SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000845-22

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
	:	
Plaintiff-Respondent,	:	On Appeal From a Judgment of
	:	Conviction of the Superior
v.	:	Court of New Jersey, Law
	:	Division, Middlesex County
JOSE RODRIGUEZ,	:	
also known as	:	
JOSE E. RODRIGUEZ	:	
	:	Sat Below:
	:	Hon. Michael A. Toto, P.J.Cr.
Defendant-Appellant.	:	Hon. Andrea G. Carter, J.S.C.
	:	

BRIEF ON BEHALF OF DEFENDANT-APPELLANT

On the Brief:

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DEFENDANT IS CONFINED

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STATEMENT OF PROCEDURAL HISTORY

The Appellant, hereinafter referred to as Mr. Rodriguez, was arrested on March 1, 2017, and on January 30, 2018, he was indicted by a state Grand Jury in Indictment No. 18-01-00013-S, with possession with intent to distribute cocaine, in violation of N.J.S.A. 2C:35-5a.(1)/35-5b(1) (Count 1); possession with intent to distribute marijuana in violation of N.J.S.A. 2C:35-5a(1)/35-5b10(a) (Count 2); possession of cocaine in violation of N.J.S.A. 2C:35-10a(1) (Count 3); and possession of marijuana in violation of N.J.S.A. 2C:35-10a(1) (Count 4). (Da1-4). On the same date venue for trial was set in Middlesex County. (Da5)

Following hearings on Mr. Rodriguez's Motion to Suppress all evidence -- obtained by the Illinois State Police at the time of the stop, questioning and arrest of Maria Stout and Lonnie Jacobs in Illinois on February 28, 2017 -- held on April 4, May 25, and September 23, 2019, before the Hon. Michael A. Toto, P.J.Cr., the court issued a written decision and Order on January 14, 2020, denying Mr. Rodriguez's motion. (Da6-29)[1] Judge Toto subsequently denied Mr. Rodriguez's motion for reconsideration on May 8, 2020. (Da30)

[1] "1T" Refers to the April 4, 2019, motion to suppress transcript;
"2T" Refers to the May 21, 2019, motion to suppress transcript;
"3T" Refers to the September 23, 2019, suppression motion transcript;
"4T" Refers to the March 2, 2021, Miranda hearing transcript;
"5T" Refers to the April 5, 2021, Miranda motion oral decision;
"6T" Refers to the March 15, 2022, trial transcript;

On March 2, 2021, a hearing was held before the Hon. Angela G. Carter, J.S.C., on Mr. Rodriguez's Miranda motion to suppress any and all evidence obtained following Mr. Rodriguez's arrest in the parking lot of his apartment complex in Old Bridge, New Jersey, on March 1, 2017, based upon the police violation of Mr. Rodriguez's Miranda rights. On April 5, 2021, Judge Carter issued an Order, suppressing Mr. Rodriguez's statements made to the police in the parking lot of his apartment complex and "inside Apartment B" at and immediately following his arrest at "approximately 3:00 P.M." on March 1, 2017; as well as his "unrecorded statements" made to the police at police headquarters 11:00 P.M. on March 1, 2017. However, she denied Mr. Rodriguez's motion with regard to "other statements" made to police officers on March 1, 2017.(Da31)[2] On December 10, 2021, Judge Carter denied Mr. Rodriguez's Motion for reconsideration, (Da32), having issued a Statement of Reasons on December 8, 2021. (Da33-43)

"7T" Refers to the March 16, 2022, trial transcript;
"8T" Refers to the March 17, 2022, trial transcript;
"9T" Refers to the March 21, 2022, trial transcript;
"10T" Refers to the March 22, 2022, trial transcript;
"11T" Refers to the March 32, 2022, trial verdict transcript;
"12T" Refers to the March 24, 2022, trial verdict transcript;
"13T" Refers to the October 07, 2022, trial sentencing transcript.

[2] Notably, Mr. Rodriguez's recorded statement taken at the Holmdel Police Barracks after these unrecorded statements and after Mr. Rodriguez had been in continuous police custody for more than 9 hours and transported to his family apartment in New York City which the New Jersey police searched, allegedly with Mr. Rodriguez's "consent."

Trial of this matter was held before Judge Carter and a jury on March 15-17, and March 21-23, 2022. Mr. Rodriguez was acquitted of possession of cocaine with the intent to distribute (Count 1), and convicted of the remaining three counts of Ind. No. 18-0100013-S. By Judgment of Conviction dated October 21, 2022, Mr. Rodriguez was sentenced to 12 years imprisonment on (Count 2), concurrent to concurrent terms of 5 years on (Count 3), and 18 months on (Count 4). (Da44-46) Mr. Rodriguez's Motion for bail pending appeal was denied by Judge Carter on December 7, 2022 (Da47) and by the Appellate Division December 29, 2022. (Da49; 13T5-22 to 13T52-7). A timely Notice of Appeal was filed with this court on Nov. 17, 2022 (Da49-52), and an Amended Notice of Appeal filed on November 23, 2022 (Da53-57).

STATEMENT OF FACTS[3]

At about 7:15 A.M. on February 28, 2017 Illinois State Police Office Sean Veryzer, while on patrol on Interstate 80 in the area of Moline, Illinois, observed a Ford F-150 vehicle with a "topper", and bearing Nevada license plates, proceeding eastward. Trooper Veryzer claimed to have stopped the vehicle solely because the vehicle lacked rear tire mud flaps, a violation of Illinois state law, even for out-of-state registered vehicles which did not require such flaps. (1T15-21 to 1T20-20). As

[3] The issues in this appeal relate to the suppression of evidence, and the facts are derived from the pre-trial physical evidence suppression and Miranda hearings below. See State v. Gibson, 318 N.J. Super. 1, 9 (App. Div. 1999).

he approached the vehicle, he saw through the tinted side windows three duffle bags lying "under a piece of plywood." (1T21-1 to 21).

Trooper Veryzer asked the driver, Maria Stout, for her driver's license, as well as the vehicle's registration and insurance card, and likewise asked to see the license of her passenger, Lonnie Jacobs. (1T22-21 to 1T23-4). Lonnie supposedly said the vehicle belonged to a Nevada resident named "Gus", and that he and Ms. Stout were on their way to New York to "pick up a car." (1T23-5 to 13). Trooper Veryzer told Ms. Stout about the splash guard violation, and that he was only going to issue her a warning. Now in possession of both all driving and registration credentials, Trooper Veryzer did not issue a "warning" or – in order to verify those credentials through dispatch – return to his vehicle alone. Rather he ordered Ms. Stout to exit the vehicle and accompany him back to his patrol car (1T51-11 to 25; 1T141-25 to 1T142-2) where his drug sniffing canine was kept, to question her further, patting her down before placing her in the police car.[4]

On the walk back to the police car, Trooper Veryzer began to question Ms. Stout about the duffel bags, about which he acknowledged there was nothing even

[4] The issuance of such a warning would not require removing the driver from her car on the shoulder of a major interstate highway and putting her in a patrol car for "questioning," notwithstanding Veryzer's subjective belief that this makes it "easier to ask questions" and to foster a better "human" perception of the police. (1T24-2 to 11). Nor would such perception be fostered by Veryzer's illegal pat-down of Ms. Stout before placing Ms. Stout in his patrol vehicle with a large canine in the back. (1T56-6 to 16).

subjectively suspicious for people traveling across the country from the west coast to the east – including from Nevada -- to bring clothing and personal items in such luggage (1T58-24 to 1T59-66; 1T144-15 to 20). He nevertheless asked Ms. Stout "what are you guys hauling in the back," to which she replied "nothing." (1T142-20 to 22) (emphasis added).[5]

At this point, and even before re-entering the patrol car, Veryser radioed his headquarters for a back-up officer, stating that "I need him to get here so that I can walk my dog,"[6] (1T143-23), something he acknowledged he was forbidden to do without objectively reasonable suspicion. (1T89-1 to - 1T91-1). The putative reason for this, according to Trooper Veryser, was so he could conduct his search while a "back-up" could issue the equipment warning "so we don't have to fight the reasonable suspicion or the time frame when we're waiting on the response from" dispatch on the license and registration check. (1T143-12 to 15). But Trooper Veryzer did not, at the same time that he requested back-up to "walk his dog", provide dispatch with credentials information necessary for the issuance of the flash-guard "warning." (1T90-14 to 24).

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[5] Most people, if asked, would almost certainly not see themselves as "hauling" such items. In any event, Trooper Veryzer stated that even if Ms. Stout had responded that the luggage contained "clothes" he would not have believed her. (1T144-5 to 11).

[6] The audio/video tape of Trooper Veryser's questioning of Ms. Stout before the issuance of any Miranda warnings, played at the Suppression hearing on April 4, 2019, is provided to the court as (Da58).

Nor did he do so when he entered his patrol car next to Ms. Stout. As the audio video tape of what occurred in Trooper Veryser's vehicle (Da58) reveals, Trooper Veryser did not relay Ms. Stout's license information to dispatch for nearly eight and one-half minutes into the stop. (1T168-16 to 21) and two minutes after inadequately administering Miranda warnings, issued 7 minutes, 22 seconds into the stop. (1T163-22 to 1T164-2).

In those minutes, Trooper Veryser questioned Ms. Stout about where she was coming from, her final destination; the nature and length of her relationship with Mr. Jacobs; whether she was married and had a maiden name; whether she possessed a permit to carry a concealed weapon; and reason for the trip. (1T145 to 1T151, passim). Meanwhile Trooper Veryzer used his patrol car computer to check federal databases to see if Ms. Stout had a criminal record, learning that she had been "arrested" in the past for "manufacture and delivery" of a CDS. (1T28-21 to 22).

During this time, he continued to question her about what she was "hauling" in the "duffel bags," and interpreting her response of "nothing," as a "deni[al] of the existence...of the duffel bags..." (1T27-23 to 24; 1T62-14 to 21). He asked how much she was being paid to help Lonnie drive to New York. When she responded, "Paid to drive?", Trooper Veryser said Yeah. They're paying you to haul that marijuana out there... I guarantee you there's marijuana in... those duffel bags..." (1T160-8 to 11 [emphasis added]). He continued "I see this all the time":

> ...[Y]ou're hauling marijuana across the country for personal gain...You and him are going across there, you're going to take it to somebody. I'd like to help you get it there... But before...I go any further I want you to read your Miranda rights..."(2T160-20 to 25 [emphasis added]).

Having formally accused Ms. Stout of narcotics trafficking, while offering to "help" her, he then – nearly 7 and 1/2 minutes into the stop and without having sought from dispatch information for the traffic warning -- partially administered her Miranda rights, without asking her if she wished to waive those rights. (1T160-25 to 1T161-23).

However, when he asked "Did you want to tell me about the marijuana in the duffel bags or not?" to which Ms. Stout replied "No, I don't want to tell you about it," (1T162-1 to 5), Trooper Veryser claimed to have interpreted the fact that her very verbalization of her refusal to talk to him constituted a "waiver" rather than an invocation of her right to remain silent. (1T162-21 to 1T163-6). After belatedly advising dispatch of the license and registration data to issue an equipment warning, but even before waiting for a reply, Trooper Veryzer told Ms. Stout that "[w]hile [he was] waiting," he was going to use his canine to walk around her truck "real quick", "...just to confirm what I already know." (1T170-3 to 7 [emphasis added]). While conducting this search, dispatch responded "valid Nevada...There's no records." (1T170-11 to 13).

Returning to the patrol car, and telling Ms. Stout that "the dog confirmed what I already know," that "you guys" are transporting marijuana in the duffel bags (1T171-4 to 12), and that they were going to search her vehicle: and despite her refusal to talk to him about his accusations, Veryzer now continued to push Stout to "cooperate," telling her that "this is a life-changing thing" that people who cooperate "do a lot better in court," and that she should "talk to" his "undercover guys", at least hearing what they have to say." (1T117-1 to 1T172-20). These "guys," he said only wanted to "help them" to make the delivery to the person who was going to pay them and intimated that if she didn't want to talk perhaps Lonnie would ("We can do it with one person [or] we can do it with two people..." (1T176 -12 to 23).

Trooper Veryser returned to the Ford F-150, removed and arrested Lonnie Jacobs,[7] and searched him, finding a key to the rear enclosed portion of the truck. A search revealed eight duffle bags containing suspected marijuana. (1T34-12 to 1T35-3). Ms. Stout and Mr. Jacobs were transported to the Genesco, Ill. Police Department along with their vehicle, where further investigation was turned over to Special Agents of the Illinois State Police and to a DEA special agent with whom they worked.

[7] Trooper Veryser characterized the status of Ms. Stout and Mr. Jacobs at this point not as an "arrest" but as being "officially detained [for] a drug investigation (1T184-19 to 22), stating that he wasn't into a "drug investigation" during his previous un-Mirandized accusatory questioning of questioning of Ms. Stout. (1T184-23 to 1T185-1).

Later that same morning, Lieut. Peter Layng, a Task Force Officer at the DEA, then assigned to the Drug Trafficking North Unit of the New Jersey State Police, received a call at his office in Newark from the Illinois based agent, advising him of what had occurred in Illinois, and indicating that Stout and Jacobs were willing to cooperate in making the delivery in New Jersey of the marijuana to someone known to them as "Stacks." (2T6-18 to 2T7-7). Det. Sgt. Layng became the lead investigator. (2T7-21). There followed a tandem journey for Stout and Jacobs across five states with the seized marijuana in the Ford F-150 pickup accompanied by Illinois law enforcement agents.

The police thus knew from the outset that the delivery was to be made in New Jersey, to a man known as "Stacks", whose cell phone number Mr. Jacobs possessed. The police had Jacobs contact Mr. Rodriguez several times during the trip, during which Mr. Rodriguez agreed to meet Jacobs at 35 Spruce Lane in Old Bridge, New Jersey, a garden apartment complex where he maintained an apartment. (2T10-7 to 11). However, Det. Sgt. Layng decided to change the meeting location to a CVS parking lot across the street from the apartment complex, because it would be easier to "surveil" the anticipated transaction. (2T11-3 to 7). At no time did the police seek an anticipatory search warrant in New Jersey.

At about 2:00 P.M., on March 1, one hour after Mr. Jacobs and Stout parked their vehicle in the lot, Mr. Rodriguez arrived driving a white BMW with New York

plates, spoke briefly with Jacobs, and then drove to the apartment complex lot with Mr. Jacobs and Ms. Stout following, (2T11-20 to 2T13-19). Det. Layng from his position did not observe the meeting between Mr. Rodriguez and Jacobs in the CVS lot, and although Mr. Jacobs wore a so-called "Kell" Device to monitor what was said, this was not recorded. Det. Layng was apprised of the conversation through radio transmissions from the surveillance team. (2T11-24 to 2T25-5; 2T13-18 to 2T14-23).

In the apartment complex parking lot, Det. Layng parked about 40 yards from where Mr. Jacobs and Mr. Rodriguez had parked next to each other (3T18-17 to 23).[8] He testified that Mr. Jacobs and Mr. Rodriguez placed 6 duffle bags into the BMW operated by Mr. Rodriguez, and observed Jacobs and Mr. Rodriguez carry 2 duffle bags in the direction of "9 Ashwood Plaza Apartment B." Mr. Rodriguez was observed unlocking the door to Apartment B, and placing the 2 bags immediately inside the door and then re-locking it, and returning to his vehicle with Jacobs (2T20-

[8] Det. Layng testified that no audio or video recordings from patrol car or body cameras were made, and that although he had originally testified at a prior hearing that "dispatch recordings" had been made, he was "surpris[ed]" to learn that "apparently they're not." (3T9-1 to 23; 3T11-16 to 25). Det. Layng had also originally testified (on May 21, 2019) that he had parked on the same side of the street as Jacobs and Defendant and saw them walk to Apartment "9B," at the continued hearing on Sept.23, 2019, when it was pointed out that the entrance to "9B" could not be seen from that location, he stated that he was on the same side of the street and had exited his vehicle at the time. He also acknowledged that he had mis-identified the door leading to Apartment 9B on an exhibit at the prior hearing. (3T32-8 to 3T35-3; 3T33-9 to 10).

