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COUNTER-STATEMENT OF PROCEDURAL HISTORY

On July 30, 2002, defendant-respondent William Brady Eckel was charged in Cape May County Indictment No. 02-07-00493-I with possession of cocaine, third degree, contrary to N.J.S.A. 2C:35-10a(1) (count one); possession with intent to distribute cocaine, third degree, contrary to N.J.S.A. 2C:35-5a(1) and N.J.S.A. 2C:35-5b(3) (count two); and possession with intent to distribute less than one ounce of marijuana, fourth degree, contrary to N.J.S.A. 2C:35-5a(1) and N.J.S.A. 2C:35-5b(12) (count three). Respondent's girlfriend, Dana Sanfillipo, was charged as a co-defendant. (Da1 to 4).

Respondent and Sanfillipo filed motions to suppress. On December 13, 2002, a suppression hearing was held before the Honorable Carmen H. Alvarez, J.S.C. The court denied the motions. (1T59-16 to 17).<sup>1</sup> Immediately thereafter, a plea

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<sup>1</sup> 1T - December 13, 2002 (suppression/plea hearing)  
2T - January 31, 2003 (sentencing)

hearing was conducted. Pursuant to a plea bargain, respondent entered a retraxit plea of guilty to count two of the indictment.

In return for the plea, the State agreed to recommend the dismissal of the other counts of the indictment, a pending charge of aggravated assault, and all related disorderly persons offense charges pending in municipal court. The State additionally agreed to dismiss all charges against Sanfillipo and to limit respondent's sentence exposure under the plea bargain to probation conditioned upon 180 days imprisonment and 200 hours of community service. (1T61-3 to 62-4).

On January 31, 2003, respondent appeared before Judge Alvarez and received the maximum sentence permitted under the plea bargain. (2T7-24 to 9-3). Respondent appealed his conviction. In a published decision decided December 29, 2004, the Appellate Division reversed respondent's conviction and the denial of his motion to suppress. State v. Eckel, 374 N.J. Super. 91, 101 (App. Div. 2004).

The State filed a Petition for Certification. Pursuant to an application by the State, the Appellate Division stayed its decision pending this Court's disposition of the Petition. (Sa2). On March 11, 2005, this Court granted the State's Petition for Certification. (Sa3).

#### COUNTER-STATEMENT OF FACTS

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Sb - State's supplemental Supreme Court brief  
Sa - Appendix to State's supplemental brief

Respondent was 18 years old and resided in Lower Township. He was romantically involved with co-defendant Sanfillipo (Sanfillipo), with whom he had a baby. Respondent and Sanfillipo had an acrimonious relationship with Sanfillipo's father, who also resided in Lower Township. (1T4-20 to 21; 1T8-17 to 19; 1T9-15; 1T14-8 to 15-2).

On June 30, 2002, the Lower Township police were called to Sanfillipo's father's house on a call of a domestic disturbance involving respondent. In the aftermath of the call, Patrolman Douglas Whitten ran a computer check on respondent and discovered an active warrant issued by the Upper Township Municipal Court based on his failure to appear on motor vehicle summonses totaling \$280. (1T4-10 to 13; 1T7-1 to 2; 1T8-15 to 25; 1T20-3 to 6).

Later that day, Sanfillipo's parents complained to Lower Township Patrolman McGurk that Sanfillipo had taken a green Mercury Cougar without their permission. The car was registered to Sanfillipo's parents but used by their son. Sanfillipo's parents indicated that Sanfillipo would be with respondent. (1T4-20 to 6-19; 1T7-1 to 13; 1T13-7 to 12; 1T15-10 to 11; 1T21-18 to 19).

Whitten heard McGurk's radioed account of the complaint. He was familiar with respondent, knowing him by his middle name, Brady, and knew where he lived. As he was then in the vicinity and suspected respondent and Sanfillipo might have gone to

respondent's home, he drove to the house and parked across the street. (1T6-21 to 24; 1T7-13 to 17; 1T16-24 to 17-1).

After just a few minutes, Whitten saw Sanfillipo pull out of the driveway of respondent's house in the Mercury and drive off.

Respondent was a front seat passenger and there was a juvenile in the back seat. Whitten performed a motor vehicle stop, and he and his partner, Sergeant Jack Bears, exited the patrol car. Whitten walked to the driver's window while Bears approached the passenger side. Bears immediately ordered respondent out of the car and told him the police had a warrant for his arrest. Bears handcuffed respondent and placed him in the rear seat of the patrol car, located behind the Mercury. (1T7-17 to 19; 1T8-1 to 13; 1T9-7 to 11; 1T10-12 to 15; 1T16-6 to 11; 1T26-5 to 12; 1T27-2 to 7).

Whitten, meanwhile, asked Sanfillipo for her documentation and discovered that she did not have her driver's license. After Bears secured respondent in the patrol car and returned to the Mercury, Whitten ordered Sanfillipo to exit and escorted her to the rear of the Mercury, where he conversed with her for a period which did not exceed five minutes. Sanfillipo was aware that respondent was going to be taken in on the warrant and asked Whitten if she could kiss him good-bye. Whitten declined the request. (1T8-8 to 10; 1T9-12 to 15; 1T26-14 to 27-1; 1T27-20 to 23; 1T34-3 to 5).

Sanfillipo then stated that respondent had some clothes in

the Mercury on the floor in front of the front passenger's seat and asserted that she wanted to retrieve them for him. Whitten denied Sanfillipo permission to get the clothes and said he would retrieve them himself. (1T9-15 to 18; 1T25-18 to 21). Without obtaining Sanfillipo's permission to enter the vehicle, Whitten walked around the car to the open passenger door, reached in and picked up some clothes lying on top of a telephone book situated on the floor in front of the passenger's seat. When he picked up the clothes, he allegedly saw green vegetative matter and some stems on the phone book.<sup>2</sup> (1T9-18 to 10-4; 1T36-8 to 11).

Whitten recognized the vegetative matter as marijuana. He looked behind the front passenger seat and on the floor saw an open box of Philly Blunt cigars, which were associated with marijuana use. He also saw a pair of shorts next to the cigars.

Whitten picked up the shorts, went through the pockets and discovered a rolled up black plastic bag about the size of a softball. Inside was another plastic bag containing several small glassine baggies, a plastic baggy containing suspected cocaine, a small electronic scale, and a tray for the scale with white residue. (1T10-4 to 11-14).

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<sup>2</sup> On summation, defense counsel, referring to the vegetative matter, asserted, without contradiction, that the vegetation consisted of "some grains of something which he didn't even test." (1T53-3 to 4). It can be inferred therefore that the amount was quite small.

Whitten now ordered the juvenile out of the back seat. Whitten dug into the seam between the seat and wall of the vehicle next to where the juvenile had been sitting and pulled out a plastic bag containing additional suspected marijuana. (1T11-24 to 12-8).

In response to Whitten's questions, the juvenile and Sanfillipo denied knowledge of the drugs. Sanfillipo suggested the shorts belonged to her brother, as he was the one who usually used the car. Whitten then walked to the patrol car and asked respondent about the drugs. Respondent also denied knowledge. (1T11-17 to 23; 1T12-14 to 13-14).

Whitten and Bear declined to arrest or charge Sanfillipo for the unauthorized use of the Mercury. Sanfillipo's parents were called to the scene. They stated that they did not wish to press charges, retrieved the vehicle and drove off. Respondent was taken to the station for processing. (1T13-15 to 17; 1T15-7 to 15; 1T23-9 to 19; 1T31-18 to 32-2).

During the suppression hearing, Whitten asserted unequivocally that neither Sanfillipo nor the juvenile were under arrest before he began searching the Mercury. (1T23-9 to 19; 1T31-18 to 21). He admitted that he characterized the search in his report as a search incident to respondent's arrest and acknowledged that he would have searched the vehicle as an incident to the arrest regardless of Sanfillipo's remarks about the clothing. (1T29-24 to 30-8; 1T31-22 to 32-2). Whitten

asserted that the vehicle had not been driven erratically or unlawfully before the stop, and that none of the vehicle's occupants had made furtive movements, acted aggressively or given the officers any reason to believe they were armed or dangerous. (1T27-12 to 28-12).

The trial court found that the search was valid as an exercise of Whitten's "community care taking" responsibilities, as a search incident to respondent's arrest, and as a consequence of the discovery of the green vegetation under respondent's clothing. (1T58-24 to 59-17). Respondent proceeded to plead guilty pursuant to a plea bargain and appealed. (1T67-2 to 6; D11).

In reversing defendant's conviction and the denial of the motion to suppress, the Appellate Division recognized that the United States Supreme Court in New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860 (1981), had established a bright-line rule which permitted the search of the passenger compartment of an automobile and containers discovered therein as an incident to the lawful arrest of a "recent occupant" of the vehicle. However, the panel, relying on the reasoning of this Court's decision in State v. Pierce, 136 N.J. 184 (1994), which rejected the application of the Belton rule under our state constitution to searches incidental to arrests for minor motor vehicle offenses, on widespread criticism of the rule, and on sharp expressions of displeasure with the rule by the majority of the

United States Supreme Court in Thornton v. United States, 541 U.S. 615, 124 S.Ct. 2127 (2004), determined that "Belton does not represent the law in New Jersey under the greater protections provided by our State Constitution." State v. Eckel, 374 N.J. Super. at 96-100. Accordingly, the court reversed defendant's conviction and the denial of the motion to suppress. Id. at 101.

This appeal follows.

#### LEGAL ARGUMENT

##### POINT I

THE SEARCH OF THE AUTO IN WHICH RESPONDENT WAS RIDING VIOLATED HIS RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES UNDER ARTICLE I, PARAGRAPH 7 OF THE NEW JERSEY CONSTITUTION, BECAUSE BELTON IS INCOMPATIBLE WITH THAT PROVISION AND CANNOT JUSTIFY THE SEARCH, THE SEARCH WAS IN AN AREA OUT OF HIS REACH, AND THE AUTO WAS UNLIKELY TO CONTAIN A WEAPON OR CONTRABAND.

Even if the search of Sanfillipo's Mercury was permitted under the United States Supreme Court's interpretation of the Fourth Amendment in New York v. Belton, supra, the search violated Article I, Paragraph 7 of the New Jersey Constitution, because respondent was handcuffed in a presumably locked patrol car and had no access to the Mercury's passenger compartment when the search occurred, and it was in any event unlikely that the Mercury contained a weapon or evidence of the crime for which he was arrested. Belton's bright-line authorization to search the passenger compartment of a vehicle in which an arrestee was a "recent occupant" is incompatible with our constitution and

provides no authorization for the search. Therefore, the Appellate Division's decision was correct and must be affirmed.

The Fourth Amendment of the United States Constitution and Article I, paragraph 7 of the New Jersey Constitution are virtually identically worded provisions which proscribe unreasonable searches and seizures and generally require such an intrusion to be authorized by a warrant issued upon probable cause to be reasonable. U.S. Const., Amend. IV; N.J. Const., Art. I, Par. 7; State v. Maryland, 167 N.J. 471, 482 (2001); Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043 (1973). The constitutional proscription of unreasonable searches and seizures was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence. Chimel v. California, 395 U.S. 752, 761, 89 S.Ct. 2034, 2039 (1969). The Fourth Amendment's warrant requirement plays a central role in ensuring that a search is reasonable. As the Supreme Court has stated,

We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. \* \* \* And so the Constitution requires a magistrate to pass on the desires

of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative. [McDonald v. United States, 335 U.S. 451, 455-456, 69 S.Ct. 191, 193 (1948)].

Due to the importance of the warrant requirement, a warrantless search and seizure is per se unconstitutional unless it falls within one of the few, narrowly circumscribed, exceptions to the warrant requirement. State v. Maryland, 167 N.J. at 482. In order to deter misconduct by governmental actors, material seized in violation of the warrant requirement "may not be used as evidence against that individual in the State's case-in-chief." Mapp v. Ohio, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, reh'g denied, 368 U.S. 871, 82 S.Ct. 23 (1961).

The State bears the burden of proving by a preponderance of the evidence that a warrantless search falls within a warrant requirement exception. State v. Patino, 83 N.J. 1, 7 (1980). The State failed to establish its burden in this matter.

A. Search incident to arrest under the federal and state law - The roots of our state constitutional jurisprudence

The State has sought to justify its search of Sanfillipo's Mercury as a search incident to a contemporaneous arrest, one of the recognized warrant requirement exceptions under the federal and state constitutions. Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 2040 (1969); State v. Dangerfield, 171 N.J.

446, 462 (2002). Both the federal and state search incident to arrest exceptions, as those exceptions are presently interpreted, have their roots in the United States Supreme Court's decision in Chimel.

Chimel involved the arrest of a burglary suspect at his home by three police officers, who conducted a search of the entire three-bedroom residence, including the attic, garage, and a small workshop. The police searched dresser drawers in the master bedroom and seized various items that the trial court admitted in evidence against the defendant. The search continued for almost one hour. Id., 395 U.S. at 753-754, 89 S.Ct. at 2030.

In a 7-2 decision, the Supreme Court found that the search exceeded the permissible scope of the search incident to arrest exception. The Court recounted the history of the exception, which began as a 1914 dictum in Weeks v. United States, 232 U.S. 383, 392, 34 S.Ct. 341, 344 (1914), and culminated in the Court's decisions in Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098 (1947), and United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430 (1950), in which the Court authorized, respectively, the search of an entire four room apartment and a 90 minute search of a desk, safe, and file cabinets in a one room office. Chimel, 395 U.S. at 755-760, 89 S.Ct. at 2036-2038. The Court observed that Rabinowitz had come to be viewed as standing for "the proposition ... that a warrantless search 'incident to a lawful arrest' may generally extend to the area that is

considered to be in the 'possession' or under the 'control, of the person arrested," ibid., a scope of search which Justice Scalia later would term a search of the "effects" of an arrestee. Thornton v. United States, 541 U.S. at \_\_\_, 119 S.Ct. at 2137 (Scalia, J., concurring).

Focusing on a dissent by Justice Frankfurter in Rabinowitz, which criticized this expansive view of the exception as being inconsistent with the concern about general warrants which inspired the Fourth Amendment, as well as the Court's pronouncement one year earlier in Terry v. Ohio that "[t]he scope of [a] search must be strictly tied to and justified by the circumstances which rendered its initiation permissible," the Court ruled that the expansive Rabinowitz view was unconstitutional. Chimel, 395 U.S. at 760-764, 89 S.Ct. at 2039-2041, citing Rabinowitz, 339 U.S. at 69, 70 S.Ct. at 436 (Frankfurter, J., dissenting), and Terry, 392 U.S. 1, 19, 88 S.Ct. 1868, 1878 (1968). The Court declared that the purpose of the exception was to remove from the arrestee's reach things that might be used to assault an officer or effect an escape as well as to prevent the destruction of evidence of the crime for which the person was arrested. Chimel, 395 U.S. at 762-763, 89 S.Ct. at 2040. Accordingly, stated the Court, the exception would only comply with the Fourth Amendment if it were limited in scope to "a search of the arrestee's person and the area 'within his immediate control'" -- construing that phrase to mean the area

from within which he might gain possession of a weapon or destructible evidence." Ibid. The Court ruled that the search must be contemporaneous with the arrest. Id., 395 U.S. at 763-764, 89 S.Ct. at 2040, quoting Preston v. United States, 376 U.S. 364, 367, 84 S.Ct. 883 (1964).

