "smudge" mark on the car, and officers expressing to him what they found to be suspicious, Flannigan steadfastly expressed that he did not find anything to be suspicious. (T:42-11 to 24).

In the meantime, Sgt. Malone instructed Officer Bernhard, another first responding officer, to speak with Mr. Caneiro to ascertain where possible surveillance footage might be stored. (T:162-6 to 23). As a result, Bernhard learned that the surveillance system was stored in the garage. A few minutes later, Bernhard again spoke with Mr. Caneiro, this time at the direction of Officer Marino, to ascertain whether the surveillance system was a "white DVR box." (T:163-3 to 19; T:171-18 to 22). At no point during these two exchanges did Bernhard ask for consent to search Mr. Caneiro's garage or to seize his surveillance system. (T:187-14 to 22). It was also never

[1] "T" refers to the transcript of the 104(c) Hearing, dated April 8, 2025, and previously provided to the Court on April 23, 2025. Defendant relies on, and incorporates, the testimony therein to support the instant Motion.

explained to Mr. Caneiro (or his daughter) why these questions were being asked. (T:187-3 to 24). Mr. Caneiro was never informed at that time that his garage was about to be searched or that his DVR system was about to be seized.

Marino was another first responding officer. He activated his BWC upon arrival, at approx. 5:05 AM. (T:70-2-11; 85-1 to 86-6). He left his BWC on from 5:05 AM until approx. 6 AM. (T:88-9 to 12). After Bernhard told Marino the DVR system was in the garage, Marino went into Mr. Caneiro's garage to locate and seize the DVR system. (T:97-1 to 22).

Specifically, at approx. 5:37 AM, Marino walks into Mr. Caneiro's garage, alone. This real time of 5:37 corresponds with the 32:00 time stamp on Marino's BWC. Using a flashlight, Marino begins visually searching around the garage for the DVR unit. (Exhibit A). At the time he initially enters the garage, the garage light is on. (Exhibit A). Less than a minute later, however, at 32:50 the power goes out in the garage, and Marino continues to perform his search for the DVR system using his flashlight. (Exhibit B). Soon thereafter, Marino is joined by at least two additional officers, Bones and Sgt. Malone.

At 34:00, after locating the general location of the DVR system in the garage, Marino asks Sgt. Malone, "Yo, you want me to take this out?" to which Sgt. Malone replies, "Yeah." Due to the position of the DVR system – mounted on top of a tall refrigerator/ freezer – officers remove Mr. Caneiro's ladder seen hanging on the wall and place it next to the refrigerator. They do this so that they can then climb the ladder to reach the surveillance system atop the fridge. Marino tells Bones, "Here's the power cable just disconnect that" to which Bones asks, "All this stuff?" The reason the officer asks this question is because there are numerous items of what appear to be cable boxes along with numerous tangled cables. It is not entirely clear to the officers – especially in the dark at a strained angle – which specific item constitutes the DVR system.

The officers continue their search, with their dialogue only further highlighting that the officers are struggling to identify which item is the DVR system as they try to navigate the various items of technology and numerous associated cables:

DM: **I don't know what that is**. [UNINTELLIGIBLE]. Is it hooked up to anything?

O13: Yeah.

DM: Here grab that too

DM: **Yeah it looks like it might be something.**

O13: We gotta get somebody to come rewire this whole fucking thing.

DM: He needs a lot more than that.

O13: Yeah, I know.

DM: **I don't know if this is. That might be it.**

O13: It definitely is.

DM: That [UNINTELLIGIBLE] this.

O13: There's a lot of camera, uh, oh man.

. . .

O13: **You think, this is just like a receiver I think**. I don't think that's important.

DM: No.

O13: **I think those are**, those are [UNINTELLIGIBLE] too.

DM: Yeah **that looks just like** audio I think.

O13: This is just like [UNINTELLIGIBLE].

DM: There's nothing under that monitor?

O13: No, nope.

DM: Before unplugging power cord from DVR, please shut down the system.

O13: Uh, I think this looks like it's on stop record but that's nothing to do with. I could grab it.

DM: Grab it. Oh, it's not [UNINTELLIGIBLE]. **I don't think this, I think that's a router**. **I think this is it but.**

O13: Yeah, [UNINTELLIGlBLE]. Woo.

DM: Yeah, it says DVR on it.

O8: Where you able to get a power cord?

O13: Uh, I could try.

. . .

O8: So, try to just get the power cord for it. All of them so this way we don't have to fool around to to tryna buy one or.

DM: Uh-huh, and uh.

O13: This is the one **but I can't even. Can't find where it is.**

At 35:55, Marino's BWC shows Bones standing on the ladder in the garage to gain access to the DVR system located on top of the freezer/ fridge. (Exhibit C). A review of Bones's BWC shows Bones removing the various systems from atop the refrigerator. (Exhibit D). After that, the officers begin looking for power cords to hook up Mr. Caneiro's systems to their system. Bones, standing on a ladder with one leg and leaning on the fridge with his other leg, starts yanking at the power cords. (Exhibit E). After finding cords pertaining to one system, the officers continue to search for power cords required for a second system. Meanwhile, another officer holds onto the two systems seized while Marino holds onto the first set of power cords. (Exhibit F). By 38:36 –

approx. 6 minutes into the search – the officer on the ladder (Bones) continues to yank at more cords. (Exhibit G). At 39:00, Bones hands off more cords to Marino. (Exhibit H).

Sgt. Malone then states, "**Hang on to that. That's going to be ours**." Marino notes that he thinks one item is a router, "but I'm taking it just in case." Malone then responds, "**Okay that's fine. Just hang on to everything**."

By 39:23, the items are handed over to Marino, who then states, "Alright I'll go secure this in my trunk." At approximately 39:30, the search has concluded and Marino begins walking to his vehicle to secure the items in his trunk. The entire search takes approximately **7.5 minutes**.

At 40:52, Marino passes another officer, who observes Marino carrying the DVR system and asks, "Are you going to give it to the homeowner?" to which Marino replies, "**no, we're taking it**." The officer states, "oh yeah?" after which a brief conversation ensues.

At approx. 42:30 (approx. 5:45 PM in real time), Marino places the items into his trunk, where they remain for approx. 6 hours until Brady and Weisbrot finally approach Mr. Caneiro with a consent to search form so that the officers can search the DVR system itself. No consent was ever obtained for the initial search of Mr. Caneiro's garage nor for the seizure of the DVR system from his garage nor to detain the seized item in an officer's trunk for upwards of 6 hours.

To be clear: the main fire was in the southeast corner of the house. (T:11-23 to 24). In relation to where the fire was, the garage was located at the "opposite side of the house" specifically, "the north wall." (T:13-2 to 7; 46-3 to 7).

Contrary to the State's position, no exigency in this case existed. Shortly after his arrival on scene at approx. 5:30 AM, law enforcement officers directed Fire Marshal Flannigan's attention to the garage: "They wanted me to go look at the garage." (T:10-20 to 11-3). This was one of many instances where officers continued to walk near or around the garage – a safe location on scene.

By the time Flannigan arrived at 5:30 AM, there were "at least 30" firefighters on scene (T:37-16 to 19) and the fire had been extinguished. (T:45-21 to 46-2). The garage, therefore, was a safe area to be in. (T:46-3 to 10). Moreover, the garage was fully intact. (T:234-4 to 7). In fact, Marino even specifically explained that he did not consider the garage to be part of Mr. Caneiro's 'house' because unlike the house, the garage "was not the in the main area that was affected" by the fire. (T:97-1 to 98-4).

Accordingly, the main fire was contained and soon extinguished, the garage area was taped off and secured as a crime scene area so that it would be undisturbed, and there was plenty of time to get a warrant, or, ample opportunity to seek consent prior to performing the search and seizure.

