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August 20, 2024

Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
P.O. Box 970
Trenton, New Jersey 08625

Re: State v. Shawn Fenimore
Sup. Ct. Docket No. 089786

Your Honors:

Please accept this letter in lieu of a more formal petition for certification. Mr. Fenimore relies on the arguments made in his Appellate Division briefs incorporates them by reference.

This case presents a novel legal issue unaddressed since this Court changed the contours of the automobile exception in State v. Witt. 223 N.J. 409, 450 (2015): under the automobile exception, can police search a car parked at police headquarters without a warrant. The Appellate Division erroneously held not only that a car parked at the police station in full control of officers can be searched under this exception, but that parked cars in general can be. In Witt this Court held clearly that the newly liberalized automobile

exception applied in one specific context: "on the roadway." Id. at 450. Mr. Fenimore's parked car was certainly not on the roadway. Moreover, it is unclear that a parked car can be searched under this exception at all. This Court must grant certification because the issue of how and when cars that are not on the roadway may be searched by police is one of general public importance that must be settled by this Court. Rule 2:12-4.

In addition to presenting a novel legal issue of general importance, this case also presents a conflict with well-established precedent regarding another component of the automobile exception: the requirement that the circumstances giving rise to the probable cause are spontaneous and unforeseeable. The Appellate Division failed to properly apply State v. Smart, 253 N.J. 156 (2023). The conflict with Smart further warrants certification, Rule 2:12-4, and is addressed first in this petition.

Fenimore arrived at the police station because he was called by a police officer. State v. Fenimore, No. A-2246-22, unpub. op. (App. Div. July 26, 2024), slip op. at 3. That officer called Fenimore and asked him to come to the station because it was alleged that Fenimore had hit a woman with his car while high on drugs. Ibid. That officer thought Fenimore sounded high when he spoke with him. Ibid. Fenimore told the officer he would drive himself to the station. (February 4, 2022 1T 6-19 to 8-19, 39-25 to 41-4,101-21 to 102-6;

State's Appellate Division Brief at 6) When Fenimore arrived at the station, he was driving, and he was high. Ibid. Fenimore driving himself to the station while high is the entirely expected result of asking a high person to come to the police station when that high person told you he would drive himself. In other words, Fenimore showing up high was not unexpected or spontaneous, which is a requirement under Witt and Smart for the automobile exception to apply.

Although the Appellate Division recognized that the officers knew it was quite possible that Fenimore would drive to the police station while high, it nonetheless held that Fenimore driving to the police station while high was spontaneous and unforeseeable. The Appellate Division reasoned that "[w]e acknowledge Trooper Radetich suspected defendant was possibly under the influence when he called defendant an hour or two before defendant arrived at the station, but that suspicion was not the animating reason he requested defendant come to the police station." Fenimore, slip op. at 29. That reasoning does not survive any scrutiny because it imports a non-existent intent requirement into the automobile exception.

In Witt, this Court provided "enhanced protection" to the privacy of New Jersey residents by requiring that in order to warrantlessly search a car under the automobile exception, "the circumstances giving rise to probable cause be

'unforeseeable and spontaneous[.]'" Smart, 253 N.J. at 171.There is no loophole in Smart that if the police foresaw that probable cause for a crime would develop but they did not mean for that probable cause to develop while taking steps for the probable cause to develop, the foreseeability does not constitutionally count. Adding this loophole significantly undermines Smart.

Moreover, Fenimore did not just arrive at the police station driving a car and likely high. After he arrived at the station, the police interviewed him, asking him if he was high, observed physical symptoms of drug use, and ran him through a battery of field sobriety tests before arresting him for driving under the influence and only then proceeding to search his car. Fenimore, slip op. at 4. Just like in Smart, officers took the time to conduct a thorough investigation and "made the decision to conduct [sobriety testing] to transform their expectations into probable cause to support a search." Id. at 172. Whatever the officers' "animating reason" was to talk to Fenimore—which is both irrelevant yet also directly related to the subsequent car search because police wanted to talk about allegations that he had hit someone with his car while high—by the time officers searched his car, they had undertaken a significant amount of deliberate investigation. Under Smart, when police completed that investigation, they had to get a warrant to search the car. The Appellate Division's failure to honor Smart requires certification.

The Appellate Division failed to honor New Jersey's more-protective automobile exception in another way: by holding that a car parked at police headquarters could be searched without a warrant. This Court very clearly held in Witt that the automobile exception is reserved for cars that are stopped on the roadway: "Going forward, searches on the roadway based on probable cause arising from unforeseeable and spontaneous circumstances are permissible." Witt, 223 N.J. at 450. In fact, in Witt, this Court referred to "roadside searches" or "roadside stops" or "on the roadway" or "roadside" at least nine times. Id. at 414, 420, 435, 441, 442, 444, 445, 446, 450.

