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NOTES

CRIMINAL PROCEDURE—SKIRTING THE WARRANT CLAUSE: *STATE V. HARRIS* AND THE SPECIAL NEEDS EXCEPTION

Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.¹

INTRODUCTION

Imagine that you are at home one evening when the police barge into your house without knocking, serve you with a temporary restraining order you know nothing about, and simultaneously execute a search warrant. The police place you under arrest, force you to open your safe to allow them to search it, and even bring in dogs. Now imagine your indignation when you discover that you are not being prosecuted for the underlying grounds of the restraining order, but rather the results of the search conducted in your home—and the only basis for this warrant is the uncorroborated word of your ex-significant other. You would think your constitutional right to be free from unreasonable government searches of your home has been violated. But the highest court in New Jersey disagrees.

In *State v. Harris* the New Jersey Supreme Court held that domestic violence search warrants based on reasonable cause will suffice in place of warrants based on probable cause under the statutory scheme of the Prevention of Domestic Violence Act.² Recognizing that the Constitution explicitly states that warrants should be based on probable cause,³ the high court mentioned the special needs exception without analyzing whether it fit the situation and moved on with its analysis.⁴ The situation at issue, trying to control the combination of domestic violence and deadly weapons, is admittedly a very challenging one.⁵

1. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting), *overruled in part by Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967).

2. *State v. Harris*, 50 A.3d 15, 18 (N.J. 2012); N.J. STAT. ANN. § 2C:25-28(j) (West 2012).

3. U.S. CONST. amend. IV, cl. 2.

4. *Harris*, 50 A.3d at 24-26.

5. See generally Lisa Memoli & Gina Plotino, *Enforcement or Pretense: The Courts and the Domestic Violence Act*, 15 WOMEN'S RTS. L. REP. 39 (1993) (discussing some of the cases and lapses in enforcement that led to the push to change the statute in New Jersey);

But that is not reason enough to dispense with constitutional rights.⁶

Section I of this Note will lay out the different pieces that make up the puzzle of the Supreme Court of New Jersey's decision in *State v. Harris*. Part I.A presents a brief overview of the warrant clause. Part I.B explains how the statutory scheme of the Prevention of Domestic Violence Act (PDVA) operates. Part I.C recounts the facts and procedural history leading up to the Supreme Court of New Jersey's decision in *State v. Harris*.⁷

Section II argues that the constitutional requirement that “no Warrants shall issue, but upon probable cause”⁸ cannot be circumvented by way of the special needs exception in this case.⁹ The majority in *Harris* held, for the first time, that reasonable cause to believe that weapons were present and that there was a serious risk of harm to the victim was sufficient to issue a search warrant under section 25-18(j) of the PDVA.¹⁰ Parts II.A through D discuss the elements of the special needs exception to the warrant requirement and assert that the New Jersey Supreme Court erred in its conclusion that the PDVA scheme qualifies as such an exception.

Section III explores the emergency aid and community caretaking exceptions to the warrant requirement and contends that neither of them replaces nor excuses the requirement of probable cause for search warrants under the PDVA. Finally, Section IV compares New Jersey's approach to tackling the serious problem of domestic violence involving deadly weapons with the approaches of several other states and proposes the adoption of the standard suggested by the dissenting justices in *Harris*.

Michael Luo, *In Some States, Gun Rights Trump Orders of Protection*, N.Y. TIMES (March 17, 2013), http://www.nytimes.com/2013/03/18/us/facing-protective-orders-and-allowed-to-keep-guns.html?pagewanted=all&_r=1&&pagewanted=print.

6. *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting).

7. 50 A.3d at 18-21.

8. U.S. CONST. amend. IV, cl. 2. The New Jersey Constitution uses nearly identical wording to provide the same protection to its citizens. N.J. CONST. art.I, ¶ 7 (“no warrant shall issue except upon probable cause . . .”).

9. *Harris*, 50 A.3d at 31 (Albin, J., dissenting) (“The United States Supreme Court has never suggested—even remotely—that the special-needs doctrine would justify a home search in circumstances such as presented here.”).

10. *Id.* at 27 (majority opinion) (“Here...the domestic violence search . . . was entirely proper.”); *id.* at 32 (Albin, J., dissenting) (“We have never directly addressed whether the [possession and heightened risk of danger to the victim] prongs for the issuance of a search warrant . . . can be based on less than probable cause.”).

I. THE LAW AND THE FACTS OF *STATE V. HARRIS*

A. *The Warrant Clause*

The Fourth Amendment of the United States Constitution guarantees the right to be free from unreasonable searches and seizures.¹¹ This protection extends to both civil and criminal searches.¹² The framers of the Constitution were concerned with protecting the security of the people's "persons, houses, papers, and effects."¹³ Particularly, the Supreme Court has declared that the Fourth Amendment is aimed primarily at protecting unreasonable physical intrusions by the government into the home.¹⁴

If searches and seizures are conducted without a warrant, they are considered presumptively unreasonable.¹⁵ The Fourth Amendment states "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."¹⁶ The Supreme Court has explicitly affirmed a straightforward reading of the Fourth Amendment by relying on its plain text in holding: "The Constitution prescribes ... that where the matter is of such a nature as to require a judicial warrant, it is also of such a nature as to require probable cause."¹⁷

11. U.S. CONST. amend. IV, cl. 1.

12. *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985) ("[W]e have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities."); *see also* AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 2* (1997) ("[T]he Fourth Amendment applies equally to civil and criminal law enforcement. Its text speaks to all government searches and seizures, for whatever reason. Its history is not uniquely bound up with criminal law.").

13. U.S. CONST. amend. IV, cl. 1.

14. *United States v. U.S. Dist. Court*, 407 U.S. 297, 313 (1972) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.").

15. *Camara v. Mun. Court of City & Cnty. of S.F.*, 387 U.S. 523, 528-29 (1967) ("[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."); *Katz v. United States*, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."), *superseded by statute*, Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 212; *Agnello v. United States*, 269 U.S. 20, 33 (1925) ("Absence of any judicial approval is persuasive authority that it is unlawful."). *But see* AMAR, *supra* note 12, at 5-10 (arguing that the construction of the Fourth Amendment and the historical evidence weigh against a presumption of unreasonableness in the absence of a warrant).

16. U.S. CONST. amend. IV, cl. 2.

17. *Griffin v. Wisconsin*, 483 U.S. 868, 877 (1987). *But see* Barry Jeffrey Stern, *Warrants Without Probable Cause*, 59 *BROOK. L. REV.* 1385, 1402 (1994) ("[T]he pre-constitutional history does not establish that the framers intended the Fourth Amendment to

Realizing that the demands of public safety do not always allow for the process of obtaining a warrant,¹⁸ the Court has come to recognize several “well-delineated exceptions” to the presumptive warrant requirement.¹⁹ In specific situations, the warrant, or even the underlying probable cause, is forgiven. Where the Court has decided that the warrant is for one reason or another impracticable, the Court instead uses an interest-balancing test to ensure that the search is “reasonable” under the Fourth Amendment.²⁰

In particular, this Note focuses on the special needs exception to the warrant requirement, both because the New Jersey Supreme Court relied on it and because it seems to be the most applicable exception to the searches conducted under the PDVA. In order for this exception to apply: (1) there must be a “special[] need beyond” ordinary law enforcement purposes;²¹ (2) the subject(s) of the search must have a reduced expectation of privacy;²² and (3) the requirement of obtaining a warrant or probable cause prior to conducting a search must be a practical hindrance to protecting the special need.²³ If these conditions are met, a search warrant based on probable cause is replaced with interest-balancing to determine the reasonableness of the search.²⁴

B. *The Prevention of Domestic Violence Act of 1991 and Its Interpretation*

The current version of the PDVA²⁵ was enacted in 1991, repealing the earlier statute of the same name originally enacted in 1981.²⁶ The

preclude a warrant requirement for searches and seizures that are constitutionally reasonable but not supported by the traditional definition of probable cause.”).

18. See *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006) (listing several circumstances in which the warrant requirement has been waived for reasons relating to protection of the public).

19. *Katz*, 389 U.S. at 357.

20. See *Brigham City*, 547 U.S. at 403-04 (“It is a ‘basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.’ Nevertheless, because the ultimate touchstone of the Fourth Amendment is ‘reasonableness,’ the warrant requirement is subject to certain exceptions An action is ‘reasonable’ under the Fourth Amendment . . . viewed *objectively*.”) (internal citations omitted).

21. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

22. *Id.* at 348-49 (Powell, J., concurring).

23. *Id.* at 351-52 (Blackmun, J., concurring).

24. See *id.* at 351.

25. For the purposes of this Note, the Prevention of Domestic Violence Act (PDVA) encompasses N.J. STAT. ANN. §§ 2C:25-17 to -33 (West 2012).

26. See generally Maura Beth Johnson, Note, *Home Sweet Home?: New Jersey’s Prevention of Domestic Violence Act of 1991*, 17 SETON HALL LEGIS. J. 234 (1993).