The Court rebuked those who would argue that it was "reasonable" to search a man's house when he is arrested in it. The Court declared that such an argument was "founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on consideration relevant to Fourth Amendment interests." Chimel, 395 U.S. at 764, 89 S.Ct. at 2041. Under such "an unconfined analysis," Fourth Amendment protection in this area would approach the evaporation point," because "[i]t is not easy to explain why, for instance, it is less subjectively 'reasonable' to search a man's house when he is arrested on his front lawn -- or just down the street -- than it is when he happens to be in the house at the time of arrest." Id., 395 U.S. at 764-765, 89 S.Ct. at 2041. The Court worried that "[n]o consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items." Id., 395 U.S. at 766, 89 S.Ct. at 2041.

More than four years later, the Court, with a number of new justices, retreated significantly from Chimel regarding the need

to justify the scope of each search incident to arrest by the purposes of the rule. United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467 (1973). In Robinson, the defendant was arrested for driving on the revoked list. While the defendant was outside his vehicle, an officer conducted a patdown search of the defendant's person as an incident to the arrest and felt an object in the breast pocket of the defendant's coat. The officer could not tell what the item was and had no reason to suspect it was a weapon. Nevertheless, the officer reached into the pocket and pulled out the object, which turned out to be a crumpled cigarette pack containing unknown contents. The officer opened the pack and discovered that it contained heroin. Id., 414 U.S. 220-223, 94 S.Ct. 469-471.

Although there was no reason for the officer to believe the defendant was armed when the patdown commenced and the cigarette pack could not be identified as a weapon through the coat and could not have contained a weapon or evidence of the offense for which the defendant was arrested, the Court affirmed the patdown search and the retrieval and opening of the pack as a search incident to arrest. In doing so, the Court essentially announced a bright-line rule which permitted the full body search of an arrestee and search of the effects contained on his person regardless of the nature of the offense and regardless of whether one of the reasons identified in Chimel as supporting the

authority for a search incident to an arrest existed.<sup>3</sup> Id., 414 U.S. at 233-235, 94 S.Ct. at 476-477.

In State v. Welsh, 84 N.J. 346 (1980), this Court considered whether the search of the passenger compartment of an arrested driver's auto constituted a valid search incidental to an arrest.

As in this case, the arrestee was apprehended on an outstanding warrant, handcuffed and placed in the back of a patrol car before the search commenced. Id. at 355.

Relying on Chimel's pronouncement of the permitted scope of a search incident to an arrest, the Court asserted that the relevant factors in any search incident to arrest analysis are those which disclose what areas the person under arrest could reach at the time of the search, and how likely it is that he

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<sup>3</sup> The bright-line rule announced in Robinson caused consternation in legal circles. In the aftermath of Robinson, Massachusetts enacted a statute which required that the Chimel purposes exist in all searches incident to an arrest. G.L. c. 276, § 1 (Mass. 1974). The Massachusetts Supreme Court has stated that the statute was specifically enacted to counteract Robinson. The statute governs the search of the passenger compartment of a vehicle as an incident to the arrest of one of its occupants. Commonwealth v. Toole, 389 Mass. 159, 161, 448 N.E.2d 1264, 1266 (1983).

would attempt resistance or escape or destroy evidence. Important considerations in that case were whether the arrestee had been placed under some form of restraint, the positions of the defendant and the arresting officer in relation to the vehicle, the difficulties to be encountered by the arrestee in gaining access to the vehicle or to the particular area therein searched, and the number of officers present as compared with the number of persons arrested or who were bystanders in the immediate vicinity. Welsh, 84 N.J. at 355, citing W. LaFave, Search and Seizure § 7.1 (1978). Noting that the defendant had been handcuffed in a patrol car parked toward the rear of his stopped auto with three State Troopers present, the Court declared that the defendant "could not reach even into other areas of the police car, let alone into his own vehicle." Welsh, 84 N.J. at 355. Because the defendant was unable to reach into his vehicle to gain possession of a weapon or destructible evidence, the Court ruled that the search of the vehicle's passenger compartment was not a valid search incident to arrest. Id. at 354-355.

B. Search incident to arrest under the federal and state law - Belton and its aftermath

One year after Welsh was decided, the Supreme Court in **New York v. Belton**, 453 U.S. 454, 101 S.Ct. 2860 (1981), extended the bright-line technique of Robinson to the search incident to arrest exception as it applied to a search of the passenger compartment of a vehicle "recently occupied" by an arrestee. In

Belton, a New York State Trooper stopped a car containing four occupant for speeding. Upon approaching the vehicle, the officer smelled the odor of marijuana emanating from within and observed on the floor an envelope identified with a label commonly associated with marijuana sales. The officer ordered the occupants out of the vehicle, patted each down, removed the envelope from the floor and determined that it contained a small amount of marijuana. After the marijuana was found, the removed occupants, still standing outside the car, were placed under arrest. The officer then re-entered the vehicle and searched the passenger compartment. From a rear seat, the officer retrieved the defendant's leather jacket. The officer unzipped one of the pockets of the jacket and pulled out a bag of cocaine. Id., **453 U.S. at 456, 101 S.Ct. at 2862; People v. Belton**, 50 N.Y.2d 447, 449, 429 N.Y.S.2d 574, 575, 407 N.E.2d 420, 421 (1980).

In a 5-4 decision, the Supreme Court declared that the search was a valid search incident to arrest. The Court declared initially that the lower courts were experiencing difficulty in determining the proper scope of a vehicular search incident to a lawful arrest. Belton, 453 U.S. at 459, 101 S.Ct. at 2863. For this proposition, the Court referred to a split of opinion as to whether the reachable area of an arrested defendant should be measured from his position outside a vehicle when a search commenced or inside the vehicle at the time of the stop. Ibid. The Court complained that the lower courts had found no workable

definition of Chimel's "'area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile and the arrestee is its recent occupant." Id., 453 U.S. at 460, 101 S.Ct. at 2864. The Court worried that "[w]hen a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." Id., 453 U.S. at 460, 101 S.Ct. at 2864.

The Court declared that it needed to provide "[a] single, familiar standard ... to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." Id., 453 U.S. at 458, 101 S.Ct. at 2863, citing Wayne R. LaFave, "Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 S.Ct.Rev. 127, 142. The Court cited Robinson approvingly as an example of the solution to the uncertainty it perceived, asserting that the Court in that case had "hewed to a straightforward rule, easily applied, and predictably enforced." Belton, 453 U.S. at 459, 101 S.Ct. at 2863, citing Robinson, 414 U.S. 218, 94 S.Ct. 467.

In applying Robinson's bright-line methodology to the case, the Court held that the police, as an incident to the lawful arrest of a "recent occupant" of a vehicle, could contemporaneously search the passenger compartment of that

automobile and the contents of any "containers" found therein. Belton, 453 U.S. at 460, 101 S.Ct. at 2864. The Court defined "container" as "any object capable of holding another object," which included clothing. Id., 453 U.S. at 460 n.4, 101 S.Ct. at 2864 n.4. The Court's holding encompassed only the interior of an automobile's passenger compartment, not the trunk. Ibid. In establishing this bright-line rule, the Court claimed that it was adhering to "the fundamental principles established in the Chimel case," Belton, 453 U.S. 460 n. 3, 101 S.Ct. at 2864 n. 3, because "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" Id., 453 U.S. at 460, 101 S.Ct. at 2864, quoting Chimel, 395 U.S. at 763, 89 S.Ct. at 2040.

Justice Brennan authored a vehement dissent to the opinion. He observed that "the Court for the first time [had] grant[ed] police officers authority to conduct a warrantless 'area' search under circumstances where there is no chance that the arrestee 'might gain possession of a weapon or destructible evidence.'" Belton, 453 U.S. at 468, 101 S.Ct. at 2868, citing Chimel, 395 U.S. at 763, 89 S.Ct. at 2040. Justice Brennan complained that "[t]his expansion of the Chimel exception [was] both analytically unsound and inconsistent with every significant search-incident-to-arrest case [the Court had] decided in which the issue was

whether the police could lawfully conduct a warrantless search of the area surrounding the arrestee." Belton, 453 U.S. at 468, 101 S.Ct. at 2868 (string citation omitted).

In this regard, Justice Brennan declared that the decision was contrary to the "fundamental principle of Fourth Amendment analysis," "[p]redicated on the Fourth Amendment's essential purpose of 'shield[ing] the citizen from unwarranted intrusions into his privacy,' that exceptions to the warrant requirement are to be narrowly construed [string citation omitted]," as well as to two "corollaries" of that principle: "First, for a search to be valid under the Fourth Amendment, it must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible, [citing inter alia Cupp v. Murphy, 412 U.S. 291, 295, 93 S.Ct. 2000, 2003 (1973); Terry v. Ohio, 392 U.S. at 19, 88 S.Ct. at 1878, and Chimel, 395 U.S. at 762, 89 S.Ct. at 2039]"; and second, that "in determining whether to grant an exception to the warrant requirement, courts should carefully consider the facts and circumstances of each search and seizure, focusing on the reasons supporting the exception rather than on any bright-line rule of general application [citing Sibron v. New York, 392 U.S. 40, 59, 88 S.Ct. 1889, 1900 (1968) and Preston v. United States, 376 U.S. at 367, 84 S.Ct. at 883]." Belton, 453 U.S. at 464, 101 S.Ct. at 2866. Justice Brennan pointed out that the Chimel exception had been predicated upon a need to protect

officers from objects which an arrestee could use to harm them and to prevent the destruction of evidence of the crime for which the person was arrested, and "thus place[d] a temporal and a spatial limitation on searches incident to arrest, excusing compliance with the warrant requirement only when the search 'is substantially contemporaneous with the arrest and is confined to the *immediate* vicinity of the arrest.'" Id., 453 U.S. at 464-466, 101 S.Ct. at 2866-2867 (original emphasis; string citation omitted). Through the use of a "fiction -- that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car ," the Court in Belton provided officers with the authority to search areas not covered by Chimel's purpose. Ibid. (original emphasis).

Justice Brennan doubted whether the difficulty complained of by the Court as to Chimel's application and the need for a bright-line rule to guide officers really existed. Id., 453 U.S. at 470-471, 101 S.Ct. at 2869-2870. However, he warned, "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." Id., 453 U.S. at 470-471, 101 S.Ct. at 2869-2870, quoting Mincey v. Arizona, 437 U.S. 385, 393, 98 S.Ct. 2408, 2413 (1978). In any event, he feared that the Court's bright-line rule would not provide the guidance sought by the Court and would engender "far more problems than it solve[d]" by "leav[ing] open too many questions and ... provid[ing] the police and the courts with too

few tools with which to find the answers." Belton, 453 U.S. at 468, 101 S.Ct. at 2869. For example, he declared:

[A]lthough the Court concludes that a warrantless search of a car may take place even though the suspect was arrested outside the car, it does not indicate how long after the suspect's arrest that search may validly be conducted. Would a warrantless search incident to arrest be valid if conducted five minutes after the suspect left his car? Thirty minutes? Three hours? Does it matter whether the suspect is standing in close proximity to the car when the search is conducted? Does it matter whether the police formed probable cause to arrest before or after the suspect left his car? And *why* is the rule announced today necessarily limited to searches of cars? ... Even assuming today's rule is limited to searches of the "interior" of cars -- an assumption not demanded by logic -- what is meant by "interior"? Does it include locked glove compartments, the interior of door panels, or the area under the floorboards? Are special rules necessary for station wagons and hatchbacks, where the luggage compartment may be reached through the interior, or taxicabs, where a glass panel might separate the driver's compartment from the rest of the car? Are the only containers that may be searched those that are large enough to be "capable of holding another object"? Or does the new rule apply to any container even if it "could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested"? ...

The Court does not give the police any "bright-line" answers to these questions. More important, because the Court's new rule abandons the justifications underlying Chimel, it offers no guidance to the police officer seeking to work out these answers for himself. As we warned in Chimel: "No consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items." 395 U.S., at 766, 89 S.Ct., at 2041

. . . . By failing to heed this warning, the Court has undermined rather than furthered the goal of consistent law enforcement: it has failed to offer any principles to guide the police and the courts in their application of the new rule to nonroutine situations. [Belton, 453 U.S. at 469-470, 101 S.Ct. at 2869 (original emphasis)].

Justice Brennan's dissent resonated in widespread scholarly criticism of Belton. Generally, the holding was seen as a doctrinally unsound expansion of Chimel which did not provide principled guidance, was inconsistent with the "grabbing area" rationale of that decision, and threatened arrests for the purpose of conducting general searches in areas for which probable cause did not exist. Albert W. Alschuler, Bright Line Fever and the Fourth Amendment, 45 U.Pitt.L. Rev. 227, 272-285 (1984) (hereinafter Alschuler) (Belton obviously artificial and added a layer of incoherency to Fourth Amendment law); Jeffrey A. Carter, Fourth Amendment-Of Cars, Containers and Confusion, 72 J.Crim.L. & Criminology 1171, 1173, 1217-1221 (1981) (characterizing Belton as "disappointing," efficacy of its bright-line rule "questionable," and its legacy "confusion"); Catherine Hancock, State Court Activism and Searches Incident to Arrest, 68 Va.L.Rev. 1085, 1130-1131 (1982) (observing that "[by] the elimination of Chimel's case-by-case measure of grabbing areas . . . Belton dramatically lowered the level of Fourth Amendment protection afforded to motorists in almost every state"); David M. Silk, When Bright Lines Break Down: Limiting New York v. Belton, 136 U.Pa.L.Rev. 281, 313 (1987) (hereinafter

Silk) (urging that Belton be read and applied narrowly and not expanded beyond intended scope).<sup>4</sup>

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<sup>4</sup> See also, Yale Kamisar, The "Automobile Search" Cases: The Court Does Little to Clarify the "Labyrinth" of Judicial Uncertainty, in 3 The Supreme Court: Trends and Developments 1980-81 96 (Jesse Chaper et al. eds., 1982) (arguing that "automobile exception" based on probable cause constituted preferable basis for authorizing warrantless search in Belton); John Parker, Robbins and Belton - Inconsistency and Confusion Continue to Reign Supreme in the Area of Warrantless Vehicle Searches, 19 Hous.L.Rev. 527, 552 (1982) (arguing that "[r]easonableness and exigency have given way to predictability in Belton"); David S. Rudstein, The Search of an Automobile Incident to an Arrest: An Analysis of New York v. Belton, 67 Marq.L.Rev. 205, 232, 261 (1984) (reading Belton to allow car search even if arrestee handcuffed and placed in squad car and urging reconsideration of Belton and return to rationale of Chimel, allowing search of vehicle and containers therein only if

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within potential control of arrestee); Robert Stern, Robbins v. California and New York v. Belton: The Supreme Court Opens Car Doors to Container Searches, 31 Am.U.L.Rev. 291, 317 (1982) (describing Belton as subordinating privacy interests to bright-line rule and allowing warrantless searches of containers in automobile passenger compartments incident to arrest of driver or occupants); The Supreme Court, 1980 Term, 95 Harv.L.Rev. 93, 260 (1981) (noting that "the Court has turned its back on the logic of its earlier decision in Chimel . . . , which restricted police searches incident to arrest to the arrestee's immediate area of control").

In particular, Wayne R. LaFave, whose endorsement of bright-line rules to guide police officers in resolving Fourth Amendment issues the Belton majority quoted approvingly, Belton, 453 U.S. at 458, 101 S.Ct. at 2860, concluded that Belton "does a disservice to the development of sound Fourth Amendment doctrine." Wayne R. LaFave, The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith", 43 U.Pitt.L.Rev. 307, 325 (1982) (hereinafter LaFave). Professor LaFave observed that because the automobile search authorized by Belton is not based on probable cause, the decision creates the risk that "police will make custodial arrests which they otherwise would not make as a cover for a search which the Fourth Amendment otherwise prohibits." 3 LaFave, Search and Seizure § 7.1(c), at 21.