1 to 15). After Jacobs left, Mr. Rodriguez opened the BMW and retrieved a small "lockbox" about half the size of a "lunch box" and walked back in the direction of the apartment. (1T20-1 to 23). At his time there were numerous law enforcement officers -- including from the federal DEA, the New Jersey State Police, and the Illinois State Police – at the scene. (2T60-19 to 2T61-25).

Mr. Rodriguez was immediately approached, arrested, handcuffed and searched. (2T53-20 to 2T55-21). No officer involved in that arrest ever testified or reported that he was the officer who administered Miranda warnings to Mr. Rodriguez. Det. Lyang, the case agent on this case, initially testified that "we" "handcuffed him, searched him, read him---his rights per Miranda." (2T20-17 to 19), but he subsequently acknowledged that at the time he reached Mr. Rodriguez, he was already in handcuffs, that he could not "definitively" say that he either administered Miranda rights to Mr. Rodriguez, or that he heard -- or could identify -- any other officer administer Miranda rights, either in the parking lot or in Apartment B. The most he could say was that "after doing this for 22 years, at the point of arrest search comes Miranda." (2T55-1 to 21; 2T68-8 to 19).

Det. Layng immediately questioned Mr. Rodriguez with the purpose of obtaining "[a]ny admissions" he would make to me, including an "honest statement" from him that he had entered Apartment B carrying the duffel bags, despite his denials of both accusatory questions. (2T20-15 to 20; 3T34-7 to 24). Det. Layng

had Mr. Rodriguez open the door to Apt. B using the key the police had found in his pocket upon his arrest, and along with at least 3-4 other officers,[9] including an Illinois DEA agent (Bump) and an Illinois state trooper, took Mr. Rodriguez inside where Det. Layng continued questioning Mr. Rodriguez, who did not volunteer any information. (3T35-5 to 10). Many other officers were on the scene, but Det. Lyang, who intended to obtain Mr. Rodriguez's "consent" to search his apartment, his vehicle and the lockbox he had in his possession, felt that if "there were a lot of us in there," the "issue of voluntariness would come up." (3T21-21 to 14).

Without any Miranda warning, Det. Layng continued questioning Mr. Rodriguez for more than 20 minutes, during which they learned of another residence Mr. Rodriguez maintained in Queens, New York with his wife and two young sons; and at the end of which Mr. Rodriguez signed four written consent to search forms, for his vehicle; his Ashwood Mall apartment; his lockbox; and his family apartment in Queens, New York. (3T23-4 to 14). Following the searches of Mr. Rodriguez's vehicle and apartment, he was transported by the police to his residence in Queens, New York, where a further warrantless search was conducted. As with the prior searches, no search warrant was sought or obtained from any court.

[9] Det. Layng testified that there were between 10-15 armed officers on the scene of Mr. Rodriguez's arrest. (4T42-8 to 10).

Thereafter, Mr. Rodriguez was transported back to Holmdel barracks in New Jersey, where unrecorded questioning continued for several hours, first with Det. Layng and then with Special DEA Agent John Yoo.(4T75-23 to 4T76-25). Not until 10:45 P.M., after 7 and 1/2 hours in constant police custody – including time during which he was questioned at Holmdel headquarters in New Jersey in un-recorded interviews was -- Mr. Rodriguez apprised of his Miranda rights, without being asked whether he wished to waive those rights. The questioning during that "interview" was largely based on, and simply recorded information previously obtained by the police from Mr. Rodriguez himself during those 7 and 1/2 hours of un-Mirandized custodial questioning.

The arrest of Mr. Rodriguez in the apartment parking lot occurred at approximately 2:19 P.M. on March 1, 2017. The first time there was evidence presented of his having been administered any part of his Miranda rights at all was at approximately 10:45 P.M. at Holmdel Police barracks, more than 8 and 1/2 hours after he was questioned in the parking lot, taken back into his locked apartment by Det. Layng and several other officers, where he was further questioned for an additional 20 minutes; the warrantless search of that apartment, Mr. Rodriguez's vehicle, and Mr. Rodriguez's family's apartment in Queens, New York, all purportedly with Mr. Rodriguez's "voluntary" "consent." Nor, even as to

questioning that occurred at Holmdel at about 10:45 P.M., was there any evidence that Mr. Rodriguez waived his rights. (See 3T38-6 to 3T40-2).

Judge Carter suppressed all statements made by Mr. Rodriguez in violation of his Miranda rights from the time of his arrest until his recorded statement at 10:45 P.M. She did not suppress the recorded statement. Based upon Judge Carter's decision, Mr. Rodriguez filed a motion for reconsideration of the September 23, 2019, suppression of evidence motion based upon the doctrine of fruit of the poisonous tree. This motion for reconsideration was denied.

LEGAL ARGUMENT

POINT I ALL EVIDENCE, BOTH PHYSICAL AND VERBAL, SHOULD HAVE BEEN SUPPRESSED AS IT WAS OBTAINED IN VIOLATION OF MR. RODRIGUEZ'S RIGHTS UNDER THE FOURTH AND FIFTH AMENDMENTS, AND NEW JERSEY'S BROADER FIFTH AMENDMENT ANALOGUE (Da6 – Da43).

A. The motion court erred in failing to suppress the evidence obtained from the illegal stop and search of the vehicle being operated by Maria Stout in the State of Illinois.

Mr. Rodriguez maintains that the courts below erred in failing to suppress all evidence both physical and verbal resulting from a clear pattern of police misconduct beginning early in the morning of February 29, 2017 in Illinois and culminating -- after an interim detour into New York – almost 40 hours later in New Jersey when,

as the court below ruled in suppressing his two prior statements in the parking lot of his residence and inside his residence, he gave his only Mirandized statement. That statement, however, merely formalized what the police had already obtained from Mr. Rodriguez through the illegal police conduct and questioning during the previous 9 hours since his arrest.

At the heart of this contention is the court's failure to properly apply the "fruit of the poisonous tree" doctrine which forbids the use "tainted" evidence, whether directly or derivatively obtained as a result of prior unlawful police conduct. Since the very purpose of the exclusionary rule is to deter police misconduct and to ensure the integrity of the judicial process, the all important "essence" of this doctrine is "that not merely the evidence so acquired shall not be used before the court but that it shall not be used at all." Silverthorn Lumber Co. v. United States, 251 U.S. 385, 392 (1920). This rule has long applied to require the exclusion of both physical and verbal evidence tainted by the initial police misconduct, whether constituting violations of the constitutional rights of citizens under the Fourth, Fifth, and Sixth Amendments, State v. Johnson, 118 N.J. 639, 651-52 (1990), or of statutory or judge-made law designed to preserve those rights against police infringement. See, e.g., Nardone v. United States, 308 U.S. 338 (1939); State v. Minter, 115 N.J. 269 (1989) (wiretapping statutes); Harrison v. United States, 392 U.S. 219 (1968) (rule requiring prompt production of arrestee before magistrate).

In the instant case, the "poisonous tree" which bore the "tainted" fruits which should have been suppressed at trial (i.e. all physical evidence and all of Mr. Rodriguez's statements made following his arrest), had its roots in Trooper Veryzer's unlawful conduct in Illinois on the morning of February 28, 2017, and culminated with Mr. Rodriguez' confession after 10:43 P.M. on March 1, 2017.

Trooper Veryzer's conduct in this case was in fact virtually identical to that in a stop and search he had conducted two years earlier in which the Appellate Court of Illinois found that this officer (whom it specifically named in its decision) had acted unlawfully in searching a pick-up truck bearing Nevada license plates traveling eastbound on Interstate 80, allegedly for exceeding the 70 m.p.h. speed limit by 3 m.p.h., resulting in the discovery and seizure of 73 pounds of marijuana. See People v. Kruckenberg, 2019 Il App. 3d 170505 (2010) (Da66). In that case, Veryzer based his subsequent belief that he possessed "reasonable suspicion" to conduct the subsequent canine search, on his observation of two "auxiliary fuel tanks," one of which was mounted to a metal plate rather than the bed of the truck; the Mr. Rodriguez's "minimal luggage" in relation to the length of the trip; his residence in Reno, Nevada, an area from which the majority of marijuana seized on Rte. 80 originates; his belief that a heavy duty truck was "one of the least economical ways to travel;" and the distances between his stated destinations in Illinois. (Id. at 32; Da69). The court, citing United States v. Cortez, 449 U.S. 411, 417 (1981),

rationally rejected that the "totality of the circumstances" justified the free-air canine sniff that subsequently occurred. (Id. at 33; Da69).

In the instant case, as in Kruckenberg, Trooper Veryzer stopped a vehicle for a motor vehicle infraction for which, as he advised the driver, he was going to issue a "warning." At the time of his initial interaction with the occupants, and based on his own observations, he possessed nothing resembling objectively reasonable suspicion which would permit him use his canine to do a free-air drug sniff of the vehicle. Rather than simply checking with dispatch on the driving credentials and writing the warning, he ordered Ms. Stout to exit her vehicle on a busy interstate highway and accompany him back to his patrol car where he patted her down and directed her sit in the front seat, He stated that this was "common practice" in Illinois, since it's "easier to ask questions," to "talk to them," and to project a more "human" perception of police. (1T24-2 to 11). In fact, of course, when combined with a pre-entry pat-down to a patrol car with a clearly unfriendly barking dog just behind, it reinforces a detainee's perception that he or she is not free to leave, and thus to make any person so detained "nervous."

That Veryzer's purpose from the outset of the stop was to unleash his canine on the Nevada registered vehicle, and to prolong the stop for as long as that took, just as in Kruckenberg, was made clear by (1) his calling for back-up even before re-entering his patrol car in order to write the "warning" while he "walked" his

canine; (2) his failure to contact dispatch for several minutes after re-entering his patrol car to request a license and registration check; (3) his questioning Ms. Stout about her relationship with Mr. Jacobs, where they were going, what the purpose of their trip was, the amount of luggage they were bringing, similar questions unrelated to the purpose of the stop, all apparently while using his computer to search for Ms. Stout's criminal record; and (4) his directly accusatory questioning of Ms. Stout without the issuance of Miranda warnings. Despite Ms. Stout's denials of what she was being directly accused of, this did not deter Veryzer from transforming her unlawfully obtained responses to his questions into a self-ratifying justification for the canine search he had already determined to conduct.

In this case, as in Kruckenberg, Trooper Veryzer's intent, from the very initiation of the stop, despite possessing nothing more than a "hunch," was to "walk his dog" around Ms. Stout's vehicle in order to justify a search; it was not to issue a "warning" about mud flaps. For that he would merely have had to contact dispatch for license and registration information, and for which he would not have needed a back-up officer to write the warning for him.

Indeed, without using the word "pretext," that is precisely what the Court in Kruckenberg intimated about the purpose of Veryzer's conduct, from the time he stopped the Mr. Rodriguez's vehicle, until the time of the suspicionless canine search, equally applicable to this case. There, as here, Veryzer had testified that his

purpose in calling for another officer to write his warning was to avoid prolonging the stop (Da70, at 27) (1T143-10 to 23). But it also established that "he did not intend to complete the written warning himself" (Da63, at 26). But what then was his intent? His conduct – removal of the Mr. Rodriguez to his patrol car, engaging him in "seemingly innocuous conversation" his protracted warning writing process, and his abrupt termination of the conversation to "walk the dog" upon arrival of a fellow officer "impermissibly prolonged the stop," and, said the court, perhaps too charitably, made him a "victim to his own concern for delay. Finding that Veryzer had "impermissibly prolonged the stop," the Court required suppression of the physical evidence. (Da70, at 27).

The circumstances of the instant case are, if anything, more egregious than in Kruckenberg, which itself was grounded in long-standing Fourth Amendment constitutional principles, discussed and applied in a similar factual context by Illinois' highest court in People v. Brownlee, 713 N.E.2d 556 (Ill. 1999). The reasonableness of an investigatory "detention" depends on whether the officer's action in believing that an offense was being committed was reasonable at the inception, and whether it was "reasonably related in scope to the circumstances which justified the interference in the first place." Terry v. Ohio, 392 U.S. 1, 19-20 (1968). It is "clear" that to be lawful, an investigative detention must be temporary

and last no longer than is necessary to effectuate the purpose of the stop." Florida v. Royer, 460 U.S. 481, 500 (1983).

In this case the sole justification for the stop was the absence of mud flaps on the vehicle – lawful in the vehicle's state of registration, but not in Illinois – for which the officer could and, as he advised Ms. Stout, would issue a warning. He observed nothing whatever while obtaining both Ms. Stout's and Mr. Jacob's driving and registration credentials even remotely capable of providing objectively reasonable grounds for believing a crime was being committed, or that either occupant was committing such a crime, or that either one was armed and presently dangerous.

Yet the officer's subsequent conduct made at the very time he directed Ms. Stout to get out of her vehicle and took her back to his patrol car (in the rear of which was a barking and demonstrably unfriendly dog); patting her down before placing her inside that; (1) he was not himself going to issue an equipment warning; (2) he was already determined that at some point he was going to "walk [his] dog" to "confirm" his hunch that marijuana was being transported; and (3) that he was going to keep custodial control of her driving credentials and continue to question her about matters having nothing to do with the equipment violation he had purportedly stopped her for in an attempt to get her to incriminate herself in criminal activity;

and (4) when this failed to accomplish his purpose to directly accuse her of such activity without the administration of Miranda warnings.

None of this antecedent misconduct was capable of producing the objectively reasonable suspicion necessary to deploy his canine. But what it did produce was an unlawful extended detention of Ms. Stout under conditions which were the constitutional equivalent of an "arrest," requiring nothing less than probable cause.[10] The result of such unlawful "detention" is that the unattenuated evidential fruits of such arrest – whether physical or testimonial – are tainted and must be suppressed. Wong Sun v. United States, 371 U.S. 471 (1963); Dunaway v. New York, supra; Florida v. Royer, supra; State v. Rodriguez; 172 N.J. 117, 132 (2002); State v. Costa, 327 N.J. Super. 22, 32 (App. Div. 1999).

The "reasonable suspicion" necessary to support a brief investigatory detention, is a narrowly crafted and limited exception to the Constitution's probable cause requirement, and has been justified because of the non-custodial and minimally intrusive nature of an investigatory stop. See Terry v. Ohio, 392 U.S. 1 (1968). It may not be employed to justify the removal and custodial questioning of

[10] Eliding the officer's clearly stated intentions to deploy his dog from the very outset of the stop, and his subsequent conduct in extending the detention of the occupants beyond isolating and confining the driver, and questioning her in an accusatory manner, the motion judge pointed to the canine's reactions as the principle "circumstance" providing "probable cause" to search her vehicle. (Da23) But that search occurred only after and as a result of Trooper Veryser's unlawful "arrest" of Ms. Stout, which is never lawful in the absence of probable cause.

a person so stopped regardless of the words used by the police, or the methods they employ. As the Supreme Court has written:

> Detentions may be "investigative" yet violative of the Fourth Amendment absent probable cause. In the name of investigating a person who is no more than suspected of criminal activity, the police may not carry out a full search of the person or of his automobile or other effects. Nor may the police seek to verify their suspicions by means that approach the conditions of arrest...[R]easonable suspicion of crime is insufficient to justify custodial interrogation even though the interrogation is investigative. Florida v. Royer, supra, at 499 (emphasis added).

Thus, the Court has elsewhere stated:

> The application of the Fourth Amendment's requirement of probable cause does not depend on whether an intrusion of this magnitude is termed an "arrest" under state law. The mere facts that [a person] was not told he was under arrest, was not "booked," and would not have an arrest record if the interrogation had proved fruitless...obviously do not make [the person's] seizure even roughly analogous to the narrowly defined intrusions involved in Terry and its progeny. Dunaway v. New York, supra, at 212-13.