New Jersey Legislature sought “to assure victims of domestic violence the maximum protection from abuse the law can provide.”²⁷ The Legislature “stress[ed] that the primary duty of a law enforcement officer when responding to a domestic violence call is to enforce the laws allegedly violated and to protect the victim.”²⁸ According to the New Jersey Supreme Court, “[b]ecause the [Prevention of] Domestic Violence Act is remedial in nature, it is to be liberally construed to achieve its salutary purposes.”²⁹ In order to accomplish these goals, the PDVA provides both criminal and civil remedies.³⁰

On the criminal side, when a police officer has probable cause to believe that domestic violence has occurred, he or she can arrest the suspected abuser and “upon observing or learning that a weapon is on the premises, seize any weapon that the officer *reasonably* believes would expose the victim to a risk of serious bodily injury.”³¹ However, according to New Jersey’s *Domestic Violence Procedures Manual*: “If the domestic violence assailant or the possessor of the weapon refuses to surrender the weapon or to allow the officer to enter the premises to search for the named weapon, the officer should obtain a Domestic Violence Warrant for the Search and Seizure of Weapons.”³² This search warrant is the same in both the criminal and civil contexts.³³

On the civil side, section 25-28(j) authorizes the victim to file a complaint with a Family Part judge seeking a temporary restraining order (TRO) which may include other forms of ex parte relief including the issuance of a warrant to search for and seize weapons.³⁴

Emergency relief may include forbidding the defendant from returning to the scene of the domestic violence, forbidding the defendant from possessing any firearm or other weapon... ordering the search for and seizure of any such weapon at any location where the judge has reasonable cause to believe the weapon is located and the seizure of any firearms purchaser identification card or permit to purchase a handgun issued to the defendant and any other

27. § 2C:25-18.

28. *Id.*

29. *Cesare v. Cesare*, 713 A.2d 390, 393 (N.J. 1998).

30. *Id.*

31. § 2C:25-21 (emphasis added).

32. STATE OF NEW JERSEY, DOMESTIC VIOLENCE PROCEDURES MANUAL, § 3.10.1(F) (2d ed. 2008), available at <http://www.judiciary.state.nj.us/family/dvprcman.pdf> (last visited Feb. 18, 2014) [hereinafter MANUAL].

33. To see a blank affidavit and search warrant form, see MANUAL, *supra* note 32, at app. 19.

34. § 2C:25-28(j); MANUAL, *supra* note 32, § 5.10.3.

appropriate relief.³⁵

This Note will focus in particular on the search warrant authorized by section 2C:25-28(j) which is at issue in *Harris*.³⁶

While section 2C:25-28(j) acknowledges that there must be “reasonable cause” as to the location of the weapon before a judge orders a search and seizure of any weapons,³⁷ there is no further direction regarding what kind of showing is needed to issue the search warrant.³⁸ A New Jersey appellate court interpreted the search warrant issued under the PDVA to require “reasonable cause” as to three elements in *State v. Johnson*.³⁹

[W]here there is reasonable cause to believe that, (1) an act of domestic violence has been committed by [the] defendant (2) the defendant possesses or has access to a firearm or other weapon ... and (3) defendant’s possession or access to that weapon poses a heightened or increased risk of danger to the victim, then the issuance of a search warrant as authorized by [section] 2C:25-28j does not violate Fourth Amendment principles.⁴⁰

“Reasonable cause,” while not defined in the PDVA itself, has been considered “akin to ‘reasonable suspicion,’ which New Jersey courts have found to be a more relaxed standard than ‘probable cause.’”⁴¹ To meet reasonable suspicion, “[a]n officer must be able to ‘point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion.’”⁴²

35. § 2C:25-28(j) (emphasis added).

36. Although the facts in *State v. Harris* only concerned the civil statute, as mentioned, the search warrant is available to police in the criminal context as well. *State v. Harris*, 50 A.3d 15, 18 (N.J. 2012). See MANUAL, *supra* note 32, § 3.10.1(F).

37. § 2C:25-28(j).

38. *Harris*, 50 A.3d at 32 (Albin, J., dissenting).

39. *State v. Johnson*, 799 A.2d 608, 611 (N.J. Super. Ct. App. Div. 2002) *disapproved* by *State v. Dispoto*, 913 A.2d 791 (N.J. 2007). In *Johnson*, the appellate division affirmed the suppression of evidence where a search warrant issued under § 2C:25-28(j) for weapons lacked specificity as to the location, and led to marijuana but no weapons. *Id.* at 614-15.

40. *Id.* at 626. This test was incorporated into the DOMESTIC VIOLENCE PROCEDURES MANUAL. See MANUAL, *supra* note 32, at § 5.10.4.

41. *State v. Perkins*, 817 A.2d 364, 369 (N.J. Super. Ct. App. Div. 2003) *abrogated* by *State v. Harris*, 50 A.3d 15 (N.J. 2012). New Jersey courts have held that “[p]robable cause is... a well-grounded suspicion or belief.” *State in Interest of J.G.*, 701 A.2d 1260, 1273 (N.J. 1997) (quoting *State v. DeSimone*, 288 A.2d 849, 850 (N.J. 1972)). Other courts have found similar Supreme Court language to be the equivalent of a probable cause standard. See *United States v. Pruitt*, 458 F.3d 477, 490 (6th Cir. 2006) (holding that “the Court’s inquiry under the ‘probable cause’ and ‘reason to believe’ standards is the same . . .”).

42. *Perkins*, 817 A.2d at 369-70. The Supreme Court of the United States acknowledges that the concepts of probable cause and reasonable suspicion are difficult to

The New Jersey Supreme Court in *State v. Dispoto* corrected the interpretation by the appellate court in *Johnson*, holding that probable cause is required to issue a search warrant in regards to the first element of the *Johnson* test: whether an act of domestic violence had occurred.⁴³ The New Jersey Supreme Court did not, however, overrule “reasonable cause” as the standard for the other two elements necessary for the issuance of a warrant for the search and seizure of weapons under section 2C:25–28(j).⁴⁴

Up until the New Jersey Supreme Court’s decision in *Harris*, the searches authorized under the PDVA had not been used to “advance a criminal investigation against an alleged abuser.”⁴⁵ Furthermore, the *Harris* court expressly held, for the first time, that “[section] 2C:25–28(j) ... permits issuance of a warrant upon reasonable cause.”⁴⁶

C. *State v. Harris*

The victim, identified as W.J., sought and received a TRO from a Family Part judge.⁴⁷ W.J. signed a sworn statement expressing that she and the defendant, Carlton Harris, had a dating relationship and that he had committed acts of domestic violence against her.⁴⁸ These acts “include[d] beating her in the face, stalking her daily, repeatedly

define, but has contrasted them:

[w]e have described reasonable suspicion simply as ‘a particularized and objective basis’ for suspecting the person stopped of criminal activity, and probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.

Ornelas v. United States, 517 U.S. 690, 696 (1996) (internal citations omitted).

43. *State v. Dispoto*, 913 A.2d 791, 798 n.3 (N.J. 2007).

44. *Harris*, 50 A.3d at 32 (Albin, J., dissenting) (“We have never directly addressed whether the remaining two prongs for the issuance of a search warrant in *Johnson* can be based on less than probable cause.”).

45. *Dispoto*, 913 A.2d at 798 (“[T]he remedial protections afforded under [PDVA] are intended for the benefit of victims of domestic violence and are not meant to serve as a pretext for obtaining information to advance a criminal investigation against an alleged abuser.”). *See also Perkins*, 817 A.2d at 371 (“[U]nless the factual circumstances justify a search under a recognized exception to the warrant requirement, a search and resulting seizure under [the PDVA] ... is deemed reasonable and thereby passes constitutional muster so long as the results are not used to facilitate a criminal prosecution.”); *State v. Johnson*, 799 A.2d 608, 624 (N.J. Super. Ct. App. Div. 2002) (“[T]he analysis of the validity of the warrant and search cannot be equated with that applied to a search and seizure where the purpose is to secure evidence in a criminal prosecution.”).

46. *Harris*, 50 A.3d at 18.

47. *State v. Harris*, No. A-6112-09T1, 2011 WL 813377 *1, *1 (N.J. Super. Ct. App. Div. Mar. 10, 2011) *appeal granted*, 20 A.3d 434 (N.J. 2011) and *aff’d in part, rev’d in part*, 50 A.3d 15 (N.J. 2012).

48. *Id.*

telephoning her at all hours, kicking in her front door, and threatening to kill her and her children while wielding a gun.”⁴⁹ The TRO enumerated the expected prohibitions against communication and contact between the victim and defendant, and was accompanied by a search and seizure warrant for Mr. Harris’s guns.⁵⁰ The no-knock warrant described the caliber of four guns and a belt of ammunition, and gave officers full access to the house, the garage, and the car if it was parked in the driveway.⁵¹

The officers went to Mr. Harris’s residence⁵² that evening, placed Mr. Harris under arrest, and proceeded to search for the guns.⁵³ The police recovered three guns and ammunition: a .308 caliber assault rifle in the attic-bedroom, five large capacity magazines with a Colt Anaconda .45 caliber revolver from a basement safe, and a Ruger P89 handgun discovered by a gun-sniffing dog on top of the china cabinet in the dining room.⁵⁴ The next day, the police checked the serial numbers of the firearms and learned that the Colt Anaconda revolver had been reported stolen.⁵⁵ The defendant, Mr. Harris, was then indicted and charged with twelve criminal violations relating to the stolen revolver and the unlawful possession of an assault rifle and large capacity magazines.⁵⁶

The trial court suppressed all the evidence on the defendant’s motion, ruling “that weapons seized pursuant to a warrant issued under the PDVA may not be evidential in any criminal prosecution.”⁵⁷ The

49. *Id.*

50. *Id.*

51. *Id.* at *2.