Another observer, Albert W. Alschuler, noting the inconsistency between the Belton rule and the "grabbing area" restriction imposed by Chimel, declared that Belton "divorced the doctrine of search incident to arrest from its moorings. Belton converted this doctrine from a rule with a reason to a gratuity for a job [*i.e.*, the arrest] well done." Alschuler, supra, 45 U. Pitt.L.Rev. at 284-285. Professor Alschuler observed that

If any bright line rule had been necessary to resolve the issue in Belton, it would have been the opposite of the rule that the Court announced. . . . [O]ccupants almost invariably are removed before an automobile is searched; and once they have been removed, there is no longer much chance that they can secure weapons from the automobile or destroy evidence there. [*Id.* at 274].

In the aftermath of Belton, most of the state courts applied Belton's bright-line rule in assessing the validity of automobile searches incident to arrests. See Silk, supra, 136 U.Pa.L.Rev. at 292 n. 81. However, courts in nine states declined to apply Belton under their state constitutions and decisional law. See, e.g., State v. Hernandez, 410 So.2d 1381, 1385 (La. 1982) (distinguishing Belton, but observing that "we do not consider [Belton] to be a correct rule of police conduct under our state constitution")<sup>5</sup>; State v. Kirsch, 69 Or. App. 418, 686 P.2d 446, 448-449 (Or. App. 1984) (observing that "Belton is not the law of Oregon" and that the Oregon Constitution, pursuant to State v. Caraher, 293 Or. 741, 759, 653 P.2d 942 (1982) (requiring independent analysis under Oregon constitution where defendant was handcuffed and was in a police car being transported to police station when search commenced), authorizes car search incident to arrest only if necessary to protect officer or to preserve evidence, or if relevant to crime for which arrest is made and reasonable in light of facts)<sup>6</sup>.

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<sup>5</sup> There appears to be a split among the lower level appellate courts in Louisiana as to whether Hernandez precludes a Belton analysis in that state. Compare State v. Tassin, 758 So.2d 351, 354 (La. App. 4th Cir. 2000) (defendant handcuffed and confined to the rear of a police car; Belton not followed in state), with State v. Bergman, 887 So.2d 1381, 1385 (La. App. 5th Cir. 2004) (court treated passenger compartment search after removed arrestee advised of the presence of a gun as authorized by Belton).

<sup>6</sup> Accord, State v. Hite, 198 Or. App. 1, 7, 107 P.3d 677,

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681 (Or. App. 2005) (under Oregon constitution, a search incident to arrest for crime must be close to the arrest in time, space, and intensity and is limited to a search for evidence of the crime for which the arrestee is arrested, "evidence of which reasonably could be concealed on the arrestee's person or in the belongings in his or her immediate possession at the time of the arrest").

See also, People v. Blasich, 73 N.Y.2d 673, 543 N.Y.S.2d 40, 44-45, 541 N.E.2d 40, 44-45 (1989) (upholding search but observing that New York rejects Belton bright-line rule and interprets state constitution to permit warrantless searches of automobiles incident to arrests only in areas from which arrestee might actually gain possession of weapon or destructible evidence); Commonwealth v. White, 543 Pa. 45, 54-57, 669 A.2d 896, 901-902 (1995) ("[A] police officer may search the arrestee's person and the area in which the person is detained in order to prevent the arrestee from obtaining weapons or destroying evidence, but otherwise, absent an exigency, ... there is no justifiable search incident to arrest under the Pennsylvania Constitution save for the search of the person and the immediate area which the person occupies during his custody... ."); State v. Arredondo, 123 N.M. 628, 633, 944 P.2d 276, 283 (N.M. App. 1997) (under New Mexico constitution, expanded search for drug evidence which resulted in discovery of cocaine in a dashboard hole of defendant's vehicle cannot rely upon the presumption of exigency that arises when an officer observes the person arrested committing a crime);<sup>7</sup> Vasquez v.

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<sup>7</sup> Arredondo followed and relied upon the New Mexico Supreme Court's decision in State v. Gomez, 122 N.M. 777, 789, 932 P.2d 1, 13 (1997), in which the Court expressly declined to apply a federal bright-line approach regarding the automobile search exception and declared that the New Mexico Constitution required a factual analysis as to whether exigent circumstances existed. This Court reached the same conclusion as the court in Gomez in State v. Cooke, 163 N.J. 657, 661 (2000). In State v. Gutierrez,

State, 990 P.2d 476, 480-489 (Wyo. 1999) (explicitly eschewing Belton's bright-line rule under the state constitution "and maintain[ing] a standard that requires a search be reasonable under all of the circumstances as determined by the judiciary"); State v. Box, 28 Kan.App.2d 401, 17 P.3d 386 (Kan. App. 2000) (in upholding search incident to arrest, court explicitly declined to apply Belton and analyzed facts pursuant to six factors set forth by the Kansas Supreme Court for assessing the validity of such searches in State v. Tygart,<sup>8</sup> 215 Kan. 409, 412, 524 P.2d 753 (1974)); Camacho v. State, 119 Nev. 395, 75 P.3d 370, 373-374 (2003) (rejecting Belton in finding passenger compartment search incident to arrest invalid under the state constitution), affirming, State v. Greenwald, 109 Nev. 808, 809-810, 858 P.2d 36, 37 (1993) (rejecting Belton's application and finding search of saddlebags of motorcyclist detained in police car invalid under state constitution).<sup>9</sup>

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**136 N.M. 18, 94 P.3d 18, 21-22 (N.M. App. 2004), the Court noted the existence of Belton under federal law and implied that Arredondo turned on the standard for a search incident to arrest in an auto under the New Mexico state constitution.**

<sup>8</sup> The six Tygart factors are: (1) the closeness of the vehicle to the place of arrest, (2) the probability that seizable items related to the crime were inside the vehicle, (3) the amount of elapsed time between the arrest and the search, (4) the departure of the arrestee from the vehicle, (5) the vehicle was used in connection with the crime, and (6) the character of the place of the arrest, i.e., public area, business premises or private home.

<sup>9</sup> It must logically be inferred that the Alaska Constitution requires courts in that state to eschew Belton's bright-line rule in assessing the validity of a passenger compartment search as an incident to an arrest. In Middleton v.

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State, 577 P.2d 1050, 1055 (1978), the Alaska Supreme Court applied the state constitution to reject the analogous United States v. Robinson bright-line rule governing the full body search of arrestees and to require that such searches be justified by the factors set forth in an earlier Alaska opinion, McCoy v. State, 491 P.2d 127, 132 (1971), specifically, a need to protect the arresting officer, prevent the detainee from escaping or prevent the destruction of evidence. See also, Zehrunge v. State, 569 P.2d 189 (Alaska 1977), modified in part on rehearing, 573 P.2d 858 (1978). Two middle level Alaska appellate courts subsequently applied the McCoy factors to assessing searches incident to arrests in passenger compartments by their facts without resorting to the Belton rule. See Dunn v. State, 653 P.2d 1071, 1079-1080 (Alaska App. 1982); Wilburn v. State, 816 P.2d 907 (Alaska App. 1991).

The courts of two other states have restricted Belton under their state constitutions or decisional law. See, e.g., State v. Stroud, 106 Wash.2d 144, 720 P.2d 436, 440-441 (1986) (modifying Belton and holding that Washington Constitution authorizes a warrantless search of automobile passenger compartment incident to valid arrest but excludes locked containers and locked glove compartment from Belton); State v. Bradshaw, 99 S.W.3d 73, 77-79 (Mo. App. E.D. 2003) (finding Belton inapplicable to passenger compartment search incidental to arrest on a warrant for drunk driving under Missouri caselaw limiting search incident to arrest to articles connected to arrest, because such a search would not produce evidence which could be used against the arrestee).

Additionally, three other states have limited the application of Belton by statutes which codify a requirement that a search incident to an arrest may only be conducted to uncover evidence of the crime for which the arrestee is being apprehended, to protect the officer or to prevent the escape of the arrestee. See, State v. Graham, 271 Mont. 510, 512, 898 P.2d 1206, 1208 (1995) (applying § 46-9-102, MCA); **Commonwealth v. Toole, 389 Mass. at 161, 448 N.E.2d at 1266** (excluding evidence obtained by warrantless search of truck following lawful arrest, removal and handcuffing of driver and acknowledging validity of search under Belton but invalidating search based on G.L. c. 276, § 1); State v. Box, 28 Kan.App.2d at 404, 17 P.3d at 388 (K.S.A. 22-2501).

C. New Jersey's departure from federal law in

limiting the permissible scope of the search  
incident to arrest exception under state law.

Only several months after Belton was decided, this Court remarked that its decision in State v. Welsh, supra, "reaffirmed that the proper scope of a search incident to an arrest is limited to the person of the arrestee and the area from within which he might gain possession of a weapon or destructible evidence." State v. Alston, 88 N.J. 211, 235 n.15 (1981) (citing Chimel). The Court declared that the search in Welsh could not have been sustained as one which was incident to a lawful arrest under the Chimel standard. However, the result in Welsh "would not be the same" had the Court applied the holding in Belton. Ibid. Finding that the search in Alston could be sustained under the automobile exception, the Court left "to future consideration the question of the continued viability our analysis of the scope of the Chimel exception as expressed in Welsh." Ibid.

In State v. Pierce, 136 N.J. 184 (1994), this Court addressed the issue of whether the warrantless arrest of a motorist for a motor vehicle offense gave the police authority to search the passenger compartment of his vehicle as an incident to his arrest. In that case, the vehicle, driven by the co-defendant, was stopped for moderately exceeding the speed limit.

The police determined that the co-defendant's license was suspended. An officer ordered him out of the vehicle, informed him he was under arrest for driving while suspended, patted him down, handcuffed him and placed him in the rear seat of a patrol

car parked directly behind the stopped vehicle. The officer next ordered the defendant and another co-defendant to exit the stopped vehicle. The officer patted them down, discovered no weapons, and then commenced a search of the vehicle's passenger compartment, discovering a stolen revolver and cocaine in containers therein. Id. at 186-188.

In tacit recognition that the search lay within the bright-line rule of Belton and accordingly comported with current constructions of the Fourth Amendment, the Court considered whether the search was consistent with Article I, Paragraph 7 of the New Jersey Constitution. The Court indicated pronounced discomfort with the Belton rule. It repeated its earlier post-Belton observation in Alston that Welsh, which would have invalidated the search at bar, was consistent with Chimel's focus on the area which an arrestee actually controlled or had access to. Pierce, 136 N.J. at 195-196. The Court observed that Belton was "widely criticized" by numerous commentators<sup>10</sup> for giving police the authority to search based on traffic violation arrests which might not have been made had the arrests not justified a search. Id. at 200-201. The Court expressed concern in this regard that New Jersey, by enacting N.J.S.A. 39:5-25, had given officers authority to arrest motorists for any traffic violation.

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<sup>10</sup> In this regard, the Court cited to the numerous law review articles set forth at pps. 22-24, supra, setting forth critical remarks of the commentators in parenthetical descriptions to most of the citations.

Pierce, 136 N.J. at 189-190. The court noted that Professor LaFave, whose advocacy of "bright-line" rules in Fourth Amendment jurisprudence was relied upon in Belton, had asserted that "Belton has done a disservice to Fourth Amendment doctrine." Pierce, 136 N.J. at 200. Moreover, the courts of a number of other states had rejected Belton. Pierce, 136 N.J. at 202.

The Court held pursuant to Article I, Paragraph 7 of the state constitution that "the rule of Belton shall not apply to warrantless arrests for motor-vehicle offenses" and declared the search invalid. Pierce, 136 N.J. at 208. As a basis for this decision, the Court asserted that the rationale for Chimel, "the analytical source" for Belton, was

less persuasive when offered to justify the need for a vehicular search following an arrest for a traffic offense. The Court in Chimel observed that an arresting officer might reasonably search the arrestee and the adjacent area to remove weapons that the arrestee might use to effect escape or resist arrest, and to locate evidence pertinent to the arrest to prevent its concealment or destruction. [citation omitted]. That justification for a warrantless vehicular search diminishes significantly when the basis for the arrest is a routine violation of one of the motor vehicle statutes. [Pierce, 136 N.J. at 210].

In this regard, the Court declared that out of the substantial number of ordinary citizens who might on occasion commit commonplace traffic offenses, the vast majority are unarmed. Moreover, when the predicate offense is a motor-vehicle violation, the vehicle stopped by police would not ordinarily contain evidence at risk of destruction that pertains to the underlying offense... . In addition,

motorists arrested for traffic offenses almost invariably are removed from the vehicle and secured. When an arrestee ... has been handcuffed and placed in the patrol car, and the passengers are removed from the vehicle and frisked, the officer's justification for searching the vehicle and the passengers' clothing and containers is minimal. Thus, in the context of arrests for motor-vehicle violations, the bright-line Belton holding extends the Chimel rule beyond the logical limits of its principle. [Pierce, 136 N.J. at 210-211].

As a further basis for its ruling, the Court considered that the failure to follow Belton in warrantless traffic stops would not impede effective law enforcement. If an officer has probable cause to suspect that the vehicle contained contraband, a warrantless search of the car could be justified by the automobile exception to the warrant requirement. Pierce, 136 N.J. at 214. Furthermore, the officer could conduct a personal search as an incident to the arrest of the suspect to allay fears of safety. Ibid. If the arrestee remains in or "adjacent" to the auto with the result that the vehicle remains within the area of the arrestee's "immediate control," as that term is understood in Chimel, a contemporaneous search of the vehicle could be sustainable under Chimel, but not based on Belton's automatic application of Chimel. Pierce, 136 N.J. at 214-215.

The Court declined to address whether Belton was generally compatible with the rights protected by the New Jersey Constitution, as it deemed the issue "significant enough to warrant additional briefing and oral argument." Id. at 208.

To this date, the Court has yet to rule whether Belton's bright-line rule is generally inconsistent with the New Jersey Constitution.

In State v. Dangerfield, 339 N.J. Super. 229, 236 (App. Div. 2001), modified, 171 N.J. 446 (2002), involving the search incident to arrest of a cyclist for defiant trespass, the Appellate Division addressed the validity of the analogous Robinson bright-line rule under state law. The court ruled that the stop and trespassing arrest underlying the search was not sustainable by probable cause, and that the search therefore was not valid. Dangerfield, 339 N.J. Super. at 238.

The court's opinion did not end there; the court articulated an alternate basis for its holding. Under the United States Supreme Court's current interpretation of the Fourth Amendment, a full body search incident to the arrest of the cyclist would have been permitted, as that Court had expressly held that there was no limitation based on the insignificance of the offense involved on the scope of a bodily search as an incident to an arrest. Robinson, supra (driving on the revoked list); Atwater v. City of Lago Vista, 532 U.S. 318, 345-355, 121 S.Ct. 1536, 1553-1557 (2001) (seat belt violation). Citing to out-of-state decisions, including Zehrunig v. State, supra, 569 P.2d at 196-199, an Alaska Supreme Court decision which pursuant to the Alaska Constitution had rejected the Robinson bright-line ruling in favor of a factual analysis, the Appellate Division ruled that defiant

trespass, a petty disorderly persons offense, was sufficiently innocuous that the officers should have issued the defendant a summons instead of performing a custodial arrest and searching him even if there was probable cause to arrest. All the officers were entitled to do was to perform a patdown frisk for weapons if there was an articularly suspicion that the defendant was armed and presently dangerous or to search the defendant's person for evidence of the offense for which there was probable cause to arrest. Moreover, even if the custodial arrest had been proper, the offense was too insignificant to warrant a full body search until the defendant had been given the opportunity to post bail. Dangerfield, 339 N.J. Super. at 237-243.

