SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1865-22

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court,
v.	:	Law Division, Atlantic County.
DIAAB SIDDIQ,	:	Indictment. 19-04-0991
Defendant-Appellant.	:	Sat Below:
	:	Hon. W. Todd Miller, J.S.C. Hon. Patricia M. Wild, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

This dispute about the June 2016 execution of a knock-and-announce search warrant returns to this Court for a second time. At the first suppression hearing, held in 2018, the State called one witness to testify about the manner in which police entered the home. That witness, Detective Darrin Lorady, testified that he was responsible for knocking and announcing police, but that he did not recall making any announcement until after breaking through the front door.

In 2022, this Court ordered a remand for a new suppression hearing focused on whether police complied with the warrant's knock-and-announce requirement. This Court explained that the motion court had failed to make specific credibility findings about Lorady's testimony. This Court also faulted the State and the motion court for discouraging a defense witness who had been in the home when police entered from testifying. This Court made clear that, if a knock-and-announce violation had occurred, the evidence would need to be suppressed.

Two weeks prior to the remand suppression hearing ordered by this Court, the prosecutor convened a meeting between Lorady and other police officers involved in the search who did not testify at the first hearing. At this meeting, Detective Howard Mason told the other officers that it was he – not Lorady – who had knocked and announced police presence during the search six years prior. These actions by Mason were not recorded in any earlier footage or written report

documenting the search. Nonetheless, at the remand hearing, Lorady – who had previously testified under oath that he had knocked but not announced before breaking down the door, never mentioning Mason – now claimed to remember that Mason had actually knocked and announced before entering. Lorady testified that he realized this discrepancy for the first time two weeks earlier during the meeting with the prosecutor, other officers, and his supervisors.

Other officers present at this meeting testified similarly, without offering any explanation for their ability to recall this particular detail six years later or their failure to testify at the first hearing. Although these officers claimed they clearly remembered Mason knocking and announcing, they admitted that they had performed a large volume of home searches in the years since the search at issue and could not recall similar details from those searches.

Relying on our Supreme Court's precedent explaining how memory functions, the defense argued that the officers' testimony was unreliable due to the substantial passage of time and the witnesses' exposure to the contaminating influence of co-witness feedback at the meeting convened by the prosecutor two weeks prior to the remand hearing. The motion court disregarded this controlling law, instead reaching its own contradictory, unsupported conclusion that exposure to co-witness feedback years after events renders witnesses' memories more reliable by creating a "collective memory." The motion court also defied this

Court's prior decision in this case by holding in the alternative that, had a knock-and-announce violation occurred, that violation would not compel suppression of the evidence.

The motion court's decision was directly contrary to our Supreme Court's precedent, scientific consensus on memory contamination, and this Court's previous decision in this very case. It must be reversed.

FACTUAL AND PROCEDURAL HISTORY[1]

A. Search Warrant Application

On June 27, 2016, following a "year-long joint state and federal investigation into alleged drug distribution in Atlantic County," that included wiretap and visual surveillance, police observed a meeting between Diaab Siddiq and co-defendant Ameer Stephens, in which Siddiq stated he had narcotics on his person. (Da 5; 5T:34-14 to 35-12) [2] Police stopped Siddiq's car in Atlantic City, found four ounces of heroin, and placed Siddiq into custody. (5T:33-14 to 36-15)

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[1] This brief combines the facts and procedural history because they are intertwined. The history of the investigation and all the searches police conducted during its course are recounted in detail in this Court's prior decision. (Da 1-26) Because that decision limited the remand to "the execution of the search warrant at the Mays Landing residence," this brief focuses only on details germane to that search.

[2] Da: Defendant-appellant's appendix
1T: 11/1/18 motion to suppress hearing
2T: 11/14/18 motion to suppress hearing
3T: 7/2/19 plea hearing

Once Siddiq was in custody, police applied for a search warrant for, among other locations, a two-story home in Mays Landing that the police believed Siddiq used to stash heroin. (Da 5-8; 5T:38-1 to 17) On June 28, 2016, the Honorable Bernard E. DeLury, Jr., P.J.S.C., issued the warrant. (Da 5-8; 5T:40-22 to 41-19) Although police had sought a "no-knock warrant," Judge DeLury, denied that request, instead requiring police to knock and announce their presence before entering the Mays Landing residence. (Da 8; 5T:40-22 to 41-19)

A team of police officers executed the warrant for the Mays Landing residence on June 28, 2016. (5T:54-7 to 12) None of the officers wore body-worn cameras during the execution of the search warrant. (5T:72-14 to 19) The only police report documenting the search was written by Lieutenant Justin Furman of the Atlantic County Prosecutor's Office nearly a month later, on July 25, 2016. (5T:59-5 to 12) The report stated that "[e]ntry was made into the residence through the front door at approximately at 12:40 a.m." (5T:55-1 to 59-18) The report provided no detail as to how police entered the home or whether they knocked and announced their presence before doing so. (5T:55-1 to 59-18)

4T: 8/2/19 sentencing hearing
5T: 7/14/22 remand motion to suppress hearing
6T: 9/8/22 remand motion suppress hearing
PSR: pre-sentence report

B. 2018 Suppression Hearing and Subsequent Appeal

Following these searches, Siddiq was charged as one of many defendants in a "thirty-four-count indictment alleging a vast narcotics distribution conspiracy." (Da 2) Siddiq moved to suppress evidence recovered during the search of the Mays Landing residence arguing, among other things, that police violated the warrant by failing to knock and announce their presence before breaking down the door to the home.

The Honorable Patricia M. Wild, J.S.C., held a testimonial suppression hearing on the manner of home entry on November 1, 2018, at which Detective Darrin Lorady of the Atlantic County Police Department was the sole State's witness. (1T) On direct examination, Lorady testified that he was the officer who knocked on the door during the execution of the search warrant:

> PROSECUTOR: Detective, was there -- among those officers present at the search warrant, did somebody knock on the door and announce police presence?
>
> LORADY: Yes.
>
> PROSECUTOR: And do you recall who that officer was?
>
> LORADY: Yes.
>
> PROSECUTOR: Who was that officer?
>
> LORADY: <u>It was me, myself.</u>
>
> (1T:14-7 to 14)

Lorady subsequently clarified that, although he had knocked on the door, he did not recall announcing the presence of the police until after forcing the front door open. Lorady explained that this was part of a "fairly standard procedure" he employed in making such entries:

> PROSECUTOR: Tell us specifically about what happened when you were at the door with regard to your knocking. Tell us about that so we can understand that.
>
> LORADY: It's fairly standard procedure. We knocked on the door, you know obviously loud enough so someone could hear. A couple of bangs on the door, bang, bang, bang. Wait approximately ten seconds to see if anyone answers. Another knock, a couple of knocks, boom, boom, boom, wait. Nothing. Then you set the tool [to force open the door]. It takes a couple of seconds to set the tool and then we would be able to make entry. In that case, that's basically what happened there.
>
> PROSECUTOR: Was there, were there any -- in addition to the knocking what you described here on the record, were there any verbal commands?
>
> LORADY: I generally knock. I don't remember saying -- yelling police at the front door. You knock to see if anyone answers. You want to hear if anyone is in there. You know sometimes yelling police, people don't want to answer up. So you knock, see if anyone is in there. There was nothing. Knock again, nothing. After the door is open, we would announce our presence, "police, search warrant" and enter the residence.
>
> (1T:18-4 to 14)

Lorady later reiterated that he only announced the presence of police "[o]nce we made entry," after forcing open the door. (1T:19-12 to 19)

Following Lorady's testimony, defense counsel sought to call Chaka James, who was present in court, to testify. The prosecutor "immediately addressed the judge," saying that she anticipated James would testify that her belongings were present in a closet where a weapon was found in the residence and therefore suggesting James "should be advised of her Fifth Amendment rights prior to proceeding." (Da 19) Defense counsel accused the prosecutor of intimidating James. (Da 19) Judge Wild agreed with the prosecution that James should be advised of her rights because the indictment "could just as easily be superseded" to charge James for possession of the gun. (Da 19-20) After a continuance for her to consult with an attorney, James told the court she did not wish to testify. (Da 20)

Judge Wild denied Siddiq's motion to suppress. After this ruling, the State returned a superseding twelve-count indictment against Siddiq. (Da 27-40) Siddiq "pled guilty to money laundering, N.J.S.A. 2C:21-25(a); maintaining a narcotics production facility, N.J.S.A. 2C:35-4; possession with the intent to distribute heroin, N.J.S.A. 2C:35-5(b)(2); and certain persons not to possess a firearm, N.J.S.A. 2C:39-7(b)(1)." (Da 3, 41-47) Siddiq was sentenced to an aggregate twelve-year prison term with an eight-year period of parole ineligibility. (Da 3, 48-51)

On appeal, this Court ordered a remand for a new suppression hearing, concluding that Judge Wild had failed to make any finding about the critically

disputed issue of whether "Lorady knocked and announced the presence of police prior to opening the door with a pneumatic device." (Da 21) This Court found that, contrary to Judge Wild's conclusory finding, Lorady's testimony was not "internally consistent" regarding the issue of whether he knocked and announced police presence before entering the residence. (Da 24-25) Citing its published decision in State v. Caronna, 469 N.J. Super. 462, 486 (App. Div. 2021), this Court also rejected the State's argument that, had a knock-and-announce violation occurred, that violation would not require application of the exclusionary rule. (Da 25)

This Court also concluded that Judge Wild clearly erred by intervening when James was about to take the witness stand. (Da 22-24) This Court found that the assertion that James could be prosecuted for residing in the home "bordered on the preposterous" and noted that the prosecution did not raise this possibility until immediately prior to James sought to testify, which was "more than two years after [Siddiq's] arrest and execution of the warrant, and two years after the return of the first indictment." (Da 23-24) Because Judge Wild had already made credibility determinations, the Court ordered that the remand hearing "take place before a different judge." (Da 25)

C. 2022 Suppression Hearing on Remand

The Honorable W. Todd Miller, J.S.C., presided over the remand hearing beginning on July 14, 2022.

Testimony at the hearing established that, just over two weeks prior to the remand hearing, on June 27, 2022, prosecutor Nicole Eiselen called a meeting of six police witnesses, including Detective Lorady, Lietenant Dan Corcoran, and Detective Howard Mason of the Atlantic City Police Department, as well as Lieutenant Furman, Detective Joseph Procopio, and Sergeant Chad Myers of the Atlantic County Prosecutor's Office. (6T:34-3 to 16) At Eiselen's request, Procopio wrote a report documenting the meeting, dated June 29, 2022. (6T:10-22 to 11-19) According to Procopio, at the meeting, Mason stated that he recalled being the person who knocked and announced police presence when executing the search warrant at the Mays Landing address. (6T:36-24 to 38-9) All the witnesses at the meeting said they agreed with Mason's recollection. (6T:36-24 to 38-9)

At the suppression hearing, Lorady testified that he had realized during this meeting that his prior testimony at the 2018 hearing that he had knocked and failed to announce police presence was "mistaken." (5T:65-2 to 13) Lorady now claimed that Mason – who he never mentioned during his testimony at the 2018 suppression hearing – "was the one who knocked and announced on the door in question that night." (5T:52-23 to 53-4) Lorady testified that Mason knocked and

announced "a couple of times" before Lorady broke down the door. (5T:45-9 to 46-4)

Lorady admitted that he had not realized the error in his testimony from four years earlier until the meeting Eiselen convened with his "supervisors and Detective Mason" two weeks prior to the remand hearing. (5T:52-23 to 53-4; 65-24 to 66-17) According to Lorady, at the meeting, Eiselen provided him with a transcript of his prior testimony. (5T:65-14 to 66-9) "[A]fter discussing it with the other officers," Lorady "realized there was a mistake" in his testimony claiming that he had been responsible for knocking and announcing police presence. (5T:66-13 to 17)[3]

Mason testified that he has "a routine how I knock and announce" and typically knocks and states "police search warrant" three times before breaking through the door. (5T:107-15 to 23) Mason acknowledged he had not written a report in this case and had participated in "close to 1,000" search warrant executions during his career. (5T:113-14 to 23) Mason admitted that he could not remember any details of more recent searches that he had conducted, including the last search warrant execution he conducted in 2019. (5T:114-19 to 115-16) Mason

[3] Witness testimony diverged as to whether Lorady was physically present at the meeting or called in by phone. Procopio testified, consistent with his report, that Lorady and Mason had attended telephonically. (6T:11-1 to 19) Furman testified that Lorady attended in person, but that Mason was contacted by phone. (5T:156-19 to 157-19)

also testified he could not remember whether Lorady was present during his meeting with prosecutor Eiselen two weeks prior or whether anything was read to him during the call. (5T:139-1 to 18)

Corcoran testified that he heard Mason both knock and announce police presence before entering. (5T:148-2 to 14) Corcoran admitted he could not recall other details of the entry, including the color of the front door, whether it was wood, steel, or glass, or whether police damaged the door upon entering. (5T:154-6 to 155-6) Corcoran likewise could not recall any details from the most recent search warrant that he had executed prior to the hearing, although he testified "it's been within this year." (5T:161-14 to 162-15)