52. From both the facts contained in the opinion of the appellate court and those in the New Jersey Supreme Court’s opinion, it does not appear that the victim and the defendant were cohabitating. Thus, when the search was performed, it was at the defendant’s separate, private residence. *State v. Harris*, 50 A.3d 15, 20 (N.J. 2012).

53. *Harris*, 2011 WL 813377, at *1.

54. *Id.*

55. *Id.*

56. *Id.* The full counts were:

second-degree unlawful possession of an assault rifle, N.J.S.A.2C:39-5(f) (count one); third-degree possession of a loaded rifle, N.J.S.A. 2C:39-5(c)(2) (count two); five counts fourth-degree possession of a large capacity ammunition magazine (counts three, four, five, six and seven), N.J.S.A. 2C:39-3(j); second-degree unlawful possession of a firearm, N.J.S.A. 2C:39-5(b) (count eight); third-degree receiving stolen property, N.J.S.A. 20-7(a) (count nine); three counts of third-degree certain persons not to possess a firearm, N.J.S.A. 2C:39-7(b)(3) (counts ten, eleven and twelve).

Id.

57. *Id.* at *3.

appellate division reversed in part and affirmed in part.⁵⁸ The appellate court characterized the warrant as a “special needs warrant,” which prior cases had ruled could not be used to “gather evidence of criminal offenses unrelated to the domestic violence.”⁵⁹ The appellate court therefore considered the search warrantless since the evidence was used to prosecute the defendant for unlawful possession.⁶⁰ The court suppressed the stolen Colt Anaconda and remanded to discover whether the plain view exception⁶¹ to the warrant requirement applied to the assault rifle and ammunition.⁶²

The New Jersey Supreme Court reversed, holding that the search warrant based on reasonable cause issued under section 2C:25-28(j) was valid under the special needs exception to the warrant clause.⁶³ In analyzing whether or not the weapons seized under the PDVA could be used as evidence in a criminal prosecution, the court reviewed the seizures under the plain view doctrine.⁶⁴ The court remanded the case to the trial court to determine whether the officers knew the illegal nature of the weapons when they saw them during the search.⁶⁵ The New Jersey Supreme Court did not address arguments made by the parties and their amici in regards to whether there was sufficient probable cause to justify the warrant.⁶⁶ As will be discussed below, the court instead relied on the special needs exception, but its analysis was limited to mentioning that the exception was “[p]ertinent” and that the lower courts had used the special needs exception in their analyses.⁶⁷

58. *Id.* at *1.

59. *Id.* at *11.

60. *Id.*

61. The plain view exception in New Jersey involves satisfying three elements: (1) the police officer’s presence was lawful, (2) the officer’s discovery of evidence was inadvertent, and (3) the seizability of the evidence was “immediately apparent.” *Id.* at *11. The defendant did not contest the lawfulness of the officers’ presence, and the appellate court disagreed with the defendant’s contest of the inadvertence requirement but remanded to determine whether their unlawful nature was “immediately apparent.” *Id.* at *11-12.

62. *Id.* at *11-12.

63. *State v. Harris*, 50 A.3d 15, 25-27 (N.J. 2012).

64. *Id.* at 28-31. The *Harris* court’s assessment of the facts under the plain view doctrine will not be dealt with in this Note.

65. *Id.* at 31.

66. *Id.* at 21-23.

67. *Id.* at 24-26.

II. THE SPECIAL NEEDS EXCEPTION DOES NOT APPLY IN *STATE V. HARRIS*

A. *There Might Have Been a Special Need*

The special needs exception is applicable when there is a “special need[]” for a search, and ordinary law enforcement purposes would be hindered by a requirement to obtain a warrant and/or probable cause.⁶⁸ Some examples of “special needs” include: maintaining discipline in a school,⁶⁹ efficiency in the workplace,⁷⁰ and proper supervision of probationers.⁷¹ This doctrine has two branches: one requiring an individualized suspicion as a necessary justification for a search, and one that does not.⁷² To date, the only special needs cases in which the Supreme Court has not required individualized suspicion have involved drug testing.⁷³ In all others, the Court has required individualized suspicion, albeit reasonable suspicion rather than probable cause to justify the search.⁷⁴ In order to determine whether a special needs search is “reasonable” and comports with the Fourth Amendment, the Court engages in a balancing test: on one side is the government interest or the “special need,” and on the other are the privacy interests of the individual subject to the search.⁷⁵

The New Jersey Supreme Court’s application of the special needs exception has mirrored the application by the Supreme Court of the

68. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

69. *Id.* at 340 (majority opinion).

70. *O’Connor v. Ortega*, 480 U.S. 709, 721-22 (1987).

71. *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987).

72. *State in Interest of J.G.*, 701 A.2d 1260, 1265-66 (N.J. 1997). Waiving individualized suspicion is a way of lessening the Fourth Amendment requirement that warrants “particularly describ[e] the place to be searched, and the persons or things to be seized.” *Id.* at 1265 (quoting U.S. CONST. amend. IV, cl. 2).

73. For approved programs, see generally: *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (testing of high school students seeking to participate in extracurricular activities); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (testing of schoolchildren seeking to play interscholastic sports); *Nat’l Treasury Emp. Union v. Von Raab*, 489 U.S. 656 (1989) (testing of customs employees seeking promotion which would involve work with illicit substances or carrying a firearm); *Skinner v. Ry. Labor Exec.’s Ass’n*, 489 U.S. 602 (1989) (testing of railroad employees). For disapproved programs, see generally: *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (testing of pregnant women by hospital for use in cocaine prosecution if they did not enroll in a drug program); *Chandler v. Miller*, 520 U.S. 305 (1997) (testing required for candidates seeking to run for state office).

74. *See, e.g., Griffin*, 483 U.S. at 879 (reasonable suspicion sufficient to search home of probationer); *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (reasonable suspicion sufficient to search purse of student found smoking in the bathroom).

75. *T.L.O.*, 469 U.S. at 341.

United States.⁷⁶ New Jersey's high court has applied the special needs doctrine with careful and thorough analysis of both precedent and facts in determining the applicability of the special needs exception and performing the accompanying balancing test.⁷⁷ In contrast, the court in *State v. Harris* assumed that the special needs doctrine applied and, without any balancing of interests at all, replaced the probable cause requirement with reasonable cause.⁷⁸ The court noted that there were "several exceptions to the general rule that a warrant based on probable cause must be issued prior to any search or seizure."⁷⁹ The majority went on to say that the special needs exception was "[p]ertinent" and that the lower courts had both "viewed this matter solely through the lens of the special needs exception."⁸⁰ It is true that the appellate division in *State v. Harris* invoked the special needs exception, but that opinion similarly lacked meaningful analysis and misstated the law⁸¹—surely not a determination warranting adoption by the higher court.⁸²

In *State v. Harris*, the court should have applied the test to determine whether a special need existed. First, the court should have carefully examined the state interest of protecting domestic violence

76. The New Jersey Supreme Court has applied it in cases where (1) "the requirements of the statute [are] not 'intended to facilitate ... criminal prosecution . . .,'" (2) results of the search were not given to the prosecutor, and (3) the warrant requirement is impractical. *State v. O'Hagen*, 914 A.2d 267, 276 (N.J. 2007). The court then proceeds to weigh the competing interests. *Id.* (discussing how the special needs test had been applied in *State in Interest of J.G.*, 701 A.2d 1260 (N.J. 1997)).

77. In *State in Interest of J.G.*, the court's in-depth analysis spanned more than five of the fifteen total pages in determining whether there was a special need and then weighing it against the privacy interests of individuals who were and would be affected. 701 A.2d at 1266-72. Similarly, in *State v. O'Hagen*, the court performed an in-depth analysis, first making sure the special needs doctrine applied, and then carefully weighing the interests. *O'Hagen*, 914 A.2d at 277-81.

78. *State v. Harris*, 50 A.3d 15, 24-26 (N.J. 2012).

79. *Id.* at 24.

80. *Id.* Compare with *O'Hagen*, 914 A.2d at 276-81 (the court went through a careful analysis of their prior case law, a recitation of the test, and then a careful application of the test before engaging in a balancing of interests, ultimately finding that the special needs exception made a warrant and individualized suspicion unnecessary for DNA collection of convicts).

81. *State v. Harris*, No. A-6112-09T1, 2011 WL 813377 *1, *5-*6 (N.J. Super. Ct. App. Div. Mar. 10, 2011) *appeal granted*, 20 A.3d 434 (N.J. 2011) *and aff'd in part, rev'd in part*, 50 A.3d 15 (N.J. 2012). As will be noted in more detail in Part II.D, the appellate court references "'special needs' warrants," which do not exist. *Id.* at *5. Compare with *State in Interest of J.G.*, 701 A.2d at 1266-72 (the court went through U.S. Supreme Court precedent and state precedent, laid out the full definition of the special-needs exception, and then went through a careful application).