At 7:05 AM, Fire Marshal Tuberion arrived after being called about the suspicious nature of the fire. (T:203-7 to 8; 221-5 to 13). After conducting a "brief investigation," Tuberion tells Det. Brady that he suspects the fire was incendiary i.e. a "purposely caused fire." (T:202-11 to 203-8). Importantly, however, according to various officers on scene (Brady; Bernhard; Marino; and Redmond), though they found the fire to be suspicious and/ or suspected arson, they did not suspect Mr. Paul Caneiro whatsoever. In fact, as was made unequivocally clear through all of their testimony during the previous 104(c) hearing, Mr. Caneiro was never a suspect while he was on scene. Nor was he a suspect when he 'voluntarily' responded to the police station at around noon with his family for formal interviews. According to Det. Brady, Mr. Caneiro did not become a suspect until later that evening, approx. 7:25 PM, after police officers 'reviewed additional evidence,' which included the DVR footage – subject of the instant Motion.

After Det. Weisbrot from MCPO arrived on scene, he and Det. Brady, at approx. 11:37 AM, have an unrecorded conversation with Mr. Caneiro where they ask for consent to search his DVR system that had already been previously seized and placed into Marino's trunk. (T:208-4 to

210-13; 249-3 to 10). According to Det. Brady, Mr. Caneiro gave consent. (T:209-3 to 211-2). However, by this time, Mr. Caneiro's Fourth Amendment constitutional rights had already been violated via the aforementioned warrantless search and seizure of his DVR system from his garage.

In fact, Det. Brady – who was not yet present on scene at the time of the initial seizure – acknowledged this constitutional violation in so many words. First, he acknowledged that the consent to search form was necessary even though Mr. Caneiro was not a suspect. (T:243-15 to 21). Det. Brady explained, "We're prying into someone's personal stuff" and therefore, they don't "necessarily" only use consent to search forms only for suspects. (T:244-13 to 21). That is, despite Mr. Caneiro not being a suspect whatsoever, the consent to search form was still utilized because – as Det. Brady explained, "it's his property. We wanted to have his permission to go looking through his property." (T:248-9 to 22). Even more specifically, Brady agreed that "even if Mr. Caneiro was not a suspect, it would not be unusual to use [a consent to search] form because it's important to protect people's privacy interests under the Fourth Amendment" (T:244-22 to 245-6). Finally, when previously asked: "even if [Mr. Caneiro] is not a suspect, you wouldn't go looking through his property without his consent, correct?" Det. Brady responded, "Correct."

And yet, here, that is exactly what officers did: they went into Mr. Caneiro's garage and 'went looking through his property' for the DVR system. As is seen on BWC, numerous officers attempt to gain access to the DVR system, in the dark, by climbing items in Mr. Caneiro's garage, digging around his various electronic systems, pulling out wires carelessly, and ultimately taking his DVR system without his consent and placing it into the trunk of an officer's vehicle. At no point was Mr. Caneiro even informed that this was occurring, let alone asked for consent. Likewise, no warrant was obtained though there was plenty of time to obtain one. Indeed, officers remained on scene for at least six more hours after their initial desire to seize the system.

Accordingly, the instant warrantless search/ seizure at issue here is precisely the type of unlawful search and seizure contrary to the Fourth Amendment that Det. Brady described as being, unequivocally, unconstitutional.

LEGAL ARGUMENT

The constitutionality of any warrantless search of a home begins with the Fourth Amendment to the United States Constitution and Article I, Paragraph 7 of the New Jersey State Constitution, which both guarantee "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV; see also N.J. Const. art. I, ¶ 7. "[T]he primary goal of [these provisions] is to protect individuals from unreasonable home intrusions." State v. Walker, 213 N.J. 281, 289 (2013), citing State v. Hutchins, 116 N.J. 457, 462-63 (1989). Therefore, "warrantless searches or arrests in the home must be subjected to particularly careful scrutiny." Hutchins, 116 N.J. at 462 (quoting State v. Bolte, 115 N.J. 579, 583 (1989).

"Historically, federal and state courts have 'applied a more stringent standard of the Fourth Amendment to searches of a residential dwelling.'" State v. Edmonds, 211 N.J. 117, 129 (2012) (quoting State v. Bruzzese, 94 N.J. 210, 217 (1983), cert. denied, 465 U.S. 1030 (1984)). That is because "[t]he sanctity of one's home is among our most cherished rights." Edmonds, 211 N.J. at 129 (alteration in original) (quoting State v. Frankel, 179 N.J. 586, 611 (2004)). In fact, our courts view physical entries into the home as the "chief evil" that the Fourth Amendment was designed to protect against. State v. Wright, 221 N.J. 456, 465-67 (2015); State v. Brown, 216, N.J. 508, 526 (2014); State v. Vargas, 213 N.J. 301, 313 (2013); Walker, 213 N.J. at 289; United States v. United States Dist. Court, 407 U.S. 297, 313 (1972).

It is therefore no surprise that "[o]ur constitutional jurisprudence has expressed an explicit preference that government officials first secure a warrant 'before executing a search, particularly of a home.'" Vargas, 213 N.J. at 313 (quoting Frankel, 179 N.J. at 597-98); Brown, 216 N.J. at 527; Edmonds, 211 N.J. at 129. As such, "a warrantless entry into a home is presumptively invalid unless the State can show that it falls within one of the specific, delineated exceptions to the general warrant requirement. State In the Interest of J.A., 233 N.J. 432, 446 (2018) (citing State v. Davila, 203 N.J. 97, 111–12 (2010)). "[O]nly in extraordinary circumstances may ... [such entries] be justified." Ibid (quoting Bolte, 115 N.J. at 583–84).

Importantly, "[e]vidence found pursuant to a warrantless search not justified by an exception to the warrant requirement is subject to suppression[.]" Ibid (citing Edmonds, 211 N.J. at 121–22). Suppression of evidence under these circumstances is mandated "under the exclusionary rule—a judicially created remedy designed to safeguard the right of the people to be to be free from unreasonable searches and seizures[.]" Ibid (quoting State v. Williams, 192 N.J. 1, 14 (2007) and United States v. Calandra, 414 U.S. 338, 348 (1974)) (internal quotations omitted). This rule "prohibits the State from introducing into evidence the fruits of unlawful police conduct" and "denies the prosecution the spoils of constitutional violations[.]" Ibid (quoting State v. Badessa, 185 N.J. 303, 310-11 (2005) (internal quotations omitted).

POINT I

THE EXIGENCY EXCEPTION DOES NOT APPLY HERE FOR THE REASONS DISCUSSED BELOW.

"Generally, when the State invokes the exigent-circumstances exception to justify a warrantless search, it must prove by a preponderance of the evidence that (1) the search was premised on probable cause and (2) law enforcement acted in an objectively reasonable manner to meet an exigency that did not permit time to secure a warrant." State v. Manning, 240 N.J. 308,

333 (2020) (citing See In re J.A., 233 N.J. 432, 448 (2018); State v. Johnson, 193 N.J. 528, 552 (2008)).

The term *exigent circumstances* "cannot be precisely defined or reduced to a neat formula." Johnson, 193 N.J. at 552. It covers a range of situations "when inaction due to the time needed to obtain a warrant will create a substantial likelihood that the police or members of the public will be exposed to physical danger or that evidence will be destroyed or removed from the scene." Id. at 553. There is no single test that can be applied to determine whether police conduct in a particular case was objectively reasonable in response to alleged exigent circumstances. Instead, courts conduct a fact-sensitive inquiry, taking into consideration the totality of the circumstances. See, e.g., State v. Miranda, 253 N.J. 461, 480-481 (2023); Manning, 240 N.J. at 333; J.A., 233 N.J. at 448; Johnson, 193 N.J. at 552-553. As such, there are a host of nonexclusive factors that courts can consider. See Alvarez, 238 N.J. Super. at 568 (App. Div. 1990). These factors are used to determine whether "the need to act without delay [was] imperative." Manning, 240 N.J. at 333.

These factors include:

- The degree of urgency involved and the amount of time necessary to obtain a warrant.
- Reasonable belief that the contraband or evidence is about to be removed;
- Whether the location itself can be placed under surveillance while a warrant is secured;
- The possibility of danger to police officers guarding the site of contraband or evidence while a search warrant is sought;
- Information indicating the possessors of the contraband or evidence are aware that the police are on their trail;
- The ready destructability of the contraband or evidence and, in drug cases, the knowledge that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in narcotics traffic;
- The gravity of the offense involved;
- The possibility that the suspect is armed;

- The strength or weakness of the facts establishing probable cause;
- The time of the entry; and
- Whether the exigent circumstances can properly be characterized as "police-created"and, if so, whether the police conduct was reasonable under the circumstances or specifically designed to

Alvarez, 238 N.J. Super. at 568. “While these factors can be articulated with disarming ease, their application to a concrete factual pattern is not without difficulty. The issue is ‘highly fact-sensitive.’” Ibid.

