STATE OF NEW JERSEY,	:	SUPERIOR COURT OF NEW JERSEY
	:	APPELLATE DIVISION
Plaintiff-Respondent,	:	
	:	DOCKET NO.: A-000496-23
v.	:	
	:	
	:	On Appeal from the Judgment
	:	of Conviction of the
YONATHAN SELIGMAN,	:	the Superior Court
	:	Law Division,
	:	Hudson County
	:	
Defendant-Appellant.	:	
		Sat Below:
		Hon. John Young, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF
DEFENDANT-APPELLANT YONATHAN SELIGMAN
WHO IS IN CUSTODY

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STATEMENT OF PROCEDURAL HISTORY

In Hudson County Ind. No. 22-10-01309-S, defendant, Yonathan Seligman was charged with Maintaining/Operating a CDS Production Facility (1st Degree); Five counts of possession with Intent to Distribute (1st Degree); possession with intent to distribute (2nd Degree); possession with intent to distribute (3rd Degree); possession with intent to distribute (4th Degree); possession with intent to distribute while within 1,000 feet of school property (3rd Degree); possession with intent to distribute within 500 feet of real property compromising a public building (2nd Degree); possession of CDS (3rd Degree).

These charges arose from evidence recovered following the execution of a search warrant in Union City, New Jersey. (Da9) Defendant filed a motion to suppress, and the State requested the court conduct a testimonial hearing.

A testimonial hearing was thereafter conducted on June 22, 2017, and the court heard oral argument on April 27, 2018. (1T; 2T; respectively). The State's sole witness, Detective Jefte Pichardo, testified at the testimonial hearing. (1T). On March 11, 2019, Judge Young denied defendants' motion to suppress. (Da15 through Da36).

On November 7, 2022, Mr. Seligman entered a guilty plea to

Count 2 of the indictment charging Mr. Seligman with first degree, possession with intent to distribute CDS, contrary to N.J.S.A. 2C:35-5B(1). Pursuant to the plea agreement, Defendant was to be sentenced in the second-degree range, providing the trial court with a wide latitude as to the ultimate sentence.

On October 10, 2023, Defendant submitted a sentencing memorandum requesting that the trial court sentence Mr. Seligman to a flat term of Five Years in New Jersey State Prison. (Da27 through Da33).

On October 13, 2023, Defendant argued that the court sentence Mr. Seligman to a term of flat term of Five Years in New Jersey State Prison. Ultimately, Judge Young sentenced Mr. Seligman as a second degree-offender and sentenced Mr. Seligman to a flat term of Seven Years in New Jersey State Prison. (3T24-8 to 18);(Da103 through Da106).

On October 18, 2023, a Notice of Appeal was timely filed with the Appellate Division, and an Amended Notice of Appeal was filed on October 23, 2023 and assigned Docket No. A-000496-23. (Da107 through Da111).

STATEMENT OF FACTS

On or about February 14, 2021, Special Agent Michael Leung of the Homeland Security Investigation Newark Airport Border

Enforcement Security Task Force received information from Customs and Border Protection regarding a package that was intercepted at JFK Airport in New York State. Following a search, the package was determined to contain two plastic bags containing green in color pills. Purportedly, field tests were conducted on the green pills, which yielded a positive presumptive indication of MDMA/Ecstasy.

The postage of the parcel had a shipping label listing a delivery address of "Yoni Seligman, 908 22nd Street #1102, Union City, New Jersey 07087." It was determined that "908 22nd Street, #1102, Union City New Jersey 07087" is a nonexistent address. Following a brief investigation, law enforcement determined that the Defendant, Yonathan Seligman, resided at 809 22nd Street, #1102, Union City, New Jersey 07087. Based upon that information, Detective Enrique Diaz of the Union City Police Department, the affiant, believed that Yonathan Seligman was the intended recipient of the parcel and that the listed address of "908 22nd Street #1102, Union City, New Jersey 07087" was a typographical error. On February 18, 2021, the Honorable Vincent Militello, J.S.C. signed a Search Warrant, permitting law enforcement to enter and search the apartment. Further, the Search Warrant required that search must be made in the daytime or in the nighttime and must be made after knocking and announcing their intent. (Da9).

On February 19, 2021, members of the Union City Police Department, as well as members of the Homeland Security Investigation Newark Airport Border Enforcement Security Task Force responded to 809 22nd Street to conduct a controlled delivery and execute the court ordered anticipatory search warrant. Notably, the BWC footage provided within discovery, did not show Law Enforcement knocking and announcing their presence or intent. In fact, the BWC footage from several officers only show law enforcement using a metal ram to break open the door.

Thereafter, law enforcement forced entry into the residence, wherein Mr. Seligman was the only individual present, and conducted a search of the residence. The search yielded a series of suspected CDS, as well as other items such as labels, a scale and pill crusher, which were ultimately seized and placed into property and evidence. Thereafter, Mr. Seligman was charged.

LEGAL ARGUMENT

POINT I

THE TRIAL JUDGE ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE YIELDED FROM THE EXECUTION OF A SEARCH WARRANT (Da15 through Da36)

Defendant filed a motion to suppress evidence stemming from the execution of a search warrant. The trial judge denied the

motion to suppress. (Da15). Defendant submits that this ruling was erroneous.

"[A]n appellate court reviewing a motion to suppress must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record." State v. Elders, 192 N.J. 224, 243, (2007). The governing principle, then, is that "[a] trial court's findings should be disturbed only if they are so clearly mistaken that the interests of justice demand intervention and correction." Id. Even applying this deferential standard, it is submitted that the trial court erred in denying defendant's motion to suppress.

The warrant requirement embodied in both the Fourth Amendment to the United States Constitution, *U.S. Const.* amend. IV, and in paragraph 7 of Article I of the New Jersey Constitution, *N.J. Const.* art. I, ¶ 7, limits the power of the sovereign to enter our homes and seize our persons or our effects. A pre-existing common law requirement has been grafted onto that constitutional proscription: that, subject to limited exceptions, law enforcement must first knock and announce its purpose before it lawfully may enter a dwelling to execute a warrant. State v. Robinson, 200 N.J. 1, 3-4, 2009. "The knock-and-announce rule renders unlawful a forcible entry to arrest or search "where the officer failed first

to state his authority and purpose for demanding admission." Miller v. United States, 357 U.S. 301, 308 (1958).

Compliance with a knock-and-announce warrant requirement is a critical predicate for a reasonable search under the New Jersey Constitution. It is simply objectively unreasonable—without justification for police to ignore a knock-and-announce requirement contained in a warrant that they requested and obtained. Ignoring the requirement contravenes the search and seizure rights of New Jersey residents. State v. Caronna, 469 N.J. Super. 462, 471 (App. Div. 2021).

As mentioned above the Search Warrant entered in this case allowed Law Enforcement officers to enter the premises only after knocking and announcing their presence. However, despite such direction, every law enforcement officer failed to initiate their body worn camera prior to purportedly knocking and announcing.

In fact, a review of the Body Worn Camera footage provided does not show law enforcement officers knocking and announcing their presence. Nor does it show law enforcement allowing a reasonable time for Mr. Seligman to open the door. In fact, the Body Worn Camera footage provided only depicted law enforcement using a metal ram to open the door.