82. Indeed, the *Harris* court noted that while the findings of fact are not typically disturbed by a court on appellate review, when "considering the legal conclusions and analysis of the trial court, [the appellate court's] review is plenary." 50 A.3d at 23.

victims from assault with deadly weapons. Had they done this, they might have decided this interest is beyond ordinary law enforcement purposes. The court then should have looked at the interests of the person subject to such the search, who has an undiminished and very high expectation of privacy in his home. The court also should have examined the practicability of a warrant, finding that the statutory scheme incorporates a warrant.⁸³ Finally, balancing these interests, the court would have found that the law enforcement officers were not excused from their constitutional requirement to obtain a search warrant based on probable cause.⁸⁴

The only element of the special needs analysis that the New Jersey Supreme Court in *Harris* even remotely touched on was the “special need,” to which they looked towards the purpose of the statute to find.⁸⁵ The court recognized that the Legislature was very clear that the purpose of the statute was “to assure the victims of domestic violence the maximum protection from abuse the law can provide.”⁸⁶ Although the court did not specifically state this under a special needs analysis, this may be “beyond the normal need for law enforcement.”⁸⁷ As the Legislature said, the primary purpose of the statute is to protect victims of domestic violence from further harm, not to obtain evidence for criminal proceedings against the perpetrators of the alleged violence.⁸⁸ Furthermore, the search warrant is authorized by the civil part of the statute in conjunction with a TRO, designed to protect the victim from harm.⁸⁹ Therefore, protecting victims from assaults with weapons through civilly authorized searches and seizures could be classified as a non-law-enforcement special need.⁹⁰

If they had established that the need qualifies under the exception, the court should have examined how practical the warrant requirement was, and weighed the defendant’s privacy interest against the special need of the government to be excused from the warrant requirement.⁹¹

83. *See infra* Part II.B-D.

84. *See infra* Part II.B-D.

85. *Harris*, 50 A.3d at 23.

86. *Id.* (quoting N.J. STAT. ANN. § 2C:25-18 (West 2012)).

87. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

88. § 2C:25-18.

89. § 2C:25-28(j).

90. In the similar administrative-search context, the Supreme Court held that a non-law enforcement need is not disqualified where a legislature deals with a social problem using parallel means, one criminal and the other administrative, each permitting searches. *New York v. Burger*, 482 U.S. 691, 713-15 (1987).

91. *Harris*, 50 A.3d at 34 (Albin, J., dissenting) (discussing the balancing test that should have been applied).

As will be explained in detail below, if the court performed this balancing test at all, it would have been forced to conclude that the special needs doctrine does not apply. This is because the other two prongs of the test cannot be satisfied: there is no diminished expectation of privacy of the subjects of these searches, and a warrant does not hinder the statutory scheme.⁹²

B. *The Subjects of the Search Have No Diminished Expectation of Privacy*

The dissent in *Harris* emphasized that “[t]he United States Supreme Court has never invoked the special needs doctrine to suspend the probable cause/warrant requirement for the search of a home—where the privacy interests of the individual are at their highest—except in the case of a probationer.”⁹³ The Supreme Court of the United States has ruled the special needs exception could apply to belongings and persons of students searched by school administrators;⁹⁴ offices of public employees searched by their employers;⁹⁵ and homes of probationers searched by probation officers.⁹⁶ In each of these cases, the subject of the search had some lower expectation of privacy, because of the location of the search, their employment position, or their criminal background.⁹⁷ The lower expectation of privacy in these instances results in a balancing test of the interests of both parties. This balancing is a better test for the reasonableness of a search, because the requirement of probable cause presupposes an undiminished expectation of privacy.

The search of a probationer’s home in *Griffin v. Wisconsin* is the most analogous of the Supreme Court special needs cases to the searches

92. See *infra* Parts II.B-D.

93. *Harris*, 50 A.3d at 33-34 (Albin, J., dissenting).

94. See *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 374 (2009) (the Court found a strip search of a thirteen-year-old for over-the-counter drugs unreasonable, but used a special needs balancing test to make that determination); *New Jersey v. T.L.O.*, 469 U.S. 325, 328-29 (1985) (school administrators searched the handbag of a student while enforcing a school policy against smoking and discovered evidence of drug dealing).

95. See *O’Connor v. Ortega*, 480 U.S. 709, 725 (1987) (holding that the special needs exception applied to searches of employees offices by employers, but remanded to determine whether the search at issue in this case was reasonable).

96. See *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (holding that probationers have a “conditioned liberty” and require close supervision as part of their probation).

97. *Id.* at 868 (probationers subject to terms of their probation); *O’Connor v. Ortega*, 480 U.S. 709 (1987) (government employees at their place of work subject to supervision); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (public schoolchildren in school subject to school rules).

under the PDVA and *State v. Harris*.⁹⁸ In *Griffin*, two probation officers and three police officers, acting on a tip from a detective “that there were or might be guns in [the defendant’s] apartment,” conducted a warrantless search of a probationer’s home.⁹⁹ This search was based solely on “reasonable grounds,” and the searchers successfully located the handgun to which the tip pertained.¹⁰⁰ The Supreme Court accepted the need to supervise probationers for their own rehabilitation and to protect the public as a “special need.”¹⁰¹

While going through the special needs analysis to determine whether the defendant’s Fourth Amendment rights had been violated, the Court emphasized repeatedly that probationers have a diminished reasonable expectation of privacy.¹⁰² Even the four dissenting justices agreed that “[t]he probation officer is not dealing with an average citizen, but with a person who has been convicted of a crime.”¹⁰³ In fact, under Wisconsin law, probationers were considered to be “in the legal custody of the State Department of Health and Social Services.”¹⁰⁴

In contrast, the defendant in *State v. Harris* had no diminished expectation of privacy, let alone one that approached the level of being in the legal custody of a government agency.¹⁰⁵ When W.J. made the domestic violence complaint that led to the search warrant, she told the police that the “defendant had been arrested three months earlier for assaulting her and that those charges remained pending.”¹⁰⁶ In fact, the defendant had not been convicted of any crime that might have conditioned his liberty in any way, nor had the defendant faced his accuser in court—he was charged once and accused twice of domestic

98. *Harris*, 50 A.3d at 33-34 (Albin, J., dissenting) (“The United States Supreme Court has never invoked the special needs doctrine to suspend the probable-cause/warrant requirement for the search of a home—where the privacy interests of the individual are at their highest—except in the case of a probationer.”) (discussing *Griffin v. Wisconsin*, 483 U.S. 868 (1987)).

99. *Griffin*, 483 U.S. at 871.

100. *Id.* at 871-72.

101. *Id.* at 875.

102. *Id.* at 874 (“To a greater or lesser degree, it is always true of probationers (as we have said it to be true of parolees) that they do not enjoy ‘the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.’”) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)).

103. *Griffin*, 483 U.S. at 882 (Blackmun, J., dissenting).

104. *Id.* at 870.

105. See *State v. Harris*, 50 A.3d 15, 34 (N.J. 2012) (Albin, J., dissenting) (“The search of a probationer’s home is obviously not comparable to that of a person accused of a crime or a domestic violence offense.”).

106. *Id.* at 19 (majority opinion).

violence.¹⁰⁷ According to the statutory construction and subsequent interpretation of the PDVA by the New Jersey Supreme Court, even if the defendant had never before been accused of domestic violence, the police would still not have needed probable cause to obtain a warrant to search his house for weapons.¹⁰⁸

Defendants in cases like *Harris* have an undiminished expectation of privacy in their homes, not to mention the fact that defendants are presumed innocent until proven guilty.¹⁰⁹ On this basis alone, the situation does not fall within the bounds of the special needs exception to the warrant clause requiring probable cause. However, there is another independent basis for disqualifying this situation from the special needs analysis: the third element, the impracticability of the warrant requirement, is similarly unfulfilled.¹¹⁰

C. *Requiring a Warrant Based on Probable Cause Would Not Hinder Procedure*

As Justice Blackmun stated in his concurring opinion in *New Jersey v. T.L.O.*, “[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.”¹¹¹ In *T.L.O.*, the Court recognized that the warrant and probable cause requirements were wholly “unsuited” to the school environment because they would “unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.”¹¹² More pertinent to the search of homes, the Court in *Griffin v. Wisconsin* came up with three ways the “warrant requirement would interfere to an appreciable degree with the probation system”: (1) “a magistrate rather than a probation officer [would] judge [] how close a supervision the probationer requires,” (2) delay in getting a warrant would hinder probation officers’ response, and (3) the deterrent aspect would be reduced.¹¹³ These

107. *Id.*

108. *Cesare v. Cesare*, 713 A.2d 390, 394 (N.J. 1998) (holding that under the PDVA “a court is *not obligated to find* a past history of abuse before determining that an act of domestic violence has been committed in a particular situation”) (emphasis added).

109. *See Taylor v. Kentucky*, 436 U.S. 478, 483-84 (1978).

110. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (“[W]e have permitted exceptions when ‘special needs . . . make the warrant and probable-cause requirement impracticable.’”) (internal citations omitted).

111. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

112. *Id.* at 340 (majority opinion).

113. *Griffin*, 483 U.S. at 876.

potential impediments to the statutory purpose and regime resulting from a warrant based on probable cause made “it reasonable to dispense with the warrant requirement.”¹¹⁴

Looking at these three characteristics from the *Griffin* scheme, the PDVA differs because it would not be similarly hindered by a requirement to obtain a warrant based on probable cause.¹¹⁵ The decision whether to conduct a search is already determined by a neutral magistrate, the Family Part judge, who reviews the complaint and decides whether to issue a TRO and other forms of relief.¹¹⁶ Secondly, because a warrant is already required by the PDVA, requiring the warrant to be based on a higher standard, probable cause, would not create additional delay.¹¹⁷ Finally, there is also no similar deterrence aspect of the PDVA that would give subjects of searches notice of the fact that only reasonable cause is required. Probationers are on notice because their liberty is conditioned, but people accused of domestic violence have no such reason to be on notice if they have not yet been served with the TRO and/or never have been previously accused.¹¹⁸ Therefore, unlike *Griffin* and other special needs cases, neither a warrant nor probable cause is impracticable to the statutory regime.¹¹⁹

In fact, the statutory scheme already requires probable cause for the first prong of the test, whether an act of domestic violence occurred, which then allows a warrant for the search and seizure of weapons to be issued.¹²⁰ If the police are required to demonstrate probable cause for one of the elements to obtain the search warrant, demonstrating probable cause as to the other elements may be an impediment but should not be considered impracticable. This is clearly not a situation contemplated by the U.S. Supreme Court justices in *T.L.O.* where “*exceptional circumstances* [of the school environment] ... make the warrant and probable cause requirement impracticable”¹²¹ Failure to show

114. *Id.* at 876-77.

115. *State v. Harris*, 50 A.3d 15, 34 (N.J. 2012) (Albin, J., dissenting).

116. N.J. STAT. ANN. § 2C:25-28 (West 2012).

117. *See* § 2C:25-28(j); *Harris*, 50 A.3d at 34 (Albin, J., dissenting).

118. *Harris*, 50 A.3d at 34.

119. *Id.* (“I do not believe that the probable-cause requirement is impracticable in a statutory scheme protecting victims of domestic violence . . .”).

120. *State v. Dispoto*, 913 A.2d 791, 798 (N.J. 2007). As previously mentioned, the New Jersey Supreme Court overruled a determination by the appellate division and required *probable* cause, as opposed to *reasonable* cause, that an act domestic violence had occurred, but reasonable cause remains sufficient in regards to the other two bases for the search warrant: access/possession of a weapon and threat of that possession/access remained. *Id.*

121. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (emphasis added).

exceptional circumstances should make the special needs exception inapplicable, even without the lack of diminished privacy expectations of the subjects of the searches under the PDVA.¹²²

D. *The Special Needs Exception Is to Forgive the Warrant*

In one way, the *Harris* court's reliance on the special needs exception at all seems strange. The anomaly in *Harris* is that there *was* a warrant involved; all the previous special needs cases involved completely warrantless searches.¹²³ The New Jersey appellate division in *Harris* incorrectly stated the law when it characterized and explained the search warrant at issue as a “special needs’ warrant.”¹²⁴ The court stated:

Generally, such a warrant is not issued to secure evidence in a criminal investigation, but to further a legitimate governmental interest; in other words, the warrant is directed to promote the State's “special-needs.” Special needs warrants are typically issued upon a showing of reasonable suspicion that a person has violated a rule or regulation which the State has an interest in protecting.¹²⁵

The only authority the lower court in *Harris* cited to support that statement of the law was *T.L.O.*, which concerned a completely warrantless search of a student by a school administrator and created the special needs *exception* to the warrant requirement.¹²⁶ If the police obtained a warrant, then clearly obtaining a warrant was not impracticable and the special needs doctrine could not apply.¹²⁷

The situation in *State v. Harris* presents an interesting conundrum. If the police officers had gone in without a warrant, as they do under the criminal side of the PDVA when responding to domestic violence calls,¹²⁸ they would have had an argument for the impracticability of the

122. See *Chandler v. Miller*, 520 U.S. 305, 320-22 (1997) (the Court distinguished infeasibility of individualized suspicion in prior drug testing cases from the instant case, and consequently the special needs balancing failed).

123. See, e.g., *State v. O'Hagen*, 914 A.2d 267, 270 (N.J. 2007); *State in Interest of J.G.*, 701 A.2d 1260, 1267 (N.J. 1997); *Griffin v. Wisconsin*, 483 U.S. 868, 872 (1987); *O'Connor v. Ortega*, 480 U.S. 709, 712 (1987); *T.L.O.*, 469 U.S. 325, 330 (1985).

124. *State v. Harris*, A-6112-09T1, 2011 WL 813377 *1, *5 (N.J. Super. Ct. App. Div. Mar. 10, 2011) *appeal granted*, 20 A.3d 434 (N.J. 2011), *and aff'd in part, rev'd in part*, 50 A.3d 15 (N.J. 2012).

125. *Id.*

126. *T.L.O.*, 469 U.S. at 340.

127. See *supra* Part II.C.

128. *State v. Perkins*, 817 A.2d 364, 371 (N.J. Super. Ct. App. Div. 2003) (warrantless search allowed because special needs covered the Fourth Amendment violation as long as criminal charges were not brought), *abrogated by State v. Harris*, 50 A.3d 15 (N.J. 2012).

warrant and come closer to falling within the scope of the special needs exception.¹²⁹ But, as the facts occurred, the police had a warrant based on less than probable cause, and without the special needs exception, violated Mr. Harris's Fourth Amendment rights in executing it.¹³⁰ This is puzzling, because a warrant is supposed to offer the subject of a search greater protection—not less.¹³¹

A similar construct to the warrant sanctioned by the PDVA was proposed by the dissent in *Griffin v. Wisconsin*.¹³² Justice Blackmun proposed that while the lower level of suspicion might be justified by the special need, the warrant itself should be retained as an added “means of protecting the probationer's privacy.”¹³³ That way, the probationer would still have the benefit of a neutral magistrate reviewing the facts, but the probation officers would still only need to meet “reasonable grounds” rather than probable cause.¹³⁴ Justice Blackmun pointed out that the Court had previously made a similar exception for administrative warrants, which can be issued by the judiciary and are based on a standard less than probable cause.¹³⁵

Justice Scalia, writing for the majority, rejected this proposition and drew a firm line between judicial warrants and administrative search warrants.¹³⁶ The majority found that Justice Blackmun's suggested solution, the solution apparently adopted by the New Jersey Legislature and courts under the PDVA, “is a combination that neither the text of the Constitution nor any of [the Court's] prior decisions permits.”¹³⁷ The Court then unequivocally affirmed a plain reading and application of the Fourth Amendment: “it remains true that ‘[i]f a search warrant be constitutionally required, the requirement cannot be flexibly interpreted to dispense with the rigorous constitutional restrictions for its issue.’”¹³⁸ The intrusion by the government into a citizen's home to search and seize weapons sanctioned by the PDVA is certainly a situation in which a search warrant is constitutionally required; therefore, probable cause is

129. *Griffin v. Wisconsin*, 483 U.S. 868, 877-78 (1987).

130. *Harris*, 50 A.3d at 18.

131. *Steagald v. United States*, 451 U.S. 204, 213 (1981) (“A search warrant ... is issued upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place, and therefore safeguards an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police.”).

132. *Griffin*, 483 U.S. at 882 (Blackmun, J., dissenting).

133. *Id.*

134. *Id.*

135. *Id.* at 882 n.1.

136. *Id.* at 877-78 (majority opinion).

137. *Id.* at 877.

138. *Id.* at 878 (quoting *Frank v. Maryland*, 359 U.S. 360, 373 (1959)).

the necessary foundation on which that search warrant must rely.¹³⁹

On the other hand, if the court had gone through a detailed analysis and found the special needs doctrine applied, would it be within the purview of the New Jersey Legislature to add a warrant as an extra level of protection to the search? After all, courts in New Jersey have held that the state constitution is more protective than the Federal Constitution concerning Fourth Amendment rights.¹⁴⁰ If the search qualifies under the special needs exception and is therefore “reasonable” under the Fourth Amendment, what harm could a warrant based on reasonable cause inflict as an extra procedural safeguard? But, if the warrant *is* practicable after all, then how could the search be considered under the special needs exception in the first place? Needless to say, this case poses several interesting questions for the special needs exception, none of which the New Jersey Supreme Court tried to answer or even acknowledge. This Note does not attempt to provide an answer to them, but endeavors to point out that even if the components of the special needs test had been met, the resulting warrant under the statute would have been a new and interesting creature.