This Court affirmed the Appellate Division's ruling that no probable cause existed for the trespassing arrest and that the search thus was invalid. Dangerfield, 171 N.J. at 457-458. As for the Appellate Division's alternate holding, the Court reversed the ruling that the police should have issued a summons instead of arresting the defendant and placed the decision to arrest in the officers' discretion. Id. at 458-461. This left open one issue in the Appellate Division's opinion: the permissible scope of a search incident to arrest once a person was arrested for a disorderly or petty disorderly persons offense. The Court declared that it need not decide the matter because of its ruling that no probable cause existed for the

arrest. Id. at 463-464.<sup>11</sup>

The Court provided dicta on the issue left open. Initially, the Court noted the purposes of Chimel's search incident to arrest exception, declaring that it "is permitted to remove from the arrestee's reach things that might be used to assault an officer or effect an escape as well as to prevent the destruction of evidence of the crime for which the individual has been arrested." Id. at 461. The Court observed that under a Chimel analysis, "the nature of the offense for which probable cause existed to permit the arrest and the surrounding circumstances, rather than the seriousness of the offense, significantly influence the decision whether the arrestee may possess evidence of the crime for which he or she has been arrested." Ibid. Because the defendant was arrested as a defiant trespasser, there

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<sup>11</sup> The Court declared that it modified the Appellate Division's opinion "insofar as it holds that a petty disorderly persons offense under the Code should be treated differently than other Code offenses regarding the arrest power of the police" and "that a police officer is required to issue a summons in lieu of making a warrantless arrest for some minor offenses under the Code." "In all other respects," declared the Court, it "affirmed] the judgment under review." Dangerfield, 171 N.J. at 171. Thus, the portion of the Appellate Division's ruling concerning the scope of a search incident to arrest remains law, albeit without the express imprimatur of this Court.

was "no reasonable basis to believe that he could have been in possession of, or was concealing, evidence of that offense." Ibid. Furthermore, "where an individual is not suspected of having committed a violent crime, but has instead been arrested for a non-violent offense, such as possession of a small amount of marijuana, vagrancy or possession of liquor, articularly facts of potential danger must be presented to justify a Terry protective search for weapons." Id. at 464, citing State v. Smith, 155 N.J. 83, 91-92 (1988), cert. denied, 525 U.S. 1033, 119 S.Ct. 576 (1998).

The Court noted that New Jersey generally had not afforded greater protection under the state constitution than that which was provided for in Chimel. Nevertheless, the United States Supreme Court had permitted full body searches under its interpretation of Chimel for arrests for minor traffic offenses. This, as well as lack of reasonable basis for concluding that persons arrested for offenses like defiant trespass possessed evidence of a crime, opened the question as to whether the scope of a search of the arrestee's person incident to an arrest for certain offenses under the Code should be more restrictive under the New Jersey Constitution. The Court asserted that it was leaving the question open. Id. at 461-463.

Clearly, this dicta suggested a preference for a case-by-case analysis of all factors surrounding an arrest, including the nature of the offense, in determining the scope of a personal

search as an incident to arrest. Had the Court ascribed to the Robinson bright-line view of the issue without reservation, there would not have been any rational purpose served by the dicta. Moreover, the Court would likely have extended its reversal of the Appellate Division's ruling to the portion which restricted bodily searches incidental to arrests for minor offenses.

D. Thornton v. United States - The Current View of the United States Supreme Court of Belton

In Thornton v. United States, 541 U.S. 615, 124 S.Ct. 2127 (2004), the majority of the United States Supreme Court expressed pronounced displeasure with the illogic and arbitrariness of Belton. In that case, the arrestee was confronted by the police as he walked away from his vehicle. He disclosed that he was carrying drugs and was handcuffed and placed in the back of a patrol car, at which point his auto was searched and a gun was discovered under the seat. Id., 541 U.S. at \_\_\_\_, 124 S.Ct. at 2129. Resolving a split between the Circuits, the Court determined that Belton applied even when the police initiated contact with an arrestee after he left an automobile, so long as the arrestee was a "recent occupant" of the vehicle. 541 U.S. at \_\_\_\_, 124 S.Ct. at 2131-2132. The Court declared:

To be sure, not all contraband in the passenger compartment is likely to be readily accessible to a "recent occupant." It is unlikely in this case that petitioner could have reached under the driver's seat for his gun once he was outside of his automobile. But the firearm and the passenger compartment in general were no more inaccessible than were the contraband and the passenger compartment in Belton. The need for a clear

rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort of generalization which Belton enunciated. [Id., 541 U.S. at \_\_\_\_, 124 S.Ct. at 2131-2132].

In a concurring opinion, Justice O'Connor stated that she was writing separately to "express [her] dissatisfaction with the state of the law in this area." Id., 541 U.S. at \_\_\_\_, 124 S.Ct. at 2131-2133. She complained that "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of Chimel... ." Ibid. She stated this "erosion is a direct consequence of Belton's shaky foundation." Ibid.

Justice Scalia, in a concurring opinion joined by Justice Ginsburg, was even harsher in his assessment of Belton. Justice Scalia noted initially that a search incident to arrest under Chimel is "justified only as a means to find weapons the arrestee might use or evidence he might conceal or destroy." Ibid. He stated that the risk that the defendant would grab a weapon or evidentiary item from his car was "remote in the extreme" because he was handcuffed and secured in the back of the officer's squad car instead of "anywhere near" the searched vehicle. Ibid. Indeed, declared Justice Scalia, the theory that the defendant "despite being handcuffed and secured in the back of a squad car, ... might have escaped and retrieved a weapon or evidence from

his vehicle ... call[ed] to mind [an earlier decision's] reference to the mythical arrestee 'possessed of the skill of Houdini and the strength of Hercules.'" Ibid. (citation omitted).

Justice Scalia indicated that one might expect the Government to provide statistical evidence that such a threat was real. However, he declared:

The United States, endeavoring to ground this seemingly speculative fear in reality, points to a total of seven instances over the past 13 years in which state or federal officers were attacked with weapons by handcuffed or formerly handcuffed arrestees. [citation omitted]. These instances do not, however, justify the search authority claimed. Three involved arrestees who retrieved weapons concealed on their own person. [citation omitted]. Three more involved arrestees who seized a weapon from the arresting officer. [citation omitted]. Authority to search the arrestee's own person is beyond question; and of course no search could prevent seizure of the officer's gun. Only one of the seven instances involved a handcuffed arrestee who escaped from a squad car to retrieve a weapon from somewhere else: In Plakas v. Drinski, 19 F.3d 1143, 1144-1146 (C.A.7 1994), the suspect jumped out of the squad car and ran through a forest to a house, where (still in handcuffs) he struck an officer on the wrist with a fireplace poker before ultimately being shot dead. Of course, the Government need not document specific instances in order to justify measures that avoid obvious risks.

But the risk here is far from obvious, and in a context as frequently recurring as roadside arrests, the Government's inability to come up with even a single example of a handcuffed arrestee's retrieval of arms or evidence from his vehicle undermines its claims. The risk that a suspect handcuffed in the back of a squad car might escape and recover a weapon from his vehicle is surely no greater than the risk that a suspect

handcuffed in his residence might escape and recover a weapon from the next room -- a danger we held insufficient to justify a search in Chimel, supra, at 763, 89 S.Ct. 2034. [Thornton, 541 U.S. at \_\_\_\_, 124 S.Ct. at 2134].

Justice Scalia further discounted a claim that the officers "should not be penalized for having taken the sensible precaution of securing the suspect in the squad car first." Ibid.

Mirroring Justice O'Connor's complaint, he declared:

The weakness of this argument is that it assumes that, one way or another, the search must take place. But conducting a Chimel search is not the Government's right; it is an exception -- justified by necessity -- to a rule that would otherwise render the search unlawful. If "sensible police procedures" require that suspects be handcuffed and put in squad cars, then police should handcuff suspects, put them in squad cars, and not conduct the search. [Id., 541 U.S. at \_\_\_\_, 124 S.Ct. at 2134-2135].

Justice Scalia noted that officers at roadside stops overwhelmingly were choosing to secure handcuff suspects in the back of their police cars before routinely searching the stopped vehicles. He declared, "The popularity of the practice is not hard to fathom. If Belton entitles an officer to search a vehicle upon arresting the driver despite having taken measures that eliminate any danger, what rational officer would not take those measures?" Id., 541 U.S. at \_\_\_\_, 124 S.Ct. at 2135 (citation omitted). Justice Scalia warned that given the prevalence of this practice, "[t]he Court's effort to apply our current doctrine to this search stretches it beyond its breaking

point." Id., 541 U.S. at \_\_\_\_, 124 S.Ct. at 2133. He stated that he "agreed entirely" with the assessment of one judge, who declared:

[I]n our search for clarity, we have now abandoned our constitutional moorings and floated to a place where the law approves of purely exploratory searches of vehicles during which officers with no definite objective or reason for the search are allowed to rummage around in a car to see what they might find." [United States v. McLaughlin, [170 F.3d 889,] 894 [9th Cir. 1999] (Trott, J., concurring). [Thornton, Id., 541 U.S. at \_\_\_\_, 124 S.Ct. at 2135].

Justice Scalia recommended limiting Belton to searches "where it was reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." Id., 541 U.S. at \_\_\_\_, 124 S.Ct. at 2137.

Justice Stevens dissented in an opinion joined by Justice Souter. He declared that the Court was unwise in extending Belton beyond "the narrow class of cases it was designed to address ... without supplying any guidance for the future application of its swollen rule." Id., 541 U.S. at \_\_\_\_, 124 S.Ct. at 2140.

Thus, to a varying degree, five Justices of the Supreme Court appear ready to abandon Belton if given the chance. Their ability to do so is limited by principles of stare decisis. This Court, which can avail itself of the state constitution, does not suffer from the same impediment.

E. The Belton bright-line rule is inconsistent with protections afforded by the New Jersey State Constitution to any arrestee

This Court should extend Pierce to arrests for any offense and declare that the New Jersey Constitution precludes an application of the Belton bright-line rule to all passenger compartment searches incidental to arrests. There are a number of reasons to support such a ruling. First, Belton is contrary to traditional principles of liberty enjoyed by New Jersey residents and the constitutional scheme designed to protect their rights. As discussed at the outset of this Point, both the federal and state search and seizure provisions aim to guaranty that official intrusions into recognized zones of privacy are supported by probable cause, and that a neutral magistrate stand in between the constables' presumably good faith intention to intrude and the zone of privacy to be searched. The requirement of a magistrate's judgment is essential to the scheme. It is the product of an understanding, based on hard experience, of the fallibility of man, that the best of intentions often are misguided, and that power accordingly needs to be checked and balanced to facilitate rational official decision-making. Under this scheme, an entry into an area not supported by a magistrate's authorization, or by probable cause plus exigent circumstances, is unreasonable and unconstitutional absent a threat to the officer's safety which justifies the intrusion. Thus, under our state constitution, police are free to search an auto for contraband to the extent where there is probable cause plus exigent circumstances. State v. Cooke, 163 N.J. at 661.

Police are permitted to conduct a limited search of autos for weapons only based on a reasonable articulable suspicion that a weapon is present. State v. Lund, 119 N.J. 35 (1990). And pursuant to the Chimel standard, a search is generally permitted under our constitution only in areas where an arrestee can reach so that the danger of harm to an officer or destruction of evidence can be precluded. Pierce, 136 N.J. at 214-215.

Belton does grave violence to this scheme by permitting official intrusions into areas of vehicles for which no probable cause exists under circumstances in which no exigency exists. Essentially, such a search is equivalent to a search under a general warrant, the evil which motivated the enactment of the Fourth Amendment. Indeed, such a search offers even less protection than a general warrant, because at least a general warrant is authorized by a presumably neutral, detached magistrate. As Justices Scalia and O'Connor recognized in Thornton, Belton has converted a doctrine based on exigency and exception into a theory of law enforcement entitlement. Indeed, the search incident to arrest exception has been converted, as Professor Alschuler has stated, into "a gratuity for a job well done." This is completely contrary to our traditional notion of constitutional protection. An officer should not be permitted to engage in a fishing expedition into areas for which no probable

cause exists simply as a bonus for performing a valid arrest.<sup>12</sup>

Second, a related problem with Belton is that it is based on a fiction, that the entirety of a vehicle's passenger compartment is within the area contemplated by Chimel, a fiction based on expediency. This is clear from the majority's frank admission in Thornton, in the excerpt quoted above, that a "recent occupant" of a vehicle such as the defendant in that case had no actual access to the area searched and that the rule was nonetheless necessary for law enforcement efficiency. Thornton, 541 U.S. at \_\_\_\_, 124 S.Ct. at 2131-2132. As Justice Brennan observed in his Belton dissent, the mere fact of expediency "can never by itself justify disregard of the Fourth Amendment." Belton, 453 U.S. at 470-471, 101 S.Ct. at 2869-2870. This Court should not permit our search and seizure jurisprudence to be premised on a lie, no matter how noble intentioned. There should be no place under our law for "purely exploratory searches of vehicles during which officers with no definite objective or reason for the search are allowed to rummage around in a car to see what they might find." Thornton, 541 U.S. at \_\_\_\_, 124 S.Ct. at 2135 (Scalia, J. concurring).

Third, as pointed out by the Justice Brennan's dissent in

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<sup>12</sup> The rash of profile stops on our highways in the last two decades is a consequence of permitting officers to avail themselves of the bonus afforded by Belton's bright-line rule.

Belton, Justice Stevens's dissent in Thornton and the numerous commentators cited above, the "swollen rule" of Belton offers no principled guidance to law enforcement officers and courts and causes more problems of interpretation than it solves. Contrary to the theory of certainty and simplicity which its adherents have proclaimed, a police officer is left uncertain as to what is a contemporaneous search incident to an arrest. Is a search occurring five to ten minutes after a defendant's removal from a vehicle, such as existed in this case, "contemporaneous?" How recent must a "recent occupant"'s occupancy be to accord him such a status? How far from the situs of a search must "a recent occupant" be for a search to qualify under the rule? Does a search commencing 30 seconds after a defendant has left the scene in a patrol car qualify? Are motorcycles covered by Belton? See State v. Greenwald, 109 Nev. 808 at 809-810, 858 P.2d at 37 (search of the saddlebags of a motorcycle while the cyclist is handcuffed in the back of a patrol car). Would Belton apply to a search of the many cabin cruisers which travel along our intracoastal waterway? Does Belton apply to the area behind the rear seat in a hatchback? Does Belton apply to the living quarters of a Winnebago?

Not only does the Belton bright-line offers police officers no guidance in answering these questions, there simply is no principled basis for drawing the distinctions necessary for resolution. A far better guaranty for certainty is the

resolution reached by the Pennsylvania Supreme Court in Commonwealth v. White, supra. White declared that under the Pennsylvania Constitution, a search incident to arrest arising out of an auto stop is limited to "the search of the person and the immediate area which the person occupies during his custody." Id., 543 Pa. at 57, 669 A.2d at 902 (emphasis supplied).<sup>13</sup>

Fourth, the general proscription of Belton under our constitution is required by the analysis of this Court's opinion in Pierce. Although Pierce involved an arrest for a motor vehicle infraction and the Court limited its holding to motor vehicle violation arrests, this Court rejected the Belton rule in that case in good part as a result of the arbitrariness and

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<sup>13</sup> If Justice Scalia is correct that the vast preponderance of defendants are safely handcuffed and secured in patrol cars before a search of the passenger compartment commences, such a ruling may have the practical consequence of virtually eliminating searches as an incident to arrest in the auto stop situation. However, as noted above, a search incident to an arrest is an exception to a constitutional requirement, not an entitlement to law enforcement officers. Moreover, an officer often would have recourse to other exceptions supported by probable cause and exigency, such as the automobile and auto-frisk exceptions, and such a ruling would provide an incentive for the officer to apply for a search warrant.

illogic of the decision, the widespread criticism it engendered, and the willingness of several courts to provide greater protection under their state constitutions. It is clear from a reading of the opinion that the Court was troubled by the failure of Belton to be tailored to the purposes of the search incident to arrest doctrine established in Chimel. Pierce, 136 N.J. at 200-202, 209-213.