During the hearing the State elicited testimony from their sole witness, Union City Detective Jefte Pichardo. Detective Picardo testified that on February 19, 2021, he participated in the execution of a search warrant, at 809 22nd Street in Union City, NJ. (2T 6:10 through 15). He testified that his role was to be "stacked" outside the apartment and to assist in the search of the apartment after entering. (2T 6:23 to 7:3). He defined being "stacked" as having four or more officers stage outside the target's residence. (2T 7:5 through 9). He testified that he had no involvement in the investigation prior to that date, nor was he involved in the case aside from his assistance in the effectuation of the search warrant. (2T 11: 7 through 13). He testified he did not remember any noise or communication in the apartment (2T 9:7 through 9), and that he was in the second or third spot outside the apartment (2T 7:17 through 18). Further, he stated that "Sergeant Rodriguez and one of the agents from HSI" knocked on the door and "believed" he was stating "Police! Search Warrant" (2T 8:18 through 25; 11:5 through 6).

Detective Pichardo testified that his body worn camera (hereinafter body worn camera or BWC) was functioning on the date in question and that body worn camera that was utilized, began as video only for the first 20 to 30 seconds and then the audio

begins. (2T 9:10 though 19). Detective Pichardo testified that he turned his body worn camera only after the purported knock and announce and as they were entering the doorway. (2T 13:11 through 14). The State introduced, and was admitted without objection, S2, specifically Detective Pichardo's BWC into evidence. (Da; 2T 10 through 16). Notably, in the video, you cannot hear or see any of the 6 officers knock or announce their presence, as required by the search warrant.

On cross-examination, Detective Pichardo, conceded that there was no explanation or reason for not putting his BWC on before entering the building and assembling in front of the door. He testified that there were no exigent circumstances that would justify not placing his body worn camera on. (2T 13:19 through 23). He conceded that he should have put his bodycam on prior to assembling in front of the door, and prior to members of law enforcement purportedly knocking and announcing.

He acknowledged the presence of both an AG directive as well as a Union City Police Department policy that required him to activate his BWC on "whenever we make contact with an individual." (2T 15:5 through 24). He acknowledged the July 28, 2015 AG Directive that indicated that BWC shall be required to be activated in instances where an officer is making an arrest or when an

officer is conducting any kind of search. He conceded that he knew when he got set in the "stack" outside the apartment, that he would coming into contact with Mr. Seligman, as Mr. Seligman has previously opened his door to pick up the package. (2T 16:2 through 11). Lastly, Officer Pitchardo indicated that he "should have" put his body cam on prior to going onto that floor. (2T 19:2 through 7).

The State did not call any other witnesses, but stipulated to the fact that four other officers body worn camera footage were provided in discovery and all those body worn cameras were activated by their respective officers only after entering the apartment, in violation of the aforementioned directive and policies listed above.

As testified to by Detective Pitchardo, the Search Warrant entered in this case allowed law enforcement officers to enter the premises only after knocking and announcing their presence. However, despite such direction, and that several officers had body worn cameras on their persons, every single officer failed to timely put their body worn cameras on.

Defendant argued that due to the blatant failure of law enforcement timely activate their body worn camera, there was not sufficient credible evidence that the officers did in fact properly

knock and announce their presence, and as such, the State was unable to meet its burden in establishing that the effectuation of the search warrant was in fact constitutional. Further, Defendant argued that Defendant's constitutional rights were in fact violated, thereby warranting a suppression of the search warrant and all the evidence yielded from such search.

Additionally, the defendant argued because of Law enforcement's failure to timely initiate their body worn camera before executing the search warrant, the court should take a negative inference as to the testimony from Detective Pitchardo. The trial court failed to address this argument at all in its decision, and as such warrants a reversal back to the trial court to address this argument by the Defendant. It is submitted that had the court adopted a negative inference, the State could not have been able to meet its burden and the court should have granted defendant's suppression motion.

Notwithstanding the above error by the trial court, the trial court found that there was no evidence that the knock and announce requirement was not complied with, as there was credible testimony from Detective Pitchardo that he witnessed Officer Rodriguez knock and announce the presence of law enforcement. (Da24). The trial court further found that "the officer's failure to activate their body camera's is not a constitutional violation" and that "evidence

of criminality discovered pursuant to a valid warrant is a remedy saved for constitutional violations." (Da26). Accordingly, the trial court denied Defendant's motion.

It is respectfully submitted that the trial court erred in its decision. Firstly, as is evidenced by both the ever-expanding utilization and policy surrounding law enforcement use of body worn cameras, the justice system is evolving in regard to transparency, and utilization of body worn cameras. Indeed, this change in policy warrants a change in the law as to what the recourse is for failure to properly utilize body worn cameras, especially in critical stages of a case, wherein law enforcement is infringing on someone's residence to commencing a search and seizure of same.

Lastly, without requiring suppression, or at a minimum requiring a negative inference to be found, any actual consequence for the failure of law enforcement to utilize their body worn camera, especially at the most critical stage of a case, specifically when executing a search warrant on the residence of an individual, which goes to the very essence of someone's 4th amendment right against unreasonable search and seizure, there is absolutely nothing to deter law enforcement to properly follow police procedure and activate their body worn cameras. Accordingly, it is respectfully submitted that the trial court erred in denying Defendant's

suppression motion and the matter should be remanded back to the trial court for more findings to be made.

POINT II

DEFENDANT IS ENTITLED TO A RESENTENCING BECAUSE THE TRIAL JUDGE FAILED TO FOLLOW THE REQUIREMENTS OF THE CODE OF CRIMINAL JUSTICE IN IMPOSING SENTENCE (3T20-4 to 3T24-18)

Pursuant to the plea agreement, Defendant was to be sentenced as a second-degree offender. No specific term of years was agreed upon, and therefore the trial court had a wide latitude as to the term of years the Defendant would serve. At Defendant's sentencing, Defense counsel requested that the court sentence Mr. Seligman to a term of five years' New Jersey State Prison. The court sentenced Mr. Seligman to a term of seven years' New Jersey State Prison.

One of the purposes of the *Code of Criminal Justice* is to safeguard offenders against excessive, disproportionate, or arbitrary punishment. State v. Candelaria, 311 N.J. Super. 437, 454 (App. Div. 1998). "While an appellate court must defer to the sentencing findings of the trial judge, the deferential standard of review applies only if the trial judge follows the *Code*...if the trial court fails to identify relevant aggravating and mitigating factors, or merely enumerates them, or forgoes a

qualitative analysis, or provides little 'insight into the sentencing decision,' then the deferential standard will not apply." State v. Case, 220 N.J. 49, 65 (2014).

In the present case, Mr. Seligman was sentenced to a Flat term of Seven Years New Jersey State Prison. Defendant submits that the sentence imposed was in violation of the mandates of the Code and was excessive, and that consequently, a re-sentencing is required.

A. *The Sentencing Judge Failed to credit Mr. Seligman with all the Appropriate Mitigating Factors*

The aggravating and mitigating factors a court may consider in imposing sentence are set forth in N.J.S.A. 2C:44-1(a) and (b). The factors are not merely to be accorded equivalent values, but rather are to be weighed and balanced. See State v. Hodge, 95 N.J. 369 (1984). The statute "contemplates a thoughtful weighing of the aggravating and mitigating factors, not a mere counting of one against the other." State v. Denmon, 347 N.J. Super. 457,467-468 (App.Div.), certif.den. 174 N.J. 41 (2002). An explicit statement of the balancing of the aggravating and mitigating factors must be set forth on the record. State v. Natale, 184 N.J. 458, 489 (2005).