In summary, the special needs exception cannot apply in *State v. Harris*, and other cases involving search warrants issued under section 2C:25-28(j). Even if a “special need” on the face of the statute appears to be outside the scope of normal law enforcement,¹⁴¹ the warrant and probable cause requirements are not impracticable, and are both, at least in part, already included in the statutory regime.¹⁴² Additionally, the high expectation of privacy that subjects have in their homes is undiminished and would outweigh the special need in a balancing test for reasonableness.¹⁴³ The special needs exception therefore does not cover warrants based on reasonable cause issued under the PDVA section 2C:25-28(j). And even if it did, this case would have been the first of its kind, using a warrant very close to one rejected by the majority in *Griffin*.¹⁴⁴ Furthermore, as will be shown below, there are no other exceptions to the constitutional requirement for searches to be

139. N.J. STAT. ANN. § 2C:25-28(j) (2012); *Griffin*, 483 U.S. at 878 (quoting *Maryland*, 359 U.S. at 373).

140. See *State v. Miller*, 777 A.2d 348, 350 (N.J. Super. Ct. App. Div. 2001) (“This authority to apply the State Constitution independently from and more broadly than the federal Constitution has been exercised frequently by the New Jersey Supreme Court in respect of search and seizure issues.”).

141. See *supra* Part II.A.

142. See *supra* Part II.C.

143. See *supra* Part II.B.

144. See *Griffin*, 483 U.S. at 877-78.

supported by a warrant based on probable cause that would cover *State v. Harris*, and cases like it.¹⁴⁵

III. NO OTHER EXCEPTIONS TO THE WARRANT REQUIREMENT APPLY TO FACTS RESEMBLING THOSE IN *STATE V. HARRIS*¹⁴⁶

A. *The Emergency Aid Doctrine Does Not Apply to Searches Conducted Under Section 2C:25-28(j) of the PDVA*

The emergency aid doctrine may also, at first blush, appear to cover the search for and seizure of weapons under the PDVA. Like other exigent circumstances, the Supreme Court of the United States has held that police may enter a house without a warrant based on probable cause¹⁴⁷ where someone is “seriously injured or threatened with such injury.”¹⁴⁸ Furthermore, the standard for determining whether an officer’s emergency aid search is reasonable is whether there was an “objectively reasonable basis” to believe that a third party needed help.¹⁴⁹ An argument could be made that this is precisely the situation in a case of domestic violence involving threats of serious injury with a firearm.¹⁵⁰ Under the PDVA, there would even be probable cause that

145. See *infra* Section III.

146. For the purposes of this Note, I only discuss two other exceptions that come closest to applying in this situation; I do not intend to represent that these are the only exceptions to the warrant requirement, just that they are the most applicable, if ultimately unsuited, to search and seizure of firearms under the PDVA. The administrative-search exception is not applicable because the PDVA does not enforce a “regulatory scheme.” See *New York v. Burger*, 482 U.S. 691, 702-03 (1987).

147. For what may be obvious reasons, this doctrine is always applied to completely warrantless searches; if the threat were immediate, there certainly would not be time to obtain a warrant. See *Mincey v. Arizona*, 437 U.S. 385, 394 (1978) (finding that one of the reasons for refusing to apply the emergency aid doctrine was that “there [was] no suggestion that a search warrant could not easily and conveniently have been obtained”).

148. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006).

149. *Id.* at 404-06. The Supreme Court of New Jersey recently amended their interpretation of the test to eliminate any analysis of the subjective motivation of the officer and now require “only that: (1) the officer had ‘an objectively reasonable basis to believe that an emergency requires that he provide immediate assistance to protect or preserve life, or to prevent serious injury’ and (2) there was a ‘reasonable nexus between the emergency and the area or places to be searched.’” *State v. Edmonds*, 47 A.3d 737, 746 (N.J. 2012) (internal citations and quotation marks omitted).

150. In fact, this argument was made (unsuccessfully) in a recent New Jersey case of reported domestic violence, also discussed *infra* Part III.B. *State v. Edmonds*, 47 A.3d 737 (N.J. 2012). In that case, the police received an unverified tip from someone claiming to be the alleged victim’s brother that domestic violence was occurring at the victim’s residence and there may be a gun involved. *Id.* at 740. When the officers arrived, the victim claimed there was no violence, that only she and her son were in the apartment, and refused to give the police consent to search her residence. *Id.* at 740-41. The police entered over her objection,

domestic violence had occurred, and reasonable cause to believe that the defendant had access to a gun, as well as a warrant authorizing the search.¹⁵¹

However, the emergency aid doctrine, along with all forms of exigent circumstances, is premised on the immediacy of the threat, specifically, to a third party, and is therefore limited in both scope and time.¹⁵² The Supreme Court in *Mincey v. Arizona* underscored that when there was no longer any threat of violence on the premises, the emergency aid exception was no longer valid and the police were required to get a search warrant.¹⁵³ Cases that arise under section 2C:25-28(j) of the PDVA do not fit this emergency aid doctrine because by the time the officer conducts the search, the victim has already left the house, given a statement, and the threat of violence—the exigency—has already passed.¹⁵⁴ In an emergency, a police officer can enter the home, secure the alleged abuser, and make sure the victim receives medical attention if he or she needs it, but the officer cannot proceed to search the premises for weapons without an appropriate warrant based on probable cause.¹⁵⁵

verified that her son was okay, questioned the defendant boyfriend on the couch, and proceeded to search for weapons. *Id.* at 741. A weapon was found under a pillow, the defendant claimed it as his own and he was subsequently arrested and charged with illegal possession of a weapon. *Id.* The alleged victim was also arrested for obstruction of justice after explaining that it was her ex-boyfriend who has been making threatening phone calls. *Id.*

151. *State v. Harris*, 50 A.3d 15, 32 (N.J. 2012) (Albin, J., dissenting).

152. *Mincey*, 437 U.S. at 392 (“[T]he Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of *immediate* aid.”) (emphasis added). *See also* Mary Elisabeth Naumann, Note, *The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception*, 26 AM. J. CRIM. L. 325, 333-34 (1999) (“Under the emergency aid doctrine, the officer has an immediate, reasonable belief that a serious, dangerous event is occurring. For example, the officer may believe someone needs necessary medical assistance at once, believe that life or safety is compromised, or think a crime victim needs protection.”).

153. *Mincey*, 437 U.S. at 392-93.

154. *State v. Harris*, A-6112-09T1, 2011 WL 813377 *1, *2 (N.J. Super. Ct. App. Div. Mar. 10, 2011) *appeal granted*, 20 A.3d 434 (N.J. 2011), and *aff'd in part, rev'd in part*, 50 A.3d 15 (N.J. 2012).

155. The court in *State v. Edmonds* stated this limitation on scope and time very succinctly:

The emergency-aid doctrine, particularly when applied to the entry of a home, must be limited to the reasons and objectives that prompted the need for immediate action. Therefore, a police officer entering a home looking for a person injured or in danger may not expand the scope of the search by peering into drawers, cupboards, or wastepaper baskets. When the exigency that justifies immediate action dissipates, the rationale for searching without a warrant is no longer present.

Edmonds, 47 A.3d at 746-47 (internal citations and quotation marks omitted).

B. *The Community Caretaking Doctrine Does Not Apply to Searches Conducted Under Section 2C:25-28(j) of the PDVA*

The community caretaking doctrine is yet another exception to the warrant requirement of the Fourth Amendment recognizing that police officers have duties beyond enforcing the law.¹⁵⁶ This “wide range of social services” other than investigation and law enforcement consists of “aiding those in danger of harm, preserving property, and ‘creat[ing] and maintain[ing] a feeling of security in the community.’”¹⁵⁷ Instances of the community caretaking function of the police are characterized by the following factors: (1) the scope of the function the police are performing is “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute”¹⁵⁸ and (2) getting a warrant requires too much time.¹⁵⁹

A notably attractive facet of this doctrine is that in New Jersey, a secondary law enforcement purpose behind the search is not dispositive of the doctrine’s applicability.¹⁶⁰ Even in the context of a criminal investigation that has already begun, police can still make warrantless entries into homes or vehicles that fall within the community caretaking exception.¹⁶¹ The New Jersey Supreme Court, in *State v. Bogan*, stated: “We will not ... handcuff police officers from fulfilling a clear community caretaking responsibility ... merely because the officers are engaged in a concurrent criminal investigation.”¹⁶² The *Bogan* court went on to emphasize, “that the community caretaking responsibility must be a real one, and not a pretext to conduct an otherwise unlawful warrantless search.”¹⁶³ Therefore, as long as the police’s primary function is community caretaking and not a pretext for a search, the reasonableness test will rule Fourth Amendment violations rather than

156. See generally, Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261 (1998).

157. *State v. Bogan*, 975 A.2d 377, 384 (N.J. 2009) (internal citation and quotation marks omitted) (quoting Livingston, *supra* note 156, at 271-72).

158. *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

159. *Edmonds*, 47 A.3d at 751 (“In performing these [community caretaking] tasks, typically, there is not time to acquire a warrant when emergent circumstances arise and an immediate search is required to preserve life or property.”). See also Livingston *supra* note 156, at 274.

160. For instance, the court in *Diloreto* found that, “[i]n addition to harboring safety concerns as caretakers, the police lawfully accumulated information to meet the probable cause and exigency standards before searching defendant’s car.” *State v. Diloreto*, 850 A.2d 1226, 1237 (N.J. 2004).

161. *Bogan*, 975 A.2d at 386.

