SUPREME COURT OF NEW JERSEY
DOCKET NO. 091575

STATE OF NEW JERSEY, Plaintiff-Cross-Appellant, v. PHILLIP D. BRYANT and JAMES HUNTER, Defendants-Cross-Respondents.	Criminal Action On Leave to Cross-Appeal from an Interlocutory Order of the Superior Court of New Jersey, Appellate Division App. Div. Docket No. A-1399-24 Indictment No. 22-02-00124 Sat Below: Hon. Robert J. Gilson, P.J.A.D. Hon. Lisa A. Firko, J.A.D. Hon. Lisa Perez Friscia, J.A.D.

PROPOSED BRIEF OF PROJECT FOR PRIVACY & SURVEILLANCE ACCOUNTABILITY, INC. AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-CROSS-RESPONDENTS

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INTRODUCTION

A Fourth Amendment-compliant warrant must "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. So the warrant must define the search before it begins. Officers may determine which evidence falls within that authorization. But they may not use the search itself to supply what the warrant failed to describe. The tower dump warrants here reverse that sequence. They named an offense, a 105-minute window, and every device in "close proximity" to one address. *State v. Bryant*, 483 N.J. Super. 13, 24–25 (App. Div. 2025), *leave to appeal granted,* 263 N.J. 524 (2026). Officers then used the search itself to cross-reference and choose whose location records the government would examine. *Id.* at 25–26. And that search yielded two suspects from 10,477 people's location records. *Id.* at 26.

The Fourth Amendment and New Jersey's Constitution both forbid that reversal. In fact, these warrants resemble the hated general warrants that inspired the Fourth Amendment. Those warrants were odious not because they were expansive but because they specified an offense and left executing officers to choose whom and where to search. *See Steagald v. United States*, 451 U.S. 204, 220 (1981). Particularity requires the magistrate to make that choice first. Officers may then determine which evidence falls within the warrant's terms. But execution cannot supply what the warrant itself had to describe. That distinction matters especially

when new surveillance tools let the government search thousands of people's records to find a suspect. And the defect does not depend on how many matches the search returns. One or ten thousand, the particularity problem is the same.

Protecting that constitutional line is central to the work of *Amicus* Project for Privacy and Surveillance Accountability, Inc. ("PPSA"). PPSA is a nonpartisan, nonprofit organization dedicated to protecting the privacy of Americans against unwarranted government surveillance. PPSA studies and litigates how the Fourth Amendment and its state analogues govern new investigative technologies. Its work includes tower dumps, geofence warrants, and related surveillance tools. PPSA submits this brief to explain a single, narrow principle: The U.S. and New Jersey Constitutions require warrants to be particular. That principle resolves this case without disrupting ordinary warrant practice.

ARGUMENT

A warrant must define the search before execution begins. Part I shows that the Fourth Amendment and the New Jersey Constitution require the warrant—not its execution—to identify what may be searched. Execution may determine which evidence falls within the warrant's terms. But it cannot supply the place, person, or things that the warrant itself had to describe. Part II applies that rule and shows why severance cannot save these warrants. This Court should affirm.

I. The Warrant Clause Requires the Warrant—Not Its Execution—to Identify What May Be Searched.

General warrants were dangerous because they left the scope of the search to the officers who executed them. The Fourth Amendment took the choice of where to search and what to seize away from executing officers and assigned it to the magistrate. The warrant must describe that choice before the search begins. Execution may then determine which evidence falls within the warrant's terms, but it cannot supply what the warrant itself had to describe. Federal precedent establishes both rules. And New Jersey law does the same.

A. The warrant must identify what officers may search before they begin.

The Fourth Amendment prohibited general warrants not because they searched too much, but because officers chose whom and where to search. The general warrants and writs of assistance that provoked the Fourth Amendment "specified only an offense" and "left to the discretion of the executing officials the decision as to which persons should be arrested and which places should be searched." *Steagald*, 451 U.S. at 220. The Fourth Amendment instead gave that choice to a neutral magistrate. And it required the magistrate to state with particularity "the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. Thus, particularity "makes general searches … impossible" because, as to what may be searched and seized, "nothing is left to the discretion of

the officer executing the warrant." *Marron v. United States*, 275 U.S. 192, 196 (1927).

Merely naming the offense precisely does not cure a warrant that leaves officers to choose what to search. The U.S. Supreme Court recognized that in *Stanford v. Texas*, which observed that a general warrant may still "specif[y] the offense believed to have been committed" and be "issued upon probable cause." 379 U.S. 476, 480–81 (1965). But it remains a general warrant if officers choose where to search. *Id.* at 485–86.