The existence of an "arrest" or of a custodial investigative detention amounting to an arrest is an objective determination, based neither upon the invocation of particular words, nor on the subjective intention of the officer, nor on the subjective belief of the person detained. See Dunaway v. New York, supra, at 212-13; State v. Rodriguez, supra, at 126; State v. Coburn, 221 N.J. Super. 586, 596 (App. Div. 1987), certif. den., 110 N.J. 300 (1988). Custody exists "if the action of

the...officers and the surrounding circumstances fairly construed would reasonably lead a detainee to believe he could not leave freely." Id. at 586. See also State v. O'Loughlin, 270 N.J. Super. 472, 477 (App. Div. 1994); State v. Godfrey, 131 N.J. Super. 168, 176 (App. Div. 1974), aff'd, 67 N.J. 267 (1975).

A "certain set of facts may constitute an arrest whether or not the officer intended to make an arrest and despite his disclaimer that an arrest occurred." Taylor v. Arizona, 471 F.2d 848, 851 (9th Cir.), cert. den., 409 U.S. 1130 (1972). And where such facts exist, even an affirmative "statement by a police officer that a suspect was free to leave may be incredible and not worthy of belief as a matter of law." State v. Micheliche, 220 N.J. Super. 532, 537 (App. Div. 1987), certif. den., 109 N.J. 40 (1987).

Time and again, courts have addressed and rejected police contentions that a Defendant "consented" to accompany them to police headquarters, or other place of interrogation, on facts similar to, or even less egregious, than those in the instant case. See, e.g., Florida v. Royer, supra; Dunaway v. New York, supra; Hayes v. Florida, supra; State v. Rodriguez, supra; Taylor v. Arizona, supra; United States v. Tucker, 610 F.2d 1007 (2d Cir. 1979); People v. Holveck, 565 N.E.2d 919 (Ill. 1990); State v. Riley, 704 S.W.2d 691 (Mo. App. 1986).

Even the acquiescence of a person confronted by a police "request" under the circumstances presented in the instant case does not constitute consent. See Bumper v. North Carolina, 391 U.S. 543 (1968). As one court aptly noted:

> The mere fact that a police officer "asks" a citizen to accompany him rather than commands obedience does not mean that a citizen can reasonably believe he is free to refuse. Often the very circumstances surrounding the question supply its inevitable answer. State v. Winegar, 711 P.2d 579, 586 (Ariz. 1985) (rejecting claim of "consent" and finding illegal arrest where two officers, following investigatory stop, asked Mr. Rodriguez to accompany them to City Hall across the street). See also Florida v. Royer, supra (finding unlawful custodial detention where police at airport, retaining Mr. Rodriguez's airline ticket, "asked" Mr. Rodriguez to accompany them to an interrogation room 40 feet away); People v. Brownlee, supra, at 555-56.

It is submitted that Judge Toto erred in in his conclusion that applying Illinois law, the search and seizure conducted by Illinois police did not violate Stout's and Jacob's Fourth Amendment rights, and in failing to suppress, all fruits – tangible and communicative – discovered as an unattenuated result of that taint.

B. The police failed to seek or obtain an anticipatory search warrant for the "controlled delivery" in New Jersey of the marijuana seized in Illinois.

Following the formal arrest of Jacobs and Stout, they, along with their vehicle, were taken to Illinois State Police headquarters, where, according to Jacobs, the police threatened that if he didn't cooperate in completing the delivery of the

marijuana, they would have their own pet dog (who was traveling with them) euthanized, and that they would be sent to prison for "many, many years." (3T50-5 to 8).

Although no recording of the debriefing of these now "cooperating" witnesses was made, both the testimony of Lonnie Jacobs and Lt. Peter Layng of the New Jersey State Police,[11] who was assigned to the DEA field office in Newark New Jersey, made clear that much was learned about the identity of the individual to whom the marijuana was to be delivered in New Jersey through a "controlled delivery" being planned as a "cooperative investigation" with the Illinois state police and the DEA. (2T33-19 to 2T36-21); and even more was learned about the location of the delivery, which was at all times under the control of the police.

As early as 10:37 A.M. they learned that the delivery was to be made at an apartment complex at 35 Spruce Lane in Old Bridge, New Jersey to someone known to Mr. Jacobs as "Stacks" (2T49-9 to 12; 4T60-17 to 4T61-16). Mr. Rodriguez even provided a GPS heading to the entrance to the apartment's parking lot. Mr. Jacobs had known Mr. Rodriguez as "Stacks" for around six months and had socialized with

[11] Supported by recordings of phone conversations between Mr. Jacobs and Mr. Rodriguez during the course of the peculiar multi-state caravan –- consisting of Ms. Stout, Mr. Jacobs and three officers in a police vehicle and other officers driving Ms. Stout's vehicle containing the evidence -- that ensued during the next 24-hours. There is no evidence that the vehicle was ever stopped in Indiana, Pennsylvania or New Jersey for a mud flap violation.

him. (4T37-1 to 6). They knew Mr. Rodriguez's phone number, and that he had another residence in Queens, New York, where he lived with his wife and children. As shown by the numerous conversations between Jacobs and the Mr. Rodriguez, the police – by way of their captive co-operators -- both knew and essentially controlled the date, time, place and manner of the controlled delivery, as well as the vehicle containing the contraband to be delivered, more than 24-hours before the delivery occurred.

Yet at no time in those 24-hours did the police seek a warrant from any court in New Jersey for the search and seizure they anticipated occurring in New Jersey. All warrantless searches are presumed to be unreasonable, and thus invalid; and it is the State's burden to prove that any warrantless search was objectively reasonable when tested against established principles of law. See State v. Valencia, 93 N.J. 126, 133 (1983).

Because both the existence of probable cause, or lack thereof, and the reasonableness or unreasonableness of a search or seizure, is something to be judicially determined, see State v. Anderson, 198 N.J. Super. 340, 348 (App. Div.), certif. den., 101 N.J. 283 (1985), search warrants are strongly favored under the Federal and State constitutions. Illinois v. Gates, 462 U.S. 213, 236 (1983); State v. Valencia, supra, at 133; State v. Welsh, 84 N.J. 346, 352 (1980).

The warrant requirement is predicated on the premise that the necessity and reasonableness of a search or seizure can best be determined "by a neutral and detached magistrate instead of a [police] officer engaged in the often-competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 13-14 (1948) (emphasis added).

Both the Constitution and the courts have recognized that in certain narrowly delineated situations involving "exigency," see Vale v. Louisiana, 399 U.S. 30, 34 (1970); Katz v. United States, 389 U.S. 347, 357 (1967); State v. Ercolano, 79 N.J. 25 (1979); State v. Patino, 83 N.J. 1, 7 (1980), where the need of the officer possessing probable cause to act arises before he is able to obtain a warrant, the stricture may be excusable. But the "prima facie invalidity of any warrantless search is overcome only if that search falls within one of the specific exceptions" recognized by the courts, and the courts will not validate a search where the exigency claimed by the police was self-created by their own conduct.

One such exigency, the so-called "automobile exception" to the warrant clause was first set forth by the Supreme Court in Carroll v. United States, 267 U.S. 132 (1925). The rationale for this exception, as stated by the Patino court, was "grounded in the exigent circumstances created by the inherent mobility of vehicles and the somewhat lessened expectation of privacy in one's vehicle." Id. at 9.

But mobility alone does not justify the stop or search of a vehicle, United States v. Powers, 439 F.2d 373, 375 (4th Cir.), cert. den., 402 U.S. 1011 (1971), and the protections of the Fourth Amendment, and the warrant clause of that Amendment, as well as Article I, para. 10 of the New Jersey constitution, still apply to automobiles. Marshall v. Barlow's Inc., 436 U.S. 307, 315 n. 10 (1978). See also Coolidge v. New Hampshire, 403 U.S. 443, 461 (1971); State v. Patino, supra, at 8; State v. Slockbower, 79 N.J. 1, 7 (1979).

Thus, even assuming probable cause to believe the vehicle and person stopped are in possession of criminal contraband, the only exigency which would serve to validate such conduct would be the temporal confluence of the officer's probable cause and the vehicle's mobility. The police may not create their own "exigency" for a warrantless search where the probable cause basis, if it exists at all and was lawfully obtained, develops at a time sufficiently before the search to allow them to obtain a warrant. State v. Williams, 168 N.J. Super. 352 (App. Div. 1979).

While the courts have recognized that a warrant need not be sought the very moment probable cause arises, where it is not "practical" because a vehicle "can be quickly moved out of the jurisdiction in which the warrant must be sought," State v. Ercolano, supra, at 43, quoting Carroll v. U.S., supra, at 153, clearly that is not the case where probable cause arises hours or days before the vehicle will be in motion, as in virtually all controlled delivery cases, and where the vehicle will be moving

into and not "out of" the warrant jurisdiction. In such cases, where the "securing of a warrant is reasonably practicable, it must be used." Id. (emphasis added).

Under such circumstances, any alleged "exigency" based on motor vehicle mobility evaporates or, more to the point, is a false exigency created by the police "having squandered an overt opportunity to obtain a warrant antecedent to an otherwise acceptable search..." United States v. Chuke, 554 F2d. 260, 263-63 (6th Cir. 1977), quoted in State v. Marsh, 162 N.J.Super. 290, 297 (Law Div. 1978), aff'd sub nom., State v. Williams, 168 N.J. Super. 352 (App. Div. 1979). There being no exigency in this case, the question remains why did the police not seek a warrant before the controlled delivery? It is submitted that the answer is clear.

As with an arrest, the sine qua non of any search, with or without a warrant, which may be found to be "otherwise" constitutionally "acceptable" is the absence of the taint of police misconduct in obtaining the evidence claimed by them to support a finding of probable cause, whether such misconduct constitutes an infringement of rights under the Fourth or Fifth Amendment. No evidence thus obtained may be used to obtain a warrant, or to obtain additional evidence against a Mr. Rodriguez; and all such evidence must be excluded from trial as "fruit of the poisonous tree." See State v. Lashley, 453 N.J. Super. 405, 411-412 (App. Div. 2002). The clear pattern of law enforcement's intentional disregard of constitutional rights evidenced in this case, beginning with Trooper Veryzer's misconduct in

Illinois; the arrest of Stout and Jacobs; the off the record interrogations and threats which compelled them to become agents of the police, and through whom the police identified and located Mr. Rodriguez (the alleged purchaser of the seized marijuana) including the exact location and timing of the delivery, both of which in fact the police ultimately controlled. And all without seeking or obtaining the judicial oversight of any court.

C. The trial judge, who found that the police had violated Mr. Rodriguez's Miranda rights at the time of his arrest, erred in failing to consider and apply the "fruit of the poisonous doctrine" in her denial of Mr. Rodriguez's Motion for Reconsideration by failing to suppress all evidence derived from the evidential taint of that violation.

This unbroken pattern of disregard for constitutional requirements revealed itself with the arrest of Mr. Rodriguez in the parking lot of his apartment on March 1, 2017, where, surrounded by approximately 12 armed state and federal officers he was arrested, searched handcuffed after observing the transfer of most of the duffle bags to Mr. Rodriguez' BMW and two of them into his apartment, and the departure of Mr. Jacobs.

As the motion/trial judge correctly found for the nearly 8 hours Mr. Rodriguez was in continuous police custody before his recorded statement, the State failed to

meet its burden of proof[12] that any officer actually read him Miranda rights at any time after his arrest until his recoded confession more than 8 hours later, or that, even then that he was asked to waive those rights; or that Mr. Rodriguez ever did waive such rights.

During the more than 8 hours between his arrest and his recoded confession, Mr. Rodriguez was continuously in the control of the police and subjected to additional unrecorded questioning in his New Jersey apartment, in the car ride to his family apartment in Queens -- and during the searches of those places and property purportedly with his "voluntary" consent, signed after 24 minutes of continuous un-Mirandized questioning both in the parking lot and in his apartment surrounded by up to a dozen armed officers -- and finally at State police headquarters in Holmdel, New Jersey during Det. Layng's un-recorded and un-Mirandized questioning of Mr. Rodriguez.[13]

It is small wonder that at the outset of Mr. Rodriguez's recorded statement at 10:45 P.M. on March 1, the police treated the provision of his Miranda rights as a

[12] In New Jersey, admissibility of a confession must be proved by the State beyond a reasonable doubt, State v. Miller, 76 N.J. 392, 404-405 (1978), and that a defendant's waiver of Miranda rights was knowing, intelligent and voluntary, in light of all the circumstances. State v. Adams, 127 N.J. 438, 447 (1992).

[13] Following this 12 minute "interview," there followed a further un-recorded interview with DEA Special Agent John Yoo and Officer Michael Minchwarner, at which Det. Layng was intermittently present.

mere formality. They already knew what he was going to say based on their previous violations of Mr. Rodriguez's constitutional rights.

In denying Mr. Rodriguez's motion to re-consider Judge Toto's previous denial of his motion to suppress, the trial judge elided her own previous ruling suppressing Mr. Rodriguez's statements made to the police in violation of his Miranda rights while in unbroken police custody for more than eight hours after his arrest --- including almost one half hour of illegal questioning in his New Jersey apartment while about a dozen armed officers searched through it, prior to his signing the supposedly "voluntary" consent forms for the search of his BMW, his family' apartment in Queens, New York, and the silver and black combination box -- and prior to his recorded confession at the end of that period. And she failed to address the critical issue of the application of the "fruit of the poisonous tree" doctrine did not apply so as to require suppression of all evidence, both physical and verbal, directly resulting from the initial police misconduct.

The New Jersey Supreme Court has long recognized that the doctrine applies not only to evidence obtained as the result of illegal searches and seizures, but "also applies to evidence obtained in violation of a Defendant's Fifth- and Sixth-amendment rights." State v. Johnson, 118 N.J. 639, 652 (1990). See also Commonwealth v. White, 371 N.E.2d 777, 781 (Mass. 1977). As with violations of a Mr. Rodriguez's Fourth Amendment rights, the purpose of the "fruit of the

poisonous tree" doctrine as applied to Miranda violations is to "prevent such violations from escaping [judicial] review." Comm. v. White, supra, at 781. Indeed, application of the doctrine to the Fifth Amendment context is, if anything, even more compelling than in the Fourth since while "evidence obtained in violation of the Miranda guidelines may be similarly probative and reliable, there is a far more significant danger that that it will not be so." Id.

In this case, after numerous armed police officers surrounded, arrested, handcuffed and searched Mr. Rodriguez in the parking lot of his apartment building, and in violation of his Miranda rights (and his denial of criminal conduct), both in the parking lot and in his apartment to which they took him, using the key they found on his person, continued to question him for nearly a half an hour, during which he identified locations and property which they police sought to search, and acknowledged dominion and control of the evidence contained therein. Under such circumstances, in "requesting" that Mr. Rodriguez sign the consent to search forms, the police were making a "request that the Mr. Rodriguez be a witness against himself...." See State v. Williams, 432 P.2d 679, 683 (Or. 1967).

Because, as the court below correctly found, all statements made by Mr. Rodriguez while in police custody over the course of 8 hours must be suppressed because of a violation of Mr. Rodriguez's Fifth Amendment rights, that initial constitutional misconduct tainted the subsequent evidential fruit – physical and

verbal -- obtained as an unattenuated result of that misconduct. The principles underlying the "poisonous tree doctrine" are "applicable not only to interrogations leading up to confessions but are equally applicable to interrogations aimed at obtaining the Defendant's consent to search and seizure when he is a focal suspect in the custody of the police." Id. at 682-683 (emphasis added). See also State v. O'Neill, 104 N.J. 148, 171, n.13 (2007) ("The fruit-of-the-poisonous-tree doctrine denies the prosecution the use of derivative evidence obtained as a result of a Fourth or Fifth Amendment violation.")