The same basis for rejecting Belton exists in the search in this case, and indeed, in any passenger compartment search incidental to an arrest of a "recent occupant" of the vehicle. Although the holding in Pierce covered only minor moving violation arrests, the Court stated that it was not deciding the general constitutionality of Belton because the matter had not been briefed and argued. While the Court based its holding in part on a fear of motor vehicle arrests made solely to provide a cover for a search, Pierce, 136 N.J. at 190-191, 207-208, the Court's ruling in Dangerfield, which granted officers discretion to issue a summons to or arrest an occupant of a car for a disorderly person's offense, creates a similar opportunity for abuse which needs to be proscribed as in Pierce.

Fifth, a general proscription of Belton's bright-line rule is necessary to preclude the inconsistency which would result should the Court eventually adopt the Appellate Division's limitation in Dangerfield on a full body search incident to an arrest for disorderly persons offense or apply a similar

limitation to arrests for an offense for which it is unlikely that the arrestee possesses evidence of that offense or a weapon.

This Court in Dangerfield, while leaving the issue open, signaled a receptiveness toward a fact-based analysis instead of a bright-line rule by emphasizing, in dicta, that the likelihood of finding evidence of a crime for which a suspect is arrested depends on the nature of the crime involved under a Chimel fact-based analysis and declaring that there is little likelihood that defiant trespassers would possess evidence of that offense. Dangerfield, 171 N.J. at 461, 464. Should the Court eventually adopt such a fact-based analysis for the permissible scope of body arrests, such a ruling would be inconsistent with Belton's bright-line rule and could create an absurd situation in which the police would be unable to conduct a full body search of a defendant arrested in an automobile because it was unlikely that he possessed items related to his offense but would nonetheless be able to search the entire passenger compartment of the vehicle and any containers therein pursuant to Belton.

Sixth, as discussed above, the concurring and dissenting opinions in Thornton v. United States, supra, indicate that a limitation of Belton's bright-line rule would be consistent with the views of a majority of the Justices of the United States Supreme Court. It would be pointless to retain as flawed a rule as Belton's when the majority of the Court which implemented it would like to see its restriction.

Seventh, a proscription of the Belton bright-line rule under our constitution is necessary to place the law of our state regarding motor vehicle searches in conformity with the laws of our large neighboring states of Pennsylvania and New York. Both these states have ruled that Belton is inconsistent with their state constitutions and have opted under their constitutions for a fact-based Chimel analysis of the permissible scope of a passenger compartment search under the search incident to arrest exception. Commonwealth v. White, *supra*; People v. Blasich, 73 N.Y.2d at 673, 543 N.Y.S.2d at 44-45, 541 N.E.2d at 44-45. Given the heavy commercial and commuter traffic between Philadelphia and Camden and its neighboring New Jersey suburbs, as well as between New York and Newark and its neighboring New Jersey communities, and given the long borders between New Jersey and Pennsylvania and New Jersey and upstate New York, such uniformity in the motor vehicle area is essential for motorists and police officers alike.

Eighth, a general preclusion of Belton's bright-line rule would be consistent with numerous other search and seizure decisions of this Court which have afforded greater protection under Article I, Paragraph 7 of the New Jersey Constitution than is provided under the Fourth Amendment of the United States Constitution. *See* State v. Johnson, 68 N.J. 349 (1975) (consent to search); State v. Alston, 88 N.J. 211 (1981) (retaining federal automatic standing rule); State v. Hunt, 91 N.J. 338

(1982) (toll records); State v. Hemepele, 120 N.J. 182 (1990) (curbside trash); State v. Novembrino, 105 N.J. 95 (1987) (no good faith exception); State v. Tucker, 136 N.J. 158 (1994) (fleeing suspect deemed seized); State v. Pierce, supra; State v. Carty, 170 N.J. 632 (2002) (basis for stop required before consent to search is valid); State v. Cooke, supra (exigent circumstances needed to be shown to justify automobile exception); State v. Holland, 176 N.J. 344 (2003) (higher standard for independent source). This Court has referred to the Fourth Amendment's "floor of constitutional protection" in guaranteeing, through the application of the state constitution, the full realization of our liberties. State v. Hemepele, 120 N.J. at 197. At least four of these decisions have involved automobiles in recognition of a greater expectation of privacy under our constitution for occupants of automobiles. State v. Johnson, supra; State v. Pierce, supra; State v. Carty; supra; State v. Cooke, supra. A decision generally precluding Belton under our constitution would be consistent with the greater protection provided by these decisions.

In contrast to these enumerated reasons, there is no reason to retain Belton's bright-line rule in this state. Certainly, there is no essential law enforcement need served by the rule. Law enforcement interests are well served in the absence of Belton by the ability of an officer to search a vehicle pursuant to the automobile exception if probable cause and exigent

circumstances exist. State v. Cooke, 163 N.J. at 661; State v. Pierce, 136 N.J. at 214. The probable cause standard certainly is not an onerous impediment to effective law enforcement; “[i]t requires nothing more than ‘a practical, common-sense decision whether, given all the circumstances ... there is a fair probability that contraband or evidence of a crime will be found in a particular place.’” State v. Dangerfield, 171 N.J. at 456, quoting State v. Demeter, 124 N.J. 374, 380-381 (1991).

Furthermore, if the officer has a reasonable belief that the driver or occupants pose a threat to his safety, he may search the vehicle pursuant to the auto-frisk exception sanctioned by State v. Lund, 119 N.J. 35 (1990). Thus, a preclusion of the Belton rule would only proscribe law enforcement access to those parts of a vehicle which are not covered by the automobile or auto-frisk exceptions.

Certainly, such a restriction would not pose any threat whatsoever to the actual, as opposed to the perceived, safety of law enforcement officers. As Justice Scalia noted in his concurrence in Thornton, and as the State admits in its brief, arrestees are routinely removed from the vehicle, handcuffed and placed in secure patrol cars before a search incident to arrest commences. Under these circumstances, it is no wonder at all that the Government in Thornton, despite all its resources to uncover incidents nationwide, could only produce seven examples over the course of 13 years in which police were attacked with

weapons by handcuffed or formerly handcuffed arrestees. Only one of those cases involved an escape from a police car, and that defendant did not obtain the weapon from a car he occupied at the time of his arrest. Thornton, 541 U.S. at \_\_\_\_, 124 S.Ct. at 2134 (Scalia, J., concurring).

Furthermore, the argument that officers need the certainty of the Belton rule in construing the permissible scope to arrest because of the fluidity and danger of an arrest scenario is specious. First of all, the vast majority of searches of passenger compartments as an incident to arrest occur after a defendant is securely in handcuffs in the back of a locked police cruiser. Moreover, even if the defendant is not placed in the police car, he still most likely would be in handcuffs and under control. Obviously, therefore, the situation following an arrest is not as dangerous and fluid as the proponents of the Belton rule would maintain. The arresting officer would have time and sufficient control of his faculties to make the rather elementary calculation as to the reach of the detained suspect.

The speciousness of the argument is further exposed when one examines the demands placed by the constitution on an officer before the suspect is subdued and compares them to the post-arrest situation. In an often highly charged and volatile situation in which the officer may be severely challenged physically, he or she is expected to have the rational capacity to calculate, by instantly applying the often fluctuating factual

situation to a myriad of statutory and regulatory provisions in the law books, whether he or she has a sufficient legal basis to perform an investigative detention or whether the situation has escalated to probable cause to arrest. If the situation has not ripened to probable cause, the officer has to make the additional determination of whether he or she has a rational basis to believe that the suspect is armed and presently dangerous and should be frisked.

Officers routinely make these difficult calculations day in and day out without being overwhelmed by the task. No one seriously proposes that officers should simply frisk suspects without reasonable suspicion of dangerousness, detain them without reasonable suspicion of wrongdoing or arrest them without probable cause simply because it would spare the officer the effort of making legal and factual determinations which are far more challenging than the factual calculation of a suspect's wingspan under circumstances which often are far more trying than those occurring when the suspect is secured. Respondent maintains that the calculation of the "grabbing" zone of a "recent occupant" must be made from the point of the arrestee's location at the moment a search incident to arrest commences, as that would be the location most consistent with the Chimel exceptions's twin purposes of ensuring officer safety and preventing the destruction of evidence. In the case of a defendant safely handcuffed in a patrol car, the calculation

should present no problem at all. However, even if the calculation should be made from the defendant's location at the moment of arrest, the difficulty of such a factual calculation would pale in comparison with the difficulty of the legal and factual determinations which the officer had to make before the arrest.

Not only is the Belton rule not necessary for effective law enforcement, New Jersey would not stand in isolation if the rule were abolished in our state. The rule's preclusion under our constitution would be consistent with the positions of the numerous legal scholars who have commented on the opinion. See law review articles cited on pps. 22-24. Indeed, the criticism of Belton among legal scholars has only continued since the numerous articles cited in Pierce were written. See, e.g., Myron Moskovitz, A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton, 2002 Wisc.L.Rev. 657, 690 (2002) ("If Chimel created confusion, Belton begat bedlam"). Eugene L. Shapiro, New York v. Belton and State Constitutional Doctrine, 105 W.Va.L.Rev. 131, 138 (2002) (hereinafter Shapiro) ("[T]he 'difficulty' and 'disarray' the Belton majority alluded to has been more a product of the police seeing how much they could get away with (by not [moving a suspect further from the car, handcuffing him or closing the car door as they searched]) than their being confronted with inherently ambiguous situations.").

Moreover, a proscription of Belton under our constitution would follow in the footsteps of nine other states, specifically, Louisiana, Oregon, New York, Pennsylvania, New Mexico, Nevada, Wyoming, Kansas and Alaska, and receive some support from limitations through statutes or judicial constructions of state law in four other states, Washington, Montana, Missouri and Massachusetts. See cases cited on pps. 24-29.

Furthermore, a state constitutional proscription of the Belton rule is not precluded by a state policy of uniformity between the interpretations of analogous provisions of the federal and state constitutions. As discussed above, this Court has frequently departed from the United States Supreme Court's interpretations of the Fourth Amendment by offering considerably more protection under the amendment's state constitutional counterpart.

In arguing that our constitution does not generally proscribe the application of the Belton rule, the State contends that the Appellate Division has "ignored" more than 20 years of "consistent" jurisprudence that Belton is the law in New Jersey.

The State argues that Pierce merely "carved out an exception to Belton for situations involving minor motor vehicle offenses," and indeed, precluded application of Belton "only in [those] situations." The State maintains that the only reasons for this limited exception are the incentive for police in the case of minor vehicle violations to make an arrest for offenses which

they otherwise would not make as a cover for searches which would otherwise be prohibited and the diminished possibility that person who commits a minor motor vehicle infraction would use a weapon against the arresting officer or destroy evidence.

(Sb21). The State asserts that subsequent opinions of this Court, State v. Dangerfield, supra, and State v. Goodwin, 173 N.J. 583 (2002), make it clear that Pierce is limited to its facts and that Belton remains the law in all situations other than minor moving violation arrests. Moreover, it claims that another Appellate Division panel, State v. Irelan, 375 N.J. Super. 100 (App. Div. 2005), has disagreed with the panel in this case by refusing to extend "the Pierce exception" to situations involving searches incident to arrests for driving while intoxicated.<sup>14</sup>

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<sup>14</sup> The State implies the decision in this case is primarily the product of the whim of one recalcitrant judge, who also was a member of the panel in State v. Dunlap, Docket No. A-5240-02T4 (App. Div., July 8, 2004) ("Belton, if adopted, must be construed as narrowly as possible"), certif. granted, 182 N.J. 428 (2005), and who allegedly has disregarded his duty to follow the decisions of this Court. (Sb22 to 25). **This contention** gratuitously smears the commendable efforts of the judge in

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question to follow his judicial oath. See State v. Domicz, 377 N.J. Super. 515, 535 (App. Div. 2005) (state courts are “the guardians of our liberties,” and “this State’s judicial officers should not abandon their own conscience and reasoned judgment in honoring the oaths they ... have taken”).

The State's contentions distort the basis of Pierce, extract and twist language in Dangerfield and Goodwin out of their intended contexts and mischaracterizes the history and present state of the Appellate Division's jurisprudence in this area. Regarding Pierce, the State ignores that the decision in good part was based on the need to conform any search narrowly to Chimel's purposes for the search incident to arrest exception; the willingness of the courts of several other states to completely preclude or modify the application of Belton under their state constitutions, and the widespread criticism of Belton's unsoundness by legal scholars, including the highly influential Professor LaFave, upon whose writings Belton relied.

State v. Pierce, 136 N.J. at 200-203, 210. Indeed, the Court in a lengthy string citation included parenthetical descriptions to the articles of the critical commentators, including quoted language which tends to be emphatic, critical and often acerbic.

Id. at 200-201. This portion of Pierce's rationale would apply to all arrests, not only arrests for minor motor vehicle offenses, when the arrestee is removed from a car and secured.

Thus, the Pierce rationale clearly is not limited to the facts of that case. In fact, the Court did not intend to proscribe its rationale from extending to other arrests; instead, it expressly left open the issue of its extension. Indeed, hinting that it was receptive to a complete repudiation of the Belton rule, the Court asserted that it was not deciding the

general validity of the rule under the state constitution at that time because the issue, which it deemed "significant," had not been sufficiently briefed or argued. Id. at 208.

The language which the State relies on from Dangerfield, that Pierce's "restrictive approach concerning arrests for minor traffic offenses is not applicable to Code offenses," is a brief excerpt twisted out of context from dicta which does not address the issue left open in Pierce. After agreeing with the Appellate Division that the search of the cyclist was illegal because there was no probable cause to arrest him for defiant trespass, this Court addressed in dicta whether the Appellate Division was correct in rejecting the United States Supreme Court's bright-line Robinson rule permitting full body searches for persons arrested for any offense. The Appellate Division had ruled that a full body search should be restricted in arrests for less serious offenses.

This Court expressed concern that the Chimel exception's purposes, the protection of officers and the preservation of evidence, were not likely to be met through a full body search of a defiant trespasser. Thus, there was an open question as to whether the New Jersey constitution would permit such a search. The Court observed that the search incident to arrest exception under New Jersey law had generally been construed coextensively with Chimel. Dangerfield, 171 N.J. at 462. However, observed the Court, the Pierce Court had departed from the situation under

federal law, in which a full body search incident to arrest was authorized for any arrest, by limiting the right to search through interpretation of "some provisions of the Motor Vehicle Code" to proscribe Belton area searches in the case of arrests for minor motor vehicle offenses. Ibid. The Court, then, in the quote relied upon by the State, stated that this "restrictive approach was" not available for Code offenses. It followed this statement immediately with an assertion that it did not intend a modification at this point of the portion of Pierce which "recognizes 'the right of a police officer, following a valid custodial arrest for a motorvehicle [sic] violation or for a criminal offense, to conduct a search of the person of the arrestee solely [sic] on the basis of the lawful arrest.'" Id. at 463, citing and quoting, Pierce, 136 N.J. at 213-214. The Court concluded its dicta by leaving open the question of whether a full body search comports with our constitution for every arrest. Id. at 464-464.