162. *Id.*

163. *Id.*

the warrant and probable cause requirements, even during an active criminal investigation.¹⁶⁴

Interestingly enough, the most recent case in which the New Jersey Supreme Court found the community caretaking doctrine did *not* apply was an investigation of a report of domestic violence.¹⁶⁵ In *State v. Edmonds*,¹⁶⁶ the police entered the alleged victim's house over her objections, and the court held that once the police had verified the safety of both her and her son, their community caretaking function was complete.¹⁶⁷ In the words of the *Edmonds* court: “[i]f the officers wished to search the apartment for a gun, they had to apply for a warrant supported by probable cause.”¹⁶⁸

In *Harris*, as in *Edmonds*, there was no immediate danger to the community that the search was seeking to remedy, so the community caretaking doctrine would not have applied.¹⁶⁹ Even though the secondary law enforcement purpose and use of the fruits of the search in a later criminal prosecution would not have condemned the search in *Harris*, there needed to be a situation necessitating a community caretaking function directly preceding the search.¹⁷⁰ Therefore, while applicable in some domestic violence situations, in the situation which arose in *Harris*, as well as in most others that arise under section 2C:25-28(j), the immediacy of the threat has passed. As a result, searches will

164. *Id.* at 388-89 (analyzing the officers' actions in the situation and finding them objectively reasonable and therefore constitutional). Examples of cases in which New Jersey courts have found the community caretaking doctrine to apply include: *Bogan*, 975 A.2d at 378-81 (warrantless entry into a home where 12-year-old child was supposedly home alone on a school day in order to talk to the child's parents on the phone where officer spotted the suspect involved in a molestation the officer was investigating); *Diloreto*, 850 A.2d at 1232, 1234-35 (defendant who had been mistakenly listed as an endangered missing person found asleep in his car near a known location for suicide attempts was patted down and found to have ammunition on him, and was subsequently charged and convicted of murder, an armed robbery of a gas station, and possessory offenses regarding the weapons); and *State v. Garbin*, 739 A.2d 1016, 1018-19 (N.J. Super. App. Ct. 1999) (warrantless search of a garage emitting smoke and the smell of burned rubber revealed defendant, who was then found guilty of driving while intoxicated).

165. *State v. Edmonds*, 47 A.3d 737, 753 (N.J. 2012).

166. As a point of interest, this case was decided 5-1, one month before *State v. Harris*, and perhaps unsurprisingly, Justice Albin, the author of the dissent in *Harris*, authored the majority opinion in *Edmonds*. *Id.* at 737.

167. *Id.* at 752.

168. *Id.* The single dissenting justice in *Edmonds* discussed the PDVA along with the importance of protecting domestic violence victims who might be shielding their own abusers and found the officers' conduct in this case reasonable under both the community caretaking and the emergency aid exceptions. *Id.* at 755-57 (Patterson, J., dissenting).

169. *Id.* at 752 (majority opinion).

170. *State v. Harris*, 50 A.3d 15, 20 (N.J. 2012).

not be excused from the requirement of a warrant supported with probable cause by the community caretaking doctrine.¹⁷¹

In summary, the special needs exception is inapplicable,¹⁷² and none of the other exceptions to the warrant clause allow the search conducted in *State v. Harris*. Both the emergency aid and the community caretaking exceptions fail because the immediacy of the threat to the alleged victim has already passed by the time the search is conducted.¹⁷³ Because there is no exception to cover the searches conducted under a warrant based on reasonable cause pursuant to the PDVA section 2C:25-28(j), the Legislature should change the way the search warrants are issued in order to bring it into conformance with the warrant clause of the Fourth Amendment of the U.S. Constitution, and Article I, Paragraph seven of the New Jersey Constitution.

IV. THE PREVENTION OF DOMESTIC VIOLENCE ACT WOULD BE JUST AS EFFECTIVE USING WARRANTS BASED ON PROBABLE CAUSE

This Note does not mean to undercut the gravity of protecting victims of domestic violence from abuse involving deadly weapons. The type of violence that led to the passing of laws like the PDVA is horrific and most deserving of a strong legal remedy.¹⁷⁴ Indeed, many states have statutes restricting domestic abusers' rights to bear arms.¹⁷⁵ The enforcement mechanisms vary among states; some ask for a voluntary surrender,¹⁷⁶ some add on a penalty for failing to surrender the firearms,¹⁷⁷ and some issue an order prohibiting possession without any

171. *Edmonds*, 47 A.3d at 751.

172. *See supra* Part II.

173. *See supra* Parts III.A-B.

174. *See generally* Benjamin Thomas Greer & Jeffrey G. Purvis, *Judges Going Rogue: Constitutional Implications When Mandatory Firearm Restrictions Are Removed From Domestic Violence Restraining Orders*, 26 WIS. J.L. GENDER & SOC'Y 275 (2011) (discussing the dangers of not enforcing firearms restrictions); Johnson, *supra* note 26 (recounting several problems with the former PDVA necessitating the complete overhaul); Memoli & Plotino, *supra* note 5 (discussing some of the cases and lapses in enforcement that led to the push to change the statute); Luo, *supra* note 5.

175. *See, e.g.*, ALASKA STAT. ANN. § 18.66.100 (2010); ARIZ. REV. STAT. ANN. § 13-3602(E) (2010) (West); CAL. PENAL CODE § 1524(a)(11) (West 2011); DEL. CODE ANN. tit.10, § 1045(a)(11) (1999); HAW. REV. STAT. § 134-7(f) (LexisNexis 2006); IND. CODE ANN. § 34-26-5-9 (West 1999); ME. REV. STAT. tit.19-A, § 4006 (2012); MD. CODE ANN., Fam. Law § 4-506 (LexisNexis 2006); N.H. REV. STAT. ANN. § 173-B:4(ii) (2002); N.Y. FAM. CT. ACT § 842a (McKinney 2010); N.C. GEN. STAT. ANN. § 50B-3.1 (2009).

176. *See* ARIZ. REV. STAT. ANN. § 13-3602(E) (2010); N.C. GEN. STAT. ANN. § 50B-3.1(a) (2009); N.Y. FAM. CT. ACT § 842a (McKinney 2010).

177. *See* ARIZ. REV. STAT. ANN. § 13-3602(E) (2010) (arrest for violation of the protection order); N.C. GEN. STAT. ANN. § 50B-3.1(j) (2009).

enforcement mechanism at all.¹⁷⁸ New Jersey has been “progressive” in fighting domestic violence.¹⁷⁹ But as the dissent in *Harris* notes, New Jersey stands completely alone in one aspect of its approach to weapons and domestic violence—it requires only reasonable cause to obtain a search warrant.¹⁸⁰

Part A of this section will briefly review the laws of states that take guns out of the hands of alleged abusers and how they operate in comparison with New Jersey’s PDVA. Part B will recommend how the New Jersey’s legislature could bring the PDVA into conformance with the warrant clause without sacrificing the protection of potential victims of domestic violence.

A. *States Allowing Search Warrants for Weapons That Require Probable Cause in Domestic Violence Situations*

Only five states besides New Jersey authorize a warrant for the search and seizure of weapons in cases of domestic violence – Maine, Hawaii, California, New Hampshire, and Delaware.¹⁸¹ Each of those states, except Delaware, first orders the voluntary surrender of the weapons; only if the respondent fails to comply will a court authorize a search warrant.¹⁸² They also require the warrant to be based on probable cause specifically related to the weapons, not just the domestic violence.¹⁸³ New Hampshire requires “probable cause to believe such firearms and ammunition and specified deadly weapons are kept on the premises or curtilage of the defendant and ... reason to believe that all such firearms and ammunition and specified deadly weapons have not been relinquished by the defendant.”¹⁸⁴ Maine goes a step further and requires probable cause to believe that the respondent has not

178. See ALASKA STAT. ANN. § 18.66.100 (West 2010); MD. CODE ANN., Fam. Law § 4-506 (West 2006); IND. CODE ANN. § 34-26-5-9 (West 2011); N.Y. FAM. CT. ACT § 842a (McKinney 2013).

179. Memoli & Plotino, *supra* note 5, at 50.

180. *State v. Harris*, 50 A.3d 15, 35-36 (N.J. 2012) (Albin, J., dissenting).

181. *Id.* at 35. See DEL. CODE ANN. tit. 10, § 1045(a)(11) (1999); ME. REV. STAT. tit.19-A, § 4006 (2012); HAW. REV. STAT. § 134-7(f) (LexisNexis 2006); CAL. PENAL CODE § 1524(a)(11) (West 2011); N.H. REV. STAT. ANN. § 173-B:4(ii) (2002).

182. *Harris*, 50 A.3d at 35; ME. REV. STAT. tit.19-A, § 4006(2-A) (2012); HAW. REV. STAT. § 134-7(f) (LexisNexis 2006); CAL. PENAL CODE § 1524(a)(11) (West 2011); N.H. REV. STAT. ANN. § 173-B:4(ii) (2002).

183. *Harris*, 50 A.3d at 35; ME. REV. STAT. tit.19-A, § 4006 (2-A) (2012); HAW. REV. STAT. § 134-7(f) (LexisNexis 2006); CAL. PENAL CODE § 1524(a)(11) (West 2011); N.H. REV. STAT. ANN. § 173-B:4(ii) (2002).