Moreover, New Jersey's privilege against self-incrimination is so ingrained and deeply rooted in the State's common law that it has always been considered as of "constitutional magnitude" offering "broader protection than its Fifth Amendment federal counterpart." Id. at 176-177.

Both before and after United States v. Patane, supra, the courts of this State have applied the fruits doctrine to suppress the physical evidence derived without attenuation from the un-Mirandized questioning of custodial suspects. In State v. Mason, 164 N.J. 1 (App. Div. 1979), for example, after the police received information that a woman at a bar had drugs on her person and was trying to sell them, they removed her from the bar, and placed her in an unmarked police vehicle containing three officers. When asked if she had any drugs, the Defendant initially replied she did not know, but then physically produced a plastic bag containing

drugs. Id. at 3. The trial court concluded that the Defendant had been subject to custodial questioning without the administration of Miranda warnings, and the Appellate Division affirmed. Id. at 2-4. Moreover, in squarely addressing the issue of why the fruits of the Defendant's non-verbal response, whether verbal or physical, were properly suppressed, the court said:

> Had Defendant made an oral admission of the fact that she possessed narcotics, it would not have been admissible against her because she had not been warned of her right to remain silent. We perceive no reason why the result should not be the same when her response was of a different nature...The privilege against self-incrimination extends to all acts intended to be of a testimonial character, whether in verbal or other form. Id. at 3-4. See also State v. Bijackso, 2019 N.J. Super. Unpub. Lexis 1510 (Da59) (suppression of axe used to kill a dog turned over to police during un-Mirandized questioning).[14]

The courts of our State have since Miranda thus strengthened rather than weakened both the rigorous requirements of its application by the police in custodial interrogations and, under the fruits doctrine, excluded from evidence at trial the prosecutorial use of all evidence, of whatever character, derived from unwarned

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[14] The panel in Bijacsko cited O'Neill's reference to the fact that the "disarray in decisional treatment" in the federal courts of Fifth Amendment jurisprudence, and the uncertainty "of the direction that the United States Supreme Court will take, may compel the court, under "principles of sound jurisprudence", to rest future decisions on state law grounds. (Da62, citing O'Neill at 177).

evidence. One of the fundamental reasons for these mandated strictures is a recognition that if the fruits doctrine did not apply to physical evidence derived from unwarned questioning, the courts, in Justice Souter's word's, would be providing both an evidentiary advantage to the prosecutor and "an important inducement for interrogators to ignore the rule in [Miranda]:

> Miranda rested on insight into the inherently coercive character of custodial interrogation and the inherently difficult exercise of assessing the voluntariness of any confession resulting from it. Unless the police give the prescribed warnings meant to counter the coercive atmosphere, a custodial admission is inadmissible, there being no need for the previous time consuming and difficult enquiry into voluntariness. That inducement to forestall involuntary statements...can only atrophy if we...recognize an evidentiary benefit when an unwarned statement leads investigators to tangible evidence. U.S. v. Patane, supra, at 646 (Souter, J., dissenting).

Indeed, as even the plurality decision acknowledged, a violation of the Miranda rule "creates a presumption of coercion...that is generally irrebuttable for purposes of the prosecutor's case in chief." Id. at 639. A coerced statement is never voluntary, and any evidence derived from it is tainted and the prosecutor should not be given an evidentiary advantage for the misconduct of its agents. As Justice Souter bluntly put it, where there is a Miranda taint, and physical evidence discovered as an unattenuated result of that coercion, "[t]hat should be the end of the case." Id. at 647.

The same rationale applies to purported "consents" to search signed after unwarned questioning both in his apartment parking lot and in his apartment where he was taken via a key found in his pocket following his arrest, during which Mr. Rodriguez admitted ownership and possession of the vehicle, places and items sought by the police to be searched, and at the very time that several police officers in his residence to which he had been taken for questioning were already in the process of searching that apartment.

In finding that Mr. Rodriguez's "consents" to search were "voluntary" under the circumstances of this case, the court below failed to consider the preclusive evidential effect of the prior violation of Mr. Rodriguez's Fifth Amendment rights on the factors of State v. King, 44 N.J. 346 (1965)[15] in light of the fact that "New Jersey's Constitution...provides greater protections than the federal constitution when it comes to consent searches." State v. Shaw, 237 N.J. 588, 619 (2007).

This is best reflected in the court's pointing to Mr. Rodriguez's admission of guilt "before consent" as a factor tending to show voluntariness. (Da42). But to the extent Mr. Rodriguez admitted guilt, it was only in response to the unlawful police questioning which preceded it, and which she had ruled must be suppressed as not voluntary. Moreover, the court's reliance on the fact that Mr. Rodriguez

[15] King was decided in 1965, one year before Miranda v. Arizona, 384 U.S. 346 (1966).

"voluntarily" signed consent to search forms as a factor indicating a lack of coercion, similarly failed to apply the necessary evidential corollary to her own finding of a preceding Fifth Amendment violation, namely that even a written and signed "consent" to search by a person in custody following an unlawfully obtained confession, cannot be considered voluntary, and any fruits derived from such consent search is "fruit of the poisonous tree." See State v. Shaw, supra, at 619.

Moreover, in failing to apply the "fruits" doctrine to the issue of the "voluntariness" of Mr. Rodriguez' "consents", Judge Carter, who had not decided the original Motion to Suppress before Judge Toto, failed to consider the totality of the circumstances – including the police misconduct which preceded their arrest of Mr. Rodriguez in the parking lot of his New Jersey apartment. The "non-exclusive" factors for determining a "voluntary" consent set forth in State v. King, 44 N.J. 346 (1965), are not intended to be a sort of legal accounting ledger, recording numerical plusses and minuses with a Mr. Rodriguez's fate hanging in the balance.[16]

In this case, Mr. Rodriguez's first encounter with the police was in the parking lot of New Jersey the apartment, where he was rushed at and surrounded numerous armed police officers; handcuffed; and searched. The court found that the State had failed to prove that any statement made by Mr. Rodriguez from the time of his arrest

[16] Even so considered, in this case it is clear that all of the factors tending to show coercion existed, while none of those tending to show the consent was voluntary was present. (See Da42-43).

until the time of his sole on-the-record "confession" some 8 hours later were not made in violation of his Fifth Amendment rights, including those made in the tainted interview which occurred inside his apartment immediately after his arrest.

In Mr. Rodriguez' pocket they found a key to his apartment, which, along with up to nine or more officers, they took him and; as several officers fanned out through the apartment, the illegal questioning continued for nearly a half-hour, during which he supposedly acknowledged ownership and control of his BMW, the duffel bags of cocaine, and the small metal lockbox which the police seized from him at the time of his arrest. Thus, by the time the police sought consent to waive his Fourth Amendment right to refuse consent to search for physical evidence, they had already violated his Fifth Amendment right against self-incrimination. In such circumstance, it makes no constitutional sense to conclude that any physical evidence obtained as a result of that misconduct need not be suppressed, the consequence of which would be to give "an evidentiary advantage to those who ignore Miranda," and thus "an important inducement for interrogators to ignore the rule in that case." United States v. Patane, 542 U.S. 630, 646 (2004) (Souter, J. dissenting).

Just as the fruit of a Fourth Amendment violation (e.g. an arrest without probable cause) may not be made constitutionally palatable based on what was discovered in a claimed "consent" search following that arrest -- even where

Miranda warnings have been provided,[17] -- where the taint arises from a Fifth Amendment violation, even one following an otherwise lawful arrest, the same doctrine applies to require exclusion of both statements made acknowledging custody, control or ownership of identified items, residences or vehicles, and the resulting "fruits" found under the authority of any subsequently obtained "consent" to search.

The warrantless search and seizure which husbanded the evidentiary tree in this case occurred in Illinois. If the court agrees with Mr. Rodriguez that Judge Toto's decision, applying Illinois law, was erroneous, then it is submitted, all fruits derived from that Fourth Amendment violation must be suppressed.

But Mr. Rodriguez's Motion for Reconsideration was to suppress evidential fruits, both verbal and tangible, "seized" in New Jersey -- and in New York as well -- without a warrant, based on a violation of his Miranda rights occurring in New Jersey. In failing to apply the fruits doctrine in this case, as our State courts have consistently done over the years, Judge Carter erred in her denial of Mr. Rodriguez's Motion for Reconsideration, and her decision should be reversed.

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[17] In limited circumstances, although a "consent" following an illegal arrest may serve to remove the taint, the State bears the substantial burden to prove both that the purported consent was voluntary and that, even if completely voluntary, there was a clear break in the "causal connection between the illegality" and the evidence obtained. Dunaway v. New York, 442 U.S. 200, 217-218 (1979).

POINT II THE COURT ERRED IN SENTENCING MR. RODRIGUEZ BY FAILING TO MERGE THE MR. RODRIGUEZ'S CONVICTION OF POSSESSION OF MARIJUANA WITH HIS CONVICTION FOR POSSESSION WITH INTENT TO DISTRIBUTE MARIJUANA AND BY APPLYING AGGRAVATING FACTORS N.J.S.A. 2D:44-1(A)(1),(3) AND (9) (Da44 - Da46).

In sentencing Mr. Rodriguez, the trial court improperly failed to merge his first degree conviction of possession with intent to distribute marijuana with his fourth degree conviction for simple possession of marijuana, and sentencing him separately to 18 months imprisonment concurrent to the first degree sentence of 12 years she imposed on Count 2. State v. Rechtschaffer, 70 N.J. 395, 411-412 (1976); State v. Selvaggio, 206 N.J. Super. 328, 330 (App. Div. 1985).

Likewise, the court erred in failing to merge the fourth degree possession of marijuana into the third degree possession of cocaine conviction. Neither of these charges involved an intent to distribute, and the possession of these different substances coincided at the same time and place. Merger is appropriate and necessary under such circumstances. State v. Strecko, 244 N.J. Super. 463 (App. Div. 1990).

In addition, in her sentencing of Mr. Rodriguez, Judge Carter improperly applied aggravating factors N.J.S.A. 2C:44-1(a)(1) (cruel, heinous "nature and

circumstances" of the offense), 1(a)(3) (risk Mr. Rodriguez will commit another offense) and 1(a)(9) (general and individual deterrence).

The language of N.J.S.A. 2C:44-1(a)(1) that the "nature and circumstances" of the offense and the Mr. Rodriguez's role, the language "including whether or not it was committed in an especially heinous, cruel or depraved manner," is not mere Legislative surplusage. It was clearly intended to apply in cases involving the commission of crimes involving violence such as murder, assault, robbery, arson, and similar crimes, and only then when the circumstances revealed conduct even more extremely and gratuitously harmful than that reflected in the Legislature's definition of the crime itself. And the majority of the cases which have applied this factor have done so only where the actor's conduct was both violent and reflective of a penchant for the infliction of gratuitous suffering on his or her victim. See Cannel, N.J. Crim. Code, Annot. Comment 3. to N.J.S.A. 2C:44-1, and cases cited therein. Indeed, the only reported case applying this factor in a drug distribution case appears to be State v. Blow, 237 N.J. Super. 184 (App. Div. 1989), revd. on other grounds, 123 N.J. 472 (1991) (in which Mr. Rodriguez, who had extensive record assaultive crimes, and distribution, and who was at time of arrest on probation for same offense was observed over a period of time selling heroin within 1000 feet of a school).

In applying this factor, Judge Carter, adopting the State's argument, Mr. Rodriguez, who, at 37, had no criminal record whatever, "was responsible for placing a large amount of [marijuana] into the stream of commerce" and that the quantity of CDS was "far more than necessary" to constitute the crime of which he was convicted (13T28-11 to 17). She did not explain why the possession with the intent to distribute (not distribution itself) of 175 pounds of marijuana, which for criminal liability purposes the Legislature deemed exactly the same as the distribution of 25 pounds was a criminal so "so heinous, cruel, or depraved" as to support application of this aggravating factor.

The sentencing court also improperly applied aggravating factor N.J.S.A. 2C44-1(a)(3) (the risk of committing another offense), and (a)(9)(personal deterrence.), especially in light of her application of mitigating factor N.J.S.A. 2C:44-1(b)(9) (character and attitude make it unlikely Mr. Rodriguez will commit another offense)[18] In her discussion of factor (b)(9), the sentencing court noted the overwhelming support by family, friends, and members of Mr. Rodriguez's community, as well as the "words that were spoken by Me. Rodriguez here today"

[18] Although acknowledging Mr. Rodriguez's complete lack of criminal history, Judge Carter gave it "minimal weight" because of evidence that the marijuana distribution charge of conviction was "not just a one-off, one-time[,]", that it was a "carefully planned out operation." (13T32-21 to 24). and thus despite any record supported evidence of prior criminal conduct in 37 years of life, she concluded he did "not necessarily lead a law-abiding life for a significant period of time." (13T32-25 to 13T33-2).

(13T35:1-10; see Mr. Rodriguez's statement at (13T14-14 to 16-24). While candidly acknowledging that in every sentencing the (b)(9) factor was one she always "struggled with" (13T34-4 to 7), in the sense of "is what I am seeing a representation of someone who truly, duly appreciates that what happened in this case is something that cannot and should not happen again...given the character and attitude of the Mr. Rodriguez?" (13T34-19 to 35-1). Answering her question in the affirmative, Judge Carter noted Mr. Rodriguez's "full appreciation for the extent to which" his actions affected all of those people who "expected better from you." (13T35-10 to 13).

This mitigating finding by Judge Carter, it seems clear, is thus dramatically in opposition to her finding of aggravating factor (a)(3), the "risk" of recidivism. Moreover, it undermines the application of aggravating factor (a)(9). That factor, often applied as a matter of form because general deterrence is a factor in all cases But (a)(9) only applies where the need to deter exists for others in general and the Mr. Rodriguez in particular. While interrelated, these concepts are distinguishable, and both must be present to support the sentence imposed on the particular Mr. Rodriguez before the court. See State v. Jarbath, 114 N.J. 394, 405 (1989). General deterrence alone, without any personal deterrent effect vitiates the impact of a sentence as a general deterrent. Id. See also State v. Gardner, 113 N.J. 510, 520 (1989). Judge Carter's careful consideration of Mr. Rodriguez's character and attitude, based on his own self-analysis, and his "appreciation" of the negative

effects of his past conduct on his community, his family and his friends make it unlikely he will commit another offense renders virtually inapplicable personal deterrence as basis for the aggravating factor of (a)(9), and thus for the application of this factor at all.

CONCLUSION

For the foregoing reasons, and based upon the foregoing authorities, all evidence seized by the police in this case, whether in Illinois, New Jersey or New York, both physical and oral, should be suppressed, Mr. Rodriguez's convictions reversed and the case remanded.

Respectfully submitted,

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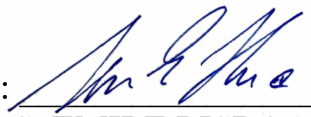
BY: 
S. EMILE LISBOA IV ESQ.

Dated: July 14, 2023

Superior Court of New Jersey
APPELLATE DIVISION
DOCKET NO. A-000845-22

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of New Jersey, Law Division,
v.	:	Middlesex County.
JOSE E. RODRIGUEZ, a/k/a JOSE RODRIGUEZ,	:	Sat Below: Hon. Michael A. Toto, P.J. Cr. Hon. Andrea G. Carter, J.S.C.
Defendant-Appellant.	:	

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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December 4, 2023

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COUNTER-STATEMENT OF PROCEDURAL HISTORY

On February 1, 2018, the State Grand Jury returned Indictment No. 18-01-00013-S, charging defendant Jose E. Rodriguez, also known as Jose Rodriguez, with first-degree possession with intent to distribute cocaine, in violation of N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(1) (count one); first-degree possession with intent to distribute marijuana, in violation of N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(10)(a) (count two); third-degree possession of cocaine, in violation of N.J.S.A. 2C:35-10(a)(1) (count three); and fourth-degree possession of marijuana, in violation of N.J.S.A. 2C:35-10(a)(3) (count four). (Da1-4)

On January 14, 2020, in a written decision and order, the trial court denied defendant's motion to suppress evidence. (Da6-29). On May 8, 2020, the court issued an order denying defendant's motion for reconsideration. (Da30).