The Court below only found applicable mitigating factor 4 (there were substantial grounds tending to excuse or justify the

defendant's conduct, though failing to establish a defense). However, in addition to that mitigating factors Defendant is entitled, as argued in the trial court and as set forth in the sentencing memorandum submitted on behalf of Defendant (Da-27), to the benefit of the additional following mitigating factors:

Mitigating Factor #1- The defendant's conduct neither caused nor threatened serious harm and Mitigating Factor #2- The defendant did not contemplate that his conduct would cause or threaten serious harm.

Given that Mitigating Factors #1 and #2, were argued together at the trial court level and addressed together by the court, these mitigating factors are hereby addressed together herein.

As articulated to the lower court, Defendant's conduct was non-violent, and no victims were identified. Moreover, the trial court did not consider arguments that Mr. Seligman did not contemplate his conduct would cause harm due to the fact that he was in the throes of an ongoing substance abuse issue. Accordingly, it is submitted that Mr. Seligman was entitled to Mitigating Factors #1 and #2 and the court erred by not providing any weight to those factors.

Mitigating factor #9 – The character and attitude of the defendant indicate he is unlikely to commit another offense.

There was ample information in the record for the court to find that Mr. Seligman was entitled to Mitigating Factor #9.

As extensively argued below, Mr. Seligman had "taken every step possible to rehabilitate himself." (T3 9:3 through 4). This was evidenced by 54 letters from individual associated to him in the AA program, to his sponsor, and his Rabbi. At the time of Mr. Seligman's sentence, he was gainfully employed, and had removed himself from the area that contributed to his ongoing substance abuse issue. Moreover, Mr. Seligman himself, at the time of his sentencing, acknowledged to the court that he "allowed himself to be a part of something that could ruin lives and ant the chance to show my contrition by being a functioning party of my family and society as a whole." (T3 19:12 through 15).

Despite the above information, the trial court erred by improperly minimizing the extent of the rehabilitation by the Defendant. Further, the trial court erred in not considering the extent of Mr. Seligman's character and background, specifically identified in the character letters, his involvement and commitment to his sobriety and his gainful employment. Accordingly, the trial court erred by failing to find Mitigating Factor #9 and providing it with the appropriate weight.

Mitigating factor #10- The defendant is particularly likely to respond affirmatively to probationary treatment.

The trial court additionally erred in not finding Mitigating Factor #10, or alternatively minimizing Mr. Seligman's record of

appearance and compliance with his pretrial monitoring.

As argued below, Mr. Seligman "was fully compliant with his pre-trial monitoring," remained "offense free" and "appeared each and every time on time for court" providing his commitment to the conditions set and the requirements set forth by the court. (T3 8:17 through 20).

The lower court erred by not finding mitigating factor #10 or providing any weight towards Mr. Seligman's compliance with Pretrial Monitoring, as evidence that Mr. Seligman would respond positively to probation, if the sentence called for such.

Mitigating factor #11 – The imprisonment of defendant will entail excessive hardship to herself or her dependents.

As argued below, as evidenced by the 54 letters submitted to the lower court before sentencing and annexed to the defendant's sentencing memorandum, Mr. Seligman dramatically and significantly impacted the lives of many individuals, including many family members and friends.

However, most notably, the majority of the letters were from individuals who have also struggled with substance abuse issues and have attribute Mr. Seligman with

It is submitted that the trial court should have considered the support that Mr. Seligman provides for the individuals in his

various communities. Moreover, an extended removal of Mr. Seligman from his support system, most notably, the support received through the AA program, as well as the support and progress made through the Hamad Organization of Indiana, will certainly have a deleterious effect on his sobriety. The removal from this positive environment, specifically to go to State Prison for Seven Years, would certainly be an extreme hardship on Mr. Seligman.

Accordingly, the trial court erred in not finding mitigating factor #11 or applying any weight.

It is clear the lower court failed by not applying several mitigating factors. In light of these concerns, Defendant submits he is entitled to a resentencing, as the mitigating factors outweigh the aggravating factors, and the trial court should have sentenced Mr. Seligman to a flat term of Five years New Jersey State Prison.

CONCLUSION

For the foregoing it is respectfully urged that denial of Defendant's suppression motion be reversed, and the matter remanded to the trial court. In the alternative, defendant submits that he is entitled to a re-sentencing, as the trial court's sentence was excessive, having failed to credit Defendant with several mitigating factors.

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000496-23T4

STATE OF NEW JERSEY, Plaintiff-Respondent, v. JOHNATHAN SELIGMAN, Defendant-Appellant.	Criminal Action On Appeal from a Judgment of Conviction of the Superior Court of New Jersey, Law Division, Hudson County. Indictment No. 22-10-1309-S Sat Below: Hon. John Young Jr., J.S.C.

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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Dated: May 10, 2024

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STATEMENT OF PROCEDURAL HISTORY

On October 31, 2022, a Hudson County grand jury returned superseding Indictment No. 22-10-1309-S ("Indictment") charging Yonathan Z. Seligman ("defendant") in twenty counts with: first-degree maintaining or operating a CDS production facility contrary to N.J.S.A. 2C:35-4 (Count 1); first-degree possession with intent to distribute 3,4-methylenedioxymethamphetamine (MDMA) contrary to N.J.S.A. 2C:35-5a(1) and 5b(1) (Count 2); first-degree possession with intent to distribute lysergic acid diethylamide (LSD) contrary to N.J.S.A. 2C:35-5a(1) and 5b(6) (Count 3); second-degree possession with intent to distribute cocaine contrary to N.J.S.A. 2C:35-5a(1) and 5b(2) (Count 4); third-degree possession with intent to distribute ketamine contrary to N.J.S.A. 2C:35-5a(1) and 5b(13) (Count 5); second-degree possession with intent to distribute alprazolam contrary to N.J.S.A 2C:35-10.5(a)(4) (Count 6); five counts of second-degree possession of CDS with intent to distribute within five-hundred feet of a public housing facility contrary to N.J.S.A. 2C:35-7.1 (Counts 7 to 11); five counts of third-degree possession with intent to distribute CDS within one-thousand feet of a school zone contrary to N.J.S.A. 2C:35-7

(Counts 12 to 16); and, four counts of third-degree possession of CDS contrary to N.J.S.A. 2C:35-10(a)(1) (Counts 17 to 20). (Da1-6).[1]

On May 23, 2022, defendant filed a motion to suppress evidence obtained following a search of his apartment pursuant to a warrant. (Da7-8). On March 8, 2023, the trial court conducted a testimonial hearing on defendant's motion. (T). On April 26, 2023, oral arguments were conducted. (2T). On May 31, 2023, the trial court denied defendant's motion and set forth its reasons in a written opinion. (Da15-26).

On July 10, 2023, following the denial of his motion, defendant pleaded guilty to Count 2 of the Indictment. (Ra1-6). In exchange for his guilty plea, the State agreed to recommend that defendant be sentenced in the second-degree range, and to dismiss the other charges against him. Ibid.