Importantly, where “removal as well as destruction of evidence is offered as an exigent circumstance, a collateral issue is whether the physical character of the premises is conducive to effective surveillance, as an alternative to a warrantless entry, while a warrant is procured.” Alvarez, 238 N.J. Super. at 568 (quoting State v. Lewis, 116 N.J. 477, 485 (1989)) (internal quotations omitted). Additionally, in assessing exigent circumstances, the "inconvenience to the officers and the slight delay in processing the application for a warrant is never a convincing reason for proceeding without one." State v. Naturile, 83 N.J. Super. 563, 569 (App. Div. 1964). Similarly, generalized fears cannot validate a warrantless search undertaken for investigatory purposes. See, e.g., Manning, 240 N.J. at 338-340.

Historically, there are a variety of reasons why exigency may arise. These include emergencies, hot pursuits, and concerns regarding imminent destruction of evidence. Rather than attempt to explain why any of these possible causes for exigency exist here, or whether any of the above factors weigh in favor of the warrantless entry, search, and seizure, the State instead suggests that exigency should be automatically applied to this case *merely because* it involved a fire scene.

The State’s suggestion is misguided, however, and fails to adequately explain the caselaw on this topic. Specifically, the State cites to, and relies upon, three cases to support its contention

that the fact, alone, that the officers were on scene investigating a fire granted them authority to perform the warrantless entry, search, and seizure: (1) Caniglia v. Strom, 593 U.S. 194 (2021); (2) Bringham City v. Stuart, 547 U.S. 398 (2006); and (3) Michigan v. Tyler, 436 U.S. 499 (1978).

First, in Caniglia, the case was a civil matter whereby the Plaintiff successfully argued that police violated his Fourth Amendment rights when they conducted a warrantless entry and search of his home and seized his firearms. See generally, Caniglia, supra. In his concurring opinion, Justice Kavanaugh merely notes that "the exigent circumstances doctrine allows officers to **enter a home** without a warrant in certain situations, including: to fight a fire and investigate its cause" as well as "to prevent imminent destruction of evidence[2]; to engage in hot pursuit of a fleeing felon or to prevent a suspect's escape; to address a threat to the safety of law enforcement officers or the general public; to render emergency assistance to an injured occupant; or to protect an occupant who is threatened with serious injury." 593 U.S. 194, 204-05 (J. Kavanaugh, Concurring).

Importantly, Justice Kavanaugh's comment is made in the context of discussing when "a warrant is not required" "**to enter a home**." Id. at 204. (Emphasis added). Justice Kavanaugh clearly is making a very generalized comment and only with respect to warrantless *entries* in homes. He goes on to state, "The Court's Fourth Amendment law already recognizes the exigent circumstances doctrine, which allows officers to **enter a home** without a warrant if the exigencies of the situation make the needs of law enforcement so compelling that the warrantless entry is objectively reasonable under the Fourth Amendment." Id. at 205-06 (internal quotations omitted) (emphasis added). Justice Kavanaugh then goes on to discuss additional examples of when a warrantless entry into a home is permitted, such as to prevent a suicide or to perform a wellness

[2] It should be noted that the 'destruction of evidence' example is not related to the firefighting example; rather, it is a separate example of when exigency may be present, such as in State v. Alvarez, supra. "Threatened destruction of evidence is often cited as an exigent circumstance in drug cases." State v. Speid, 255 N.J. Super. 398 (App. Div. 1992).

check for an elderly man. Id. at 207-08. Justice Kavanaugh ends his opinion explaining, "both of those examples and others as well, such as cases involving unattended young children inside a home, illustrate the kinds of **warrantless entries** that are perfectly constitutional under the exigent circumstances doctrine[.]" Id. at 208 (emphasis added). Justice Kavanaugh does not at any point discuss any subsequent searches or seizures that may occur as a result of that warrantless entry, nor does he discuss whether those warrantless searches and seizures would be deemed contrary or consistent with the Fourth Amendment.

Similarly, in Stuart, supra, the Supreme Court merely notes in its discussion about the exigency doctrine that, "law enforcement officers ***may*** make a warrantless **entry onto private property** to fight a fire and investigate its cause" as well as "to prevent the imminent destruction of evidence," or "to engage in 'hot pursuit' of a feeling suspect[.]" 547 U.S. at 403. Once again, this generalized discussion does not expand on whether, if at all, police officers are then permitted to also conduct warrantless searches and seizures once on the property to fight a fire. Nevertheless, the Court does note, again generally, that "the exigencies of [a] situation may make the needs of law enforcement ***so compelling*** that [a] warrantless search is objectively reasonable under the Fourth Amendment." Ibid (quoting Mincey v. Arizona, 437 U.S. 385, 393-94 (1978)). (Emphasis added). No further discussion on this topic is given, and the case itself does not involve a fire. Rather the case involved officers' warrantless entry into a home after observing an active physical altercation occurring inside of the residence resulting in active injury occurring to the participants of the fight. See generally, Stuart, supra.

Here, the issue only begins with the warrantless entry into Mr. Caneiro's garage. As stated at the outset, the defense does not dispute that officers here were permitted to enter into Mr. Caneiro's garage to extinguish the fire or to engage in any critical firefighting conduct. Nor does

the defense dispute that the officers could enter the garage to save a life or to search for injured victims. However, that is not what occurred here. Although there originally was a small fire located near the garage door, this fire was extinguished prior to Sgt. Malone's arrival at 5:10 AM. Thus, by the time Marino entered into Mr. Caneio's garage at approx.. 5:37 AM – approx. 30 minutes later – the fire was long gone. No firefighting was necessary in the location of the garage at that time. Rather, all firefighting was occurring on the complete opposite side of the home. The sole purpose of the officers entering into Mr. Caneiro's garage at 5:37 AM was to conduct a warrantless search for evidence, which, was already being secured by way of a crime scene perimeter: crime scene tape and officer presence were being utilized to ensure that no one disturbed the area.

Finally, the State cites to Michigan v. Tyler, 436 U.S. 499 (1978). In Tyler, a fire occurred at the defendant's furniture store just before midnight. Id. at 501. The local fire department, along with law enforcement, responded to the scene of the active fire. Id. at 501-02. Once on scene, the Fire Chief and a police lieutenant observed two plastic containers of flammable liquid in the building in plain view. Ibid. After examining the containers, the Fire Chief concluded that the fire "could possibly have been arson" and called a police detective to the scene. Id. at 502. Upon arrival, the detective attempted to photograph the containers and interior of the store, however abandoned those efforts due to the heavy smoke and steam. Ibid.

By 4 AM the fire was extinguished at which time firefighters departed and the detective left with the containers so they could be safely kept at the police station. Ibid. Four hours later, the Fire Chief returned to the scene with another Chief, "whose job was to determine the 'origin of all fires that occur within the Township.'" Ibid. Shortly after, the detective also returned and observed burn marks in the carpet and stairway – also in plain view. Ibid. The detective left and returned

with tools to remove pieces of the carpet and stairs to preserve evidence. Ibid. "[T]here was neither consent nor a warrant for these **entries and seizures**." Id. at 502-03. (Emphasis added).

Approximately 3 weeks later, police returned again to the scene – without a warrant – and seized additional evidence, also without a warrant. Id. at 503. The "sole purpose" of making these subsequent warrantless entries was to "make[] an investigation and seize[] evidence." Ibid. As a result of the investigation, it was decided that the fire was an arson. Ibid.

On appeal to the United States Supreme Court, the Court held that a warrant was not necessary for the reentry that occurred only several hours later in the early morning hours. Id. at 511. Because visibility was an issue, and the need to return was therefore necessary to complete the investigation, this warrantless reentry did not offend the Fourth Amendment. Ibid. In contrast, the additional reentries that occurred after the date of the fire were "clearly detached from the initial exigency and warrantless entry." Ibid. The Court therefore held that the defendant was entitled to a new trial, and that any evidence obtained from those 'detached' entries must be suppressed. Ibid.