On April 5, 2021, the trial court denied in part and granted in part defendant's motion to suppress his statements. (Da31; 6T3-10 to 26-20). On December 10, 2021, the court denied defendant's motion for reconsideration. (Da32-43).

Defendant was tried before a jury from March 15 to March 24, 2022. Defendant did not testify or present any witnesses. (12T42-4 to 5). On March 24, 2022, the jury found defendant guilty on counts two, three, and four and not guilty

on count one. (Da44; Pa6-8;[1] 12T5-13 to 7-4).

On October 7, 2022, the court sentenced defendant to concurrent terms of imprisonment of 12 years flat on count two; to five years on count three; and 18 months on count four.[2] (Da44; 15T41-2 to 16). The court denied defendant bail pending appeal. (15T43-10 to 48-24; Da47).

On November 23, 2022, defendant filed an amended Notice of Appeal. (Da54-58). On December 29, 2022, this Court denied defendant's request for bail pending appeal. (Da48).

COUNTER-STATEMENT OF FACTS

A week before February 26, 2017, Lonnie Jacobs ("Jacobs") from Silver Springs, Nevada, made arrangements with defendant, who he knew as "Stacks," to meet at the Reno, Nevada La Quinta Hotel to discuss transportation of marijuana to the East Coast. (11T33-4 to 8; 11T37-10 to 17). Jacobs identified defendant as

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[1] The trial court restructured the counts of the indictment on the jury verdict sheet to allow for "ease in terms of ultimately following the charge and reaching a verdict." (15T27-12 to 19; Pa6-8). The verdict sheet referenced counts one and two as possession of cocaine and possession of cocaine with the intent to distribute, and counts three and four as possession of marijuana and possession of marijuana with the intent to distribute. (Pa6-8).

[2] The Judgment of Conviction (Da44) indicates that defendant was sentenced to 18 months on count four, a fourth-degree offense. In the sentencing transcript, Judge Carter, however, sentenced defendant to four years, which is an illegal term of imprisonment for a fourth-degree offense. Compare Judgment of Conviction (Da44) with 15T41-10 to 13.

Stacks in court. (11T35-23 to 36-8).

Jacobs was to be paid $5,000 for transporting the marijuana delivery to the East Coast and another $5,000 upon delivery to defendant. (11T38-2 to 11). While at the hotel, defendant selected certain "brands" of marijuana, placed them in vacuum-sealed, smell-proof "Smellyproof" bags, and then put them into eight duffel bags. (8T50-24 to 51-2; 11T40-25 to 41-22). Jacobs took these duffel bags to his home in a Ford 150 pick-up truck with Nevada license plates he had borrowed from his friend "Gus." (11T41-19 to 42-11; 11T130-21 to 131-3).

Initially, Jacobs thought his destination was New York, not New Jersey. (11T43-20 to 44-5). Jacobs waited a couple of days before embarking upon the trip because he could not find anyone other than his girlfriend, Maria Stout ("Stout"), to drive with him. (11T42-19 to 43-5). Jacobs regularly contacted defendant to let him know "everything was good." (11T43-6 to 11; 11T51-24 to 52-2).

On February 28, 2017, at approximately 7:15 a.m., Illinois State Trooper Sean Veryzer ("Veryzer") stopped Stout as she drove the Ford pick-up truck on I-80. (8T34-13 to 19). Veryzer had stopped Stout because, under Illinois law, the pick-up truck was a Division 2 class vehicle, which required but did not have any mudflaps or splash guards to prevent water, mud, and rocks from being flung onto a vehicle behind the truck. (8T34-20 to 35-15).

Using his flashlight, Veryzer peered into the right back window of the truck's

topper to ensure no one else was in the truck. (8T39-14 to 19; 8T43-15 to 21). The officer "clearly" saw some brand-new duffel bags underneath a piece of plywood and broken-down cardboard boxes. (8T39-19 to 40-5).

During the traffic stop, Veryzer deployed his drug-sniffing K-9 dog, which alerted him to the presence of drugs in the truck. (8T43-15 to 21; 11T45-24 to 46-9). As a result, the truck was searched, and the search resulted in the discovery of eight large duffel bags containing approximately 175 pounds of raw marijuana. (8T72-17 to 19).

Veryzer and other Illinois State Troopers arrested Stout and Jacobs and transported them to the Geneseo Police Department ("GPD"), where they were convinced to cooperate with law enforcement. (8T193-11 to 15; 11T49-24 to 50-2). Jacobs advised the police that defendant, who he knew as "Stacks," was the intended recipient of the marijuana. (11T35-16 to 36-8). Jacobs and Stout agreed to cooperate in a controlled delivery of the marijuana to defendant in New Jersey. (11T49-24 to 51-17).

Under the direction of law enforcement, Jacobs consented to and called defendant five times to advise him that the marijuana delivery would be delayed until the next day, on March 1, 2017. (11T62-25 to 64-24). The trip needed to be delayed to give law enforcement time to set up its controlled delivery of the marijuana to defendant. (11T64-22 to 24).

The Illinois State Police and the Drug Enforcement Administration ("DEA") Illinois agents traveled overnight to the New Jersey State Police headquarters in Holmdel, New Jersey, with Jacobs, Stout, and the marijuana. Veryzer and Special Agent Henry drove Jacobs's pick-up truck. (8T199-1 to 3).

That next day, law enforcement put the marijuana back into Jacobs's truck, placed a GPS tracking device into the truck and equipped Jacobs with a "KEL" recording device so that the police could hear any conversations Jacobs had with defendant. (9T46-1 to 8; 9T47-21 to 48-2). A GPS tracker was also placed with the marijuana to track Jacobs's vehicle and the drugs from Holmdel Station to the meeting place. (9T48-3 to 7).

At about 1:00 p.m., surveillance was set up at a CVS Pharmacy parking lot in Old Bridge, New Jersey. (8T92-13 to 20; 9T46-13 to 47-4). This parking lot was optimal because it was large enough for law enforcement to insert several unmarked cars therein and observe Jacobs meet with defendant. (9T46-18 to 24). This CVS was also close to the location defendant had given Jacobs. (9T47-2 to 4).

At approximately 2:05 p.m., officers observed a white BMW X5 with New York license plates enter the CVS parking lot and park near Stout and Jacobs' truck. (8T93-13 to 94-16; 9T49-2 to 3). When the police ran the New York license plates for the BMW, it came back to defendant as the vehicle's operator. (9T53-14 to 17).

Defendant stepped out of the BMW and approached the truck. (9T49-4 to 7).

After Jacobs exited his truck, he and defendant spoke briefly. (8T94-17 to 22; 9T13 to 14). Jacobs and defendant went back to their vehicles and drove off. (9T49-13 to 18). Jacobs followed defendant's BMW while law enforcement followed Jacobs's truck. (8T94-22 to 95-18; 9T49-13 to 50-9).

The vehicles traveled to the Glenwood Apartments and Country Club, an apartment building complex. (8T93-13 to 20; 9T50-1 to 14). Jacobs and defendant drove to the rear complex parking lot and parked their vehicles side by side on Popular Lane. (9T50-19 to 23).

At approximately 2:10 p.m., Jacobs and defendant were seen removing six of the marijuana-filled duffel bags from Jacobs's truck and placing them in the back of defendant's BMW. (8T236-1 to 4; 9T53-21 to 54-3). The officers then observed defendant and Jacobs take the two remaining duffel bags and walk toward Apartment B at 9 Ashwood Mall, Old Bridge, New Jersey. (8T236-5 to 6; 9T54-3 to 12). Defendant retrieved a key from his pocket, unlocked the apartment door, and placed the two duffel bags inside. (9T54-15 to 20). He then closed and locked the apartment door. (9T54-20 to 21). Defendant and Jacobs returned to their vehicles empty-handed. (9T54-21 to 55-5). Jacobs and Stout drove away. (11T102- 4 to 103-11; 11T107-24 to 108-3).

Neither Jacobs nor Stout was ever charged with a crime in New Jersey or Illinois. (8T74-7 to 75-6; 8T197-17 to 198-18; 11T123-18 to 19). They were

allowed to return to Nevada. (11T108-15 to 23).

After Jacobs left the parking lot, defendant unlocked the BMW and removed a small silver and black box. (9T55-17 to 20). As defendant walked back towards Apartment B, officers apprehended and handcuffed him. (9T56-3 to 18).

Pursuant to defendant's consent to search, the police seize two large marijuana-filled duffel bags from his apartment, marijuana unrelated to this investigation, found in a kitchen cabinet, and the silver and black box containing cocaine; six duffel bags from defendant's BMW; and $60,000 to $70,000 in cash from a safe in defendant's Queens residence. (Pa1-4; 9T56-18 to 60-14; 9T75-10 to 22).

In his 10:45 p.m. police interview, defendant admitted that (1) only he and his girlfriend had a key to their apartment. (9T71-22 to 72-4; (2) he placed the two duffel bags into that apartment (as observed by officers) and that he knew that there was marijuana in those duffel bags. (9T72-5 to 15); (3) that the six duffel bags he placed in his BMW were full of marijuana. (9T72-16 to 73-6); (4) his primary address was 95-10 Lefferts Boulevard in Queens, New York. (9T74-3 to 75-3); (5) cocaine in two vacuum-sealed bags was found in the silver and black box retrieved from his BMW. (9T77-12 to 19); and (7) the police removed $60,000 to $70,000 in cash from his Queens residence. (9T75-10 to 22).

Brianna Senger was qualified as an expert for the State in chemical analysis of

controlled dangerous substances ("CDS"). (10T9-13 to 11-15). Senger opined that certain of the substances from the duffel bags were tested and were positive for cannabis, and the white powdery substance tested positive for cocaine. (10T20-7 to 11).

Defendant neither testified nor presented any witnesses. (11T220-18 to 227-7; 12T42-5).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTIONS TO SUPPRESS THE PHYSICAL EVIDENCE IN THIS CASE.

The seizure of the 175 pounds of defendant's marijuana was the result of a lawful motor vehicle stop in Illinois of a truck driven by defendant's delivery persons, Stout and Jacobs, who defendant had hired to deliver the marijuana across country from Nevada to New Jersey. The subsequent seizure of this marijuana from defendant in New Jersey via a consent search was also proper in all respects. Because there was no poisonous tree, let alone any poisonous fruits, this Court should affirm the trial judges' multiple denials of defendant's motions to suppress the physical evidence seized in this case.

A. Motion to Suppress Evidence before Judge Toto

1. Illinois Traffic Stop

The State presented the testimony of two officers -- Illinois State Trooper

Sean Veryzer and New Jersey State Police Officer Detective Peter Layng -- at the suppression hearing.

Veryzer testified that on February 28, 2017, at approximately 7:15 a.m., he stopped Maria Stout's ("Stout") red Ford F-150 pick-up truck on Route I-80 for an Illinois mudflaps or splash guard violation. (1T19-11 to 15; 1T124-6 to 9). Veryzer identified Stout by her Nevada driver's license. (1T22-23 to 23-1). Stout was accompanied by one passenger in the vehicle, identified by his Nevada driver's license as Lonnie Jacobs ("Jacobs"). (1T23-1 to 3). The stop of Stout's vehicle was captured on the Veryzer's squad vehicle's dual-function video camera, which captured video inside and outside of the vehicle. (1T83-5 to 8; Da73; Pa9).

While walking toward the truck, Veryzer glanced through the right rear window of the truck's topper with a flashlight. Veryzer can be heard to say out loud on the videotape, "One 30 Nevada. I think he's covering something. Looks like duffel bags." (Da73/Pa9 at 1:38 to 1:41; accord 1T132-17 to 19). The officer saw a piece of plywood and cardboard partially concealing a few black duffel bags on the truck bed. (1T21-2 to 10).

When Veryzer questioned Stout and Jacobs as to whom the vehicle belonged, Jacobs responded with "Gus." (1T23-6 to 9). Jacobs informed Veryzer that "Gus" was in Reno, and they were traveling to New York to pick up a car. (1T23-9 to 13). Veryzer requested that Stout exit the truck and accompany him back to his trooper

car while he ran a check on her driver's license and prepared a warning for a splash guard violation. (1T23-23 to 24-16). It was customary in Illinois to have the motorists sit in the police car while the officer ran his routine checks on the motorist's driver's license and license plate. (1T24-2 to 11; 1T32-25 to 33-7; 1T60-5 to 9).

Veryzer questioned Stout about the truck bed's contents as she walked with him back to his patrol vehicle. (1T24-24 to 25). Stout lied to the officer, stating, "Oh, there's nothing in there." (1T142-20 to 25).

As Stout sat in the squad car, Veryzer noticed Stout was exhibiting signs of "extreme stress or nervousness." (1T26-3 to 4). Stout began breathing quickly and chewed her gum harder and faster to the point where he could hear it "smacking." (1T26-4 to 9; 1T208-8 to 14).

Once Stout and Veryzer were in his squad car, he began "working on business related to the traffic stop, locating [his] location in [his] computer system, running checks on her to see if she's ever been stopped, running the vehicle information." (1T25-10 to 13).

When Veryzer again asked Stout about the contents of the duffel bags, she again lied by denying that there was anything in the truck bed. (1T25-18 to 25). Upon Veryzer telling Stout that he believed she and Jacobs were transporting a large amount of marijuana across the country, she responded that she was only along for

the ride and did not know what was in the duffel bags. (1T27-12 to 23).

Veryzer testified that Reno was the gateway to an area in California known as the "Emerald Triangle," where for "many years" "probably the last 20 years or more, the largest cannabis grows in the United States has occurred" there. (1T28-4 to 12).

During his conversation with Stout, Veryzer continued working on his computer, "running information, running different checks that" Illinois troopers run, as she continued to deny that duffel bags were in the back of her pick-up truck. (1T27-12 to 17). When Veryzer ran Stout's FBI number, he saw that she had been arrested for the manufacture and delivery of controlled substances in the past. (1T28-21 to 23).

At one point, Veryzer confronted Stout about his belief that she was transporting marijuana and that he had reasonable suspicion, based on the totality of the circumstances, to walk his K-9 drug-sniffing partner "Roman" around the pick-up truck's exterior. (1T27-18 to 30-15). Veryzer was certified by the Illinois Law Enforcement Training Standards Board to handle a K-9 partner. (1T62-24 to 64-9). Veryzer then read Stout her Miranda[3] rights, and Stout indicated that she understood her rights. (1T30-22 to 23; 1T160-20 to 161-13).

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

Veryzer testified that as he was deploying his K-9, dispatch continued to look up Stout's information, and Veryzer used this time to conduct the dog sniff. (1T31-1 to 4; 1T32-22 to 33-25). In Illinois, the stop cannot move forward, according to Illinois State Police policy, until the officer hears from the telecommunication center regarding the driver's license check for a suspension, for which the driver would then be issued a citation. (1T32-25 to 33-7; 1T90-2 to 8).

As Veryzer walked his K-9 counter-clockwise around the truck's exterior, the dog first alerted to the driver's side door, then jumped onto the truck's rear bumper and froze. (1T31-10 to 32-3). Upon Veryzer's command to again "seek, find, dope," unprompted, the K-9 sat down, which was the "confirmation" that an odor of narcotics was emanating from within the truck. (1T31-22 to 32-8). The sniff test took less than a minute to conduct. (1T33-24 to 25).

After the sniff test, Veryzer returned to his vehicle and advised Stout of the K-9 alert and that he had probable cause to search the truck for drugs. (1T32-14 to 17). Veryzer and another trooper, who had arrived on the scene, removed Jacobs from the passenger seat and conducted a probable cause search of Jacobs. (1T34-12 to 14). Jacobs denied that he had a key to unlock the truck topper. (1T34-14 to 16). The officers found the key to the truck topper in one of Jacobs's shoes. (1T34-16 to 20).