On October 13, 2023, defendant appeared before the sentencing court. (3T). Pursuant to the plea agreement, the court sentenced defendant to a flat term of seven years in New Jersey State Prison, and dismissed the balance of the charges in the Indictment. (3T24-10 to 20). Following the pronouncement of his sentence, defendant moved the trial court for bail pending appeal and sought

[1] The State adopts abbreviations used in defendant's brief and additionally uses the following abbreviations:

Db – Defendant's brief

Ra – The State's appendix

a stay of his sentence. (3T25-17 to 26-12). The trial court denied the stay of his sentence, but gave defendant an opportunity to argue his motion for bail pending appeal. (3T27-5 to 7). On October, 16, 2023, his judgment of conviction was entered. (Da103-06). On November 3, 2023, the trial court denied defendant's motion for bail pending appeal. (Ra7).

On October 23, 2023 defendant filed his amended notice of appeal. (Da107-11). On March 14, 2024 he filed his brief. (Db1-18). This brief follows.

COUNTER STATEMENT OF FACTS

The State adopts the facts as set forth by the trial court in its May 31, 2023 Order denying defendant's motion to suppress evidence (Da15-26) stated as follows:

> On February 14, 2021, Special Agent Michael Leung of the Homeland Security Investigation Newark Airport Border Enforcement Security Task Force received information from Customs and Border Protection regarding a package that was intercepted at John. F. Kennedy airport in New York State. Following a search, the package was determined to contain two plastic bags containing green in color pills. Field tests were conducted on the green pills, which yielded a positive presumptive indication of MDMA/Ecstasy.
>
> The postage of the parcel had a shipping label listing a delivery address of "Yoni Seligman, 908 22nd Street No.1102, Union City New Jersey 07087." It was determined that "908 22nd Street No.1102, Union City New Jersey 07087" is a nonexistent address. After a

brief investigation, law enforcement determined that the Defendant resided at 809 22nd Street, No. 1102, Union City, New Jersey 07087.

On February 16, 2021, Detective Enrique Diaz (hereinafter "Detective Diaz") of the Union City Police Department received information from the Homeland Security Investigation Newark Airport Border Enforcement Security Task Force and the Port of New York/Newark Intelligence and Analytics Branch of a second parcel delivered. The shipping label delivery address was "Seligman, 809 22nd Street No.1102, Union City, New Jersey 07087." Based upon that information, Detective Enrique Diaz believed that Defendant was the intended recipient of the initial parcel and that the listed address of "908 22nd Street No.1102, Union City, New Jersey 07087" was a typographical error on the initial package.

On February 18, 2021, the Honorable Vincent Militello, J.S.C. signed a Search Warrant, permitting law enforcement to enter and search the 809 22nd Street, No. 1102, Union City apartment. The Search Warrant permitted the search be made in the daytime or in the nighttime and required law enforcement to knock and announce their intent.

On February 19, 2021, members of the Union City Police Department, as well as members of the Homeland Security Investigation Newark Airport Border Enforcement Security Task Force responded to 809 22nd Street to conduct a controlled delivery and execute the search warrant. Body camera footage does not capture audio of law enforcement knocking and announcing their presence, but body camera footage captures law enforcement's forced entry into the residence, and the entire search. Defendant was the only individual present. Defendant was arrested.

The subsequent search yielded 1,163/520 grams MDMA/Ecstasy tablets, 23.49 cocaine, 2.92 grams cocaine, 25.47 grams of Ketamine, 370 milligrams LSD, 102 tablets/15.36 grams A[l]prazolam, $51, 985 in United States currency, as well as other items such as labels, a scale and pill crusher. These items were placed into property and evidence.

[. . .]

Detective Pichardo testified he has worked for the Union City Police Department for ten years. For the past three years he has been assigned to the "quality of life" unit, which encompasses executing search warrants, street crimes, and other law enforcement functions consistent with those tasks.

Detective Pichardo participated in the execution of the search warrant for 809 22nd Street Unit 1102 in Union City on February 19, 2021. Detective Pichardo's role in the entrance procedure was to be part of the "stack." Detective Pichardo explained the "stack" refers to four or more officers' stage outside the target apartment. Detective Pichardo searched the apartment after he entered.

Detective Pichardo testified Sergeant Rodriguez and an agent from Homeland Security Investigation Task Force knocked and announced law enforcement was present. Detective Pichardo further testified Sergeant Rodriguez "knocked several times while stating 'police, search warrant.'" Detective Pichardo then stated officers waited twenty to twenty five seconds before police used a ram to breach the apartment.

Detective Pichardo testified he wore a body camera on the date in question. Detective Pichardo explained that the body camera is always recording. Upon initiating the recording however, the first twenty

to thirty seconds of the body camera's is only video with no sound. After that brief period the body camera records both visual and audio. He turned on his body camera prior to entering the apartment. Detective Pichardo further testified, after reviewing his body camera footage, he believed that the purpose of a pause in between several attempts by another police officer who utilized a ram to forcibly enter the apartment was so an officer could again state "police, search warrant." However, because the body camera was just activated no sound was recorded.

Detective Pichardo testified he was aware of the July 2015 Attorney General directive regarding body worn cameras. Detective Pichardo also testified he was aware of the Union City Police Department's policy regarding body cameras; he stated an officer's body camera should be activated "whenever an officer makes contact with an individual." Detective Pichardo testified he was not required to activate his body camera, but on cross examination conceded he should have activated his body camera prior to the knock and announce portion of the warrant's execution.

Detective Pichardo was unaware if any other officers activated their body cameras prior to the knock and announce. At the hearing, the State clarified that, while the other officers had their body cameras activated during the search, none of their body cameras audio recorded law enforcement knock and announce their presence.

[(Da17-20) (alterations in original, footnotes omitted).]

LEGAL ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS BECAUSE THE COURT FOUND, BASED ON CREDIBLE EVIDENCE, THAT POLICE COMPLIED WITH THE KNOCK-AND-ANNOUNCE REQUIREMENT.

Defendant contends that the trial court erred when it denied his motion to suppress evidence obtained from the execution of a search warrant of his apartment because, he argues, that the knock-and-announce requirement of the warrant was not complied with. Following a hearing on defendant's motion to suppress, the trial court – based on credible evidence – held that the police did in fact comply with the knock-and-announce requirement of the warrant. (Da15-26). In his brief, defendant contends that because the officers' body worn cameras did not capture the audio of the police announcing themselves before entering his apartment, they did not comply with the terms of the search warrant and the evidence obtained should have been suppressed pursuant to the exclusionary rule. In support of his contention, defendant submits two ultimately meritless arguments. First, he argues that the expansion and evolution of the policies regarding the use of body worn cameras "warrants a change in the law." (Db11). Second, he argues that by not "requiring suppression, or at a minimum requiring a negative inference to be found," the

trial court erred by denying his motion because this means that "there is absolutely nothing to deter law enforcement to properly follow police procedure and activate their body worn cameras." Ibid. For the reasons that follow, this court should reject his arguments.

An appellate court's review of a trial court's decision on a motion to suppress is limited. State v. Ahmad, 246 N.J. 592, 609 (2021). Appellate courts "must uphold the factual findings underlying the trial court's decision" on a motion to suppress 'as long as those findings are supported by sufficient credible evidence in the record.'" Ibid. (quoting State v. Elders, 192 N.J. 224, 243 (2007)). Deference is given "to those findings in recognition of the trial court's 'opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.'" Ibid. (quoting Elders, 192 N.J. at 244). Generally, a reviewing court "will not disturb the [trial] court's factual findings unless they are 'so clearly mistaken that the interests of justice demand intervention and correction.'" State v. Gray, 474 N.J. Super. 216, 222 (App. Div. 2022) (quoting State v. Goldsmith, 251 N.J. 384, 398 (2022)). "A trial court's legal conclusions, however, and its view of 'the consequences that flow from established facts' are reviewed de novo." Goldsmith, 251 N.J. at 398 (quoting State v. Hubbard, 222 N.J. 249, 263 (2015)). "[O]n appeal [appellate court's] may only consider whether the motion to suppress was properly decided

based on the evidence presented at that time." State v. Gibson, 318 N.J. Super. 1, 9 (App. Div. 1999). Appellate courts generally defer to a trial court's findings of facts where "more than one reasonable inference can be drawn from the review of a video recording." State v. S.S., 229 N.J. 360, 380 (2017).