Furman testified that he was 15 feet from the door prior to the entry in this case and that he heard Mason and Lorady knock and announce police presence. (5T:168-5 to 169-11) Furman acknowledged that his report did not document "who did what at the door." (5T:172-15 to 22)

Chaka James testified that she has owned and lived at the Mays Landing residence that was searched since 2009. (5T:195-7 to 14) Siddiq and James are the parents of a son who was three years old at the time of the search. (5T:194-18 to 195-6) James testified that, on June 28, 2016, she was asleep in bed with her son when she saw motion sensor lights turn on outside her window and heard noise on the side of her house. (5T:198-11 to 199-8) James testified she heard a "boom

noise of something come crashing into the house" and believed an "intruder" was breaking into her house. (5T:199-12 to 24) Prior to the destruction of the door, James never heard police knock or announce their presence. (5T:200-3 to 16)

Judge Miller denied the motion to suppress. (Da 52) Judge Miller found the officers' testimony that Mason knocked and announced police presence before entering the residence credible and reliable. Judge Miller found that Lorady had been "confused" during his 2018 testimony in which he stated that he, not Mason, had been responsible for knocking and announcing. (Da 77) Judge Miller reasoned that, because "[a]ll the officers and detectives involved have executed numerous knock and announce warrants . . . [i]t seems highly unlikely that they would utilize the knock component and leave out the announce component." (Da 77)

Judge Miller discounted Siddiq's arguments that the pre-hearing meeting convened by the prosecutor six weeks after the search had contaminated the police witnesses' independent memory. (Da 80) Judge Miller found that the meeting "was not organized by the officers for improper reasons," and that, "[i]n the absence of extensive reports covering this event, it seems reasonable that those involved would review the case and make sure they understood the facts." (Da 80) Judge Miller wrote that this was "the same function a jury performs after hearing a case" during deliberations. (Da 80)

Judge Miller dismissed Siddiq's arguments, grounded in our Supreme Court's decision in State v. Henderson, 208 N.J. 208, 268 (2011), that meetings between witnesses can alter their independent recollections or create a "false memory of details . . . never actually observed." Instead of recognizing the impact of co-witness feedback, Judge Miller found the opposite: that the officers' "collective memory" formed after the meeting "should be better than one witnesses [sic] degraded memory." (Da 74)

Judge Miller discredited James's testimony due to her relationship with Siddiq. (Da 74-75) Judge Miller found that James "has an interest in protecting the father of her child" and an interest in protecting "herself from the consequences of this event as a public employee with the DCPP." (Da 74-75) Judge Miller did not discuss whether the officers had an interest in being found to have complied with the terms of the warrant.

Judge Miller also ruled, in the alternative, that even if police did not comply with the warrant's knock-and-announce requirement, suppression still would not be required due to attenuation and because Siddiq lacked a "reasonable expectation of privacy" in the home. (Da 84-86)

LEGAL ARGUMENT

POINT I

THE MOTION COURT'S CONCLUSION THAT POLICE WITNESSES MEETING PRIOR TO THE HEARING TO DISCUSS THE SEARCH THAT TOOK PLACE SIX YEARS EARLIER CREATED A RELIABLE "COLLECTIVE MEMORY" WAS DIRECTLY CONTRARY TO OUR SUPREME COURT'S HOLDINGS ON MEMORY DECAY AND CONTAMINATION. (DA 52-86)

The motion court found that the police witnesses' 2022 testimony that Mason knocked and announced police presence before entering the residence during the search in 2016 was reliable. That testimony was directly contrary to Lorady's 2018 testimony that he – not Mason – had been responsible for knocking and that he did not announce police presence until after breaking down the door. Despite this contradiction, the motion court found that the officers' testimony at the 2022 hearing was more reliable than Lorady's 2018 testimony because it was the product of the officers' "collective memory" of the search, as established at a meeting between the witnesses that the prosecutor convened two weeks prior to the remand hearing – six years after the search at issue. (Da 74) The motion court's conclusion that memory becomes more reliable when witnesses are exposed to one another's memories six years after the events at issue is directly contrary to the conclusions that our Supreme Court reached about how memory works in its

landmark decision in State v. Henderson, 208 N.J. 208, 247 (2011). It must be reversed, and the evidence found during the unlawful search must be suppressed.

Unlike a motion court's credibility determinations, which are given deference on appeal, the court's conclusions about how memory functions are akin to legal determinations about scientific reliability, which our appellate courts review de novo. State v. Olenowski, 255 N.J. 529, 581 (2023). "A trial court's legal conclusions [] and its view of the consequences that flow from established facts are reviewed de novo." State v. Goldsmith, 251 N.J. 384, 398 (2022) (internal quotations and citation omitted). Whether reviewed under a deferential or de novo standard, the motion court's claims about memory must be reversed because they are clearly mistaken. See State v. Nieves, 476 N.J. Super. 405, 418 (App. Div. 2023).

In Henderson, the Court recounted overwhelming scientific evidence showing that "memory is malleable." 208 N.J. at 247. The Court cautioned that "[m]emories fade with time" and "never improve." Id. at 267. The Court also warned that feedback from co-witnesses can cause a witness to misremember events they saw firsthand, contaminating their independent recollections. Id. at 268-71. The Court described an early study where college students were shown a film clip and given a description of the clip "ostensibly given by another witness," before being asked to write their own description of the film. Ibid. (citing Elizabeth

F. Loftus & Edith Greene, Warning: Even Memory for Faces May Be Contagious, 4 Law & Hum. Behav. 323, 328 (1980)). "Some of the students were shown accurate descriptions of the event, and the rest read descriptions that contained false details." Id. at 269. A third of the students who reviewed a false description then incorporated false details from that description into their own report of what they had just seen. Ibid.

As described by the Court, that study's conclusion has been confirmed by many subsequent studies. Id. at 269-70 (collecting studies). Notably, "witnesses who were previously acquainted with their co-witness (as a friend or romantic partner) were significantly more likely to incorporate information obtained solely from their co-witness into their own accounts." Id. at 270. Studies have also shown that witnesses who made a false identification and were then told whether a co-witness agreed or disagreed with their conclusion would frequently alter their confidence in their own identification accordingly. Ibid. (citing C.A. Elizabeth Luus & Gary L. Wells, The Malleability of Eyewitness Confidence: Co–Witness and Perseverance Effects, 79 J. Applied Psychol. 714, 717–18 (1994)). To prevent the contamination of a witness's independent memory, the Court discouraged witnesses from "discuss[ing] the identification process with fellow witnesses or obtain[ing] information from other sources." Id. at 271.