The officers searched the truck and discovered, underneath some plywood

and cardboard, eight large duffel bags containing approximately 200 pounds of raw marijuana. (1T34-24 to 35-7; 1T99-17 to 19; 2T6-23 to 7-1).

Veryzer arrested Stout and Jacobs and transported them to the Geneseo Police Department ("GPD"). (1T78-5 to 7). During questioning in Illinois, Jacobs stated that the intended recipient of the marijuana was a person in New Jersey he knew as "Stacks," who was later identified as defendant. (2T7-4 to 7; 2T8-23 to 9-1).

Jacobs and Stout agreed to cooperate in a controlled delivery of the marijuana to defendant in New Jersey by March 1, 2017. (2T7-4 to 8-23).

The Illinois State Police contacted the Illinois Drug Enforcement Administration ("DEA"), which then contacted Peter Layng in the New Jersey State Police Drug Trafficking North Unit who became the lead investigator for this case. (2T6-11 to 7-21).

Under police supervision, Jacobs contacted defendant to advise him that he would be stopping in Pennsylvania on the night of February 28, 2017, and that he would be in New Jersey the next morning on March 1, 2017. (2T8-18 to 22; 2T10-7 to 11). Jacobs and defendant had originally planned to meet at an apartment complex at 35 Spruce Lane, Old Bridge, New Jersey. (2T10-7 to 25). The police, however, changed the meeting location to the CVS parking lot next door to the apartment complex. (2T11-1 to 10). Law enforcement could easily surveil the controlled delivery from this vantage point. (2T11-3 to 7).

The Illinois State Police and DEA agent traveled overnight with Jacobs, Stout, and the marijuana to the New Jersey State Police headquarters in Holmdel, New Jersey. (2T8-9 to 9-7).

On March 1, 2017, the police placed the marijuana into Stout's and Jacobs's Ford truck, marked the truck, and placed a GPS unit into one of the duffel bags. (2T9-23 to 11-16). At approximately 1:00 p.m., surveillance was set up at the CVS parking lot. (2T11-9 to 16). Jacobs was equipped with a "KEL" device to record and transmit conversations to the surveillance team. (2T16-8 to 10). Jacobs and Stout parked, remained in the truck, and waited for defendant while the police set up surveillance. (2T11-13 to 16).

At approximately 2:00 p.m., officers observed a white BMW X5 with New York license plates enter the CVS parking lot and park near Stout's and Jacobs' truck. (2T11-20 to 23). Defendant stepped out of the BMW and walked directly over to Stout and Jacobs who were outside of the truck. (2T15-7 to 13). After speaking briefly, Jacobs and defendant left in their vehicles and traveled next door to the Glenwood Apartments and Country Club apartment building complex. (2T15-15 to 18). The police followed them. (2T15-21 to 16-4).

At approximately 2:10 p.m., Jacobs and defendant parked their vehicles next to each other on Poplar Lane. (2T19-6 to 9). Jacobs and defendant exited their respective vehicles and began unloading the duffel bags from the pick-up truck into

the back of defendant's BMW. (2T19-9 to 12). Because only six of the duffel bags fit into defendant's car, he locked the car and carried two duffel bags to 9 Ashwood Mall, Apartment B, Old Bridge, New Jersey. (2T19-19 to 23).

After Jacobs and Stout drove away, defendant unlocked the BMW and removed a small silver and black box. (2T30-7 to 11). As defendant walked back towards Apartment B, police officers apprehended and searched him and gave him his Miranda rights. (2T20-13 to 18). Defendant initially denied carrying any duffel bags or living in the apartment. (2T20-19 to 20). After the officers explained to defendant what they had just observed him do, defendant admitted to living in Apartment B part-time with his girlfriend, to placing the two bags in the apartment, and to receiving the other six duffel bags. (2T20-21 to 24).

Defendant gave the officers verbal consent to search Apartment B, the silver and black box found in his possession (which was later found to contain two vacuum-sealed bags of cocaine), his Queens, New York residence, and his BMW. (2T22-19 to 23; 2T29-3 to 7). Defendant also signed four consent to search forms admitted into evidence as "1A" to "1D" for each area searched. (Pa1-4; 2T22-21 to 33-19).

At approximately 5:10 p.m., officers accompanied defendant to his Queens, New York residence to conduct a consensual search of the apartment where between $60,000 to $70,000 in cash was found. (Pa4; 2T31-21 to 32-22; 2T73-11 to 14).

2. Judge Toto's Decision Denying Defendant's Motion to Suppress Evidence Seized in Illinois

Judge Toto properly denied defendant's motion to suppress the marijuana seized in Illinois from Jacobs and Stout. The appellate review of a motion to suppress is limited and "deferential." State v. Cohen, 254 N.J. 308, 318-19 (2023). Appellate courts must uphold the trial court's factual findings so long as those findings are supported by sufficient credible evidence in the record. Id. at 318. This deference recognizes 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.'" Id. at 318-19 (quoting State v. Ahmad, 246 N.J. 592, 609 (2021) (quoting State v. Elders, 192 N.J. 224, 244 (2007))). Appellate courts "ordinarily will not disturb the trial court's factual findings unless they are 'so clearly mistaken' that the interests of justice demand intervention and correction.'" Id. at 319 (quoting State v. Gamble, 218 N.J. 412, 425 (2014) (quoting Elders, 192 N.J. at 244).

In this case, Judge Toto denied defendant's suppression motion after having had an opportunity to see and hear Veryzer and Layng and to assess these officers' credibility. (1T15-23; 2T4-5). Judge Toto found Veryzer to be a credible witness because the officer "answered questions directly, made eye contact with the attorneys, exhibited good recall, and had an overall calm, professional demeanor." (Da16). Judge Toto similarly found Layng to be a

credible witness in that the officer "responded appropriately to the questions of both counsel and was relaxed and clear in his testimony." (Da24).

Appellate courts defer to the trial court's credibility determinations because it has "'a better perspective than a reviewing court in evaluating the veracity of a witness.'" C.R. v. M.T., 248 N.J. 428, 440 (2021) (Gnall v. Gnall, 222 N.J. 414, 428 (2015) (quoting Cesare v. Cesare, 154 N.J. 394, 412 (1998))).

Citing to State v. Evers, 175 N.J. 355 (2003), Judge Toto first found that Illinois law applied to Veryzer's stop of Stout's vehicle in Illinois. Judge Toto ruled that Veryzer, acting on behalf of the State of Illinois, could not be held to New Jersey's laws unless he had been acting as an agent for the State of New Jersey by "procuring evidence for criminal prosecution in New Jersey. Absent such an agency relationship, Illinois state law would apply to the motor vehicle stop in Illinois." (Da24-25). Judge Toto properly applied Illinois state law to analyze the lawfulness of Veryzer's motor vehicle stop. Accord Evers, 175 N.J. at 371 (New Jersey's "[c]onstitution has no ability to influence the behavior" of another state's "law enforcement officer who does not even know that New Jersey has an interest in a matter he is investigating").

Judge Toto's decision that Illinois law applied to Veryzer's stop was supported by the sufficient credible evidence in the record, given that both

Jacobs and Stout thought and initially advised Veryzer that they were headed to New York, not New Jersey. (1T23-10 to 13; 1T113-18 to 19). It was well after the stop at the Geneseo Police Department that Jacobs, Stout, and Veryzer learned that defendant's delivery destination was in New Jersey. Consequently, Judge Toto properly found that the State of New Jersey was not connected in any way with Veryzer's stop of Stout's truck in Illinois.

Under Illinois law, the burden of proving that a search or seizure was unlawful is placed on the defendant. People v. Mallett, __ N.E.3d __, 2023 IL App (1st) 220920, ¶ 31 (2023) (citing to 725 ILCSA 5/114-12(b)).[4] Only after a defendant in Illinois has made a prima facie showing that the evidence was obtained from an illegal search does the burden shift to the State of Illinois. Ibid. (citing to People v. Cregan, 10 N.E.3d 1196, 1201 (Ill. 2014)).

Also, under Illinois law, so long as an officer does not prolong a stop or cease conducting business related to a traffic stop, the officer does not need reasonable suspicion to conduct a dog sniff. People v. Pulido, 83 N.E.3d 1111 (Ill. App. Court. 3d Dist. 2017).

Judge Toto first ruled that Veryzer's traffic stop of Stout's truck for a mudflap violation was lawful. (Da16). Illinois law requires all Division 2

[4] ILCS stands for Illinois Compiled Statutes Annotated.

vehicles, like Stout's pick-up truck, to have splash guards. Accord 625 ILCS 5/12-710 (Rear Fender Splash Guards);[5] see also People v. Hackett, 971 N.E.2d 1058, 1064 (Ill. 2012) (under Illinois law, the decision to stop a vehicle is reasonable when the police have probable cause to believe that a traffic violation has occurred). Stout's vehicle did not have mudflaps, the absence of which can be easily seen in the video of Veryzer's stop. (Da73/Pa9 at 0:54).

Despite ruling that Veryzer's questions unrelated to the traffic stop were impermissible and rendered a portion of Stout's detention unreasonable under the Fourth Amendment, Judge Toto found that this initial ruling did not detract from Veryzer's "overall development of probable cause." (Da18; Da27-28). While Veryzer's questioning of Stout about whether there was marijuana in the back of the truck was independently improper, that questioning did not impermissibly delay the traffic stop and did not detract from the probable cause necessary to conduct a search of the vehicle. (Da18). Having found

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[5] 625 ILCS 5/12-710 states

> It is unlawful for any person to operate any vehicle of the second division, except a truck tractor, to which this Section is applicable upon any highway of this State unless such vehicle is equipped with rear fender splash guards . . . of either the contour type or the flap type . . . which are so attached as to prevent the splashing of mud or water upon the windshield of other motor vehicles.

Veryzer to be a credible witness, Judge Toto found as fact that while the officer conducted the K-9 sniff, he did not stop the business related to the traffic stop, such as checking Stout's license, registration, proof of insurance, and whether any outstanding warrants existed, as permitted by Pulido, 83 N.E.3d at 1120. (Da19; accord Pulido, 83 N.E.3d at 1120 (a "suspicionless canine sniff conducted during a lawful traffic stop does not independently trigger the fourth amendment, so long as it does not unreasonably prolong the duration of the traffic stop").

Veryzer nonetheless had reasonable suspicion to deploy the K-9 in this case because under the totality of the circumstances, Stout had lied to Veryzer several times that there was nothing in the back of her truck, she and Jacobs were traveling across the country in a vehicle owned by a third person where they claimed that they were going to pick up a car but did not possess a trailer or a car dolly, to haul the car back. (Da21; 1T29-15 to 30-1).

Judge Toto's decision finding that Veryzer had probable cause to search the truck for marijuana (Da18) was supported by the sufficient credible evidence in the record in that:

1. Veryzer, who was found to be a credible witness, did not prolong the stop by conducting the K-9 sniff test, which took a minute or less while Veryzer waited for dispatch's information on Stout's driver's license. (1T33-22 to 25);

2. the K-9 alerted to the presence of drugs in the truck. (1T31-22 to 32-8);

3. Stout's FBI number indicated that she had numerous CDS-related arrests for the manufacture and delivery of CDS in the past. (1T28-21 to 23);

4. Stout repeatedly lied to Veryzer about the presence of the duffel bags in the truck, which he saw with his flashlight on his initial approach to the truck. ((Da73/Pa9 at 1:38 to 1:41; 1T24-24 to 27-25; 1T142-19 to 22);

5. Stout's nervousness and loud and rapid gum chewing intensified when asked about the duffel bags. (1T26-3 to 9; 1T208-8 to 14);

6. Stout and Jacobs were two people driving cross-country from Reno with partially concealed duffel bags in the back of their truck owned by a third party; and

7. Reno is a part of the "Emerald Triangle" drug trade. (1T28-4 to 12).

Consequently, Judge Toto found that there were sufficient facts to support probable cause that Stout and Jacobs' vehicle contained contraband. Thus, contrary to defendant's claim, Veryzer's warrantless search of the truck was lawful. Neither this stop nor the seizure was any "poisonous tree."

While not under any obligation to review defendant's citation of an unpublished case (R. 1:36-3), People v. Kruckenberg, 2019 IL App (3d) 170505-U (2010), Judge Toto found Kruckenberg, which also involved a traffic stop conducted by Veryzer, but which had occurred on August 3, 2015

or 19 months before the officer's stop of Stout on February 28, 2017, to be factually inapposite to the facts of this case. (Da20).

In Kruckenberg, the Illinois appellate court first found that Veryzer prolonged the traffic stop by his "in-vehicle" conversation with Kruckenberg, which protracted the warning writing process. (Da70). In addition, Veryzer abruptly terminated his conversation with Kruckenberg and deployed his K-9. (Ibid.). The appellate court then found that Veryzer lacked the "particularized and objective basis" necessary to have suspected Kruckenberg of any illegal wrongdoing to conduct a K-9 sniff test. (Da71). Despite the Kruckenberg majority's decision, the presiding judge vigorously dissented, stating that Veryzer did have reasonable suspicion to suspect Kruckenberg of criminality. (Da71-72). The dissent would have affirmed Kruckenberg's conviction because Veryzer did not prolong the stop, which lasted "roughly 13 minutes, an amount of time that even the majority acknowledges is not 'inordinate.' Thirteen minutes is, after all, a reasonable amount of time for an officer to address the speeding violation that warranted the stop and attend to the related safety concerns," and Veryzer had completed the K-9 sniff before the second officer had arrived on scene. (Da72).

Initially, it must be noted that Kruckenberg's facts and circumstances were irrelevant to defendant's case. As Judge Toto found, Kruckenberg and

defendant's case involved two different sets of circumstances. Defendant is attempting, in violation of N.J.R.E. 406, to claim that it was Veryzer's habit to deploy his drug-sniffing K-9 without any reasonable suspicion. (Db16-17). Defendant bears the burden of establishing with a degree of specificity and frequency of uniform response that ensures more than Veryzer's "mere 'tendency' to act in a given manner," but rather that the officer's conduct was "'semiautomatic' in nature.'" Sharpe v. Bestop, Inc., 158 N.J. 329, 331 (1999) (quoting Simplex, Inc. v. Diversified Energy Systems, Inc., 847 F.2d 1290, 1293 (7th Cir.1988)).

Unlike Kruckenberg, Veryzer, in defendant's case, had reasonable suspicion, as discussed above, to deploy his K-9. (Da21; 1T29-15 to 30-1). The business of the stop continued and was not delayed by the one minute or less it took the K-9 to alert to drugs in Stout's vehicle. (1T33-22 to 25). Moreover, in defendant's case, Veryzer saw the large duffel bags in the back of Stout's truck, but when he asked about those bags, Stout repeatedly lied and claimed that there was nothing in the back of her truck.

In sum, Kruckenberg, an unpublished case, is irrelevant to the resolution of defendant's case. Judge Toto properly found that Veryzer had probable cause to search Stout's truck.

3. Judge Toto's Decision Denying Defendant's Motion to Suppress the Seizure of the Marijuana-Filled Duffel Bags in New Jersey

Regarding the police seizure of the marijuana-filled duffel bags in New Jersey, Judge Toto found that defendant validly signed consent forms to search his property, resulting in the police seizure of 175 pounds of marijuana, two vacuumed sealed bags of cocaine, and $60,000 to $70,000 in cash. (Da24; see also Pa1-4). The judge ruled that the police had secured written waivers to search defendant's property, which weighed strongly in favor of consent and "nothing in the facts indicates that Defendant was unduly coerced to sign the consent forms." (Da24; Pa1-4).