"The Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution, in almost identical language, protect against unreasonable searches and seizures." State v. Smart, 253 N.J. 156, 164-65 (2023) (quoting State v. Nyema, 249 N.J. 509, 527 (2022)). When executing a search of a residence pursuant to a validly issued warrant, the terms of the warrant must be "strictly respected." State v. Rockford, 213 N.J. 424, 441 (2013). "In New Jersey, the manner of entry into a residence is – and has been – a significant and critical predicate of a reasonable search and seizure." State v. Caronna, 469 N.J. Super. 462, 489 (App. Div. 2021) (citing State v. Goodson, 316 N.J. Super. 296, 305-06 (App. Div. 1998).

"A search warrant containing a knock-and-announce requirement does not authorize police – absent exigent circumstances – to ignore the obligation to knock and announce their presence before entering the dwelling." Id. at 497. Our Supreme Court has explained "[t]he knock-and-announce rule renders unlawful a forcible entry to arrest or search 'where the officer failed first to state his authority and purpose for demanding admission.'" State v. Robinson, 200

N.J. 1, 13-14, (2009) (quoting Miller v. United States, 357 U.S. 301, 308 (1958)). "A necessary corollary of the knock-and-announce rule is that when 'the police announce . . . their presence and [are] greeted with silence . . . a reasonable time must elapse between the announcement and the officer's forced entry.'" Id. at 16 (alteration in original) (quoting State v. Johnson, 168 N.J. 608, 621(2001)).

This Court has held that the "exclusionary rule bars the admission of evidence seized following an unreasonable entry into a dwelling in violation of a knock-and-announce requirement contained in a search warrant." State v. Nieves, 476 N.J. Super. 405, 431 (App. Div. 2023) (citing Caronna, 469 N.J. Super. at 495). The exclusionary rule not only deters constitutional violations, but also provides an "indispensable mechanism for vindicating the constitutional right to be free from unreasonable searches." State v. Carter, 247 N.J. 488, 530 (2021). (quoting State v. Novembrino, 105 N.J. 95, 157-58 (1987)). The suppression of evidence is an appropriate remedy where a defendant's constitutional rights have been violated. Novemberino, 105 N.J. at 157-58 (declining to recognize a good faith exception to the exclusionary rule because doing so would "undermine the constitutionally-guaranteed" protections that inhere in Article 1, Paragraph 7 of the New Jersey Constitution). However, this court has also cautioned that "[s]uppression of evidence ... has always been our

last resort, not our first impulse." Caronna, 469 N.J. Super. at 490 (quoting State v. Presley, 436 N.J. Super 440, 459 (App. Div. 2014).

Defendant provides no principled reason for this court to reject the trial court's finding that police complied with the knock-and-announce requirement of the warrant. At the suppression hearing, Detective Pichardo testified before the trial court that both an agent from the Homeland Security Investigation Task Force and Sergeant Rodriguez knocked on defendant's door and stated "police, search warrant"; waited twenty to twenty-five seconds and then gained entry into defendant's apartment; and, that the pause depicted on the body cam footage in between attempts to enter defendant's apartment was so that an officer could announce their presence. (T8-12 to 18; 9-1 to 5; 11-2 to 6). Moreover, the trial judge clearly found Detective Pichardo's testimony credible when the detective explained that "that the purpose of the pause [clearly visible on the body cam footage] in between several attempts . . . to forcibly enter the apartment was so an officer could again state 'police, search warrant.'" (Da19-20) (emphasis added). Based on the detective's credible testimony, the trial court found – as a fact – that police did knock and announce their presence before gaining entry into defendant's apartment and complied with the terms of the search warrant. (Da24). These "factual findings and legal conclusion clearly are supported by sufficient credible evidence in the record and, hence, are unassailable."

Robinson, 200 N.J. at 16; see also S.S., 229 N.J. at 380. The trial court properly ruled that

> [t]here is no evidence the knock and announce requirement was not complied with. There is credible testimony from Detective Pichardo that he witnessed Officer Rodriguez knock and announce the presence of law enforcement. The officers then waited twenty to twenty five seconds before forcibly entering the apartment. Officer Pichardo's body camera was activated immediately prior to entering the apartment and captured the entire search.
>
> [(Da24).]

Defendant contentions hinge on the fact that the first thirty seconds of the police body cam footage did not record audio of them announcing their presence. He advances that this alone should have resulted in the suppression of the evidence obtained from the search because the police arguably violated procedure by not turning on their body cameras earlier. In support of his claim, defendant argues that change in the law is required to keep up with evolving polices regulating the use of police body cam. Additionally, he argues that because the trial court failed to find a "negative inference" against the State for not providing the audio of the police announcing themselves prior to the search, "there is absolutely nothing to deter law enforcement to properly follow police procedure and activate their body worn cameras." (Db11). Defendant's arguments must fail for three reasons. First, as discussed above, the trial court

properly found that the knock-and-announce requirement of the search warrant was in fact complied with. Second, as correctly held by the trial court, "even if the officer's failure to activate their cameras is deemed a violation, the exclusionary rule, a punitive court created sanction to deter police misconduct, is not the appropriate remedy for a violation of a police procedure contained in the Attorney General directive." (Da25). And finally, a rebuttable presumption that exculpatory evidence was destroyed when police do not utilize their body worn cameras as mandated by N.J.S.A. 40A:14-118.5(q)(2) does not apply here because the search pre-dates the statute; and, even if it did apply the State successfully rebutted the presumption because – as discussed above – the trial court found that the knock-and-announce requirement was complied with.

Defendant's exclusionary rule argument is misplaced. At the suppression hearing, Detective Pichardo testified that a body camera is always recording, and "when you hit the button, that starts the audio and [video is] capture[d] back 20 or 30 seconds prior to the button being pressed". (T24-17 to 19). At the hearing, the trial judge correctly noted that the issue was not whether the police turned on their body cameras; rather "[i]t's the point when [they] turned it on." (T18-2 to 3). Rejecting defendant's argument that an alleged breach of police procedure warrants the application of the exclusionary rule, the trial court correctly reasoned that:

Both the State and defense counsel agree that Attorney General Law Enforcement Directive No. 2015-1 was the body worn camera directive in effect at the time of the search. [(Ra8-31).]

Counsel for Defendant cites to section 5.4, which states, "when feasible, a BWC should be activated before a uniformed officer arrives at the scene of a dispatched call for service of other police activity listed in section 5.2." (emphasis added). Section 5.2 sets forth several examples of situations which require an officer to activate his body worn camera, including that an officer's body worn camera is to be activated when "the officer is conducting any kind of search (consensual or otherwise)."

[. . .]