In the years since, the Court has repeatedly reiterated these findings and expanded on Henderson's holdings to provide further safeguards against factfinders crediting witness memories that might be unreliable due to factors including the passage of time or contamination by exposure to feedback from co-witnesses. See, e.g., State v. Anthony, 237 N.J. 213 (2019) (requiring electronic recordation of identification procedures under most circumstances and providing automatic right to pretrial hearing on reliability where procedure is not recorded); State v. Washington, ___ N.J. ___ (A-29-22), slip op. at 30-33 (Jan. 17, 2024) (Da 132-135) (explaining that suggestive events during trial preparation can distort witness memory).

The motion court's reasoning in this case defied our Supreme Court's precedent about how memory works. Instead of acknowledging the reality of memory decay and the contaminating influence of co-witness feedback, the court concluded that the officers' recollections about the search were actually more reliable because, six years after the search, the officers met together to discuss their memory of events and formed what the court termed a "collective memory." (Da 74) The motion court concluded, based on nothing, that this "collective memory . . . should be better than one witnesses' [sic] degraded memory." (Da 74)

The motion court's logic was directly contrary to our Supreme Court's unambiguous and repeated conclusion that co-witness feedback "can distort

memory, create a false sense of confidence, and alter a witness's report of how he or she viewed an event." Henderson, 208 N.J. at 255; see also Anthony, 237 N.J. at 226; Washington, ___ N.J. ___ (A-29-22), slip op. at 30-33 (Da 132-135). Although the motion court acknowledged that the defense had cited Henderson, it brushed aside Henderson's discussion of scientific conclusions about how memory works. The court stated that "it is not appropriate for this court to adopt an expert's conclusions when no expert testified." (Da 74) The court also claimed that "this case does not involve eye-witness testimony," but rather "several detectives and officers breaching a door of an alleged drug kingpin, after careful planning." (Da 74)

The motion court was wrong to disregard Henderson's holdings about how memory works. First, the defense did not need to call an expert to reiterate the Supreme Court's conclusions about the malleability of memory or the contaminating influence of co-witness feedback. The expert conclusions adopted by the Court in Henderson on these matters are binding law in this State. Indeed, the Court in Henderson stated that it anticipated there would be less need for expert testimony going forward in light of its guidance. 208 N.J. at 298. At the Court's direction, Henderson's conclusions about have been incorporated into our Model Jury Charges and are given to juries as "authoritative" guidance in how jurors should assess eyewitness credibility. Ibid. These charges tell jurors they "may

consider whether the witness was exposed to opinions, descriptions, or identifications given by other witnesses," which "can affect the independent nature and reliability of a witness's [testimony]." Model Jury Charge (Criminal), "Identification: In-Court And Out-Of-Court Identifications" (rev. May 18, 2020) (Da 87-98). In the years since Henderson, the Supreme Court has repeatedly reiterated its conclusions about how memory works, underlining their precedential impact. Anthony, 237 N.J. at 226; Washington, ___ N.J. ___ (A-29-22), slip op. at 30-33 (Da 132-135). Just because the defense did not call an expert to parrot these holdings did not mean that the motion court was free to ignore this precedent and reach its own unsupported conclusions about how memory works.

Second, the motion court was wrong to read Henderson's holdings on memory formation and retrieval as limited to eyewitness identification evidence and irrelevant to the officers' memories of how they conducted the search. Henderson surveyed a wealth of research about human memory acquisition, retention, and retrieval generally – not just in the identification context. For instance, a number of the studies relied on by the Court on the subject of co-witness feedback dealt not with subjects' identification of a person, but with their recall of a series of events observed on film. One study discussed showed that its subjects' recall of whether a film they watched featured a car driving past a barn was affected by the framing of questions they were asked after viewing the film.

208 N.J. at 246-47 (citing Elizabeth F. Loftus, Leading Questions and the Eyewitness Report*,* 7 Cognitive Psychol. 560, 566 (1975)). Another study described subjects whose estimate of the speed that cars were driving in footage of car accidents was affected by differences in language used in framing questions about the crashes. Id. at 246 (Elizabeth F. Loftus & John C. Palmer, Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory, 13 J. Verbal Learning & Verbal Behav. 585, 586 (1974)). The Court's reliance on these studies makes clear that its conclusions about how memory can be distorted by feedback apply beyond the specific context of eyewitness identification.

Indeed, consistent with the scope of the scholarship it reviewed, Henderson expressed its conclusions about memory generally and did not limit its discussion only to the identification context. The Court titled Section VI of its decision "How Memory Works." Id. at 245. Regarding memory decay, the Court made three unequivocal observations: "Memories fade with time"; "memory decay 'is irreversible'; and "memories never improve." Id. at 267. As the Court explained, "The process of remembering consists of three stages: acquisition—'the perception of the original event'; retention— 'the period of time that passes between the event and the eventual recollection of a particular piece of information'; and retrieval—

the 'stage during which a person recalls stored information.'" Id. at 246. (quoting Elizabeth F. Loftus, Eyewitness Testimony 21 (2d ed.1996)).

> At each of those stages, the information ultimately offered as "memory" can be distorted, contaminated and even falsely imagined. The witness does not perceive all that a videotape would disclose, but rather "get [s] the gist of things and constructs a 'memory' on 'bits of information ... and what seems plausible.' The witness does not encode all the information that a videotape does; memory rapidly and continuously decays; retained memory can be unknowingly contaminated by post-event information; [and] the witness's retrieval of stored 'memory' can be impaired and distorted by a variety of factors, including suggestive interviewing and identification procedures conducted by law enforcement personnel.

Ibid. (quoting Special Master's Report).

The Court's discussion of the contaminating effects of co-witness feedback on memory was similarly broad. "Studies show that witness memories can be altered when co-eyewitnesses share information about what they observed." Id. at 268. The Court explained that such feedback "can distort memory" and "may cause a person to form a false memory of details that he or she never actually observed." Id. at 254, 268. This year, in Washington, the Court characterized its decision in Henderson broadly, as having "reviewed an extensive evidentiary record about how human memory works and how it can be affected and distorted by different variables." Washington, ___ N.J. ___ (A-29-22), slip op. at 30 (Da 132). The Court explained that "[n]othing in the [Henderson] opinion or the record before the Court suggested that those principles applied only to the investigative phase of a criminal

case," explaining they "readily relate to later events" occurring during witness preparation. Ibid.