The quotation relied upon by the State in Dangerfield is somewhat cryptic. The citation in the sentence immediately following the quotation does not assist in determining its meaning. The citation refers to Pierce's recognition of the right of law enforcement officers to conduct personal searches for motor vehicle offenses and Code offenses alike. It thus relates to the disclaimer of an intention to modify Pierce, rather than to the State's quoted language.

There can be no doubt that the quoted language refers to Pierce's discussion of a particular difference between Code offenses and offenses such as the minor traffic offense at issue in that case. The only portion of Pierce which specifically addresses such a difference is a portion in which the Court, concerned by the potentially unlimited authority of an officer to arrest for a motor vehicle infraction pursuant to N.J.S.A. 39:5-25 and base a search on such an arrest, looked at alternate sources for criteria to determine when an arrest, and a consequent search, is allowed or when a summons should be issued instead so as to preclude a basis for a search. Pierce, 136 N.J. at 191. The Court in Pierce focused on R. 3:3-1(b); it declared: "Absent a complaint alleging commission of one of the offenses designated by the Code of Criminal Justice ("Code"), the Rule prescribes that a court should issue a summons rather than an arrest warrant unless one of [five specific conditions exist]...." Pierce, 136 N.J. at 191.<sup>15</sup>

The Dangerfield Court could not have construed the distinction between Code offenses and non-Code offenses drawn in Pierce to indicate an intent by the Pierce Court to narrowly

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<sup>15</sup> This comment by the Court in Pierce was misleading because it suggested that the Rule required a warrant for all Code offenses, which it did not. **The Rule by its terms only proscribes a summons for a number of specified serious Code offenses, such as burglary, robbery and murder. It does not preclude a summons for less serious offenses, such as trespassing. R. 3:3-1(b).**

"carve out an exception" to Belton for minor motor vehicle offenses and to preclude any expansion of the exception. The Court in Pierce expressly left the possibility for such an expansion open. Such a conclusion by the Dangerfield Court as to the meaning of Pierce would have been directly contrary to the Court's ultimate resolution in the Dangerfield dicta to leave open the question of the constitutionality of a full body search for any arrest, as that issue is directly analogous to the question of whether a Belton search could be conducted for any motor vehicle arrest.

Respondent submits that the Court in the language quoted by the State most likely was indicating that the method employed by Pierce to limit the discretion to arrest (and thus to search) pursuant to R. 3:3-1(b) in the motor vehicle context by requiring a summons could not work as a limitation to an arrest in the case of (certain) Code offenses. Alternately, the Court could have been indicating that Pierce did not conclusively place a limit on the application of Belton in any situation other than minor motor vehicle offenses and was leaving the general viability of Belton under the state constitution open for further adjudication. The Dangerfield Court employed the same technique with the scope of the full body search exception, at first asserting that it was not modifying Pierce but then declaring that it was leaving the matter open.

The State's reliance on Goodwin is equally misplaced. In

that case, the defendant filed an untimely post-conviction relief application asserting that he was deprived of his constitutional right to the effective assistance of trial counsel because his lawyer did not file a motion to suppress. The search at issue was of a vehicle's passenger compartment while the defendant, a recent occupant, was secured in the back seat of a police car. State v. Goodwin, 173 N.J. at 588-593. This Court ruled that the defendant had failed to demonstrate excusable neglect for the tardiness of the petition, and that the petition therefore was time-barred. Id. at 593-596.

In an alternate holding, the Court declared that the defendant failed to sustain his burden of establishing that his counsel was ineffective. The Court declared that a motion to suppress would have been futile because the search of the vehicle constituted a valid search incident to an arrest. In its discussion of the standard governing the proper scope of a search incident to an arrest, the Court cited to Belton and gave a four sentence description of its holding. The Court did not analyze whether the search was sustainable under the state constitution. Id. at 596-602.

As the panel in this case and the panel in Irelan both concluded, the holding in Goodwin cannot be relied on as a declaration by this Court that Belton currently applies in New Jersey absent a "narrowly carved exception" for arrests for minor motor vehicle offenses. Irelan, 375 N.J. Super. at 112; State v.

Eckel, 374 N.J. Super. at 394 n. 4. Although Pierce expressly left the issue of the general compatibility of Belton with our constitution open; deemed it a "significant" question which should not be decided without further briefing and argument; decided that Belton was unconstitutional as applied to arrests for minor vehicle infractions; discussed at length the widespread criticism of Belton and indicated discomfort with Belton's overbreadth, Goodwin never mentioned Pierce, the criticism of Belton or the state constitution, did not analyze Belton and provided only a four sentence statement of its holding.

Additionally, the ruling that the search under Belton was valid was not necessary to Goodwin's holding, as the Court denied the appeal because the defendant could not demonstrate excusable neglect for the tardy filing of the petition. Moreover, the Court's alternate holding pertained to whether the defendant sustained his burden of proof on the petition, and the Court's determination as to the lack of merit of a suppression motion was not based on facts adduced at a suppression hearing.

Furthermore, the Court in determining whether the petition had merit had to decide the constitutional effectiveness of counsel by determining, first, whether counsel was grossly deficient under the law as it existed between the crime in 1989 and the trial in 1990, according "extreme deference" to counsel's actions, and second, whether the deficiency caused actual prejudice. Ireelan, 375 N.J. Super. at 111, citing Strickland v.

Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068 (1984).

Indeed, this Court specifically declared that it had to decide the case under the law at that time. Goodwin, 173 N.J. at 597. During the 1989-1990 period, Belton was not yet a decade old, there was yet no reported challenge to Belton under our constitution, and Pierce had yet to be decided. As the doubts about Belton's applicability had yet to be raised, it would have been reasonable for trial counsel to have believed that Belton applied to the search, and accordingly, to have concluded that a suppression motion would have been futile. In finding that the petition had no merit, this Court must have found that trial counsel was not grossly negligent in assuming Belton was the law at the time. Such a holding by no means constitutes a finding that Belton in fact was the law when Goodwin was decided. Thus, Goodwin does not provide authority for the proposition that Belton presently is viable in all situations other than arrests for minor traffic offenses.

The State cannot not rely on the jurisprudence of the Appellate Division other than the decision below as support for its position that Belton generally applies in New Jersey. None of the pre- Pierce cases cited by the State specifically discuss whether the Belton rule is proscribed by our constitution. The references to Belton in these cases generally consist of citations to Belton in summary affirmances of the validity of the

searches at bar or simple assertions that Belton permits searches of passenger compartments. The cases do not extol, analyze or explain Belton's holding.<sup>16</sup> A number of the cases focus on issues other than whether the search incident to arrest was proper or rely on alternate holdings. See State v. Casimono, supra n.16 (independent source case; validity of hypothetical seizure of a bag from the front seat of a car declared as an alternate basis for affirming the bag's seizure in a situation where the bag was actually retrieved from the car and thrown over a guardrail by defendant independently from an illegal frisk by police); State v. Anderson, supra n.16 (legality of stop the primary issue; items seized were in plain view; conclusory statement that search valid as a search incident to arrest); State v. Bell, supra n. 16 (need for anticipatory search warrant the primary issue; conclusory statement that search was valid as a search incident to arrest); State v. Nittolo, supra (virtually exclusive focus on court's improper preclusion of a defense argument; one sentence declaration that the search was a valid search incident to arrest).

The only pre-Pierce case cited by the State which even

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<sup>16</sup> The pre-Pierce cases cited are State v. Casimono, 250 N.J. Super. 173, 187-188 (App. Div. 1991), certif. den., 127 N.J. 558 (1992), cert. denied, 504 U.S. 924 (1992); State v. Anderson, 198 N.J. Super. 340, 353-352 (App. Div. 1985), certif. den., 101 N.J. 283 (1985); State v. Bell, 195 N.J. Super. 49, 58-59 (App. Div. 1984); State v. Nittolo, 194 N.J. Super. 344, 346-347 (App. Div. 1984), and State v. Kearney, 183 N.J. Super. 13, 19-20 (App. Div. 1981), certif. den., 89 N.J. 449 (1982).

alludes to the issue of the constitutionality of Belton under state law is State v. Kearney, supra, decided shortly after Belton was issued, in which the court recognized the conflict between Belton and this Court's earlier decision in Welsh, noted that this Court in Alston had left for "future consideration" the issue whether the wider latitude of Belton would be restricted and concluded that "the impact of Belton in this state is uncertain." Kearney, 183 N.J. Super. at 20. The court then approved of a search of a jacket located on a front seat directly adjacent to where the defendant was standing, a search which clearly would have been permitted under Chimel. Id. at 20-21.

As for the post-Pierce cases cited, **State v. Judge, 275 N.J. Super. 194, 204-205 (App. Div. 1994)**, observed that Pierce permitted a Chimel search of a dashboard area for drugs because it was reachable by the defendant. The court noted briefly in a footnote that Pierce precluded a Belton passenger compartment search for motor vehicle offense arrests but implied that the subsequent search of a gym bag seized from a back seat was not covered by this proscription because the defendant was under arrest for possession of the drugs discovered in the dashboard area, a criminal offense. The court also approved of the search of the gym bag under the automobile search exception. The Court never addressed whether Belton is compatible with our constitution. Id. at 197-206. The one sentence implication that Belton controlled in a footnote, in the context of an alternate

holding and a lack of a specific discussion of Belton's general constitutionality, can hardly be considered persuasive authority for the State's proposition that Belton is the law in New Jersey.

State v. Smith, 306 N.J. 370, 380 (App. Div. 1997), and State v. Halsey, 340 N.J. Super. 492, 499 (App. Div. 2001), certif. den., 171 N.J. 443 (2002), also cited by the State, are similarly unpersuasive. Smith involved a seizure of marijuana which was sticking out of a passenger's pocket in plain view and seizure of a bag located on the floor between the passenger's legs. The case does not refer to Pierce, does not discuss whether Belton is generally constitutional under state law, and contains a one sentence assertion that Belton authorized a search of the vehicle's passenger compartment because the passenger was under arrest. The seizures of drugs from the passenger's pocket and the bag between his legs were independently sustainable under the plain view and automobile search exceptions. The primary focus of the case was whether the officers engaged in racial profiling in stopping the vehicle. Smith, 306 N.J. Super. at 376-381.

Halsey also was primarily a racial profiling case. The case involved a stop on the George Washington Bridge, the arrest of all occupants of the vehicle for being under the influence of drugs, and a consequent seizure of a brown paper bag containing drugs from the passenger compartment. The court at the outset of the opinion summarily denied a claim that the search was illegal

pursuant to R. 2:11-3(e)(2), deeming it not worthy of extended discussion, and went on to address the racial profiling issue at some length. The case does not cite Belton at all and refers to Pierce only in a brief reference as to the difference in consequences between the motor vehicle violation in Pierce and a situation such as the case at bar, where all the occupants of a vehicle are intoxicated. The latter situation, stated the court, would justify a tow of the vehicle and an inventory of its contents. Halsey, 340 N.J. Super. at 495-503.

The only Appellate Division case cited by the State which addresses the general compatibility of Belton with our constitution is State v. Irelan, supra. The State asserts that Irelan "is in stark contrast" to the opinion below by refusing to "blindly follow" it, thereby creating the impression that Irelan and the panel below are split on the general viability of Belton under our law. However, the State mischaracterizes Irelan, which is not at all inconsistent with the opinion below in any material aspect.

Irelan involves the search of a center console of a vehicle of a drunk driving suspect as an incident to arrest while the suspect was detained in a patrol car. The court disagreed with the trial court's finding that Pierce completely ruled out the applicability of the Belton rule for any arrest. Pierce, stated the Court, "while refusing to follow Belton's broad sweep, [did] not rule[] out adoption of the Belton rule in some questions."

Irelan, 375 N.J. Super. at 111. Instead, declared the court, Pierce left the issue open. Id. at 109-112.

The Irelan court observed that the panel in Eckel had determined the question left open by Pierce out of "necessity," because the sole basis advanced by the State for justifying the vehicle search in Eckel was the search incident to arrest exception. Id. at 114-115. The court observed that it was not faced with this situation, as the State had offered an alternative basis for the search: it was maintaining that the search was justified by the automobile search exception. The court observed that vehicular searches based on probable cause, such as the automobile search exception, "stand on firmer ground than those that depend for their validity on a judicially-created exception to the warrant requirement, such as the Belton rule, which requires no proof of probable cause," because probable cause "'is the constitutionally-imposed standard for determining whether a search and seizure is lawful,'" and "'occupies a position of indisputable significance in search and seizure law,'" Id. at 115, quoting State v. Novembrino, 105 N.J. at 105-106. The Court in Pierce for this reason had "expressed its preference for application of the automobile exception, when possible ... ." Irelan, 375 N.J. Super. at 115, citing Pierce, 136 N.J. at 204. Accordingly, declared the Irelan court, it did not need to and would not address the general constitutionality of Belton and would instead assess the search under the

automobile search exception. In doing so, the court found probable cause to search the vehicle and upheld the search. Id. at 115-120.

Thus, contrary to the State's implication, the court in Irelan did not express any disagreement with the holding of the court below. Instead, it declined to address the question of the general constitutionality of Belton in accordance with Pierce's preference that automobile searches be assessed under the automobile search exception whenever possible.

The State further contends that the court below erred in failing to consider seven specific factors which this Court in State v. Muhammad, 145 N.J. 23 (1996), identified as being significant in determining whether to depart from current interpretations of the United State Constitution and find greater protection under analogous provisions of the state constitution. The factors identified in Muhammad are: "(1) textual language, (2) legislative history, (3) preexisting State law, (4) structural differences between the Federal and State Constitutions, (5) matters of particular State interest, (6) State traditions, and (7) public attitudes." Id. at 41.

The State is not correct. As the Appellate Division observed in State v. Domicz, supra, the absence of so-called "divergence criteria," which appear most often in concurring or dissenting opinions of this Court, does not require a state court to "remain in mute lock-step with the federal constitution."

Id., 377 N.J. Super. at 534, citing State v. Hunt, 91 N.J. 338, 364-368 (1991) (Handler, J. concurring) (first articulating the factors set forth in Muhammad) and State v. Hemptele, 120 N.J. at 230-231 (Garibaldi, J., dissenting). The Appellate Division in Domicz catalogued 11 specific instances in which this Court has determined that Article I, paragraph 7 of our constitution provides greater protection than the Fourth Amendment. The "divergence factors" referred to by the State were not specifically addressed by the majority opinions in those cases. In each of those departures from the Fourth Amendment, a number of the factors cited by the State, namely, the essentially identical text and structure, the historical antipathy of our legislature towards the exclusionary rule and the lack of public support for a departure, would apply equally to this case.

Furthermore, Muhammad does not support an argument against departure in this matter, as the cases are inapposite. Unlike this case, Muhammad does not involve a constitutional provision for which there is a long tradition of departure from federal interpretations. Instead, it involved a claim that a victim impact statement in a capital cases violates the state's equivalent of the Eight Amendment's proscription of cruel and unusual punishment. Furthermore, unlike this case, the case involved the construction of a statute, and statutes are presumed constitutional. An additional argument against departure was the inclusion in the New Jersey Constitution of the Victim's Rights

Amendment, which supported a conclusion that our constitution required uniformity with the federal interpretation of the Eighth Amendment which permits victim impact statements. Muhammad, 145 N.J. at 40-44.

In any event, two of the factors relied upon by the state, matters of particular state interest and state traditions, argue strongly in favor of divergence in this matter. As just discussed, this Court has departed at least 11 times from the United States Supreme Court's Fourth Amendment interpretations since State v. Johnson, supra, was decided in 1975. A number of these decisions have involved enhanced protection afforded to motorists and automobile passengers. See State v. Johnson, supra; State v. Carty, supra; State v. Cooke, supra. This Court recently referred to a tradition in this state of "eschew[ing] per se rules" in search and seizure contexts and indicated that it "continued to believe that courts must consider the totality of the circumstances, without focusing exclusively on any one factor... ." State v. Wilson, 178 N.J. 7, 18 (2003), citing State v. Holland, 176 N.J. at 362, and State v. Sullivan, 169 N.J. 204, 216 (2001).