It is arguable whether an officer's body worn camera is required to be activated to encompass the knock and announce step prior to the execution of a warrant. A plain reading of the directive could support the interpretation that officers are required to active their body camera prior to the knock and announce portion of a warrant execution. On the other hand, it could be argued an officer's body worn camera must be activated prior to the actual search. However, even if the officer's failure to activate their cameras is deemed a violation, the exclusionary rule, a punitive court rule created sanction to deter police misconduct, is not the appropriate remedy for a violation of a police procedure contained in an Attorney General directive. The directive itself states such.

[. . .]

Here, the officer's failure to activate their body worn cameras is not a constitutional violation. Law enforcement knocked and announced their presence; the only issue is the failure to record audio

> demonstrating officers knocked and announced. Suppression of narcotics and other evidence of criminality discovered pursuant to a valid warrant is a remedy saved for constitutional violations. A remedy is not proscribed by any precedent, nor the Attorney General directive which Defendant relies upon.
>
> [(Da24-26) (emphasis added).]

The trial court properly held that even if the failure of police officers to record the first thirty seconds of audio on their body worn cameras is a violation of the Attorney General Directive, it does not amount to a violation of the defendant's constitutional rights; and, therefore the application of the exclusionary rule is not warranted. (Da25-26). This Court recently considered police conduct in executing a search warrant in Nieves. In Nieves, this Court held that where the police – while executing a search warrant – waited less than five-seconds before entering the defendant's residence after knocking and announcing their presence, suppression of evidence was warranted because the officers did not wait a reasonable amount of time before forcibly entering the premises. Nieves, 476 N.J. Super. at 429-30. This Court reasoned that

> [t]o hold otherwise under the circumstances presented – where the purported pause following the officers' first knock-and-announce is tantamount to no pause at all – would impermissibly render the constitutional requirement that officers wait a reasonable time prior to making a forcible entry during the execution of a knock-and-announce search warrant a meaningless nullity.

[Id. at 430.]

Unlike Nieves, here the trial court properly concluded that suppression was not warranted because there is no constitutional requirement that police record the audio of themselves announcing their presence prior to executing a warrant. (Da24). Defendant's argument that the expansion in the use of body camera policies requires a change in the law is unfounded. Essentially, defendant is arguing that an alleged breach of the Attorney General Directive is tantamount to a breach of the constitutional rights of defendant. The trial court rightly declined to expand the application of the exclusionary rule to apply in cases of alleged violations of police procedure reasoning that such a remedy is "saved for constitutional violations". Ibid. Because there was no violation of defendant's constitutional rights, the exclusionary rule does not apply to the instant case, and this Court should reject his arguments.

Next, defendant's argument that a rebuttable presumption should apply is similarly without merit. In Jones, this Court determined "the rebuttable presumption set forth in N.J.S.A. 40A:14-118.5(q)(2) [that exculpatory evidence was destroyed or not captured when the body worn cameras of a police officer is not properly utilized] is applicable at suppression hearings," but it refused to find that a defendant is always entitled to the rebuttable presumption. State v. Jones, 475 N.J. Super. 520, 535, leave to appeal denied, 255 N.J. 508 (2023).

This Court then left it to the discretion of the motion court to determine whether the rebuttable presumption applies and, if so, whether the State has successfully rebutted that presumption. Ibid. The defendant's rebuttable presumption argument fails primarily because the search of his apartment pre-dated the statute[2]. Even assuming that it did apply, the presumption was rebutted because as discussed above the trial court found that the knock-and-announce requirement was satisfied based on sufficient credible evidence in the record.

For the foregoing reasons, it is urged that this Court uphold the trial court's denial of defendant's suppression motion.

[2] The statute became effective on November 20, 2023. The search of defendant's apartment was executed on February 19, 2021. (Da18).

POINT II

THE TRIAL COURT PROPERLY APPLIED MITIGATING FACTORS TO DEFENDANT'S SENTENCE.

Defendant next claims that the sentencing court erred when it did not credit defendant with mitigating factors (1), (2), (9), (10), and (11). He contends that because the sentencing judge did not credit him with these mitigating factors, "the sentence imposed was in violation of the mandates of the Code and was excessive, and that consequently, a re-sentencing is required." (Db13). His claim is without merit and should be rejected by this Court.

On review, appellate courts are deferential to sentencing determinations and "must not substitute [their] judgment for that of the sentencing court." State v. Fuentes, 217 N.J. 57, 70 (2014). Generally, an appellate court should defer to the sentencing court's factual findings and should not "second-guess" them. State v. Case, 220 N.J. 49, 65 (2014). "The sentence must therefore be affirmed unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found were not 'based upon competent credible evidence in the record;' or (3) 'the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience.'" State v. Rivera, 249 N.J. 285, 298 (2021) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

In imposing a sentence within the provided range, a sentencing court must first identify any relevant aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and (b) and explain the evidential basis for each. State v. Case, 220 N.J. 49, 64 (2014). The sentencing court must then balance those relevant aggravating and mitigating factors by qualitatively assessing each factor and assigning it appropriate weight given the facts of the case at hand. Fuentes, 217 N.J. at 72-73.

"[W]here mitigating factors are amply based in the record before the sentencing judge, they must be found." State v. Dalziel, 182 N.J. 494, 504 (2005). While it is true that "[m]itigating factors that 'are called to the court's attention' should not be ignored," only "mitigating factors 'supported by credible evidence' are required to 'be part of the deliberative process.'" See Case, 220 N.J. at 64 (first quoting State v. Blackmon, 202 N.J. 283, 297 (2010) and then Dalziel, 182 N.J. at 505.) "[O]ur case law does not require . . . that the trial court explicitly reject each and every mitigating factor argued by a defendant," particularly when an appellate court "can readily deduce from the sentencing transcript" the trial court's reasoning. State v. Bieniek, 200 N.J. 601, 609 (2010). "It is sufficient that the trial court provides reasons for imposing its sentence that reveal the court's consideration of all applicable mitigating factors in reaching its sentencing decision." Ibid.

Defendant's alleges that the sentencing court did not credit him with all the appropriate mitigating factors under N.J.S.A. 2C:44-1(b). However, the record clearly shows that the sentencing court carefully reviewed all applicable statutory factors and properly applied them to defendant's sentence.

Defendant first argues mitigating factors (1) and (2) – the defendant's conduct neither caused nor threatened serious harm, and the defendant did not contemplate that the defendant's conduct would cause or threaten serious harm – should have applied. Defendant argues that his conduct was "non-violent, and no victims were identified", and that the sentencing court "did not consider arguments that [defendant] did not contemplate that his conduct would cause harm due to the fact that he was in the throes of an ongoing substance abuse issue." (Db14). His arguments lack merit. When considering the applicability of mitigating factor (1) and (2), a sentencing court must consider the circumstances of the offence itself. See State v. Molina, 114 N.J. 181, 185 (1989); see also State v. Cullen, 351 N.J. Super. 505, 551 (App. Div. 2002) (holding that because the defendant was in possession of a single baggie containing .33 grams of cocaine, mitigating factors (1) and (2) would apply to his sentence.)