Limiting the right to search cars without a warrant to cars stopped on the side of the road was a very deliberate choice to protect passengers and officers, ("Prolonged encounters on the shoulder of a crowded highway . . . may pose an unacceptable risk of serious bodily injury at death"), and to prevent the application of a complicated exigency calculus in a fast-moving scene (the "multi-factor exigency formula is too complex and difficult for a reasonable police officer to apply to fast-moving and evolving events that require fast action"). Id. at 414, 441. These rationales do not apply to a car parked in a police station completely under the control of the police.

The Appellate Division declined to follow the clear roadside limitation from Witt. It "acknowledge[d that] Witt made several references to roadside

stops, but, considering the decision in its entirety, we do not interpret such references to necessitate the narrow application of the automobile exception defendant suggests." Fenimore, slip op. at 20. Why refuse to heed this narrow application of the now-broadened warrant requirement? Because applying Witt would overrule two pre-Witt cases "in which the automobile exception applied to parked vehicles," and the panel "decline[d] to conclude th[is] Court would do so only implicitly." Id. at 21. This reasoning is flawed for two reasons.

First, Witt overruled prior caselaw. It was, to put it plainly, a big deal. This Court explained the special justification to depart from stare decisis and crafted a new rule of law. There is no reason to assume pre-Witt automobile exception law is valid post-Witt. That is what happens when precedent is overruled—other precedent goes with it. At least one pre-Witt case condoning the search of a parked car has been indisputably implicitly overruled by Witt; the Appellate Division did not cite that case. In State v. Martin, 87 N.J. 561, 565 (1981), a car that fit the description of a car involved in a robbery was towed and then searched without a warrant. Witt held very clearly that a search under those conditions is now unlawful: "when vehicles are towed and impounded, absent some exigency, a warrant must be secured." Witt, 223 N.J. at 450. Martin makes clear that at least some cases that were good law before

Witt are not good law after Witt, despite the fact that this Court did not name every single case and explain its status as precedent.

Second, the Appellate Division focused on the fact that these other cases allowed for the search of parked cars. But the other cars in the other cases were not parked at police stations. Whatever the merits to searching cars parked elsewhere, the same considerations simply do not apply to cars parked in a police parking lot that are under the control of the police because the underlying rationale of the automobile exception laid out in Witt is one of exigency. As this Court explained in holding that a car towed to the police station cannot be searched warrantlessly, "[w]hatever inherent exigency justifies a warrantless search at the scene under the automobile exception certainly cannot justify the failure to secure a warrant after towing and impounding the car at headquarters when it is practicable to do so." Id. at 448-49 (emphasis added). There is no inherent exigency to search a car parked in a police station that is completely controlled by the police. Faced with this language, the Appellate Division determined that "'headquarters' referred to a police impound lot, rather than the parking lot of a police station[.]" Fenimore, slip op. at 22. Not only is "headquarters" not a "police impound lot," on the face of those words, but in making this determination the Appellate Division

missed the point: the point is categorical, situational exigency. It exists on the roadside. It does not exist in a police station parking lot.

In focusing on the assertion—which is unclear after Witt but not dispositive of the issue in this case—that parked cars could be searched, the Appellate Division also failed to notice changes in federal law. In defense of its holding, the Appellate Division cited to this Court's statement that the newly formulated automobile exception "eliminate[s] . . . the fear that 'a car parked in the home driveway of vacationing owners would be a fair target of a warrantless search if the police had probable cause to believe the vehicle contained drugs[.]'" Id. at 21 (quoting Witt, 223 N.J. at 447). But the holding of the Supreme Court of the United States in Collins v. Virginia, 584 U.S. 568 (2018), throws the validity of this part of Witt's reasoning into doubt.

In Collins, an officer walked up a private driveway to lift a tarp off of a motorcycle, revealing the license plate and vehicle identification numbers. Id. at 590. The Supreme Court held that the officer's actions constituted an unlawful warrantless search: "When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred. Such conduct thus is presumptively unreasonable absent a warrant." Id. at 593 (internal citation omitted). The Supreme Court explicitly held that the automobile exception does not justify

"the invasion of the curtilage" because "the scope of the automobile exception extends no further than the automobile itself." Id. at 594. In other words, "[t]he automobile exception does not afford the necessary lawful right of access to search a vehicle parked within a home or its curtilage because it does not justify an intrusion on a person's separate and substantial Fourth Amendment interest in his home and curtilage." Id. at 596. In the case of Witt's hypothetical vacationers, Collins strongly suggests that a warrant would be needed to enter their driveway and tow their car.

In short, the automobile exception does not allow for the search of a car parked at a police station when a person thought to drive his car while high drove his car to the police station while high. This is true whether or not the automobile exception allows for the search of cars parked elsewhere, which remains unclear after Witt and Collins. This case presents multiple questions about the proper scope and application of New Jersey's automobile exception. The answers given by the Appellate Division conflict with this Court's precedent and unduly restrict the privacy rights of New Jerseyans. Certification must be granted.

Respectfully submitted,

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CERTIFICATION

I hereby certify that the foregoing petition presents substantial issues of law and is filed in good faith and not for purposes of delay.

Respectfully submitted,

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