In assessing the facts, the U.S. Supreme Court first noted that:

> A burning building clearly presents an exigency of sufficient proportions to render a warrantless **entry** "reasonable." Indeed, it would defy reason to suppose that firemen must secure a warrant or consent before entering a burning structure to put out the blaze. And once in a building for this purpose, firefighters may seize evidence of arson that is **in plain view**. Coolidge v. New Hampshire, 403 U.S. 443, 465–466. Thus, the Fourth and Fourteenth Amendments were not violated by the entry of the firemen to extinguish the fire at Tyler's [furniture store], nor by Chief See's removal of the two plastic containers of flammable liquid found on the floor of one of the showrooms.

Id. at 509. With that stated, the U.S. Supreme Court then further clarified that "the exigency justifying a warrantless entry to fight a fire" does not end with the "dousing of the last flame." Id. at 509-10. The Court explained that this is because fire officials "are charged not only with extinguishing fires, but with finding their causes" and therefore, "[p]rompt determination of the **fire's origin** may be necessary to prevent its recurrence, as though the detection of continuing dangers such as faulty wiring or a defective furnace." Id. at 510. (Emphasis added). And, "Immediate investigation may also be necessary to preserve evidence from intentional or accidental destruction." Ibid. Thus, "officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished." Ibid. And, assuming the entry is constitutional, "the warrantless seizure of evidence while inspecting the premises for these purposes also is constitutional." Ibid. (Emphasis added).

Significantly, the Supreme Court noted that "the warrant requirement provides significant protection for fire victims[.]" Id. at 508. In the context of the need to secure a warrant, the Court quoted the Michigan Supreme Court to explain its ruling:

> "Where the cause [of the fire] is undetermined, and the purpose of the investigation is to determine the cause and to prevent such fires from occurring or recurring, a . . . search may be conducted pursuant to a warrant issued in accordance with reasonable legislative or administrative standards or, absent their promulgation, judicially prescribed standards; if evidence of wrongdoing is discovered, it may, of course, be used to establish probable cause **for the issuance of a criminal investigative search warrant** or in prosecution." But "[i]f the authorities are seeking evidence to be used in a criminal prosecution, the usual standard [of probable cause] will apply."

Id. at 508-09. Accordingly, the U.S. Supreme Court held:

> [A]n entry to fight a fire requires no warrant, and that once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze.

> Thereafter, additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches. . . . Evidence of arson discovered in the course of such investigations is admissible at trial, **but if the investigating officials find probable cause to believe that arson has occurred and require further access to gather evidence for a possible prosecution, they may obtain a warrant only upon a traditional showing of probable cause applicable to searches for evidence of crime.**

Id. at 511-12 (internal citations omitted).

Accordingly, the Tyler case tells us that (1) obviously, fire officials and law enforcement are permitted warrantless entry into a dwelling or premises for the purpose of extinguishing a fire; (2) remaining on the premises without a warrant, even after the fire is extinguished, may be reasonable if doing so is necessary to investigate the cause or origin of the fire, particularly to ensure that there are no hazards or safety concerns such as a gas leak or faulty wire; and (3) when doing so, officers may also seize evidence that they observe **in plain view**.

Again, here, the defense does not dispute that fire officials and police were permitted entry into Mr. Caneiro's home to extinguish the fire. However, here, police did not enter the garage at 5:37 AM to extinguish the fire. That fire had already been extinguished 30 minutes prior, and police had already decided that the fire was intentionally set. As the State boldly asserts, "It is indisputable that the officers possessed sufficient probable cause to believe that the fire to which they and fire officials had responded was intentionally set, and therefore, criminal." (Sb7). There was therefore no need to reenter the garage to 'investigate' its cause or to address any safety concerns such as a faulty wire. The cause of the fire was already decided: someone set the fire intentionally. As such, officers did not enter the garage to investigate how the fire started, but rather, to determine who set it. They entered and searched Mr. Caneiro's garage and seized his DVR system "to gather evidence for a possible prosecution," which therefore required them to

"obtain a warrant only upon a traditional showing of probable cause applicable to searches for evidence of a crime." Tyler, 436 U.S. at 512.

Additionally, unlike in Tyler, the evidence at issue here – the DVR system – was not in plain view. Officers did not happen upon the location of the DVR system in the course of their investigation; rather, they actively sought it out by first asking Mr. Caneiro where his system was located, and then searching for it in Mr. Caneiro's garage. A search, worth noting, that required the use of a flashlight in the pitch dark, that took a total of almost 8 minutes due to the various other items officers could not readily distinguish from the DVR system, and that required officers to remove a ladder from Mr. Caneiro's garage wall to obtain access to the system located on top of a refrigerator.

As such, unlike the gas can found in plain view in this case, which was lawfully seized without a warrant, the DVR system was neither lawfully located or seized.

There are 13 New Jersey cases that have cited to the Tyler case. Three of these cases rely on Tyler substantively and will be discussed here; the remaining cases only cite to Tyler in passing and/ or in a string-cite fashion related to a more general proposition. The three cases discussed below only further highlight the requirement that the seized evidence must be in plain view.

In State v. Amodio, 390 N.J. Super. 313 (App. Div. 2007), a neighbor reported a fire at the defendant's home. Id. at 319. The defendant had stumbled out of the home and fell face down on the ground while his wife and baby remained trapped inside the home. Ibid. First responders realized that the defendant's skin was burning and cut his clothes off his body to stop the burning before he was then airlifted to the hospital for treatment. Ibid. Fire marshals found the bodies of the wife and baby dead inside. A broken hammer was found near the wife's body in plain view. Ibid. The ME later determined that the wife's cause of death was a 'depressed skull fracture that

caused bleeding and bruising to the brain.' Ibid. The defendant was charged with aggravated arson, murder, and felony murder. Id. at 318.

On appeal, the defendant argued that the items seized without a warrant after the fire marshal found the two bodies should have been suppressed. Id. at 323. Citing to Tyler, the Appellate Court noted that a "burning building clearly presents exigency of sufficient proportions to render a warrantless entry 'reasonable'" and "the exigency does not end at the moment the fire is extinguished." Id. at 324. With that said, however, the Appellate Court explained that, "Once inside the building, the police and fire officials may seize evidence of arson that **is in plain view**." Ibid. (Emphasis added). As such, the Appellate Court affirmed the trial court and citing to Tyler held that the "hammer and debris from the front hallway were found **in plain view** during the course of that initial investigation. Indeed, when searching a fire scene to discover the cause of a fire, firemen routinely remove rubble; and objects that come into **plain view** as a result of such actions may be preserved without a warrant." Id. at 327. Additionally, the Appellate Court also affirmed the warrantless seizure of the defendant's clothing because they were removed to provide emergency care and seized to ensure the clothing was not discarded or that the value of the accelerants present on the clothing did not diminish. Ibid.

Similarly, in State v. Washington, 2014 WL 2011697 (May 19, 2014), a neighbor reported hearing the defendant's fire alarm to 911. Id. at *1. When fire officials arrived to address the possible fire, they "moved through the apartment to locate the fire and verify that no one was there." Ibid. In doing so, firefighters found a utility closet in the bedroom, which "was being used to house potted marijuana plants under a grow light." Ibid. Deciding to first address the fire, firefighters did so and then told a responding patrol officer about the marijuana they had observed in plain view, which resulted in the seizure of the marijuana plants and other evidence observed

next to a bed in plain view. Id. at *1- 2. "Applying the plain view and emergency aid exceptions to the warrant requirement, the trial judge found that the evidence was lawfully seized." Ibid. On appeal, the Appellate Division affirmed the trial court's ruling. Id. at *7.