In rejecting the applicability to mitigating factors (1) and (2), the sentencing judge found that:

> The difficulty I have with some of the proposed mitigating factors is that this isn't [defendant's] first go around. And having been through the throes of addiction, to say you don't understand the seriousness of distribution of large-scale narcotics has on families, society, individuals, epidemic in this country of overdose, death's someone who is in our recovery court program, that's difficult to sell this Court on. So, I can't. I can't find that you didn't threatened to cause serious harm. It's a large-scale operation. I mean, we're not talking about somebody with a few bags of heroin on the side of the street. All right? These drugs were going somewhere, and they're going to ruin lives and ruin families and put more people in these courtrooms. That's where those drugs were going.
>
> He knew what was going to happen. Now, whether he wanted it to happen or not may be a different story, but he certainly was aware that these drugs were going on the – that's how he was making his money. He wasn't using them. He was selling them, making money 50 plus thousand I think was found in the house when it was raided. So, I really don't find mitigating factors 1 or 2 applies.
>
> [(3T20-13 to 21-12) (emphasis added).]

Given the quantity of drugs recovered from defendant's apartment, the sentencing judge properly rejected defendant's argument that mitigating factors (1) and (2) should apply. This case is distinguishable from Cullen, where this Court held that mitigating factor (1) and (2) applied to the defendant's sentence because he only possessed one baggie containing .33 grams of cocaine. 351 N.J. Super at 511. Unlike Cullen, where the defendant had a single baggie of cocaine, here the trial court properly found that defendant was engaged in a "large-scale

operation" of drug distribution. (3T20-22 to 23). The search of defendant's apartment yielded "1,163/520 grams MDMA/Ecstasy tablets, 23.49 cocaine, 2.92 grams cocaine, 25.47 grams of Ketamine, 370 milligrams LSD, 120 tablets/15.36 grams A[l]prazolam". (Da18). The sentencing court correctly determined that because of the scale of defendant's drug distribution operation; and, because this was not defendant's "first go around" with the criminal justice system, it was not possible to conclude that he did not know that his actions would cause harm to others. (3T20-13 to 22). Therefore, the sentencing court correctly decided that mitigating factors (1) and (2) did not apply.

Defendant's argument regarding mitigating factor (9) – the character and attitude of the defendant indicate that he is unlikely to commit another offense – is similarly meritless. Indeed, sobriety alone is insufficient for finding of mitigating factor (9). See State v. Locane 454 N.J. Super 98, 129 (App. Div. 2018) (holding that the defendant's sobriety, given her past conditional discharge in municipal court for marijuana possession, was not adequate support for finding mitigating factors that defendant's conduct was the result of circumstances unlikely to recur and that the character and attitude of the defendant indicated that she was unlikely to commit another offense). Here, the sentencing judge found that:

> I don't' find that his character is such unlikely he would commit another offense. He committed this

> offense while he was on drug court[3] probation, apparently, resulted in his termination, and whether that program was a wake up call for him or not, I don't know. We won't know. I mean, the changes he's experienced are relatively short-lived in terms of the length of addition that he suffered from. He got out of jail a little more than a year ago and has made – has made certainly efforts to improve himself. However, 14 months while under supervision of the court I don't think provides significant evidence for this Court to determine his character and attitude is such that he wouldn't commit another offense. He's committed offense while under the supervision of court where there are more stringent probationary programs designed to address the very specific problems he was facing.
>
> [(3T21-24 to 22-16) (emphasis added).]

Here, the sentencing judge found defendant's assertion of being sober and crime free pre-trial was insufficient for the application of mitigating factor (9) to his sentence. In fact, the sentencing judge found that aggravating factor (3) – the risk that the defendant will commit another offense – applied to defendant. (Da105); See State v. Towey, 244 N.J. Super. 582, 593-94 (App. Div. 1990) (holding that the application of mitigating factor (9) is to be weighed against aggravating factor (3)). Certainly, this was not defendant's first contact with the criminal justice system; and importantly, he committed the instant offenses

[3] Although the sentencing court identifies the program as "drug court," effective January 1, 2022, the Drug Court Program was renamed to the New Jersey Recovery Court Program to better reflect its primary goal.

"while he was on drug court probation." (3T21-25 to 22-4); See Locane, 454 N.J. Super at 129 (holding that defendant's previous contact with the criminal justice system undermined a conclusion that mitigating factor (9) applied to her sentence). Moreover, as determined by the trial court, his "14 month sobriety while under supervision of the court" was not significant in determining the applicability of mitigating factor (9). (3T22-9 to 12). Therefore, the sentencing court properly rejected the application of mitigating factor (9).

Regarding factor (10) – the defendant is particularly likely to respond affirmatively to probationary treatment – the sentencing judge correctly noted that "I don't think is appropriate for the Court to even consider. Probation is not in the cards under any sense in this case." (3T22-17 to 19). Defendant pleaded guilty to a second-degree charge of possession with the intent to distribute which carried with it a presumption of imprisonment. N.J.S.A. 2C:44-1(d); (Ra1-6). This Court has held that when a defendant is convicted of an offense with a presumption of imprisonment, probation is generally not available and therefore this mitigating factor does not ordinarily apply. State v. Sene, 443 N.J. Super. 134, 144-145 (App. Div. 2015). Our Supreme Court has held that a court may, in its discretion, impose a sentence other than imprisonment upon conviction of a first or second-degree crime in those "'truly extraordinary and unanticipated' cases where the 'human cost' of punishing a

particular defendant to deter others from committing his offense would be 'too great.'" State v. Evers, 175 N.J. 355, 389 (2003) (quoting State v. Rivera, 124 N.J. 122, 125 (1991). In Evers, the Court explained that the

> defendant's status as a first-time offender, 'family man,' 'breadwinner,' and esteemed member of the community, however commendable and worthy of consideration in deciding the length of his term of incarceration, is not so extraordinary as to alter the conclusion that his imprisonment would not constitute a serious injustice overriding the need for deterrence.
>
> [Id. at 400.]

In his brief, defendant argues that he fully complied with his pre-trial conditions and posits that the trial court erred when it did not credit him with mitigating factor (10). However, defendant fails to explain what the "truly extraordinary and unanticipated circumstances" were that justified the conclusion that the statutory presumption of incarceration should not apply to him. Moreover, defendant was already in the Recovery Court Program when he committed the instant offenses outlined in the Indictment. Because defendant pleaded guilty to an offense which carried with it a presumption of incarceration, and because he failed to demonstrate the exacting standard justifying a sentence other than imprisonment, the sentencing court properly rejected the application of mitigating factor (10) to his sentence.

Defendant's final argument with respect to mitigating factor (11) – imprisonment of the defendant will entail excessive hardship to himself or his dependents – should also be rejected by this Court. Defendant argues that the "trial court should have considered the support that [defendant] provides for the individuals in his various communities" and that "an extended removal of [defendant] from his support system . . . will certainly have a deleterious effect on his sobriety". (Da16-17). His arguments are, once again, misplaced. The trial court correctly noted that "[the standard is] not a hardship. It's an excessive hardship. What is presented here in terms of the work he's doing is not such a hardship that I find it to be excessive, and I don't find mitigating factor 11 applies." (3T22-20 to 24). For mitigating factor (11) to apply, a defendant must show that he would be suffering a hardship distinct from one suffered by similarly placed defendants. See Locane, 454 N.J. Super at 129-30 (where this Court questioned the weight given to mitigating factor (11) where the hardship suffered by the defendant's children was not distinct from those suffered from any other incarcerated defendant's children). Defendant stands in no different position than any other individual facing incarceration upon conviction. Defendant makes absolutely no showing of a distinct hardship in the instant case, and therefore the trial court correctly ruled that mitigating factor (11) did not apply to defendant.