Contrary to defendant's claim (Db9; Db24), there was no need for law enforcement to obtain any anticipatory search warrant to seize marijuana and cocaine from defendant. "'There is no requirement that the Government obtains a warrant at the first moment probable cause exists … [t]he touchstone for determining the constitutionality of warrantless searches is one of reasonableness under the circumstances.'" State v. Foreshaw, 245 N.J. Super. 166, 173 (App. Div.) (quoting State v. Bell, 195 N.J. Super. 49, 55 App. Div. 1984), certif. denied, 126 N.J. 337 (1991). In defendant's case, the police did not have probable cause to arrest him until they saw him take possession of the duffel bags. Furthermore, the police did not know whether defendant would actually take possession of these duffel bags until defendant arrived on the

scene an hour later than he had arranged with Jacobs. Lastly, the police did not have defendant's street address or apartment number at the large Glenwood Apartments and Country Club apartment complex.

Despite no definitive record of who had Mirandized defendant, Judge Toto found that Miranda warnings were not necessary prior to receiving defendant's consent to enter and subsequently search defendant's apartment. (Da25). Judge Toto ruled that the interests involved in Miranda, to be free from self-incrimination, were fundamentally distinct from the interest of being free from unreasonable searches and seizures. (Da35) (citing to State v. Chappee, 211 N.J. Super. 321, 334 (App. Div. 1986)("Knowledge of the right to be assisted by counsel and to remain silent . . . has little bearing on the voluntariness of a consent to search.") (quoting Hubbard v. Jeffes, 653 F.2d 99, 101-102 (3d Cir. 1981)).

Judge Toto found that the issue turned on whether defendant's consents to search had been voluntarily given. In State v. King, 44 N.J. 346, 352 (1965), the New Jersey Supreme Court "delineated" five factors for courts to use in considering the voluntariness of a defendant's consent. State v. Hagans, 233 N.J. 30, 39-40 (2018) (citing approvingly to King, 44 N.J. at 352-53). The absence of one factor alone may be very consequential in one case while insignificant in another. Id. at 40. The voluntariness of a consent depends on

"the totality of the particular circumstances of the case[,]" and each situation must rise or fall on its own facts. Ibid. (quoting King, 44 N.J. at 353). The King factors are not commandments, but mere "'guideposts to aid a trial judge in arriving at his conclusion,'" and they are not "rigid absolute authority." Ibid. (quoting King, 44 N.J. at 353); Id. at 43.

The judge found three King factors indicating involuntariness: defendant gave his consent after he had been (1) arrested; and (2) handcuffed; and (3) he must have known contraband would be discovered. (Da35).

The two King factors indicating voluntariness were defendant (1) admitted his guilt before giving consent; and (2) affirmatively assisted the police officers. Judge Toto did not find that the presence of three King factors indicating involuntariness rendered defendant's consent invalid, especially considering the two King factors indicating voluntariness and defendant's signed written consent forms. (Da25-26) (citing to King, 44 N.J. at 353 ("'the existence or absence of one or more of the above factors is not determinative of the issue'").

Most importantly, Judge Toto found that the fact that the officers secured a written waiver to search defendant's premises weighed strongly in favor of consent. (Da26) (citing to State v. White, 305 N.J. Super. 322 (App. Div. 1997) (written waiver validated search of a suspect's home); State v.

Binns, 222 N.J. Super. 583, 589 (App. Div. 1988) (a defendant's subjective perceptions of coercion does not negate an otherwise valid consent), certif. denied, 111 N.J. 624 (1988).

Here, the New Jersey State Police Consent to Search form signed by defendant indicated that his Old Bridge apartment, New York residence, BMW, and silver and black box were to be searched. (Da26; accord Pa1-4).

Further, defendant signed these forms, which indicated that he had "knowingly and voluntarily" given his written consent to the searches, and that he had been advised by Layng that he had "the right to refuse giving [his] consent to search" and that he "may withdraw [his] consent at any time for any reason." (Ibid.; Pa1-4). Defendant signed his initials under each of these locations and statements, making his consent "unequivocal and specific." (Ibid.; Pa1-4). As discussed below, Judge Carter would make similar findings in denying defendant's motion for reconsideration. (Da41-43).

Judge Toto ruled that the police were able to identify the areas that needed to be searched with information gained from ways other than incriminating un-Mirandized statements made by defendant. (Da26-27). Layng testified that he determined defendant's New York address from the registration for defendant's BMW. (Da27; accord 5T13-14 to 14-13). This finding was supported by the sufficient credible evidence in that Layng

testified that when defendant's BMW pulled into the CVS parking lot, his vehicle registration (license plate) was called into dispatch, which advised defendant's address to be at Lefferts Avenue in Queens, New York. (2T69-14 to 70-15).

Secondly, because Layng saw defendant walk into the Old Bridge Apartment B, the detective knew that defendant lived there. (Da27; accord 2T20-1 to 6).

The marijuana-filled duffel bags were tied to defendant because the police saw him place those bags into his own car. (Da27). Lastly, the cash was found in defendant's Richmond Hill apartment, the address on defendant's car registration. (Ibid.; accord 2T19-6 to 20-14).

Secondly, defendant's signed consent forms, which acknowledged that his consent was knowing and voluntary and that he had the right to withdraw consent, were sufficient to conduct the searches. (Da27). Considering his analysis of the King factors, Judge Toto found that defendant invited law enforcement into the apartment and then signed consent to search forms. (Ibid.). Judge Toto concluded that defendant gave consent to search his dwellings and property. These searches were constitutional as an exception to the warrant requirement. (Ibid.).

It should be noted that the seizure of the cocaine from the silver and

black box defendant was carrying at the time of his arrest could also be justified as a search incident to a lawful arrest. State v. Oyenusi, 387 N.J. Super. 146, 154 (App. Div. 2006) (the "authority to search an arrestee and the area within his immediate control includes the authority to search a container found in the arrestee's possession.").

On May 8, 2020, Judge Toto denied defendant's motion to reconsider the denial of his motion to suppress evidence. (Da30).

B. Judge Carter's Decision Regarding Defendant's Miranda Motion to Suppress His Statements

At the Miranda hearing, Layng testified that the DEA notified him that on February 28, 2017, the Illinois State Police had arrested Jacobs and Stout who were found in possession of approximately 200 pounds of marijuana. (5T8-5 to 8). Stout and Jacobs agreed to cooperate with law enforcement and deliver the marijuana to its destination in New Jersey to defendant who they knew as "Stacks" and who drove a BMW. (5T8-8 to 25).

The Illinois State Police, New Jersey State Police, and DEA offices set up an operational plan to make a controlled delivery of the marijuana to defendant. (5T9-4 to 23). At the direction of law enforcement, Jacobs contacted defendant regarding the marijuana delivery. Jacobs advised defendant that he would be stopping in Pennsylvania for the night and would arrive in New Jersey on March 1, 2017. (5T9-24 to 10-11). Defendant told Jacobs to meet him at a large apartment complex with

interconnected parking lots located at 35 Spruce Lane in Old Bridge, New Jersey. (5T10-17 to 18). For surveillance purposes, law enforcement decided to have Jacobs advise defendant to meet him at the CVS Pharmacy next door to this apartment complex. (5T10-19 to 24).

An officer advised the surveillance team that a New York registered white BMW had pulled into the CVS parking lot and parked next to Jacobs' truck. (5T12-14 to 16). Jacobs exited his truck and had a brief conversation with defendant. (5T12-16 to 18). They then each returned to their vehicles. Jacobs then followed defendant's BMW to the Glenwood Apartments and Country Club apartment complex. (5T12-18 to 13-3). They parked side by side on Popular Lane in the rear complex parking lot. (5T12-24 to 13-15).

Layng observed defendant open the back of Jacobs's truck, remove six of the marijuana-filled duffel bags, and place them in the back of his BMW. (5T13-14 to 22).

Officers then observed the defendant and Jacobs take the other two duffel bags and walk toward Apartment B at 9 Ashwood Mall, Old Bridge, New Jersey. (5T13-25 to 14-2). Defendant unlocked the apartment door, placed the two duffel bags inside the apartment, and locked the door. (5T14-2 to 4).

After Jacobs drove away, defendant unlocked his BMW and removed a small black and silver box. (5T14-6 to 13). As defendant walked back to the apartment,

the police apprehended, handcuffed, and searched him. (5T14-17 to 19).

Layng testified that he remembered that either he or another police officer gave defendant his Miranda rights. (5T14-19 to 16-25). Layng wrote in his report that defendant had been Mirandized. (5T17-19 to 24).

Defendant gave the police his consent to search and signed consent to search forms for Apartment B, his BMW, his Queens residence, and a silver and black box, which was later found to contain two vacuum-sealed bags of cocaine. (5T18-9 to 14; 5T33-13 to 23; Pa1-4).

In his arrest-scene statements, defendant initially denied carrying any duffel bags or living in the apartment. (5T14-24 to 15-2). After the officers told defendant that they had just observed him placing these bags into the apartment, he admitted to living there part-time with his girlfriend, placing two duffel bags in the apartment, and receiving the other six duffel bags. (5T15-2 to 5; 5T74-25 to 74-4).

At approximately 5:10 p.m., the officers accompanied defendant to his Queens residence to conduct a consent search of his apartment. (5T74-1 to, 22; Pa4). Defendant directed officers to his master bedroom where the police recovered $60,000 to $70,000 from a portable safe. (5T75-10 to 20; Pa4).

At about 10:45 p.m., Layng and then Special DEA Agent John Yoo and Mike Mintchwarner conducted two post-arrest interviews with defendant. (5T19-7 to 11; 5T76-9 to 10).

Layng's approximate 15-minute interview with defendant was video-recorded ("first interview"). (5T23-18 to 23; 5T53-19 to 54-7). At the beginning of this interview, Layng read defendant his Miranda rights pursuant to a Miranda rights card. (Da37; Pa5; 5T20-2 to 9; 5T24-20 to 25-13). After having been read the warnings, the defendant signed the back of the Miranda card, admitted into evidence at the Miranda Hearing as "S-1." (Pa5; 5T20-1 to 23).

During this video-recorded interview, defendant admitted that he and his girlfriend had been sharing Apartment B for a year. (5T26-5 to 27-1); that he placed the two duffel bags into the apartment, as the officers had observed and that he knew that there was marijuana in those duffel bags. (5T27-10 to 19); and he admitted to knowing that the six duffel bags that he placed in his leased white BMW were full of marijuana. (5T27-20 to 28-8). Defendant further admitted to possessing cocaine. (5T33-14 to 34-1).

A short while later, at approximately 11:00 p.m. that same evening, DEA officers Mintchwarner and Yoo interviewed defendant ("second interview"). (5T76-1 to 22). Yoo acceded to defendant's request not to record this second interview because defendant was fearful of retribution if his drug source found out he had talked to the police. (5T77-1 to 5).

During this second interview, defendant outlined his involvement in smuggling and selling marijuana and cocaine that he received from his California

contact. (5T77-9 to 79-16). Defendant described the multiple trips he had taken to California to set up his drug distribution operation to purchase hundreds of pounds of marijuana at $1,600 to $1,700 per pound and several kilograms of cocaine at $23,500 per kilogram. (5T79-10 to 16). Defendant also admitted that he offered to pay Jacobs $75.00, plus expenses, for each pound of marijuana Jacobs transported to the East Coast for him. (5T78-14 to 18).

Defendant also admitted that in the past, he had smuggled 150 pounds of marijuana and five kilograms of cocaine in 10 separate U.S. Postal Service packages from California he sent to various addresses, including his girlfriend's Old Bridge apartment and a couple of New York addresses. (5T77-18 to 78-5).

On April 5, 2021, the Honorable Andrea G. Carter, J.S.C., granted in part and denied in part defendant's Miranda motion, regarding the statements he had made at three distinct time frames – at the arrest scene and in the first and second interviews. (Da31; 6T3-10 to 26-20).

Having an opportunity to see and hear both Layng and Yoo testify, Judge Carter found both officers to be credible witnesses. (6T19-17 to 20-22). She, however, found that the State failed to prove beyond a reasonable doubt that defendant had been given his Miranda rights at the arrest scene and during his second interview. (6T20-10 to 15). Consequently, Judge Carter suppressed defendant's arrest scene statements. (6T21-10 to 15). Citing to State v. Pillar, 359

N.J. Super. 249, 268 (App. Div.), certif. denied 177 N.J. 572 (2003), the judge also suppressed defendant's unrecorded second interview statements because they were "off-the-record." (5T23-22 to 25-17). Accord State v. Bullock, 253 N.J. 512, 535 (2023) (quoting Pillar, 359 N.J. Super. at 268). A police "officer's assurance that the defendant's statement could be made 'off-the-record' following the administration of Miranda warnings 'totally undermine[d] and eviscerate[d]'" the Miranda warnings. Ibid. Since Yoo did not readminister Miranda warnings to defendant, Judge Carter suppressed his second interview statements. (6T23-22 to 24-24).

Contrary to the claim in defendant's brief that Judge Carter had found "all statements made by" defendant to the police violated his Fifth Amendment rights, and were suppressed (Db33-34), the judge denied defendant's request to suppress his recorded statements, entered into evidence as ("S-2"), that he made in his first interview. (5T23-7 to 38-17; 6T21-16 to 23-21). The judge reviewed the video recording of defendant's statement and found that Layng read defendant his Miranda rights from a Miranda rights card (Da37-38) and that defendant "calmly" signed the back of this card. (6T21-16 to 23-8). Given the calm manner in which defendant's recorded statement was handled, that defendant cooperated and volunteered incriminating information to Layng, and that defendant had prior encounters with law enforcement, Judge Carter properly found that defendant understood his rights and voluntarily and intelligently waived his rights in the first interview. (6T23-9 to

21).

C. Judge Carter's Denial of Defendant's Motion for Reconsideration

On September 17, 2021, defendant filed a motion for reconsideration of Judge Toto's January 14, 2020 Order in light of Judge Carter's April 5, 2021 order regarding the suppression of two of his three statements to the police. (Da34). In her 11-page decision, Judge Carter addressed defendant's contention that the consent search of his apartment, car and residence, resulting in the police seizure of 175 pounds of marijuana in eight duffel bags, a box containing cocaine, and cash, were allegedly the "fruit of his illegal interrogations." (Da34; Da39). Contrary to defendant's claims in his brief, Judge Carter did address his "fruit of the poisonous tree" claim. (Compare Da34; Da39 with Db30-32).

On December 10, 2021, Judge Carter denied defendant's motion for reconsideration in an 11-page written decision. (Da32-43). Having presided over the Miranda hearing, and after having an opportunity to see and hear the witnesses and review the evidence, Judge Carter found that the crux of the issue, in this case, was whether defendant voluntarily consented to a search of his property. (Da42).

Judge Carter appropriately found, just as Judge Toto had previously twice found, that the interests involved in Miranda, to be free from self-

incrimination are "fundamentally distinct from the interest of being free from unreasonable search and seizures." (Da41-42) (citing to Chappee, 211 N.J. Super. at 321). "'The absence of Miranda warnings does not vitiate consent to a seizure of personal property, because the Miranda protections are addressed to constitutional rights that are distinct from Fourth Amendment rights.'" Id. at 333 (quoting Hubbard, 653 F.2d at 103).

Judge Carter, as Judge Toto had in his prior denials of defendant's motion to suppress, properly found that the King factors militated in favor of finding that defendant had voluntarily consented to a search of his property. (Da42-43). Judge Carter found the same King factors, which militated for and against voluntariness, as Judge Toto had. See Discussion of King factors, above. (Da43; accord Da25-27).

Like Judge Toto, Judge Carter concluded that "defendant properly gave consent to search his dwellings and property and that, therefore, the search was constitutional as an exception to the warrant requirement." (Da43; accord Da27).

Given their ability to have seen and heard the State's witnesses and assessed them to be credible and made factual findings supported by the sufficient credible evidence, this Court should affirm Judge Toto's and Judge Carter's decisions properly denying defendant's motions to suppress evidence

the police seized pursuant to his knowing and voluntary consent to search. Cohen, 254 N.J. at 318-19 (the appellate review of a motion to suppress is limited and "deferential" because the trial court has an opportunity to hear and see the witnesses and to have the feel of the case, which a reviewing court cannot enjoy).