More specifically, the Appellate Court explained that, "If there is a proper entry into a home under the emergency aid exception, 'evidence observed **in plain view** by a public safety official who is lawfully on the premises and is not exceeding the scope of the search will be admissible." Id. at *5 (quoting O'Donnell, 408 N.J. Super. at 182) (emphasis added). The Court also stated:

> That conduct of the firefighter was reasonably limited to the scope of the reason for entry of defendant's home. "[O]fficials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze [even] after it has been extinguished." Michigan v. Tyler, 436 U.S. 499, 510 (1978). Moreover, "if the warrantless entry to put out the fire and determine its cause is constitutional, the warrantless seizure of evidence while inspecting the premises for these purposes also is constitutional." Ibid. **The evidence that may be seized is "any evidence that is in plain view during the course of [the officers'] legitimate emergency activities."**

Ibid. (Emphasis added). In Washington, like in Taylor and in Amodio, the evidence seized had been observed in plain view. The Appellate Court also noted, that the patrolman "was by no means conducting a new investigation when he seized evidence the firefighters observed while they were doing their work[.]" Ibid. Again, the Appellate Court highlighted that "The goal of effective law enforcement is furthered and the rationale and purpose **of the plain view doctrine** are promoted by recognizing that an officer whose duty it is to process evidence may seize evidence another officer observed **in plain view**." Id. at *6 (internal quotations and citations omitted) (emphasis added).

Again, the holdings in Tyler, Amodio, and Washington are clearly premised on the fact that the evidence seized was in plain view. Here, that is not the case. Officers did not stumble upon the DVR system the same way officers stumbled upon the containers and burnt carpet marks in Tyler, or that officers stumbled upon the broken hammer in Amodio, or that officers stumbled upon the marijuana plants in Washington. Here, officers were unquestionably "conducting a new investigation." See id. at *5. They were trying ascertain who the perpetrator was for the purpose of criminal prosecution. On this point, another important distinction is that the officers in Tyler, Amodio, and Washington all observed the plain view evidence only after, or in conjunction with, fire personnel. In contrast, in this case, no firefighters were concerned with the DVR system as that had nothing to do with their instant efforts to extinguish the main fire. The firefighters took no interest in the garage area as that area did not have an active fire. The firefighters likewise did not observe the DVR system in plain view and then alert their findings to law enforcement. Rather, the police in this case decided to conduct their own, distinct, and separate criminal investigation. And, in doing so, made specific conscious efforts to ascertain the whereabouts of the DVR system and then proceeded to search for it and seize it without a warrant. All the while, either consent or a warrant could have been obtained.

Indeed, officers remained with Mr. Caneiro on scene until noon. During that time – an additional 6 hours – a warrant could have been obtained for the DVR system. There was clearly plenty of time, while the scene was still under control and secured, to obtain the warrant. There was no need to jump the gun and unlawfully search for, and seize, the DVR system.

Though not a case involving a fire scene, another New Jersey case that relies on the Tyler holding is State v. O'Donnell, 408 N.J. Super. 177 (App. Div. 2009). Like Washington, the O'Donnell Court relies on Tyler to support the constitutionality of a plain view search. In

O'Donnell, police responded to the defendant's home after they received a report that there was an unconscious 6 year old child in the home. Id. at 179. Upon arrival, officers observed the child in the bedroom, and it was evident that the child was dead. Ibid. Officers on scene also observed, in plain view, various items of evidence such as blood and vomit on the bed near the child's body and handwritten notes in the kitchen. Id. at 180. Law enforcement seized these items of evidence without a warrant. Ibid. The trial court found that the warrantless entry into the defendant's apartment "was justified under the emergency aid exception to the warrant requirement and that the seizure of the evidence observable at that time was proper **under the plain view doctrine**." Ibid.

In addition, however, after the defendant was arrested on scene, police interviewed her. Id. at 180. As a result of that interview, police learned that defendant had medications in her bedroom. Ibid. Police then returned to her home the next day, and – without a warrant – seized the medications from her bedroom. Ibid. The trial court ruled that this evidence was inadmissible. Ibid. In contrast to the earlier seizure, the trial court "concluded that the emergency that justified the initial entry into defendant's apartment did not continue when the officers returned the next day and searched the apartment for additional evidence without first obtaining a warrant." Id. at 181. Thus, the trial court suppressed the medications seized without a warrant. Ibid.

On appeal, the Appellate Division affirmed the trial court's rulings. Agreeing with the trial court's assessment, the Appellate Division explained: "If there is a proper entry into a home under the emergency aid exception, 'evidence **observed in plain view** by a public safety official who is lawfully on the premises and is not exceeding the scope of the search will be admissible.'" Id. at 182 (quoting Frankel, 179 N.J. at 599–600) (emphasis added). Citing to Tyler and "courts in other

states"[3] the O'Donnell Court explained that these courts "have upheld the validity of seizures of evidence observed **in plain view** at a crime scene to which the police responded under the emergency aid exception, even when there is some delay between the plain view observation and seizure of the evidence and the seizure is made by different police officers than the ones who initially responded to the emergency." Id. at 185. (Emphasis added). The key point being: the seized evidence must have been first observed in plain view. See id. at 185-187 (further detailing the application of the plain view doctrine). The Appellate Division even explained, "[t]here is no evidence that the Prosecutor's Office investigators searched any part of defendant's apartment that was not observable upon the initial entry by the Highland Park police officers[.]" Id. at 187.

Here, the evidence is to the contrary: the DVR system was never observed in plain view. Officers had to first ask Mr. Caneiro where the DVR system was located. As soon as this inquiry was made, the potential for 'plain view' is entirely negated. Not only that, but even after knowing the general area of where the DVR system was located, officers still had to search in the dark, using a flashlight, moving items around, climbing on top of a refrigerator, and then spending almost 8 minutes searching through various systems and wires to obtain the correct system. The search in this case, therefore, is entirely inconsistent with the caselaw upon which the State relies.

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[3] *See, e.g., State v. Spears*, 560 *So*.2d 1145, 1147–51 (Ala. Crim. App. 1989), cert. denied, 1990 *Ala. LEXIS* 310 (Ala.1990); *Wofford v. State*, 330 *Ark.* 8, 952 *S.W*.2d 646, 652–54 (1997); *State v. Magnano*, 204 *Conn*. 259, 528 *A*.2d 760, 761–66 (1987); *Allen v. State*, 638 *So*.2d 577, 578–80 (Fla. Dist. Ct. App.), rev. denied, 649 *So*.2d 232, 1994 *Fla. LEXIS* 1892 (Fla. 1994); *State v. Johnson*, 413 *A*.2d 931, 932–34 (Me.1980); *Wengert v. State*, 364 *Md*. 76, 771 *A*.2d 389, 394–401 (2001); *Smith v. State*, 419 *So*.2d 563, 568–74 (Miss. 1982), cert. denied, 460 *U.S*. 1047, 103 *S.Ct*. 1449, 75 *L.Ed*.2d 803 (1983); *State v. Tidwell*, 888 *S.W*.2d 736, 740–43 (Mo. Ct. App. 1994); *State v. Jolley*, 312 *N.C*. 296, 321 *S.E*.2d 883, 886–88 (1984); *State v. Anderson*, 42 *Or.App*. 29, 599 *P*.2d 1225, 1228–30 (1979), cert. denied, 446 *U.S*. 920, 100 *S.Ct*. 1857, 64 *L.Ed*.2d 275 (1980); *State v. Martin*, 274 *N.W*.2d 893, 896–97 (S.D. 1979); *State v. Coulter*, 67 *S.W*.3d 3, 42–45 (Tenn. Crim. App. 2001); *Hunter v. Commonwealth*, 8 *Va.App*. 81, 378 *S.E*.2d 634, 635–36 (1989); *LaFournier v. State*, 91 *Wis*.2d 61, 280 *N.W*.2d 746, 748–51 (1979); see generally, Wayne R. LaFave, Search & Seizure § 6.5(e) at 447–49 (4th ed. 2004).

Curiously, the State never once mentions the doctrine of 'plain view' in its brief or the fact that it is a prerequisite for establishing a lawful seizure of evidence at a fire scene.