184. N.H. REV. STAT. ANN. § 173-B:4(ii) (2002).

relinquished the weapons.¹⁸⁵ Hawaii requires police officers to apply for a regular search warrant if the respondent refuses to surrender the weapons in the absence of a consensual search of the premises.¹⁸⁶ California lists domestic violence among the grounds to obtain a regular search warrant for weapons and ammunition.¹⁸⁷ Again, all of these statutes require not only probable cause, but also a failure of the respondent to voluntarily surrender their weapons in compliance with the court's protective order.¹⁸⁸

Delaware's statute is the only one comparable to New Jersey's PDVA in that the search warrant can be authorized without the precondition of a failure to voluntarily surrender a weapon.¹⁸⁹ But, as the dissent in *Harris* points out, Delaware requires a showing that: (1) the respondent possesses a firearm; (2) the "[p]etitioner can describe, with sufficient particularity, both the type and location of the firearm"; and (3) "[r]espondent has used or threatened to use a firearm against the petitioner, or the petitioner expresses a fear that the respondent may use a firearm against them."¹⁹⁰ Currently, section 2C:25-28(j) of the New Jersey PDVA contains no such nexus requirement between the possession of the weapon by an alleged domestic abuser and the threat it poses to the victim.¹⁹¹ The three-pronged standard of evaluation developed by the New Jersey appellate division in *Johnson*, and later adapted and adopted by the New Jersey Supreme Court in *Dispoto*, does contain the requirement that the "defendant's possession or access to that weapon poses a heightened or increased risk of danger to the victim."¹⁹² However, the Magistrate must only find there is reasonable cause for this conclusion.¹⁹³

185. ME. REV. STAT. tit. 19-A, § 4006(2-A) (2012).

186. HAW. REV. STAT. § 134-7(f) (LexisNexis 2006).

187. CAL. PENAL CODE § 1524(a)(11) (West 2011). Though not explicitly stated in that section of the statute, a California court held that probable cause is the appropriate standard for the issuance of a search warrant under section 1524 in *Frazzini v. Superior Court*, 7 Cal.App.3d 1005, 1012 (1970).

188. *Harris*, 50 A.3d at 35; ME. REV. STAT. tit. 19-A, § 4006(2-A) (2012); HAW. REV. STAT. § 134-7(f) (LexisNexis 2006); CAL. PENAL CODE § 1524(a)(11) (West 2011); N.H. REV. STAT. ANN. § 173-B:4(ii) (2002).

189. *Harris*, 50 A.3d at 35; DEL. CODE ANN. tit. 10, § 1045(a)(11) (1999).

190. DEL. CODE ANN. tit. 10, § 1045(a)(11) (1999).

191. N.J. STAT. ANN. § 2C:25-28(j) (West 2005); *State v. Harris*, 50 A.3d 15, 36 (N.J. 2012) (Albin, J., dissenting).

192. *State v. Johnson*, 799 A.2d 608, 626 (N.J. Super. Ct. App. Div. 2002).

193. *Id.*; see also *supra* Part I.B.

B. *The New Jersey Prevention Against Domestic Violence Act Can Protect Victims Without Vitiating Constitutional Rights of Defendants*

The disparity between the approaches taken by New Jersey and other states does not necessarily mean that New Jersey needs to emulate any one of the other approaches; the PDVA and its application just need to conform to the requirements that warrants be based on probable cause contained in the Fourth Amendment of the U.S. Constitution, and Article I, Paragraph seven of the New Jersey Constitution.¹⁹⁴ The two dissenting justices in *Harris* offer a solution built on New Jersey case law that would protect victims from violence without violating the constitutional rights of defendants.¹⁹⁵ Justice Albin wrote:

[i]n my view, so long as the court makes a determination that there is (1) probable cause to believe that an act of domestic violence has been committed by the defendant; (2) probable cause to believe a search for and seizure of weapons is necessary to protect the life, health or well-being of a victim on whose behalf the relief is sought; and (3) probable cause to believe that the weapons are located in the place to be searched, a warrant issued under this statute is constitutionally sound.¹⁹⁶

This is simply an enhancement of the standard formulated in *Johnson* and *Dispoto*.¹⁹⁷ The dissenting judges insist that the standard of probable cause in a domestic violence situation, while heightened in comparison to reasonable cause, “would be somewhat different than” that for a criminal search warrant.¹⁹⁸ It would then appropriately cover prosecution for weapons found in plain view and violating sections of the criminal code, like those in *Harris*.¹⁹⁹

The New Jersey Legislature should alter section 2C:25-28(j) to include a test like the one proposed by the dissenting justices. In fact, a bill attempting to alter this very section of the statute was introduced in January of 2012.²⁰⁰ The amendment to the statute would require that both civil and criminal complaints under the PDVA to be heard exclusively in superior court rather than municipal court.²⁰¹ The

194. U.S. CONST. amend. IV, cl. 2; N.J. CONST. art. I, ¶ 7.

195. *State v. Harris*, 50 A.3d 15, 36 (N.J. 2012) (Albin, J., dissenting).

196. *Id.* (internal citations and quotation marks omitted).

197. *Id.*

198. *Id.*

199. *Id.*

200. Assemb. B. 1105, 215th Leg., 2012 Sess. (N.J. 2012).

201. *Id.*

Legislature has been willing to change the statute in the past to make it more effective²⁰² and is already in the process of changing the procedures.²⁰³ Adjusting the burden of proof to enable a search and seizure warrant issued under the PDVA to comport with the federal and state constitutions is a necessary change well within the reach of the Legislature.

The Fourth Amendment of the Constitution of the United States is “the supreme Law of the Land,” not a suggestion that can be disregarded.²⁰⁴ Other states’ legislatures and courts have taken this into account when drafting and enforcing their statutes concerning the seizure of weapons in domestic violence situations.²⁰⁵ It is high time for New Jersey to do the same. Domestic violence can be a heinous crime²⁰⁶ and absolutely deserves the strictest treatment and investigation possible, but this cannot and must not be accomplished at the expense of fundamental, constitutional rights. Therefore, New Jersey’s courts and/or legislature must require warrants under the PDVA section 2C:25-28(j) to show probable cause in regards not only to the act of domestic violence, but also to the possession of a deadly weapon and the threat it poses to the alleged victim.²⁰⁷

CONCLUSION

The Prevention of Domestic Violence Act’s issuance of a search and seizure warrant based on reasonable cause violates the Fourth Amendment of the United States Constitution and Article I, Paragraph seven of the New Jersey Constitution. Contrary to the majority’s holding in *State v. Harris*, the special-needs exception does not apply because: (1) the persons searched have no diminished expectation of privacy,²⁰⁸ and (2) obtaining a warrant is not impracticable in the

202. Since the current version of the statute was enacted in 1991, the PDVA has been amended four times. In fact, the warrant for the search and seizure was not part of the 1991 statute; it was added in the first amendment, which was enacted in 1994. Crimes—Domestic Violence—Stalking, ch. 94, sec. 4, § 12 P.L. 1991, c. 261 (C. 2C:25–28(j)) (1994), amended by N.J. STAT. ANN. § 2C:25-28(j) (West 2005).

203. Assemb. B. 1105, 215th Leg., (N.J. 2012).

204. U.S. CONST. amend. IV, cl. 2 (“This Constitution . . . shall be the supreme Law of the Land”). See also Article I, Paragraph 7 of New Jersey’s own state constitution, which contains its own formulation of the warrant clause, is also considered supreme. *Byrnes v. Boulevard Comm’rs of Hudson County*, 197 A. 667, 670 (N.J. Cir. Ct. 1938) *aff’d*, 3 A.2d 456 (1939) (“The supreme law of the state is its Constitution.”).

205. See *supra* Part IV.A.

206. See *supra* note 173.

207. See *supra* Part IV.B.

208. See *supra* Part II.B.

statutory scheme.²⁰⁹ Even if the special needs exception did apply, it would forgive the warrant entirely, not permit a warrant based on reasonable cause.²¹⁰ Furthermore, other exceptions to the warrant clause, including the emergency aid doctrine and the community caretaking doctrine, which were not explored by the court, are equally unsuited to bring the statute into compliance with the Fourth Amendment.²¹¹

The grave problem of domestic violence must be combated within the bounds of the Constitution.²¹² The warrant clause of the Constitution demands that there be probable cause as the basis for the warrant under the PDVA in regards to the threat of the weapon and the existence and location of the premises.²¹³ The New Jersey legislature should rectify the problem by redrafting the language in the statute. If New Jersey wants to preserve the right to prosecute for weapons violations discovered by these civil searches, then all it has to do is make sure that there is probable cause to issue the warrant to search. Until the statutory language is fixed, New Jersey's search and seizure of weapons with warrants based on reasonable cause under the PDVA will continue to violate the fundamental right of its citizens to be free from unreasonable searches and intrusions in their homes.

*Kelly Heuser**

209. *See supra* Part II.C.

210. *See supra* Part II.D.

211. *See supra* Parts III.A-B.

212. *See supra* Part IV.

213. U.S. CONST. amend. IV, cl. 2.

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