Not only did the motion court disregard Henderson's directly on-point conclusions about "How Memory Works," it reached a directly opposite conclusion without any scientific support. Henderson explained that co-witness feedback can change a witness's memory of events they viewed just moments before. Id. at 268-69. Rather than acknowledging that co-witness feedback can taint a witness's independent recollection of events – especially when more time has passed, and the witness's own memory has deteriorated – the motion court touted the benefits of what it termed "collective memory." Acknowledging that there were not "extensive reports covering this event" prepared by the officers contemporaneously with the search, the court surmised that it "seems reasonable that those involved would review the case and make sure they understood the facts." (Da 80) The court reasoned that "collective memory should be better than one witnesses [sic] degraded memory." (Da 74)

The court's written decision amplified its statements at the suppression hearing endorsing the notion that "the prosecutors want [the officers] to testify consistent with each other, so they hash it out as to what they all saw and collectively recall because your collective recollection is sometimes better than your individual recollection." (6T:22-23 to 23-3) The motion court's reasoning thus

favored preparation strategies that seek to ensure witnesses testify consistently, rather than strategies that would ensure that each witness only testifies to their own independent memories. Our law clearly disagrees. The Supreme Court has made clear that police should seek to avoid exposing witnesses to feedback that will "reduce [their] doubt and engender a false sense of confidence" by distorting their independent recollection to bring it in line with that of other witnesses. Henderson, 208 N.J. at 253-55.

Eschewing Henderson's insights about memory distortion, the motion court analogized this meeting of State's witnesses in advance of the suppression hearing to the entirely different context of jury deliberations:

> This is the same function that a jury performs after hearing a case. They retire to the deliberation room without notes and rely on their "collective recollection" of the facts before coming to a verdict. In this instance the assistant prosecutor, along with a detective, oversaw the meeting and made sure that the officers we're [sic] not fabricating or contriving the facts. Not all the officers attended at the same time. Some appeared in person, and some appeared by telephone and hung up before the meeting was over. The gathering was to refresh their "collective recollection" particularly since the case was six years old. This event does not offend any rule or law that this court is aware of. Rather it goes to the weight and credibility of their testimony. But it is certainly not a form of witness tampering or other mischief as a claimed [sic] by the Defense.
>
> (Da 80)

The motion court failed to recognize that witnesses and jurors perform very different functions in our legal system. Witnesses testify; jurors deliberate.

Witnesses are called to testify to their own independent recollection of events. Evidentiary rules prevent witnesses from relaying things that they have not personally observed but have only heard secondhand. "A person who has no knowledge of a fact except what another has told him [or her] does not, of course, satisfy the present requirement of knowledge from observation." Neno v. Clinton, 167 N.J. 573, 585 (2001) (quoting McCormick on Evidence § 10 (5th ed.1999)); see also State v. Carabello, 330 N.J. Super. 545, 557 (citing cases establishing that a witness must "put[] before the court his independent recollection and knowledge"). In contrast, jurors do not have an independent recollection of any facts and must work collectively to review evidence presented by witnesses who do. How jurors deliberate is not a model for how witnesses should prepare to testify because their roles are not comparable.

Contrary to the motion court's reasoning, Henderson and its progeny make clear that co-witness feedback contaminates and distorts memory, rather than improving it. 208 N.J. at 245-48, 268-71. The motion court also failed to understand that memory contamination affects even witnesses who appear credible and believe themselves to be testifying truthfully. The motion court ascribed significance to its belief that the officers did not appear to be lying. The court explained that the "testimony came across during the hearing as natural, unrehearsed, and as a fair indication of their collective recollection of the execution

of the search warrant." (Da 81) The court characterized the defense's contentions as claiming the State had engaged in "witness tampering or other mischief." (Da 81)

The reliability of a witness's memory is a separate question from the witness's credibility. In Henderson, the Supreme Court accepted "that eyewitnesses generally act in good faith," explaining that "[m]ost misidentifications stem from the fact that human memory is malleable; they are not the result of malice." 208 N.J. at 234. Therefore, a witness could appear credible and fully believe themselves to be telling the truth, but their memory could be unreliable due to the fallibility of their memory and their exposure to contaminating feedback from other witnesses. This feedback can occur without the witness even realizing it, as the result of "[e]ven seemingly innocuous words and subtle cues—pauses, gestures, hesitations, or smiles— [that] can influence a witness' behavior." Id. at 249.

This case involved a greater degree of feedback than merely subtle cues. A group of witnesses met at the direction of the prosecutor to agree on a common story of what happened in preparation for a suppression hearing at which the key issue was whether police had complied with the knock-and-announce requirement of a warrant. The presence of the prosecutor and police supervisors created an obvious incentive for the witnesses to remember details that would cohere with the

other witnesses, validate the work of the officers, and support the admission of the disputed evidence. The resulting narrative agreed upon did just that, directly contradicting what one of the witnesses had already testified to under oath years prior.

The prosecutor's intention in convening the witness meeting is irrelevant to the question of the reliability of the resulting testimony. Regardless of whether the prosecutor convened the meeting intending to contaminate the witnesses' memory, the reality is that such meetings inevitably do affect how witnesses understand their own memories. As our Supreme Court explained recently, "issues about human memory discussed in Henderson did not turn on why prosecutors or law enforcement officials conducted a particular identification procedure." Washington, ___ N.J. ___ (A-29-22), slip op. at 30 (Da 132). "[U]nduly suggestive procedures can lead to misidentifications and invoke due process concerns whether they are conducted in the initial stage of an investigation or during trial preparation sessions." Ibid.

The motion court's unsupported claim that faded memories become more reliable when witnesses meet and discuss them together six years after the events at issue is so at odds with the weight of scientific authority and our Supreme Court's precedents that it cannot stand. The only appropriate remedy is to suppress the evidence. At this point in time – 8 years after the search – the State cannot prove

that officers complied with the terms of the warrant; the search was therefore warrantless and presumptively invalid. See Caronna, 469 N.J. Super. at 486 (explaining that "entry without prior announcement is constitutionally defective, and a knock-and-announce warrant violation is considered warrantless and presumed invalid.") No body-worn camera footage depicts officers announcing their presence before breaking through the door. Likewise, no reports written close in time to events show that police complied with the warrant by announcing their presence. The only near-contemporaneous report, written by Detective Furman's report a month after the search, does not document how police entered the home. (5T:59-5 to 18)

Detective Lorady testified at the first suppression hearing, 2 years after the search, that he did not announce police presence until after breaking through the door. (1T:18-4 to 14) Lorady explained he usually waited until after breaking through the door to announce police because "sometimes yelling police, people don't want to answer up." (1T:18-4 to 14) This testimony, which was much closer in time to the events at issue, reflected that Lorady made an intentional decision to wait until after entry to announce. Although the manner of entry into the home was discussed at length, Lorady's 2018 testimony did not mention Mason at all. This 2018 testimony should be credited over Lorady's contradictory and self-

serving 2022 testimony. See Henderson, 208 N.J. at 267 ("memories fade with time . . . [and] never improve").