Post-Tyler, another significant United States Supreme Court case that was deiced is Michigan v. Clifford, 464 U.S. 287 (1984). While the premises in Tyler concerned a private business, the premises in Clifford concerned a private dwelling. In Clifford, a fire erupted in the early morning hours while the homeowners were out of town. Id. at 289. Fire officials responded at 5:42 AM and the fire was extinguished by 7:04 AM, at which time fire personnel and police left the scene. Id. at 289-90. However, 5 hours later, a team of arson investigators arrived at the residence to investigate the cause of the fire. Id. at 290. Initially, investigators observed a fuel can in the driveway in plain view, which was seized. Ibid. Next, "without obtaining consent or an administrative warrant," the investigators entered the home to investigate "the cause of the fire." Ibid. "Their search began in the basement and they quickly confirmed that the fire had originated there beneath the basement stairway" and that it was intentionally set. Ibid. In the basement, investigators found and seized evidence from the basement including a crockpot, attached wires, an electrical timer, and two fuel cans. Id. at 290-91.

After seizing those items, investigators extended their search to the upper portions of the home, where they found additional evidence of arson. Id. at 291. The defendant homeowners moved to suppress the evidence seized without a warrant, which the trial court denied. Id. at 289. On appeal, however, the Michigan Court of Appeals reversed, finding there was no exigent circumstances that permitted the warrantless entry and seizure of evidence. Ibid.

On appeal to the U.S. Supreme Court, the Court first cited to Tyler and stated, "the consensual entry and search of property is governed by the warrant requirement of the Fourth and Fourteenth Amendments." Id. at 291-92. Next, the Court reminded that, as observed in Tyler,

"reasonable privacy expectations remain in fire-damaged premises." Ibid. The Court also explained that, obviously, no warrant is required to enter the burning premises to fight the blaze or to remain on the property for a reasonable amount of time to determine the cause and origin of the fire, which serves a compelling public interest. Id. at 293. Importantly, the "origin" of a fire is the specific location where it started, and the "cause" of the fire refers to what led to the ignition such as accidental (faulty wiring, smoking, unattended cooking) or intentional (arson).

However, absent these exceptions, a warrant is required. Id. at 294. "[T]he object of the search determines the type of warrant required." Ibid. "If the primary object is to determine the cause and origin of a recent fire, an administrative warrant will suffice." Ibid. However, "[i]f the primary object of the search is to gather evidence of criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched." Ibid.

Importantly, as learned, "[i]f evidence of criminal activity is discovered during the course of a valid administrative search, it may be seized under the '**plain view' doctrine**." Ibid. (Emphasis added). "This evidence then may be used to establish probable cause to obtain a criminal search warrant. **Fire officials may not, however, rely on this evidence to expand the scope of their administrative search without first making a successful showing of probable cause to an independent judicial officer**." Ibid. (Emphasis added). The Court explained:

> **The object of the search is important even if exigent circumstances exist**. Circumstances that justify a warrantless search for the cause of a fire may not justify a search to gather evidence of criminal activity once that cause has been determined. If, for example, the administrative search is justified by the immediate need to ensure against rekindling, the scope of the search may be no broader than reasonably necessary to achieve its end. **A search to gather evidence of criminal**

> **activity not in plain view must be made pursuant to a criminal warrant upon a traditional showing of probable cause.**

Id. at 294-95. (Emphasis added).

Applying these principles to the facts in Clifford, the Court held that the warrantless searches of (1) the basement and (2) the upper areas of the home were not lawful. Id. at 295-96. The Court noted that "privacy interests are especially strong in a private residence" and thus some form of a warrant was required. Id. at 297. The Court elaborated that at the time the basement was searched, only an Administrative Warrant was needed because the cause and origin of the fire at that point was unknown. Id. at 297. However, once it was determined from the observations in the basement that the fire was intentionally set, a criminal search warrant was required to search the remaining portions of the house. Ibid. Because, at that point, it had turned into a criminal investigation. Ibid. "Because the cause of the fire was then known, the search of the upper portions of the house, described above, could only have been a search to gather evidence of the crime of arson." Ibid. While the "investigators could have used whatever evidence they discovered in the basement to establish probable cause to search the remainder of the house, they could not lawfully undertake that search without a prior judicial determination that a successful showing of probable cause had been made." Id. at 298.

Because the warrantless and consentless searches violated the homeowners' Fourth Amendment protections, the Court ruled that the evidence seized from the basement and upper house searches must be suppressed. Id. at 298-99. However, because the gas can in the driveway was observed in plain view from a lawful vantage point, that evidence was admissible. Id. at 299.

Applying the legal holdings of Clifford to the instant matter, it is clear that the search of the garage for the DVR system violated the Fourth Amendment. As has been made clear from the

officers' prior testimony as well as the discovery provided by the State, and even the arguments sent forth in the State's brief, police found the fire to be suspicious and believed it was "intentionally set." By approx. 5:30 AM, they began securing the garage area as a "crime scene" and made sure that crime scene tape and officers' presence kept the area undisturbed. Moreover, the area itself was "intact" and not on fire. Therefore, there was no exigency in the area of the garage; the origin/ cause was already determined; and the only purpose of searching for the DVR system was to secure evidence pursuant to a criminal investigation. As such, a warrant supported by probable cause was required.

To be sure, as Clifford explains, the officers could have used the suspicious facts (small second fire; gas can with burnt nozzle; burn mark on hood of car) to support a probable cause application for a search warrant. However, what officers were not permitted to do is exactly what they did: a "search to gather evidence of criminal activity **not in plain view**." Id. at 294-95. (Emphasis added). As Clifford directs, searches such as these "must be made pursuant to a criminal warrant upon a traditional showing of probable cause." Ibid. At the very least, officers could have, and/ or should have, asked for consent. See generally, Clifford, supra, (discussing how the unconstitutional search was both warrantless and consentless).

Finally, because the concept is discussed in the above cases, it is worth noting that the 'exigency' or more specifically in the context of fire investigations, the 'emergency' doctrines only permit the initial **entry** onto the fire burning property. The exigency and emergency nature of a fire does not permit carte blanche searches of the property to discover evidence of a crime. Rather, as the caselaw makes clear, the emergency nature of the fire simply permits fire officials – firefighters and investigators alike – to enter the property without a warrant. Once on the property, fire officials can remain on the property to extinguish the fire and ascertain its cause and origin.

Once those goals are complete, and once it is determined that a fire is intentionally set, only evidence that was observed in plain view can be seized without a warrant. Otherwise, a warrant – or at the very least, consent – is required to perform any additional investigation into the crime of arson. Thus, here, while the officers were permitted to enter into the garage to engage in firefighting efforts, which suffices as an emergency, they were not permitted to reenter into the garage for the sole purpose of conducting a criminal investigation or to search for and seize evidence pursuant to that investigation.

"[E]xigent circumstances are present when law enforcement officers do not have sufficient time to obtain any form of warrant because of the immediate and urgent circumstances confronting them" State v. Hathaway, 222 N.J. 453, 468 (2015) (internal quotations omitted). A subset of exigent circumstances is the "emergency aid doctrine." Id. at 469. "'The emergency aid doctrine is derived from the commonsense understanding that exigent circumstances may require public safety officials, such as the police, firefighters, or paramedics, to enter a dwelling without a warrant **for the purpose of protecting or preserving life, or preventing serious injury**.'" Ibid (quoting State v. Frankel, 179 N.J. 586, 598 (2004)). (Emphasis added).

"The primary rationale for the doctrine is that neither the Fourth Amendment nor Article I, Paragraph 7 of our State Constitution requires 'that public safety officials stand by in the face of an **imminent danger** and delay potential **lifesaving measures** while critical and precious time is expended obtaining a warrant.'" Ibid (quoting Frankel, 179 N.J. at 599). (Emphasis added). "For that reason, a warrant is not required to break down a door **to enter a burning home** to rescue occupants or extinguish a fire, to prevent a shooting or to bring emergency aid to an injured person." Ibid (quoting Frankel, 179 N.J. at 600) (internal quotations omitted). (Emphasis added).

To qualify as an excepted warrantless search under the emergency-aid doctrine, the State must satisfy a two-prong test. Id. at 470 (citing State v. Edmonds, 211 N.J. 117, 132 (2012)). The State has the burden to show that:

> (1) the officer had an objectively reasonable basis to believe that an emergency required that he provide immediate assistance to **protect or preserve life, or to prevent serious injury**; and
>
> (2) there was a reasonable nexus between the emergency and the area or places to be searched.

Ibid. (internal quotations omitted).