Finally, the State improperly attempts to stampede this Court into a decision in its favor by resorting to a baseless fear that police would be endangered and confused if Belton were abolished and by presenting a misleading, inaccurate picture of out-of-state rulings as to Belton's viability under state law.

Regarding the fear of police endangerment, the State, citing to this Court's opinion in State v. Jones, 179 N.J. 377, 406-407 (2004), points to statistics for the year 2002 which indicate nearly 4,000 assaults upon New Jersey law enforcement officers and 58,000 upon law enforcement officers nationally, along with the felonious killing of 56 officers across the nation. (Sb31).

The State also points to this Court's recognition in State v. Bruzzese, 94 N.J. 210, 233 (1983), cert. denied, 465 U.S. 1030 (1984), that "every arrest, regardless of nature of the offense, must be presumed to present a risk of danger."

However, the State fails to point to any assault occurring during the execution of a search incident to an arrest. As discussed above, such searches invariably occur after an arrestee has been subdued and restrained away from the car which is being searched. The danger inherent in the arrest in such a situation will have dissipated in the vast majority of cases. Indeed, as Justice Scalia noted in his concurrence in Thornton, the Government in that case could only present seven instances of handcuffed or formerly handcuffed prisoners assaulting officers with weapons over the course of 13 years, and in only one of those situations did a suspect escape from the scene of his arrest. Even if the Belton rule were abolished, an officer would be still be able to search a stopped vehicle for weapons pursuant to the auto-frisk exception if he had a reasonable articulable fear for his safety from the arrestee or any potential

accomplices. State v. Lund, supra.

The State's concerns about law enforcement confusion also have no basis. Without presenting any actual examples of confusion, the State paints a hypothetical scenario of hectic officers desperately trying to quickly calculate the distance a suspect could toss an object in a passenger compartment, which might vary in size from that of a Mini-Cooper to a Hummer, under dangerous roadside conditions. The State argues that the officer's decision is especially complicated by the fact that a suspect technically may be under arrest as he sits in a stopped car and may have the incentive to hide relevant evidence by tossing it behind a seat. (Sb18 n.5, 32-35).

The State's unsupported, hypothetical portrayal of a confused police officer is an insult to the intelligence and the professional competence and capacity of our law enforcement officers. As discussed at length above, a law enforcement officer is presented with a far more difficult intellectual challenge, under situations which often are fraught with actual danger, in determining, with reference to specific, often complex statutes and regulations, whether a given factual situation has provided him or her with a basis for an investigative detention or for an arrest. Furthermore, the officer has to determine whether he has a basis to conduct a limited search for his or her safety and the scope of that search. Our law enforcement officers make these difficult decisions day in and day out

without any evidence of significant confusion.

In actuality, the State's argument is based on a perception that the search incident to an arrest exception is a law enforcement entitlement to obtain evidence of any crime without probable cause based on the mere fact of an arrest. The State has lost sight that a search incident to an arrest is an exceptional measure founded on an actual need to protect an officer or prevent the destruction of evidence of the crime for which there is probable cause to arrest. Thornton v. United States, 541 U.S. at \_\_\_, 124 S.Ct. at 2131-2133 (O'Connor, J. concurrence) ("lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of Chimel"), 541 U.S. at \_\_\_, 124 S.Ct. at 2134-2135 (Scalia, J. concurrence) ("[T]his argument ... assumes that, one way or another, the search must take place. But conducting a Chimel search is not the Government's right; it is an exception -- justified by necessity -- to a rule that would otherwise render the search unlawful"). Under the rationale for the Chimel rule, it does not matter how far a suspect might "toss" evidence of any hypothetical crime to hinder an investigation. What matters is how far a suspect, once arrested, can reach to obtain a weapon or destroy evidence of the crime. As with any search, a search for evidence "tossed" outside this zone must be supported either by a warrant or another warrant

exception based on probable cause and exigency.

Clearly, contrary to what the State argues, the area in which a defendant might grab following his arrest is a relatively easy factual calculation. It is especially easy if one were to measure the zone from the location where the suspect is being detained when the search commences, the approach advocated by the Pennsylvania Supreme Court in Commonwealth v. White, supra, taken by this Court in Welsh and the only approach which is consistent with the twin purposes of Chimel. It is also an elementary calculation if it is measured from where the suspect was situated at the moment of arrest. The claim that an officer would be confused by the allowable scope of a search by the varying dimensions between a Mini and a Hummer is a red herring. The area into which an arrested suspect would grab would ordinarily not depend on the size of the vehicle's passenger compartment.

In any event, any confusion which might be prevented by retaining the Belton rule is far outweighed by the unanswered questions the rule presents, such as how contemporaneous the search must be, how distant the defendant must be from the auto searched to invalidate a search, and whether the rule applies to other types of conveyances than automobiles. Eliminating the Belton rule and replacing it with a Chimel-based requirement that an officer calculate a suspect's "grabbable" zone at the time of the search would decrease confusion by eliminating the many questions unresolved by Belton. Although the State maintains

that elimination would confuse officers who have been trained for many years to follow Belton, officers can be retrained as easily as they were following this Court's requirement in State v. Johnson, supra, that a defendant be advised of his right to refuse consent to search and its ruling in State v. Carty, supra, that consent is invalid absent a basis to request consent.

Finally, the State's presentation of out-of-state law is misleading and often disturbingly inaccurate. The State has sought to paint a picture of a largely monolithic body of states which firmly retain the Belton rule juxtaposed to a mere handful of dissidents which have opted to reject Belton based on interpretations of their state constitutions. The State declares that two of the states which have rejected Belton, North Dakota and Ohio, have since renounced their heretical ways and have returned to applying Belton. The State claims that the return of North Dakota and Belton to the flock indicates a "trend in recent years [which] has been markedly in favor of Belton," the implication being that New Jersey would eventually stand alone if this Court were to sustain the court below in declaring Belton unconstitutional under state law. (Sb35 to 37). The State discusses the Ohio repudiation of its prior rejection of Belton at some length and claims the Ohio Supreme Court "recognized" "the insurmountable difficulties faced by Ohio law enforcement officers who were not permitted to apply Belton." The State stresses that the citizens of Ohio and New Jersey drive the same

cars, and asserts that New Jersey law enforcement officers would face "the same difficulties" as those faced by the Ohio police if this Court were to adopt the opinion of the court below. (Sb37 to 38).

The State's portrayal of a largely monolithic body of states in favor of retaining the Belton rule is inaccurate and misleading. Most of the state courts which the State cites as supporting Belton have not addressed the issue of whether Belton is compatible with their state constitutions. See Commonwealth v. White, 543 Pa. 63, 669 A.2d at 905 (Montemuro, J., concurring) (only a handful of states have addressed Belton under their state constitutions). Moreover, a number of the cases which the State cites have referred to Belton summarily with only a minimal analysis or discussion, if any. See, e.g., State v. Crivellone, 138 Ariz. 437, 439, 675 P.2d 697, 699 (1983); Traylor v. State, 458 A.2d 1170, 1174-1175 (Del. 1983); Jackson v. State, 597 N.E.2d 950, 957 (Ind. 1992), cert. denied, 507 U.S. 976 (1993); Brown v. Commonwealth, 890 S.W.2d 286, 290 (Ky. 1994). Given the fact that five Justices of the United States Supreme Court, including two of its more conservative members, have criticized the rationale of Belton in Thornton, it is not unreasonable to assume that states increasingly will address the validity of Belton under their constitutions.<sup>17</sup> See Shapiro, supra, 105

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<sup>17</sup> Two states which could do so are Florida and Illinois, which precluded application of the Belton rule to defendants who exited their vehicles before contact was initiated with the police. State v. Thomas, 761 So.2d 1010, 1014 (Fla. 1999);

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People v. Stehman, 203 Ill.2d 26, 270 Ill. Dec. 426, 783 N.E.2d 1 (2002). The position reached by these states is contrary to the Supreme Court's subsequent interpretation of Belton in Thornton.

A lower level Illinois appellate court accordingly has just concluded that the Illinois Supreme Court is prepared to restrict Belton under its state constitution. People v. Dieppa, \_\_\_ N.E.2d \_\_\_, 2005 WL 1427382 (Ill. App. 2 Dist., June 17, 2005)(slip op. 3-5).

Furthermore, a not insignificant minority of states have now rejected Belton under their state constitutions. As discussed above, **at least nine states other than New Jersey, specifically, Louisiana, Oregon, New York, Pennsylvania, New Mexico, Nevada, Wyoming, Kansas and Alaska** and have relied on state law to preclude the general application of the Belton rule for any arrest under their state constitution. See cases cited on pps. 24-28. Another State, Hawaii, would likely preclude Belton under its constitution when presented with the issue. See State v. Kaluna, 55 Haw. 361, 368-372, 520 p.2d 51, 58-60 (1974).<sup>18</sup> Two

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<sup>18</sup> In Kaluna, the court in a thorough analysis departed from the analogous Robinson bright-line rule for full body searches as an incident to an arrest and precluded a personal search under the facts of the case. The court declared that each search without a warrant must turn on its facts, and that each proffered justification for a warrantless search must meet the concept of necessity inherent in the concept of reasonableness. Kaluna, 55 Haw. at 368-372, 520 p.2d at 58-60. Hawaii's fact-based decision in the area of full body searches is similar to Alaska's. See note 9, above. As discussed above, Alaska's lower appellate courts have relied upon its high court's declaration that the Robinson rule violates the Alaska Constitution to apply a factual analysis to the determination of the permissible scope

other states, Montana and Massachusetts, have limited the application of Belton by state statute. See cases cited on p. 28-29, supra. Missouri and Washington, have limited the application of Belton by decisional law. Ibid.

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of a search of a passenger compartment as an incident to arrest.  
Ibid.

The 13 states which preclude an unrestricted application of the Belton rule under their law outnumber the eight or nine states, specifically, Connecticut, Idaho, Illinois, Iowa, South Dakota, Wisconsin, Ohio, North Dakota and possibly Utah, which have specifically found the rule completely compatible with their state constitutions.<sup>19</sup> The preponderance increases in significance when one considers that the Supreme Courts of two of the States, Wisconsin and Illinois, follow a state policy of uniformity between the Fourth Amendment and their state constitutional provisions governing searches and seizures, thereby precluding any real possibility of divergence. See State v. Fry, 388 N.W.2d 565, 570 (Wisc. 1986), cert. denied, 479 U.S. 989 (1986) (court "consistently and routinely conformed the law of search and seizure" under the state constitution to current interpretations of the Fourth Amendment to avoid confusion); People v. Hoskins, 101 Ill.2d 209, 218, 78 Ill.Dec. 107, 461

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<sup>19</sup> The position of Utah on the issue is not certain. In State in re K.K.C., 636 P.2d 1044, 1046 (Utah 1981), the Utah Supreme Court in a three page per curium opinion written shortly after Belton was issued rejected claims that a search of a passenger compartment incident to an arrest violated the federal and state constitutions and analyzed and applied Belton. Subsequently, a plurality of the Utah Supreme Court overturned an auto search occurring prior to an arrest on the basis that greater protection is afforded under the Utah Constitution than under the Fourth Amendment. State v. Larocco, 794 P.2d 460 (Utah 1990). A lower level appellate court later declared that the plurality decision that the Utah Constitution is more expansive was not binding, and citing to K.K.C., applied Belton. State v. Giron, 943 P.2d 1114, 1120-1121 (Utah App. 1997).

**N.E.2d 941, 945 (1984)** ("The constitutional debates do not indicate any wish or intent to provide protection against unreasonable searches and seizures broader than those existing under the Fourth Amendment.").<sup>20</sup> A third state, Ohio, similarly follows a policy that the search and seizure provision in its constitution the Fourth Amendment "should be harmonized whenever possible." State v. Murrell, 94 Ohio St.3d 489, 496, 764 N.E.2d 986, 993 (2002). The high court of a fourth state, North Dakota, provided no analysis whatsoever for its holding, declaring in a footnote that it "decline[d] to adopt such an expansive view" of the state constitution. State v. Hensel, 417 N.W.2d 849, 853 n.2 (N.D. 1988).

A further weakness in the State's portrayal of out-of-state law is that the courts of two of the states for which pro-Belton cases are cited, Kansas and Missouri (Sb36), have issued subsequent opinions which indicate that those states do not

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<sup>20</sup> As noted above, see n. 15 supra, an intermediate Illinois appellate court has concluded, based on an analysis of the Illinois Supreme Court's most recent pronouncement regarding Belton, People v. Stehman, supra, that the Supreme Court is prepared to depart from its "lockstep" approach and afford more protection under the state constitution in Belton-type situations. People v. Dieppa, \_\_\_ N.E.2d \_\_\_, \_\_\_ (slip op. 3-5).

unequivocally apply Belton. A Kansas court in upholding a search incident to arrest explicitly declined to apply Belton and analyzed facts pursuant to six factors set forth in a pre-Belton Kansas Supreme Court decision in declining to apply Belton's bright-line rule. State v. Box, 28 Kan.App.2d 401, 403-409, 17 P.3d 386, 389-391. Moreover, a Missouri court has ruled that a Belton search must be limited to an area where articles connected with the arrest already made could be. State v. Bradshaw, 99 S.W.3d at 77-79. A third case cited by the State, State v. Stroud, 106 Wash.2d 144, 720 P.2d at 440-441, limited a Belton search under the state constitution by precluding a search of locked containers in the passenger compartment and a locked glove compartment.

Finally, the State's discussion of the two states which purportedly repudiated an earlier general rejection of Belton under their constitutions is grossly inaccurate. To support its position that North Dakota has followed this path, the State cites State v. Tognotti, 663 N.W.2d 642, 646-647 (N.D. 2003), which overruled an earlier decision in State v. Gilberts, 497 N.W.2d 93 (N.D. 1993). However, Tognotti in overruling Gilberts was not overruling a general repudiation of Belton under state constitutional law. Five years before Gilberts was decided, the North Dakota Supreme Court in State v. Hensel, supra, declared unequivocally that it declined to afford more protection under its state constitution than was afforded under Belton. Hensel,

417 N.W.2d at 853 n.2. North Dakota did not retreat from this position in Gilberts. Gilberts involved a search of a jacket belonging to a non-arrested passenger as an incident to the arrest of a driver for a motor vehicle violation. Instead of declaring that Belton was inconsistent with the North Dakota Constitution, the Court factually distinguished Belton on the basis that Belton did not involve a non-arrested passenger. Gilberts, 497 N.W.2d at 96-97. In overturning Gilberts, the Court in Tognotti simply was ruling that this distinction was factually incorrect. Tognotti, 663 N.W.2d at 646. Thus, contrary to the impression given by the State, Belton has always been considered by the North Dakota courts to be compatible with the North Dakota Constitution, and Tognotti by no stretch of the imagination could be considered a repudiation of a prior state constitutional rejection of Belton.