Lorady's 2022 testimony is even less reliable because it was prompted by his exposure to co-witnesses. Lorady admitted that he did not recall Mason knocking and announcing until after the June 2022 meeting with other witnesses. (5T:65-14 to 66-17) Therefore, by his own account, the memory was not the product of his independent recollection but was instead induced by information shared by other witnesses at that meeting. In the context of identifications, jurors are specifically told that, if they determine "the in-court identification is the product of an impression gained at the out-of-court identification procedure, it should be afforded no weight." Model Jury Charge (Criminal), "Identification: In-Court and Out-of-Court Identifications" (rev. May 18, 2020) (Da 89, 98) (emphasis added). Because Lorady admitted that his 2022 testimony was the product of an impression gained during the preparation session, it should be given no weight.

The independent memory of the other police witnesses was also contaminated by the 2022 meeting convened by the prosecutor and should be given no weight. The State chose not to call any of these witnesses at the 2018 hearing concerning the manner of entry into the home. None of these witnesses documented their involvement in the home entry at any point before the 2022 witness preparation session. Compare Henderson, 208 N.J. at 254 (requiring police

to record witness confidence "in the witness' own words before any possible feedback" and to avoid feedback thereafter); id. at 295 (encouraging the State to "strive to avoid reinforcement and distortion of eyewitness memories from outside effects").

Although the officers claimed to clearly remember details from six years prior that they had never previously documented, they freely admitted they could not recall basic details of searches that they had performed much more recently. (See 5T:114-19 to 115-16; 161-14 to 162-15) They also admitted they could not remember other details of the entry in this case beyond the fact that Mason knocked and announced. (See 5T:86-6 to 87-1; 153-18 to 155-6) The officers' candor about the limits of their memory in these regards was far more consistent with how memory formation, retention, and retrieval works than their claim that they vividly remembered Mason knocking and announcing during this search six years prior. See Henderson, 208 N.J. at 245-248.

Because the State failed to prove its compliance with the knock-and-announce provision of the warrant on remand, the search was warrantless and presumptively invalid. Caronna, 469 N.J. Super. at 486. Rather than remanding for additional factfinding or another hearing, this Court should suppress the evidence.[4]

[4] Should the Court decide to remand the case for a third suppression hearing, it must again assign a new judge because Judge Miller already made extensive credibility findings. See (Da 25) (citing State v. Camey, 239 N.J. 282, 312 (2019)).

POINT II

THE MOTION COURT ERRED BY FINDING IN THE ALTERNATIVE THAT THE EXCLUSIONARY RULE WOULD NOT APPLY TO ANY KNOCK-AND-ANNOUNCE VIOLATION AND THAT SIDDIQ LACKED STANDING. (DA 52-86)

The motion court defied this Court's remand order by ruling in the alternative that, had the police not announced their presence, their violation of the knock-and-announce rule would not require application of the exclusionary rule. (Da 84-86) The State made this exact argument in its prior appeal, and it was rejected by this Court. (Da 25) Furthermore, the motion court's reasoning was contrary to all controlling published law on attenuation and standing.

Although the motion court claimed its alternative ruling that the exclusionary rule did not apply was based on a finding of "attenuation," it failed to apply the legal standard for attenuation. To determine whether the State can meet its burden to show that seized evidence is sufficiently attenuated from police misconduct, courts generally look to three factors: "(1) 'the temporal proximity' between the illegal conduct and the challenged evidence; (2) 'the presence of intervening circumstances'; and (3) 'particularly, the purpose and flagrancy of the

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(remanding for a hearing before a different judge because the original judge made extensive credibility findings, including as to a witness not before the court).

official misconduct.'" Caronna, 469 N.J. Super. at 502 (quoting State v. Shaw, 213 N.J. 398, 415 (2012)).

Instead of looking to these factors, the motion court first reasoned that "[a]ny deprivation was [] extremely technical (meaning split second and inches difference)," noting that police announced their presence "once the officers crossed the door threshold only seconds after knocking." (Da 85) The State had argued in the prior appeal that any violation was technical and this Court has already rejected that claim. This Court wrote that it "disagree[d] with the State that a potential violation of the 'knock-and-announce' rule is insignificant and does not require application of the exclusionary rule." (Da 25 (citing Caronna, 469 N.J. Super. at 497-98). Had this Court accepted the State's argument that a violation of the rule would not require exclusion, it would have had no reason to remand for additional factfinding regarding "the facts surrounding the execution of the search warrant and law enforcement's entry into the Mays Landing residence." (Da 25)

The motion court was bound by this Court's prior ruling. Unlike the motion court's conclusion, this Court's prior reasoning was legally sound and consistent with controlling law. As then-Judge Fasciale wrote in Caronna, "an unjustified knock-and-announce violation essentially renders the search and seizure warrantless, [] and therefore it is presumed invalid." 469 N.J. Super. at 503 (citing State v. Goodson, 316 N.J. Super 296, 305 (App. Div. 1998)). Addressing

indistinguishable facts, this Court rejected a finding of attenuation in Caronna. As in Caronna, this case involves "no temporal break between the illegal police conduct of violating the knock-and-announce requirement in the warrant and the seizure of the [evidence]" in the home. Id. at 504. "Second, there are no intervening circumstances whatsoever that break the unconstitutional chain of causation." Ibid. Finally, by ignoring the express conditions of a warrant, the officers engaged in "flagrant police conduct" that prevents the State from subsequently claiming the resulting evidence is admissible under the attenuation exception to the exclusionary rule. Id. at 503. The State has not met its burden to show attenuation and the motion court's unsupported finding must be reversed.

In addition to its conclusion that any violation was technical, the motion court's kitchen-sink decision also claimed that Siddiq lacked standing to challenge the search. To reach this outcome, the court relied on federal cases and reasoned that "'stash houses' in drug distribution cases are not occupied by the targeted defendant, so there is no legitimate expectation of privacy, and the exclusionary rule does not apply." (Da 85) But our Supreme Court has consistently reaffirmed that New Jersey does not apply federal standing principles concerning a defendant's expectation of privacy. Instead, under New Jersey law, "[w]henever a defendant 'is charged with committing a possessory . . . offense – as in this case – standing is automatic, unless the State can show that the property was abandoned

or the accused was a trespasser,'" neither of which are alleged here. State v. Shaw, 237 N.J. 588, 617 (2019) (quoting State v. Randolph, 228 N.J. 566, 572 (2017)); see also State v. Johnson, 193 N.J. 528, 541-42 (2008) (reaffirming that "a defendant has standing if he is charged with an offense in which possession of the seized evidence at the time of the contested search is an essential element of guilt") (internal quotation marks omitted).