Defendant claimed at the trial court level and again on appeal that his consent to search his property was the "fruits" of his illegal interrogation. On appeal, defendant cites to and relies on an unpublished opinion, State v. Bijacsko, 2019 N.J. Super. Unpub. LEXIS 1510 (App. Div. 2019) (Da59-65).

As the New Jersey Supreme Court recently ruled in Hansen v. Rite Aid Corp., Court Rule 1:36-3 provides that "'[n]o unpublished opinion shall constitute precedent or be binding upon any court.'" 253 N.J. 191, 220 (2023) (quoting Seigelstein v. Shrewsbury Motors, Inc., 464 N.J. Super. 393, 408 (App. Div. 2020) (quoting R. 1:36-3)). The Supreme Court has ruled that any "attorney who undertakes to rely on unpublished opinions that support his or her position must, in compliance with the duty of candor, also disclose contrary unpublished decisions known to the attorney as well. R. 1:36-3." Brundage v. Estate of Carambio, 195 N.J. 575, 593 (2008). The Court noted that Rule 1:36-3 "continues to define the demarcation line between opinions considered to be 'binding'" authority and other opinions, even though the

latter, in many cases, are now readily available through the internet or through media outlets in printed format." Consequently, Bijacsko is not binding authority for either the trial court or this Court.

Secondly, and more importantly, the facts of Bijacsko are inapposite to the facts of defendant's case. In Bijacsko, defendant handed over an axe in response to custodial interrogation without being given any Miranda warnings or without having provided the police his consent. (Da63-64).

In contrast, defendant here physically handed over nothing in response to an unwarned police interrogation. Rather, defendant gave his knowing, intelligent, and voluntary consent four times and signed four consent to search forms. (Pa1-4). Thus, the issue in defendant's case was whether his consent to search had been coerced, where defendant was advised that he had a right not to consent and could withdraw his consent at any time. Ibid.

Both Judges Toto and Carter, after a proper analysis of the King factors, found as fact, based on the credible evidence in the record, that defendant's consent had not been coerced. (Da24; Da43). Lastly, except for the cash found in his Queens, New York master bedroom, defendant did not incriminate himself by advising the police where to search for any contraband. The police already knew where to search for the CDS because they saw defendant take possession of the eight marijuana-filled duffel bags from Jacobs and place six

bags in his BMW and two bags in his Old Bridge Apartment. (Accord 5T13-14 to 14-13; 8T236-1 to 6; 9T53-21 to 55-5).

Third, in addition to a consent search, the police had a right to seize the silver and black box containing cocaine pursuant to a search incident to a lawful arrest since defendant was carrying this box in his hands when he was arrested. Oyenusi, 387 N.J. Super. at 154.

In sum, Judge Toto properly found that the traffic stop of Jacobs and Stout in Illinois was lawful and the search of their truck was based on probable cause. Judges Toto and Carter both found that defendant knowingly, intelligently, and voluntarily consented to the search of his property, resulting in the police's lawful seizure of the eight duffel bags filled with 175 pounds of marijuana, 1.5 kilograms of cocaine, and thousands of dollars in cash. There was no poisonous tree, let alone any fruit thereof. This Court should affirm the trial court's decisions denying defendant's motions to suppress.

POINT II

DEFENDANT WAS PROPERLY SENTENCED TO A TERM OF 12 YEARS' IMPRISONMENT ON COUNT TWO. THE REMAINING COUNTS SHOULD HAVE BEEN MERGED.

Initially, it must be pointed out that the State agrees with defendant that the trial court should have merged defendant's convictions for the third-degree

possession of cocaine, in violation of N.J.S.A. 2C:35-10(a)(1) (count three) and fourth-degree possession of marijuana, in violation of N.J.S.A. 2C:35-10(a)(3) (count four) into his conviction for the possession with the intent to distribute marijuana (count two). Accord State v. Strecko, 244 N.J. Super. 463, 465 (App. Div. 1990). The "[s]imultaneous possession" of two different drugs in violation of the same statutory section, such as subsections (a)(1), possession of cocaine, and (a)(3), possession of marijuana, of N.J.S.A. 2C:35-10, must "merge when neither offense involves an intent to distribute." Id. at 465.

Defendant's sentence to a term of 12 years' imprisonment for first-degree possession of marijuana with the intent to distribute, even after the above merger, was fair and fitting punishment for having trafficked in 175 pounds of marijuana. Because the trial court appropriately found and weighed the aggravating and mitigating factors supported by the sufficient credible evidence in the record, defendant's sentence on count two should be affirmed.

An appellate court is bound to affirm a trial court's sentence 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, 297-98 (2021) (quoting State v.

Roth, 95 N.J. 334, 364-65 (1984)).

Moreover, the test "is not whether a reviewing court would have reached a different conclusion" on the appropriate sentence, but rather, whether "on the basis of the evidence, no reasonable sentencing court could have imposed" that sentence. State v. Ghertler, 114 N.J. 383, 388 (1989); see also State v. Dalziel, 182 N.J. 494, 499 (2005).

It is well-settled that an appellate court, therefore, is "bound to affirm a sentence" so long as the sentencing court followed the Code's guidelines, found aggravating and mitigating factors supported by the preponderance of the evidence, and correctly balanced those factors. "On review, appellate courts are deferential to sentencing determinations and 'must not substitute [their] judgment for that of the sentencing court.'" Rivera, 249 N.J. at 297 (quoting State v. Fuentes, 217 N.J. 57, 70 (2014)). An appellate court does not "substitute its assessment of aggravating and mitigating factors for that of the trial court." State v. Bieniek, 200 N.J. 601, 608 (2010). The only circumstance that justifies appellate intervention in a sentencing decision is when a sentence is "'clearly unreasonable so as to shock the judicial conscience.'" State v. Amer, 471 N.J. Super. 331, 356-57 (App. Div. 2022) (quoting State v. Liepe, 239 N.J. 359, 371 (2019) (quoting State v. McGuire, 419 N.J. Super. 88, 158 (App. Div. 2011)), aff'd as modified 254 N.J. 405

(2023).

Defendant's sentence to 12 years flat for arranging for the transportation of 175 pounds of marijuana from California through Nevada to New Jersey with the assistance of his two cohorts, Jacobs and Stout, driving the marijuana into New Jersey as a means of avoiding detection by law enforcement, does not shock the judicial conscience and should be affirmed.

In this case, the jury acquitted defendant of first-degree possession of cocaine with the intent to distribute, but convicted defendant of first-degree possession of marijuana with the intent to distribute; third-degree possession of cocaine; and fourth-degree possession of marijuana. (Da44; Da46).

The trial court here followed the sentencing guidelines by finding and weighing aggravating factors 1, 3, 5, and 9 and mitigating factors 7 and 9, all of which were supported by the sufficient credible evidence in the record. Accord Rivera, 254 N.J. at 298. (15T26-12 to 41-16). Being clearly convinced that the aggravating factors outweighed the mitigating factors, the court appropriately sentenced defendant within the first-degree range to a term of imprisonment of 12 years flat. (Da44; 15T38-1 to 39-1).

The trial court properly found, based on the sufficient credible evidence in the record, aggravating factor 1 - the nature and circumstances of the offense, and defendant's "role therein, including whether or not it was

committed in an especially heinous, cruel, or depraved manner" - because defendant was responsible for placing and trafficking in a large quantity of drugs into the stream of commerce. (N.J.S.A. 2C:44-1(a)(1); 15T27-22 to 29-1). As many courts have noted, "'drug-trafficking itself is a . . . a violence-prone business.'" (State v. Henry, 133 N.J. 104 (1993) (quoting United States v. Broomfield, 336 F.Supp. 179, 184-85 (E.D. Mich.1972)).

Defendant was caught in possession of excessive quantities of two different drugs -- 175 pounds of marijuana, which was 7 times the 25-pound quantity required for a first-degree offense, in violation of N.J.S.A. 2C:35-5b(l0), and 1.5 kilograms of cocaine, or 53 ounces, or 10 times the 5 ounces necessary for first-degree possession of cocaine for distribution. (15T28-21 to 29-4; accord 9T56-18 to 58-11).

Judge Carter also appropriately found aggravating factor 3 - that there was a risk defendant would reoffend, even though she found mitigating factor 7 – that defendant had no prior criminal record. N.J.S.A. 2C:44-1(a)(3); -(b)(7). (15T29-5 to 14). Accord Rivera, 249 N.J. at 300. Judge Carter afforded minimal weight to mitigating factor 7 because she noted that the trial testimony clearly supported a finding that defendant's offense "was not just a one-off, one-time. This was a carefully, planned out operation. And so, while there is no criminal conviction, he has not necessarily led a law-abiding life for

a significant period of time." (15T32-21 to 33-3).

Even though trial courts often look to a defendant's prior criminal record to evaluate his risk of reoffending, the New Jersey Supreme Court has "acknowledged, however, that the absence of a criminal record will not preclude application of aggravating factor three so long as it is supported by other credible evidence in the record." Ibid. The Rivera Court stated that it did not "presume that aggravating factor three cannot coexist with mitigating factor seven," if the trial court's finding of aggravating factor three includes an "'evaluation and judgment about a defendant in light of his or her history,'" and such a finding is grounded in competent, credible evidence in the record. Ibid. (quoting to State v. Thomas, 188 N.J. 137, 153 (2006)).

Judge Carter's finding that defendant would reoffend despite having no prior criminal record was supported by the record in this case in that defendant engaged in a large-scale drug distribution scheme selling two types of drugs -- marijuana and cocaine. (Accord 9T56-19 to 58-11). Given that defendant received marijuana from Jacobs, but had obtained 1.5 kilograms of cocaine from another source, Judge Carter properly found that defendant's arrest here for drug distribution was not a "one-off or a one-time incident." (15T29-5 to 10; accord 9T56-18 to 58-11). Defendant also went to great lengths to avoid detection – he brought the marijuana from California to a La Quinta hotel in Reno, Nevada,

where he hand-selected the best marijuana product. (11T39-11 to 40-13; 11T159-23 to 160-1). Defendant sealed the marijuana in "Smellyproof bags" or smell-proof bags to avoid detection. (8T50-24 to 51-2). He also enlisted the assistance of two cohorts, Stout and Jacobs, whom defendant initially paid $5,000, to secrete these large quantities of marijuana into New Jersey. (11T37-10 to 39-1; 11T42-1 to 43-5). Employing cohorts to assist him with the delivery of this massive quantity of marijuana enhanced the likelihood defendant would be successful in his criminal endeavor. The use of cohorts or accomplices "'enhance[s] the probability'" that another will be successful in committing a crime. State v. Williams, 263 N.J. Super. 620, 631 (1993) (quoting The New Jersey Penal Code: Final Report of the New Jersey Criminal Law Revision Commission 59 (1971)).

Lastly, defendant was actively involved in the transportation of these drugs to New Jersey because he remained in regular cellphone contact with Jacobs as he traveled from Reno, Nevada, to Illinois, and then to New Jersey. (11T58-2 to 85-3).

Considering the above, Judge Carter appropriately concluded, the "profits involved in these operations absent a sufficient level of deterrence will likely support a risk of re-offense." (15T29-10 to 14).

Because Judge Carter found that there was a substantial likelihood that

the defendant was involved in organized criminal activity, she found that the record supported a finding of aggravating factor number 5. (15T29-15 to 30-4; N.J.S.A. 2C:44-1(a)(5)). Her finding was supported by the fact that (1) defendant hand-selected the marijuana to transport to New Jersey; (2) the drugs were packaged with a level of sophistication to avoid detection; (3) defendant solicited the help of others to help him whom he paid money for their services to transport those drugs across state lines for distribution; and (4) defendant possessed more than a kilo of cocaine, all while possessing a large quantity of marijuana for distribution. (Ibid.; accord 8T50-24 to 51-2; 9T56-19 to 60-14; 11T37-10 to 43-5; 11T159-23 to 160-1). In addition, when arrested defendant had $60,000 to $70,000 in cash in his Queens, New York residence. (9T75-12 to 22; Pa4).

The above facts also support the trial court finding of aggravating factor 9, in that there was a need to deter not only generally, but also specifically defendant. (15T30-5 to 9). The New Jersey Legislature has declared that the unlawful distribution of CDS "continues to pose a serious and pervasive threat to the health, safety and welfare" of New Jersey citizens. N.J.S.A. 2C:35-1.1. "New Jersey continues to experience an unacceptably high rate of drug-related crime, and continues to serve as a conduit for the illegal trafficking of drugs to and from other jurisdictions." Ibid. (The New Jersey Legislature intended the

"Comprehensive Drug Reform Act of 1987" to "provide for the strict punishment, deterrence and incapacitation of the most culpable and dangerous drug offenders," such as "upper echelon members of organized narcotics trafficking networks who pose the greatest danger to society."). Defendant here sold drugs for financial gain, and when he was caught, he had $60,000 to $70,000 in cash in his Queens residence. (9T75-10 to 22).

Judge Carter denied defendant's request to find mitigating factor 8 -- his conduct was the result of circumstances unlikely to reoccur. (15T33-4 to 34-1). She found that the circumstances that existed in defendant's case –"that is drugs across our country are always accessible" will cause this offense to reoccur. (15T33-13 to 15). She concluded that there are "always folks who are going to make decisions about whether or not they want to engage" in the distribution or the possession of CDS with the intent to distribute. "And so, the circumstances that exist in this case are clearly circumstances that have the ability to reoccur time and time again. Ultimately," defendant would have to decide for himself whether he wanted to be a part of illegal drug trafficking. (15T33-15 to 20).

Despite finding a risk of defendant reoffending, the trial court gave him the benefit of mitigating factor 9 in that the defendant's "character and attitude" indicated that he was "unlikely to commit another offense." N.J.S.A.

2C:44-1(b)(9). Defendant admitted at sentencing that he lacked judgment at the time of his crime and that he was taking full responsibility for his crime; he had opened two new businesses (All Day Care and a package delivery service) with the help of his family; and he was "ready to live back out in society as an honest member of society, which [he had] done for the past six years."). (15T14-14 to 16-23). While Judge Carter afforded defendant mitigating factor 9, she noted that defendant had victimized the very community that had submitted several letters of support to the court on his behalf. (15T35-11 to 36-2).

Judge Carter rejected defendant's request that the court find non-statutory mitigating factors that he had been offense-free and had done positive things while he awaited trial. The judge found that while it was a "good thing to remain offense-free," society expects defendants to remain offense-free. (15T30-23 to 30-1). Defendant's pre-trial release on personal recognizance also required that defendant remain offense-free awaiting trial. (PSR at 1-2).

Lastly, the trial court found that the decriminalization of marijuana was unpersuasive since the Legislature had not reduced certain marijuana offenses from first-degree offenses, with the presumption of incarceration, to a lesser offense. (15T31-11 to 32-1).

In sum, the sentencing court's findings and proper balancing of

aggravating factors 1, 3, 5, and 9 and mitigating factors 7 and 9 were "substantially influenced" by its" opportunity to hear and see the witnesses" and to have the "'feel' of the case, which a reviewing court cannot enjoy.'" Cohen, 254 N.J. at 318-19. Defendant's sentence to 12 year's imprisonment was a fair and fitting punishment for his crime of attempting to secrete 175 pounds of marijuana into New Jersey. The sentence imposed does not reflect any error at all, let alone a clear error of judgment that should shock the judicial conscience. Rivera, 249 N.J. at 297-98; State v. Roth, 95 N.J. 334, 364-65 (1984). Defendant's 12-year sentence for the first-degree possession of 175 pounds of marijuana with the intent to distribute should be affirmed.

CONCLUSION

For all the aforementioned reasons, the State respectfully requests that this Court affirm the trial court's denial of defendant's several motions to suppress the evidence seized pursuant to defendant's voluntary and knowing written consents. Defendant's sentence to 12 years imprisonment for the first-degree possession of marijuana with the intent to distribute conviction should also be affirmed.

Respectfully submitted,

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