The State's presentation of State v. Murrell, 94 Ohio St.3d at 496, 764 N.E.2d at 992-993, for the proposition that Ohio has repudiated a prior invalidation of Belton under the Ohio constitution is also misleading. The Court in Murrell indeed overruled State v. Brown, 63 Ohio St.3d 349, 588 N.E.2d 113 (1992), which had decided that the Belton rule was proscribed by the Ohio Constitution. Murrell, 94 Ohio St.3d at 493-496, 764 N.E.2d at 991-993. However, the court based its decision to reverse Brown on a failure to find persuasive reasons to depart from Ohio's policy to "harmonize" the Fourth Amendment and the

Ohio Constitution's equivalent provision "whenever possible." Murrell, 94 Ohio St.3d at 495-496, 764 N.E.2d at 993. Indeed, the chief justice in dissent asserted that the sole basis for the majority's reversal was to "align[] [its] jurisprudence with that of the United States Supreme Court." Id., 94 Ohio St.3d at 496, 764 N.E.2d at 993 (Moyer, C.J., dissenting). As New Jersey does not practice a policy of harmonization "whenever possible," Murrell is of limited value as legal authority. Furthermore, contrary to the State's assertion in its brief, Murrell never identifies "insurmountable difficulties faced by Ohio law enforcement officers who were not permitted to apply Belton." (Sb38). Indeed, Murrell never identifies any law enforcement difficulties at all.

Thus, the "recent trend" in favor of Belton which the State purports to find in Tognotti and Murrell vanishes to one decision based on a harmonization policy which has not been practiced in New Jersey. If anything, a New Mexico appeals court's apparent rejection of Belton under the New Mexico constitution in 1997 and affirmance of that rejection in 2004; the Wyoming Supreme Court's rejection of Belton under its state constitution in 1999; a Kansas appellate court's observation in 2000 that the Kansas Supreme Court has opted to apply a pre-Belton fact based standard instead of a bright-line rule; the Nevada Supreme Court's affirmance in 2003 in an auto search context of its earlier

ruling in a motorcycle search case that Belton is generally inconsistent with the Nevada Constitution, and Missouri's sharp cutback in 2003 on the type of arrests which would permit a Belton search, indicate that the recent trend is in the opposite direction than that claimed by the State. State v. Arredondo, 123 N.M. at 633, 944 P.2d at 283 **State v. Gutierrez, 136 N.M. at 18, 94 P.3d at 21-22**; Vasquez v. State, 990 P.2d at 480-489; State v. Box, 28 Kan.App.2d at 401, 17 P.3d at 386; Camacho v. State, 119 Nev. at 395, 75 P.3d at 373-374; State v. Bradshaw, 99 S.W.3d at 77-79. For the foregoing reasons, this Court should reject the State's contention that Belton is and should remain the law of New Jersey with the exception of arrests for minor moving violations and should agree with the court below that Article I, paragraph 7 of our constitution precludes the application of Belton's bright-line rule in the case of all arrests. A conjoined reading of this Court's opinions in Welsh, Alston, Pierce, Dangerfield, Sullivan, Holland and Wilson indicates that Belton's bright-line approach simply does not comport with our state constitutional jurisprudence. These cases demonstrate that under our law, the permitted scope of a search incident to the arrest of a "recent occupant" of a vehicle, as is the case with any search and seizure determination, must be defined by the facts of each situation. These facts include the area in which the person can reach to obtain a weapon or destroy evidence of the offense for which he is arrested and the nature

of his and consequent likelihood that a person who committed such an offense would harbor contraband or possess a weapon. This Court's decision in Pierce, the concurring opinions of Justices O'Connor and Scalia in Thornton, the views of the many scholars who have criticized Belton, and the opinions of the courts of the increasing number of states which have precluded its application indicate that Belton is unsound and should not be applied in our state. The Belton rule is not sufficiently tailored to the purposes of Chimel, poses too many questions of interpretation and too great a potential for official abuse, and is not necessary for effective law enforcement. Accordingly, respondent urges this Court to find that Belton's bright-line rule is generally inconsistent with Article I, Paragraph 7 of our state constitution, and that Welsh's fact-oriented application of the Chimel standard remains the law in an automobile search incidental to an arrest for any offense.

F. The Search of Sanfillipo's car as an incident to defendant's arrest was contrary to State v. Welsh

In State v. Welsh, supra, this Court indicated that the relevant factors for assessing the validity of a search of an auto's passenger compartment as an incident to an arrest, as in any search incident to arrest analysis, are those which disclose what areas an arrestee could reach at the time of the search and how likely it is that he would attempt resistance or escape or destroy evidence of the crime for which he is arrested. Important considerations are whether the arrestee has been placed

under some form of restraint, the positions of arrestee and the arresting officer in relation to the vehicle, the difficulties to be encountered by the arrestee in gaining access to the vehicle or to the particular area therein searched, and the number of officers present as compared with the number of persons arrested or who are bystanders in the immediate vicinity. See Welsh, 84 N.J. at 355 (search of the passenger compartment was not a valid contemporaneous search incident to an arrest because the defendant was handcuffed in a patrol car parked toward the rear of his stopped auto with three State Troopers present).

In this case, defendant was sitting handcuffed in the back seat of a patrol car with two officers present when the search of the Mercury commenced. Although the record does not indicate, it is safe to assume that the rear doors of the patrol car, as is typically the case, could not be opened from the inside, an assumption supported by Patrolman Whitten's testimony that Sergeant Bear joined him after placing respondent in the patrol car and leaving him unattended. Prior to and up to the commencement of the search, neither respondent nor the other occupants of Mercury had given the officers any reason to fear for their safety from a weapon hidden in the vehicle. Moreover, the officers had no reason to suspect that the juvenile co-defendant in the back seat of the vehicle or co-defendant Sanfillipo would obtain access to and destroy evidence contained in the vehicle. See State v. Rose, 357 N.J. Super. 100, 104-105

(App. Div. 2003), certif. den., 176 N.J. 429 (2003) (no reasonable basis in the record for a finding that friend of defendant who was present and not in custody when motel room was searched would have destroyed evidence). Under the totality of these circumstances, it must be concluded that the passenger compartment of the Mercury was not an area which was accessible to respondent when the search commenced. Therefore, the search of the Mercury was not justifiable as a search incident to arrest. State v. Welsh, supra.

Suppression of the evidence under a Chimel analysis is required even if the Court were to determine that the area to be searched should be measured from where respondent was situated at the moment of arrest, in this case a point immediately adjacent to the front passenger door of the Mercury, rather than his position in the police car when the search commenced, as was the case in Welsh. Respondent could not have gained access to the rear seat well of the Mercury or the crack between the rear seat and interior side wall of the vehicle from his location outside vehicle with Sergeant Bear right next to him at the time. Thus, there was no basis under a Chimel analysis for the search of these areas.

Furthermore, the offense for which respondent was arrested was his failure to appear on motor vehicle summonses totaling \$280. Clearly, there was no likelihood from the nature of this offense that respondent would possess a weapon or evidence of the

offense. Pierce determined that an arrest for a minor motor vehicle infraction would not justify a search of the passenger compartment of a stopped vehicle in part because it was unlikely from the nature of the offense that a weapon or contraband was present. Respondent effectively stood in the same position as the defendant in Pierce under a Chimel analysis, as he was equally unlikely to be armed or possess evidence of his offense.

Indeed, Patrolman Whitten testified that he had no reason to suspect that the vehicle contained contraband and did not fear for his safety. As the searched area was unlikely to contain contraband or a weapon, its search was precluded by Chimel.

For the foregoing reasons, the search incident to arrest of Sanfillipo's Mercury cannot be supported under Chimel's fact-based search incident to arrest analysis. Therefore, the decision of the court below must be affirmed.

#### POINT II

EVEN IF THE BELTON RULE APPLIES IN NEW JERSEY, THE SEARCH WAS CONTRARY TO THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Even if this Court were to determine that the Belton bright-line rule applies in New Jersey, respondent asserts that the search was not supportable as a search incident to arrest because it did not occur contemporaneously with his arrest and was not conducted "as soon thereafter as [is] practicable." United States v. Chadwick, 433 U.S. 1, 14, 97 S.Ct. 2476, 2485 (1977).

In State v. Barksdale, 224 N.J. Super. 404 (App. Div. 1988), the

Appellate Division invalidated a search which occurred more than 10 minutes after a driver's arrest after the defendant and other passengers pushed the car to a safe area while the driver sat handcuffed in the back seat of a following patrol car. Applying Belton, the Court found that the search still was not sufficiently contemporaneous with the arrest to fall under the search incident to arrest exception. Id. at 415.

In State v. Bradley, 291 N.J. Super. 501 (App. Div. 1996), the Appellate Division again invalidated a search supposedly incidental to an arrest because it lacked sufficient contemporaneity to the arrest. In that case, the defendant's satchel was searched 10 minutes after his arrest by a police detective after the defendant and satchel had been removed to a location two floors above the site of arrest. In determining whether the contemporaneity requirement of the exception was met, the court employed a definition of "contemporaneous" used by this Court in State v. Doyle, 42 N.J. 334, 343 (1964): that the arrest and search "occur as parts of a single transaction, as connected units of an integrated incident." The court concluded that the search and arrest were not sufficiently integrated to meet this definition, stressing the time and distance between the arrest and search and the defendant's inability to gain access to the satchel because of the intervening presence of the officers at the scene. Bradley, 291 N.J. Super. 515-516.

In this case, Patrolman Whitten acknowledged that his

removal of co-defendant Sanfillipo from the Mercury occurred only after Sergeant Bear arrested respondent, handcuffed him, placed him in the back seat of the patrol car, and rejoined Whitten by the Mercury. According to Whitten, the entire arrest procedure took less than five minutes. Whitten then walked with Sanfillipo to the rear of the Mercury and conversed with her for another period of less than five minutes. Whitten only broke away from Sanfillipo, approached the open passenger door of the Mercury and lifted the clothes next to the front seat from the floor after Sanfillipo requested permission to remove the clothes herself.

Respondent asserts that the search of the Mercury was not sufficiently integrated with respondent's arrest to be considered contemporaneous with the arrest. Respondent's arrest and placement in a secure location away from the car was complete by the time Sanfillipo was directed to exit the vehicle. Even at this point, neither Whitten nor Bear commenced a search. Instead, Whitten proceeded to engage in a conversation approaching five minutes in length. The subjects of the conversation included the issue of where respondent would be taken and whether Sanfillipo could kiss respondent goodbye. Whitten only approached the Mercury to search it after Sanfillipo mentioned the clothes, at the end of the conversation. Thus, the contemporaneity requirement was not met in this case.

For the foregoing reasons, the search of the Mercury was insufficiently contemporaneous with the arrest to be covered by

Belton's bright-line rule. Thus, the Appellate Division's opinion must be affirmed even if this Court determines that Belton should apply.

CONCLUSION

For the foregoing reasons, defendant respectfully requests that the opinion of the Appellate Division be affirmed.

Respectfully submitted,

YVONNE SMITH SEGARS  
PUBLIC DEFENDER

By: \_\_\_\_\_  
Gilbert G. Miller

Dated: June 28, 2005

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Respondent

SUPREME COURT OF NEW JERSEY

DOCKET NO. 57,371

\_\_\_\_\_  
STATE OF NEW JERSEY, :  
 :  
Plaintiff-Appellant, :  
 :  
v. :  
WILLIAM ECKEL, :

Criminal Action

NOTICE OF MOTION TO  
SUPPLEMENTAL BRIEF

NUNC PRO TUNC

Defendant-Respondent. :

TO: Division of Criminal Justice  
Appellate Bureau  
Richard J. Hughes Justice Complex  
CN-086  
Trenton, New Jersey 08625

PLEASE TAKE NOTICE that Defendant-Respondent William Eckel,  
Wronko & Loewen (by Gilbert G. Miller, Esq.) appearing, hereby  
moves to file an overlength supplemental brief nunc pro tunc.  
Defendant relies upon the certification annexed hereto in support  
of the motion.

YVONNE SMITH SEGARS  
PUBLIC DEFENDER

By: \_\_\_\_\_  
Gilbert G. Miller  
Designated Counsel

Dated: June 28, 2005

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SUPREME COURT OF NEW JERSEY

DOCKET NO. 57,371

STATE OF NEW JERSEY, :

Plaintiff-Appellant, :

Criminal Action

v. :

CERTIFICATION

WILLIAM ECKEL, :  
Defendant-Respondent. :  

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Gilbert G. Miller, of full age, certifies as follows:

1. I am the designated appellate counsel for defendant-respondent William Eckel and make this certification in support of respondent's motion to file an 89 page overlength supplemental brief and to file that brief nunc pro tunc.

2. Respondent was convicted of possession with intent to distribute cocaine and sentenced to probation conditioned upon service of 180 days incarceration on weekends. On December 29, 2004, the Appellate Division reversed respondent's Judgment of Conviction and an order denying respondent's motion to suppress evidence. State v. Eckel, 374 N.J. Super. 91 (App. Div. 2004).

3. This Court set a briefing schedule whereby respondent's brief was due 21 days after the filing of the State's brief. The Public Defender's Office received the brief on Thursday, May 26, 2005. The Public Defender's Office mailed the brief to my office on Friday, May 27, 2005. As a result of the Memorial Day weekend, my office did not receive the brief until Tuesday, May 31, 2005.

4. I needed to finish another designated counsel brief which was due in the Appellate Division. I completed the brief on Thursday, June 3, 2005 and immediately began working on the supplemental brief.

5. This case is extremely challenging. The Appellate Division has ruled below that the bright-line rule of New York v. Belton, which permits the search of the entire passenger compartment of a stopped auto as an incident to arrest, generally violates Article I, paragraph 7 of the New Jersey Constitution. This Court has granted certification to decide this issue, which has enormous statewide significance. Moreover, the case has considerable nationwide significance as the question whether Belton should survive has received much debate across the country.

6. In its brief, the State maintained that most states in the country apply the Belton rule, and that only a handful have precluded it under their constitutions. The State also maintains that two states have repudiated their prior declarations of unconstitutionality and have reverted back to applying Belton.

7. The State's claims, and the significance of the issue, required that I conduct nationwide research on the issue. I determined that the State's assertions regarding the out of state caselaw were misleading, and that the out of state cases present quite a different picture.

8. To rebut the State's arguments, I had to extensively analyze the various state decisions which have applied Belton and which have rejected it. This was enormously time consuming. Often, to properly understand some of the cases the state was citing, I needed to read three or four others simply to

understand the cases in context. It took numerous pages to present my analysis and precluded my ability to remain within the 65 page limit.

9. I also needed to rely on numerous law review articles which have discussed the issue. Indeed, this Court, in State v. Pierce, which precluded Belton's rule in the case of arrests for minor traffic violations, relied extensively on various law journals. I needed to update Pierce's finding regarding the views of the various commentators. This required an additional expenditure of time and additional pages of writing.

10. The complexity of the issue before the Court is compounded by the closely analogous issue of whether a bright-line should exist regarding the full body search of all arrestees. The United States Supreme Court adopted such an approach in United States v. Robinson. In State v. Dangerfield, this Court left the issue open as to whether a bright-line rule for arrests should exist. Because the issues are so closely intertwined, and because the State relies on Dangerfield, I needed to address the issue. This took additional time and pages.

11. The State also relies extensively on language from this Court's cases in Dangerfield and State v. Goodwin for the proposition that this Court has established Belton as our law. The State's position conflicts with the position taken by this Court in State v. Pierce. I needed to engage in extensive

textual analysis of the decisions to rebut the State's argument.

This required a further expenditure of time and additional pages to write.

12. I have completed the brief as soon as I could, working virtually non-stop since I began my research. I have tried to reduce my pages as much as possible. I simply cannot do justice to the highly complex and significant issue at bar and my client's rights by reducing the brief any further than 89 pages.

13. Therefore, I respectfully request that I be permitted to file the 89 page supplemental brief submitted herewith nunc pro tunc.

CERTIFICATION

I certify that the foregoing statements made by me are true.

I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

---

Gilbert G. Miller

Dated: June 30, 2005