The Supreme Court has repeatedly rejected the conclusion reached by the motion court here – that a defendant must show that he has a reasonable expectation of privacy in the place searched – as contrary to New Jersey law. For example, in Randolph, the State "argue[d] that automatic standing does not relieve defendant of his obligation to show that he had a reasonable expectation of privacy in the apartment searched." 228 N.J. at 583. The Court explained that it had "dismissed a similar argument in Johnson, stating, 'the State's proposed approach merely places another layer of standing – the federal standard – on top of our automatic standing rule.'" Ibid. (quoting Johnson, 193 N.J. at 546). The Court added that it had "roundly rejected hinging a defendant's right to challenge a search based on 'a reasonable expectation of privacy' analysis." Ibid. (citing Johnson, 193 N.J. at 546 and Alston, 88 N.J. at 226-27); see also State v. Brown, 216 N.J. 508, 529 (2014) (reaffirming that New Jersey has "rejected the amorphous legitimate expectations of privacy in

the area searched standard" and further places the "burden of establishing that the defendant does not have standing to challenge the search" on the State) (internal quotation marks and citations omitted).

The motion's court grab bag of alternative justifications for admitting the evidence even if police failed to comply with the knock-and-announce warrant condition was contrary to this Court's previous decision in this case and all published authority. As discussed supra, p. 26-28, in light of the lack of contemporaneous record, Lorady's 2018 testimony, memory decay, and the contaminating impact of the 2022 witness meeting, the State has not shown its compliance with the warrant and this Court should suppress the evidence. Caronna, 469 N.J. Super. at 503.

CONCLUSION

Because police failed to comply with the knock-and-announce provision of the warrant, the evidence found in the Mays Landing address must be suppressed and Siddiq must be given the opportunity to withdraw his plea.

Respectfully submitted,

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Dated: January 30, 2024

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Letter Brief

LETTER IN LIEU OF BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

Honorable Judges of the Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

Re: STATE OF NEW JERSEY (Plaintiff-Respondent) v.
DIAAB SIDDIQ (Defendant-Appellant)
Docket No. A-001865-22

Criminal Action: On Appeal from a Motion to Suppress Physical Evidence Order of the Superior Court of New Jersey, Law Division, Atlantic County

Sat Below: Hon. William Todd Miller, J.S.C.

Honorable Judges:

Pursuant to Rule 2:6-4(a), this letter is submitted in lieu of a formal brief on behalf of the State of New Jersey.

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PROCEDURAL HISTORY

On June 28, 2016, investigators obtained and executed a search warrant for a residence located in Mays Landing, New Jersey in connection with an investigation into potential narcotic distribution charges. (Da5). As a result of that investigation, defendant was indicted on November 30, 2016 and was charged with a variety of narcotic distribution and gun related offenses. (Da53 to Da54).

Defendant filed a motion to suppress the physical evidence found at the Mays Landing home. (Da54). On November 1, 2018, the motion court heard testimony regarding the execution of the Mays Landing warrant. (Da54).

The motion court denied defendant's motion to suppress. (Da21). On July 2, 2019, defendant plead guilty to money laundering in violation of N.J.S.A. 2C:21-25A, maintaining a narcotics production facility in violation of N.J.S.A. 2C:35-4, possession of a controlled dangerous substance with an intent to distribute in violation of N.J.S.A. 2C:35-5B(2), and possession of a handgun by certain persons not to possess weapons in violation of N.J.S.A. 2C:39-7B(1). (Da46 to Da47). On August 2, 2019, defendant was sentenced in accordance with his plea agreement. (Da59).

Defendant appealed the motion court's order denying his motion to suppress the evidence found in the Mays Landing residence. (Da4). On May 5, 2022 the

Appellate Division affirmed defendant's conviction in part but "conclude[d] a remand [was] necessary to conduct an entirely new suppression hearing focused on the execution of the search warrant at the Mays Landing residence and whether law enforcement violated the terms of the warrant." (Da5).

A new suppression hearing was conducted in front of a different judge on July 14, 2022 and September 8, 2022. (Da60). The remand motion court denied defendant's motion to suppress on October 19, 2022. (Da52). This appeal follows.

COUNTER-STATEMENT OF FACTS

On June 28, 2016, a search warrant was approved for a Mays Landing residence frequented by defendant throughout a year-long narcotics investigation. (1T:142-3 to 12; 1T:143-9 to 14).[1] Lieutenant Daniel Corcoran of the Atlantic City Police Department called a group of law enforcement officers to meet at Canal's Liquor Store on the Black Horse Pike to plan how the group would execute the knock-and-announce warrant. (1T:143-8 to 19). At that meeting, Lt. Corcoran gave each officer a specific role in executing the warrant. (1T:146-5 to 12). He assigned Detective Howard Mason to knock-and-announce specifically because he knew Det. Mason was experienced in properly executing knock-and-announce warrants. (1T:147-17 to 25). Detective Darrin Lorady was assigned to operate a "rabbit

[1] 1T = Transcript from July 14, 2022 suppression hearing

tool," which would open a locked door if no one answered. (1T:146-14 to 17; 1T:147-3 to 4).

Det. Lorady and Det. Mason were positioned at the front of the group of officers at the front door of the residence. (1T:107-2 to 4). Det. Mason initially knocked on the door three times, announced "police search warrant," then listened for a response. (1T:107-15 to 25; 1T:148-1 to 2). He repeated that process two more times over the course of around twenty-one seconds. (1T:109-24 to 25). After Det. Mason knocked and announced the first time, another officer in the group heard movement inside the home and relayed that to the other officers. (1T:148-4 to 17). However, no one answered the door. (1T:148 11 to 17). Det. Lorady then used the tool to open the door. (1T:111-1 to 3).

The owner of the residence, Chaka James, was inside. (Da64). James was the mother of one of defendant's children. (Da64). Inside, officers located forty-thousand dollars in cash, a money counter, and two handguns. (Da54).

LEGAL ARGUMENT

POINT I

The motion court's factual findings are supported by sufficient credible evidence and must be given deference.