Officers may determine during execution which evidence falls within the warrant's description. But execution cannot supply what the warrant itself had to describe. *Andresen v. Maryland* shows the difference. 427 U.S. 463, 479–80 (1976). There, the warrant authorized a search of the defendant's office for records of a specified real-estate transaction. *Id.* at 479–80. The warrants identified the places to be searched and described categories of records tied to a specific lot and the specified false-pretenses offense. *Id.* at 479–82. Officers still had to examine documents "at least cursorily" to determine which fell within those descriptions. *Id.* at 482 n.11. But execution *applied* the warrants' descriptions; it did not supply them. The warrant had already confined the search to evidence tied to a specific transaction and crime. The officers decided which documents were evidence—not where to search.

The tower dump reverses that sequence. These warrants supplied time,

geography, and tower criteria. But applying those criteria required the carriers first to search their subscribers' protected location records to determine which records met the criteria. Unlike *Andresen*, the search did not merely distinguish responsive from nonresponsive evidence already tied to the crime. Instead, it searched the population to determine which protected records bore that tie.

During a search, officers may of course respond to facts they discover. But "the discovery of contraband cannot validate a warrant invalid when issued." *Maryland v. Garrison*, 480 U.S. 79, 85 (1987). Instead, the warrant's validity "must be assessed on … [w]hat the officers disclosed … to the issuing Magistrate." *Id.* The scope of a lawful search is "defined by the object of the search and the places in which there is probable cause to believe that it may be found." *Id.* at 84 (quoting *United States v. Ross*, 456 U.S. 798, 824 (1982)). As facts emerge, officers may narrow the search. But what officers learn during the search cannot cure a warrant that was invalid at the start.

Similarly, the Fourth Amendment does not "countenance open-ended warrants, to be completed while a search is being conducted." *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 325 (1979). Nor could officers' own restraint cure such a defect. As in *Groh v. Ramirez*, 540 U.S. 551 (2004), it is not enough that the "restraint was imposed by the agents themselves"; the restraint must be imposed "by a judicial officer." *Id.* at 561 (quoting *Katz v. United States*, 389 U.S. 347, 356

(1967))). A warrant must say what officers may search. Officers cannot decide later.

B. New Jersey law enforces the same rule.

New Jersey law likewise requires the magistrate to choose where officers may search. That is why this Court in *State v. Marshall*, 199 N.J. 602 (2009), rejected a warrant that left police to choose where to search after the warrant issued. That warrant impermissibly "delegated to the police" a role reserved for "the neutral and detached magistrate." *Id.* at 613. Nor may other materials supply what the warrant leaves "to the whim of that officer." *State v. Muldowney*, 60 N.J. 594, 600 (1972).

New Jersey's "all persons present" cases apply the same rule. In *State v. De Simone*, 60 N.J. 319 (1972), this Court upheld a warrant to search all occupants of a car used as a lottery "drop," *id.* at 323, because the circumstances tied everyone present to the crime. But in *State v. Sims*, 75 N.J. 337 (1978), this Court struck a similar warrant for a service station open to the public. Mere presence there did not identify who participated in the crime, so the warrant was general. *Id.* at 350–51 & n.3. Presence works only when known facts already tie everyone there to the crime. If not, a warrant authorizing their search is general and therefore unlawful.

II. These Warrants Used A Population Search to Select Whose Records the Government Could Examine.

This Court should hold these warrants unconstitutional. The warrants specified an offense, time, and location but left the search to choose whose records the government could examine. Neither the limited return nor the State's cluttered-

house analogy cures that defect. Nor does *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), save the warrants: Even if the carrier databases were identified places, the search itself still determined whose protected records the government could examine. And this application of the particularity rule leaves ordinary warrants untouched.

A. The warrants used the search itself to determine whose records could be examined.

The warrants specified the offenses under investigation, a window from 9:15 to 11:00 a.m. on November 29, 2020, and every device connecting to any cell site "in close proximity to" a specific address. *Bryant*, 483 N.J. Super. at 24–25. But they identified no account, device, subscriber, or record. And the carriers had to search their records to learn which devices met the government's criteria. The search supplied what the warrant lacked: whose records the government could examine.

The U.S. and New Jersey Constitutions reserve that choice for the magistrate. Like the warrants condemned in *Stanford* and *Steagald*, these warrants named a crime and a location but left the search to supply whose records the government could examine. *Stanford*, 379 U.S. at 480–81, 485–86; *Steagald*, 451 U.S. at 220. The magistrate did not decide that; the search did. And this Court condemned that kind of delegation in *Marshall*. 199 N.J. at 613.