"The reasonableness of a decision to act in response to a perceived danger in real time does not depend on whether it is later determined that the danger actually existed." Ibid. Additionally, the scope of the search under this exception is "limited to the reasons and objectives that prompted the search in the first place." Ibid. Therefore, for example, "police officers looking for an injured person may not extend their search to small compartments such as 'drawers, cupboards, or wastepaper baskets.'" Ibid (quoting Frankel, 179 N.J. at 599). Contraband observed in plain view, however, will be admissible. Ibid. Of course, a pretextual emergency cannot support a warrantless entry into a residence or its garage based on community caretaking. See, e.g., State v. Mellody, 479 N.J. Super. 90, 122-124 (App. Div. 2024) (officer's entry into suspect's garage, after lawfully stopping her in driveway in response to 911 call about erratic driving, not justified when officer did not act with "any special urgency consistent with rendering emergency aid" but instead ordered suspect out of vehicle to perform field sobriety test).

Here, it is clear that no such exigency or emergency existed with respect to the garage at 5:37 AM. At that point, the garage was empty and there was no fire. There was no need to enter the garage to engage in life saving measures, to protect lives, or to prevent injuries. And, even if

they were engaging in such live saving measures (which they were not), officers were not permitted to "extend their search" to additional areas of the garage to look for evidence pursuant to a criminal investigation. There is no generalized "crime scene" exception to the warrant clause. See State v. O'Donnell, 203 N.J. 160, 162 (2010).

Accordingly, there was no exigency that existed in this case with respect to the search for, and seizure of, the DVR system in the garage. Rather, there was ample opportunity to obtain either consent or a warrant to ensure that the Fourth Amendment was not violated. Moreover, even if exigent circumstances existed because of the fire, as Tyler, Clifford, Amodio, Washington, and O'Donnell, supra, all make clear: only evidence seized in plain view during the course of a fire investigation may be lawfully seized without a warrant. In contrast, evidence that is specifically sought out and searched for pursuant to a criminal investigation, that is not observed in plain view, must be obtained with a warrant or consent. Here, officers misunderstood their obligations under the Fourth Amendment and nevertheless violated these critical constitutional protections. In effect, the evidence seized here, the DVR system, must be suppressed.

POINT II

THE ILLEGAL SEARCH IS NOT SAVED BY THE SUBSEQUENT CONSENT.

In a recently decided case, State v. Amang, -- A.3d – (App. Div. 2025) (2025 WL 951862), our Appellate Division reminds us that: "Article I, Paragraph 7 of the New Jersey Constitution sometimes affords defendants greater protections than are afforded under the Fourth Amendment." Id. at *6 (citing State v. Scott, 474 N.J. Super. 388, 413 (App. Div. 2023)). "Our Supreme Court has relied on independent state constitutional grounds to diverge from United States Supreme Court search-and-seizure precedents on numerous occasions." Ibid. Indeed, "New Jersey has a 'sound tradition and powerful precedent of providing greater protection against unreasonable

searches and seizures than those guaranteed by the Fourth Amendment ....'" Ibid (quoting State v. Caronna, 469 N.J. Super. 462, 483 (App. Div. 2021)).

Significantly, "New Jersey law imposes stricter rules with respect to consent searches." Ibid. "In deciding whether a consent to search was made knowingly and voluntarily, a reviewing court considers the totality of the circumstances." Ibid (citing King, 44 N.J. at 352-53). "To meet its burden of proof, the State is required to prove voluntariness by 'clear and positive testimony.'" Ibid.

The issue presented in Amang was a novel one. Id. at *5. In that case, police sought consent to search the defendant's home after the defendant had previously invoked his right to an attorney while being read his Miranda rights. Id. at *1. In considering the unique interplay between the Fourth and Fifth Amendments, the Appellate Court again reminded, "we are especially mindful that New Jersey law affords heightened protections with respect to each of them." Ibid. To be sure, "while our Supreme Court views federal constitutional precedent as a 'polestar' it has on many occasions charted its own course when interpreting and applying the protections afforded to criminal suspects." Ibid (citing State v. Hempele, 120 N.J. 182, 196 (1990)).

In deciding the issue, the Appellate Court also noted that "the State bears the burden of proving by a preponderance of the evidence that [the] warrantless search or seizure falls within one of the few well-delineated exceptions to the warrant requirement" and that a "consent search is one such exception." Id. at 5. Thus, when taken in a vacuum, a consent search is generally a lawful workaround to the warrant requirement. However, in this case, the Appellate Division – looking at the totality of the circumstances under which the consent was sought (after a right to counsel had already been invoked) – found the consent was not valid. Id. at *10. The Appellate

Court noted that it came to this conclusion despite persuasive caselaw from other jurisdictions drawing the opposite conclusion. Ibid.

Similarly, here, if the consent were taken in a vacuum, it may be deemed voluntary; however, when assessed under the totality of the circumstances, the consent is not valid.

First, the consent that occurred at 11:37 here regarding the DVR system does not cure the constitutional deficiencies that first occurred with respect to earlier search and seizure of the same DVR system. That is, a subsequent consent search does not cure the initial constitutional violation. See State v. Cassidy, 179 N.J. 150 (2004).[4] In Cassidy, the defendant's weapons were ordered to be seized pursuant to a TRO issued by a Judge. Id. at 155. When officers arrived at the defendant's home to seize the weapons, police seized numerous firearms from his safe and bedroom. Id. at 155-56. Police did not seize the numerous magazines defendant also possessed, however, police returned the following day at which time defendant consented to handing them over. Id. at 156. Defendant was then charged criminally for unlawfully possessing these weapons. Ibid.

However, the TRO and subsequent FRO were determined to be invalidly issued because the Plaintiff's testimony and officer's testimony were never sworn. Ibid. As a result, the defendant moved to suppress the weapons seized pursuant to the deficient TRO. The trial court and Appellate Division upheld and affirmed the search, finding applicable the exigent circumstances and emergency aid doctrine. Id. at 156-57. However, on appeal with our Supreme Court, our Court reversed, finding that no such exigent circumstances or emergency existed in this case to justify the warrantless search. Id. at 157. That is, due to the invalid TRO, which constituted an invalid

[4] It should be noted that a portion of the Cassidy holding was later abrogated by State v. Edmonds, 211 N.J. 117 (2012), specifically, that the 3-part test employed in Cassidy pertaining to the emergency aid doctrine was later changed to a 2-part test in Edmonds. However, the consent issue that is addressed in Cassidy was not part of this abrogation and still stands as good law.

search warrant, the search and seizure were warrantless, with no applicable exception, and thus the guns should have been suppressed. Id. at 157-164.

Relevant here, however, is the fact that the Supreme Court was unpersuaded that the consent given by the defendant to turn over his magazines the following day cured the illegality of the initial warrantless search. Id. at 14. That is, the consent was "the taint of the illegal search and seizure" even though the defendant had even consulted with an attorney prior to consenting. Ibid. Similarly, in State v. Rodriguez (cited to by the Cassidy Court), our Supreme Court held that "In view of our conclusion that the officers lacked a sufficient basis to detain defendant, we need not evaluate whether his consent to the search was voluntary. The illegal detention voids the consent. . . . Accordingly, no further analysis is required." 172 N.J. 117, 132 (2002). In another case, State v. Costa, our Appellate Division similarly explained that:

> Although the Law Division concluded that defendant had given a knowing consent to the search of the automobile to which we must give deference, State v. Locurto, 157 N.J. 463, 470–71 (1999); State v. Johnson, 42 N.J. 146, 162 (1964), **defendant's consent, even if valid, is inconsequential, as it was a result of an illegal detention**. **Where there is a violation of the Fourth Amendment to the United States Constitution that results in the discovery of other evidence, the subsequent evidence is inadmissible**. See Wong Sun v. United States, 371 U.S. 471, 485 (1963); State v. Johnson, 120 N.J. 263 (1990) (**finding that consent obtained during an illegal confession is void**).

Id. at 32-33.