Because the sentencing court properly considered mitigating and aggravating factors under N.J.S.A. 2C:44-1(a) and (b), this Court should affirm defendant's sentence.

CONCLUSION

For the foregoing reasons, the State urges this Court to AFFIRM the trial court's denial of defendant's motion to suppress, and AFFIRM his sentence.

Respectfully submitted,

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Dated: May 10, 2024

STATE OF NEW JERSEY,	:	SUPERIOR COURT OF NEW JERSEY
	:	APPELLATE DIVISION
Plaintiff-Respondent,	:	
	:	DOCKET NO.: A-000496-23
v.	:	
	:	
	:	On Appeal from the Judgment
	:	of Conviction of the
YONATHAN SELIGMAN,	:	the Superior Court
	:	Law Division,
	:	Hudson County
	:	
Defendant-Appellant.	:	
		Sat Below:
		Hon. John Young, J.S.C.

REPLY BRIEF ON BEHALF OF DEFENDANT-APPELLANT YONATHAN SELIGMAN WHO IS IN CUSTODY

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STATEMENT OF PROCEDURAL HISTORY

Mr. Seligman relies on the procedural history set forth in his Appellant's brief.

STATEMENT OF FACTS

Mr. Seligman further relies on the statement of facts set forth in his Appellant's brief.

LEGAL ARGUMENT

POINT I

THE STATE MISSAPPLIES THE RELEVANT CASELAW IN SUPPORT OF THE TRIAL COURT'S ERROR IN FAILING TO SUPPRESS EVIDENCE SEIZED PURSUANT TO NO KNOCK WARRANT (Da15 through Da36)

Mr. Seligman relies primarily on his initial appellant's brief, but addresses the following issues raised in the State's respondent's brief. The State mischaracterized Mr. Seligman's argument, specifically by stating in response that "there is no evidence" officers failed to knock and announce their presence before resorting to the ram. (State's Brief, 15). Defendant submits that this argument is unavailing and must be disregarded by the Court.

Compliance with a knock-and-announce warrant requirement is a critical predicate for a reasonable search under the New Jersey Constitution. It is simply objectively unreasonable—without justification for police to ignore a knock-and-

announce requirement contained in a warrant that they requested and obtained. Ignoring the requirement contravenes the search and seizure rights of New Jersey residents. State v. Caronna, 469 N.J. Super. 462, 471 (App. Div. 2021).

Officer Pitchardo, as noted in Appellant's initial brief, was aware of the relevant AG Directive and Union City Policy, and more importantly conceded "should have" put his BWC on prior to going getting set up in the "stack." (2T 19:2 through 7).

Against this backdrop, the State posits "there is no evidence," the knock and announce requirement was not complied with. (Db15). This is a creative end-around the fact that potential evidence indicating officers did not comply with relevant AG Directives and departmental policy would be available but for the fact that the officers **all** had audio on their BWC turned off—spoiling any potential evidence by no fault of Mr. Seligman. While the State is certainly free—as it did—to advance the argument that no negative inference should be drawn. The trial court failed to address this argument at all in its decision, and as such warrants a reversal back to the trial court to address this argument by the Defendant. It is submitted that had the court adopted a negative inference, the State could not have been able to meet its burden and the court should have granted defendant's suppression motion.

Moreover, logically speaking, without any actual consequence for the failure of law enforcement to utilize their respective BWC, at a critical juncture in an

investigation, i.e., when executing a search warrant on the residence of an individual; which goes to the very essence of someone's 4th amendment right against unreasonable search and seizure, there is nothing else to deter law enforcement from not properly following proper procedure and activating their body worn cameras. Therefore, it is again submitted that the trial court erred in denying Defendant's suppression motion and the matter should be remanded back to the trial court for more findings to be made.

POINT II

STATE'S ARGUMENT REGARDING CLAIM DEFENDANT IS NOT ENTITLED TO A RESENTENCING, IS UNAVAILING TO PRESENT MATTER, BECAUSE THE TRIAL JUDGE FAILED TO FOLLOW THE REQUIREMENTS OF THE CODE OF CRIMINAL JUSTICE IN IMPOSING SENTENCE DEFENDANT (3T20-4 to 3T24-18)

Defendant urges this Court to look past the distinguishable caselaw relied on by the State in its brief, and determine the sentence imposed was in violation of the mandates of the Code thus making it excessive—and that consequently, a re-sentencing is required. Mr. Seligman relies on his initial Appellant's brief but addresses issues with the State's argument in response to this point.

A. *The Sentencing Judge Failed to credit Mr. Seligman with all the Appropriate Mitigating Factors*

As noted, the aggravating and mitigating factors a court may consider in

imposing sentence are set forth in N.J.S.A. 2C:44-1(a) and (b).

The Court below only found applicable mitigating factor 4 (there were substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense). However, in addition to that mitigating factor Defendant is entitled, as argued in the trial court and as set forth in the sentencing memorandum submitted on behalf of Defendant (Da-27), to the benefit of the additional mitigating factors set forth in his appellant's brief. Defendant adds the following arguments regarding the following mitigating factors discounted in the State's brief (Db20-24):

Mitigating Factor #1- The defendant's conduct neither caused nor threatened serious harm and Mitigating Factor #2- The defendant did not contemplate that his conduct would cause or threaten serious harm.

Given that Mitigating Factors #1 and #2, were argued together at the trial court level and addressed together by the court, these mitigating factors are hereby addressed together herein.

Briefly, in addressing the State's argument on this point it is important to look at this Court's ruling in State v. Cullen, 351 N.J. Super. 505, 551 (App. Div. 2002). The State attempts to limit the significance of this Court's decision in Cullen, by intimating that the Court's decision to find these two mitigating factors applied only to first time offenders is simply inaccurate. Simply put, the nature of addiction often

means that those in the throes of addiction will continue to reoffend, as the State is undoubtedly aware of, all too well.

Mitigating factor #10- The defendant is particularly likely to respond affirmatively to probationary treatment.

The trial court additionally erred in not finding Mitigating Factor #10, or alternatively by minimizing Mr. Seligman's record of appearance and compliance with his pretrial monitoring. As noted, Mr. Seligman "was fully compliant with his pre-trial monitoring," remained "offense free" and "appeared each and every time on time for court" proving his commitment to the conditions and the requirements set forth by the court. (T3 8:17 through 20).

In response, to the claim that the sentencing court abused its discretion the State merely points to said decision of the sentencing court, "I don't think is appropriate for the Court to even consider. Probation is not in the cards under any sense in this case." (3T22-17 through 19). Further, the State's contention that this Court's decision in State v. Sene, 443 N.J. Super. 134, 144-145 (App. Div. 2015), somehow precludes this mitigating factor is misplaced. It was truly "extraordinary" that Mr. Seligman was able to recover his sobriety and kick a horrific pattern of drug abuse during his nine-month period of pre-trial monitoring. Thus, Mr. Seligman is the exact kind of individual that this Court identified as an "extraordinary" case in

Sene.

CONCLUSION

Thus, it is respectfully urged that the State's arguments be seen for what they are—unavailing to the present matter. Defendant respectfully request that denial of Defendant's suppression motion be reversed, and the matter remanded to the trial court. In the alternative, defendant submits that he is entitled to re-sentencing, as the trial court's sentence was excessive, having failed to credit Defendant with several mitigating factors.

Respectfully submitted,

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