Nor can what the search returned cure the defect. The search here swept in records from 10,477 people, using nearly two-dozen towers and 79 antennae across

193.66 square miles, and reached devices 11.41 miles away—all to find two suspects. *Bryant*, 483 N.J. Super. at 25–26; Db5 (Hunter) (citing Da009); Db35 (Byrant) (citing Da 1-17). The State argues that the number of records cannot affect whether the warrants were valid when issued and stresses that the carriers returned only location and call records. Pb19–22. The State is right about timing. But timing cuts against it: A warrant "is not to be made legal by what it turns up. In law it is good or bad when it starts[.]" *United States v. Di Re*, 332 U.S. 581, 595 (1948) (footnote omitted). And these warrants were born bad because they did not identify whose records the government could search. And a tailored return cannot cure an untailored warrant. *Garrison*, 480 U.S. at 85.

Nor does the State's cluttered-house analogy work. The State likens the tower dump to the search of a cluttered home full of irrelevant items. Pb20. The analogy proves the opposite. The magistrate identifies a cluttered house for a search before entry. Clearing clutter only makes officers sort items within that house to find the evidence—the task *Andresen* approved. *Andresen*, 427 U.S. at 480–82 & n.11. The tower dump is different. The warrants identified no subscriber, account, or device in advance. The population sweep determined whose records the government would examine. In the cluttered house, officers know where to search. They need only find the proof. But here, the search determined whose records to examine.

B. *Zurcher* does not cure the particularity defect.

The State's response relies principally on *Zurcher*, which upheld a warrant to search an innocent third-party newspaper's office for evidence of crimes committed by others. *See* Pb17, Pb21. Under *Zurcher*, "valid warrants may be issued to search any property, whether or not occupied by a third party, at which there is probable cause to believe that fruits, instrumentalities, or evidence of a crime will be found." 436 U.S. at 554 (emphasis removed). The State says the carriers' databases are such third-party property and that location records near the scene are the evidence sought. *See* Pb17–18.

But *Zurcher* does not solve the problem. Even if the carriers' databases supplied the "place to be searched," the warrants still had to particularly describe "the persons or things to be seized." U.S. Const. amend. IV. The warrant in *Zurcher* did both. It identified the newspaper office and sought photographs of a particular event. *Zurcher*, 436 U.S. at 551. Here, by contrast, the warrants supplied criteria—time, geography, and tower connection—and directed the carriers to search thousands of peoples' protected records to determine whose records satisfied those criteria. And this despite those thousands of subscribers "hav[ing] a reasonable expectation of privacy in the location of their cell phones." *State v. Earls*, 214 N.J. 564, 569 (2013). That is different from the evidentiary sorting permitted in *Zurcher* and *Andresen*. There, execution determined which evidence fit descriptions whose

connection to the crime the warrant had already established. Here, the population search *itself* generated that connection.

Nor does geography solve the problem. As in *Sims*, being inside the search area did not identify who committed the crime. *See Sims*, 75 N.J. at 351. The nearly 200-square-mile search swept in many people with no known link to the robbery. *See Bryant*, 483 N.J. Super. at 26. And unlike the rendezvous in *De Simone*, 60 N.J. at 322–23, proximity to these towers tied no one to the crime. The geographic and temporal limits made the search somewhat more precise. But they did not make it particular. They supplied the criteria for *finding* a connection to the crime, not the connection itself. Whether that missing connection also presents a probable-cause problem need not be decided here. The particularity problem remains. The warrants did not identify what the government could search. Only the search itself did. And that violates both the Fourth Amendment and New Jersey law.

C. Severance cannot cure these warrants.

This principle leaves intact ordinary premises warrants, *Andresen* records warrants, *Zurcher* third-party searches, properly supported "all persons present" warrants, and warrants for known targets. Each identifies a place, account, or device and lets officers find the evidence inside. And for each, the magistrate decides what officers may search before they begin. *Andresen*, 427 U.S. at 480–82; *De Simone*,

60 N.J. at 322–23; *Zurcher*, 436 U.S. at 554, 558–59. The rule proposed here bars only one thing: using the search to choose what to search.

Nor can severance save these warrants. A court may strike an overbroad clause and preserve the rest when the warrant still identifies what officers may search. But a court cannot correct an *ex ante* error with a *post hoc* cure. The State asks the Court to strike the concededly overbroad request for subscriber information but keep the request for location and call records. Pb10 n.4; Pb19. But the location-records request is the population search itself. It told the carriers to search an unidentified pool of records to find which records the government would examine. So nothing valid remains to save.

CONCLUSION

The Court should hold that the warrant—not its execution—must identify what the government may search. These warrants improperly left that choice to the search itself. The Court should affirm.

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Respectfully submitted,

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