The principle that subsequent voluntary consent cannot cure the prior illegal conduct was further explained in State v. Williams, 461 N.J. Super. 80, 105 (App. Div. 2019). In Williams, the defendant argued that the police had "unlawfully entered the apartment, unlawfully conducted a protective sweep, and unlawfully seized the apartment and detained [defendant] outside for more

than two hours[,]" and therefore, "the consent was tainted and the evidence seized was 'the fruit of the unconstitutional [entry] and initial sweep of the apartment.'" Id. at. 105. However, the Appellate Division was unpersuaded that law enforcement acted unlawfully when they performed the entry, protective sweep, and seizure of the defendant's person. Therefore, the court explained, "Having determined that the initial entry and protective sweep of the apartment were both lawful and constitutionally permissible, we reject defendant's contention out of hand." Ibid.

That said, the Appellate Court elected to "point out, however, that even if the initial entry and protective sweep were unlawful, the cocaine seized was not located as a result of either." Ibid. That is, "the cocaine was found as a result of defendant's consent to search, which was obtained **independent** of the initial entry or protective sweep." Ibid. In other words, the cocaine was never found during the protective sweep – so even if the protective sweep was unlawful, it does not taint the voluntary consent because at that point, no cocaine had yet been discovered. Rather, the cocaine was only discovered as a result of the subsequent consent search. "Therefore, even assuming the initial entry and sweep were unlawful, the seizure did not arise, either directly or indirectly, from any unlawful police activity proscribed under the fruit of the poisonous tree doctrine. **The fruit of the poisonous tree doctrine 'excludes evidence seized as a direct consequence of unlawful police activity, as well as evidence subsequently discovered as a result of the illegality**.'" Ibid (quoting Byrnes, New Jersey Arrest, Search & Seizure, 33.1-1 (2018-2019)). See also United States v. Oguns, 921 F.2d 442, 447-48 (2nd Cir. 1990) (finding illegality of sweep did not taint consent to search because no evidence was seized until after consent granted).

Here, in contrast, the DVR system was in fact searched as a result of the illegal warrantless entry, search, and seizure. The subsequent consent search of the DVR system, therefore, did arise "either directly or indirectly" from the "unlawful police activity." See ibid. Accordingly, the

subsequent consent search of the DVR system is invalid because it is tainted and therefore constitutes the fruit of the initial unlawful warrantless search of the garage and seizure of the DVR system.

Finally, even if this Court were to assess the voluntariness of Mr. Caneiro's consent, an evaluation of the circumstances reflect that his consent was not voluntary, but rather coerced. In State v. Jefferson, 413 N.J. Super. 344 (App. Div. 2010), police arrested defendant outside of his home and then proceeded to his apartment to perform a protective sweep, which resulted in plain view observations of narcotics evidence. Id. at 351. As a result, police secured the apartment and prohibited the defendant's wife or anyone else from entering the apartment. Ibid. Hours later, defendant's wife consented to a search of the apartment. Ibid. The trial court denied defendant's suppression motion, however, on appeal, the appellate division reversed and remanded, first finding that the warrantless protective sweep, plain view search, and seizure of the home were all in violation of the Fourth Amendment. Id. at 361-62. Next, with respect to the consent, the Appellate Division explained:

> The trial court concluded, however, that Morrison gave voluntary consent for the police to search the apartment after Sergeant Passarelli returned from police headquarters. In reaching that conclusion, the trial court did not consider the taint of the initial unlawful entries into the home. Also, it did not adequately weigh the coercive effect of the lengthy police intrusion into and seizure of the home.
>
> When Morrison finally signed consent forms at 12:39 p.m., the police had already entered her apartment and conducted an unlawful sweep and plain view search. They had removed her and her child from her home. During the next two and a half hours, police officers remained inside her apartment while she was prohibited from re-entering. The police gave no indication of when their seizure of the home would end and when Morrison and her family might be permitted to return. Under these

> circumstances, we disagree with the trial court's statement that "in this case there's no evidence that Miss Morrison's will was overborne."
>
> **We conclude that the search of the apartment some three hours after defendant had been arrested was a violation of his constitutional right against unlawful search and seizure. It was the fruit of the unconstitutional entries into the hallway and the initial sweep of the apartment**, . . . **and its connection with the unlawful search" did not become " 'so attenuated as to dissipate the taint[.]**

Id. at 362 (internal quotations and citations omitted).

Here, the circumstances are similarly compelling to support that the subsequent consent was not voluntary. As Jefferson directs, it must be considered how the initial illegal entry, search, and seizure taints the consent. As in Jefferson, an illegal entry into Mr. Caneiro's garage occurred for the sole purpose of obtaining evidence pursuant to a criminal investigation for criminal prosecution. The police searched Mr. Caneiro's garage, in the dark, for almost 8 full minutes. They moved items around and had to stand on a ladder to obtain the DVR system, which was out of reach and out of plain view. They then seized the DVR system, and instead of giving it to the homeowner to preserve, they kept it in their trunk for upwards of 6 hours. In the meantime, Mr. Caneiro could not access his property, including his garage area which at that point had been taped off with crime scene tape and was under active surveillance by police. Likewise, Mr. Caneiro was never told when, if at all, he would be permitted to reenter his home, and in fact, never again was able to. As in Jefferson, it cannot be ignored that Mr. Caneiro's "will was overborne." See id. at 362.

To be sure, the 'consent' at issue here was coerced. Under both federal and state law, "[w]here there is coercion, there cannot be consent." Bumper v. North Carolina, 391 U.S. 543, 550 (1968). Because the entry into the garage by numerous officers in a police dominated environment

where the garage was determined to be secured and 'off limits' for hours before anyone was asked for consent "announce[d] in effect that the occupant[s] ha[d] no right to resist the search," the situation was rife was coercion and no valid consent was possible. Id.

In Bumper, the United States Supreme Court explained that mere "acquiescence to a claim of lawful authority" cannot discharge the burden to demonstrate that consent to search was freely and voluntary given. Id. at 549-50. In that case, the police falsely told the defendant's grandmother that they had a warrant to search her home, and believing them, she did not object to the search. The Bumper Court held no "consent" could be valid if given after the officer had asserted that he possessed the legal authority to search the home. Id. at 548-550. As such, the evidence found in the home was suppressed. Id. at 550.

In the instant case, the officers did not assert their legal authority through claim of a warrant; instead, they asserted their legal claim through action. A reasonable person, confronted two detectives requesting access to his DVR system, under the overwhelming circumstances presented here, would assume that law enforcement had legal authority to do so and that they had "no right to resist." Id. at 550.

Our Appellate Division has recognized and applied the principles animating Bumper in State v. Dolly, 255 N.J. Super. 278, 286 (App. Div. 1991). Bumper and Dolly control the outcome in this case, were the analysis to reach this far. Though the officers did not mislead Mr. Caneiro about the scope of a warrant, the officers in this case did exactly the same thing through their actions: demonstrate to Mr. Caneiro that he had no actual ability to deny officers access to the DVR system. After Mr. Caneiro was forced outside of his home with no ability to access it for upwards of 7 hours while the many officers and fire personnel came and went in and out of his home as they pleased, the supposed option to refuse to consent rings hollow. See also United States

v. Casellas, 149 F. Supp. 3d 222 (D.N.H. 2016) ("[I]t it is police coercion to obtain consent by tricking an individual into falsely believing a search is inevitable and that declining consent would be futile."). Here, the atmosphere created by the officers was not only inherently coercive — given the number of officers who arrived, remained on scene, and continued their investigation while the occupants were forced to remain outside and watch effectively demonstrated to Mr. Caneiro that he had no choice but to cooperate with their investigation by providing consent to a search of his DVR system.

In sum, the police behavior in this case presented Mr. Caneiro with a fait accompli when he was asked for his consent. Being asked to ratify police conduct that has already occurred, in a situation "pregnant with coercion," Dolly, 255 N.J. at 285, does not equal providing valid consent. As such, Mr. Caneiro's consent was not valid and the results of the search, which were obtained pursuant to that purported consent, must be suppressed. Accordingly, the consent in this case is not valid because it is tainted by the illegal search and seizure that occurred hours earlier, and further, the consent for all reasons discussed was likewise not voluntary and in fact, coerced.

CONCLUSION

For the foregoing reasons and authorities cited in support thereof, the defendant respectfully requests that his Motion to Suppress the DVR Evidence be granted.

Sincerely,
/s/ Monika Mastellone
Monika Mastellone, Esq. 122942014

CC: AP Chris Decker; AP Nicole Wallace