Defendant contends the Appellate Division should overturn the motion court's denial of his motion to suppress "[b]ecause police failed to comply with the knock-and-announce provision of the warrant." (Db25). More specifically,

defendant attacks the motion court's factual findings, arguing those findings were "directly contrary to our Supreme Court's holdings on memory decay and contamination" and were "clearly mistaken." (Dbi; Db15).

"Generally, on appellate review, a trial court's factual findings in support of granting or denying a motion to suppress must be upheld when 'those findings are supported by sufficient credible evidence in the record.'" State v. A.M., 237 N.J. 384, 395 (2019) (quoting State v. S.S., 229 N.J. 360, 374 (2017)). Further, "'[a] trial court's findings should be disturbed only if they are so clearly mistaken that the interests of justice demand intervention and correction.'" State v. Robinson, 200 N.J. 1, 15 (quoting State v. Elders, 192 N.J. 224, 244 (2007)).

Defendant relies on State v. Henderson and other eyewitness identification cases to argue the motion court erred as a matter of law by finding that the law enforcement witnesses were credible. (Db14 to Db15). In State v. Henderson, the Supreme Court of New Jersey assessed "the current standard for assessing eyewitness identification evidence . . ." 208 N.J. 208, 218 (2011). In making its decision, the Supreme Court "evaluate[d] scientific and other evidence about eyewitness identification" and concluded that "the current test for evaluating the trustworthiness of eyewitness identification should be revised." Id. at 218-19.

Defendant mischaracterizes the scientific evidence discussed in Henderson as "holdings" to argue the motion court's factual findings should not be given

deference. (Db14). However, the Supreme Court's only holdings in Henderson relate to eyewitness identification admissibility procedures, not witness memory in general. See generally id. at 302-04.

The circumstances that support the reasoning behind the Court's holdings in Henderson are not present here. The Henderson Court made clear that the scientific evidence was assessed to determine whether eyewitness identification procedures were proper because of certain issues that arise specifically in that context. See generally id. at 217-20. For example, the Court noted that "eye witness identifications bear directly on guilt or innocence." Id. at 219. Additionally, the Court also stressed that "eyewitness identification is the leading cause of wrongful convictions across the country." Id. at 218.

Further, a majority of the scientific evidence discussed in the opinion also relate to the visual portion of human memory related to identifying a person and police lineups. Id at 241-49. Defendant has not presented an expert or any authority that would explain how the scientific evidence in Henderson would also be applicable to the general memory of witnesses, or the witnesses in this case.

The motion court's factual findings are supported by sufficient credible evidence in the record. The motion court assessed each witness's credibility individually based on their testimony's "rationality, internal consistency, and manner in which it 'hangs together' with other evidence." (Da76). Det. Mason was

clear in his testimony that he knocked and announced, even detailing the specific way he did so. (1T:107-15 to 25). His testimony was internally consistent, and defendant does not argue otherwise here. His testimony was also supported by the other witnesses, including Lt. Corcoran, who was the highest-ranking member present on that day. (1T:148-1 to 2). Det. Lorady and Lieutenant Justin Furman also confirmed that the detective positioned in the front of the group of officers' executing the warrant knocked-and-announced. Defendant has not shown, as required, that the motion court's findings were "so clearly mistaken that the interests of justice demand intervention and correction" and thus, its factual findings should not be disturbed. Elders, 192 N.J. at 244.

POINT II

The motion court did not err by concluding the knock and announce rule was not violated because a reasonable time elapsed between law enforcement knocking and announcing and eventual forcible entry.

Defendant argues the physical evidence found at the Mays Landing residence must be suppressed "because police failed to comply with the knock-and-announce provision of the warrant." (Db35). Legal conclusions, like whether the knock-and-announce rule was violated, are subject to de novo review. State v. Rockford, 213 N.J. 424, 440 (2013) (citing State v. J.D., 211 N.J. 344, 354 (2012); State v. Gandhi, 201 N.J. 161, 176 (2010)).

"The knock-and-announce rule renders unlawful a forcible entry to arrest or search 'where the officer failed first to state his authority and purpose for demanding admission.'" Robinson, 200 N.J. at 13-14 (citing Miller v. United States, 357 U.S. 301, 308 (1958)). "[I]n its application, the knock-and-announce rule is not particularly onerous." Id. at 14 (citing Miller v. United States, 357 U.S. 301, 309 (1958)). However, "when 'the police announce[ ] their presence and [are] greeted with silence . . . a reasonable time must elapse between the announcement and the officers' forced entry.'" Id. at 16 (citing State v. Johnson, 168 N.J. 608, 621 (1964)).

A "reasonable" amount of time does not have to be "extensive in length, depending on the circumstances of a given case." Johnson, 168 N.J. at 621-22. "'[T]his standard is 'necessarily vague,' and turns on the circumstances existing when the police execute the warrant.'" Robinson, 200 N.J. at 16 (citing State v. Rodriguez, N.J. Super. 192, 200 (App. Div. 2008). "The facts relevant to that determination are circumscribed, as 'the facts known to the police are what count in judging reasonable waiting time.'" Ibid. (quoting United States v. Banks, 540 U.S. 31, 39 (2003)). "Particularly in narcotics cases, reasonableness in delay is not a function of merely 'how long would it take the resident to reach the door, but how long it would take to dispose of the suspected drugs[.]'" Id. at 17 (citing Hudson v. Michigan, 547 U.S. 586, 580 (2006)).

In Robinson, the defendant was charged with distributing a controlled dangerous substance. 200 N.J. at 6. He sought to suppress physical evidence seized from his apartment pursuant to a warrant, arguing law enforcement executing that warrant did not properly knock and announce prior to entering the residence. Id. at 6-7. An officer involved in executing the warrant testified he knocked at the door and said "Police department; search warrant." Id. at 8. After twenty to thirty seconds passed without any answer, officers forcefully entered the apartment. Id.

The Supreme Court concluded "that the twenty-to thirty-second delay between [law enforcement] knocking and announcing 'Police department; search warrant' and the forcible entry was reasonable." 200 N.J. at 18. It reasoned that the time period was appropriate based on "[t]he totality of the circumstances presented—including, most significantly, the potential for the destruction of evidence while entry was delayed further . . ." Id.

Here, like in Robinson, Det. Mason was clear he knocked while announcing police presence for around twenty to twenty-five seconds. (Da61). Additionally, like in Robinson, officers had probable cause to believe there were narcotics in the residence that could be destroyed if they continued waiting. (Da70). This is supported by the officer hearing movement after they knocked without anyone answering the door. (1T:148-4 to 17). Therefore, based on the motion court's

factual findings, the period of time between knocking and announcing was reasonable and thus, should not be overturned.

CONCLUSION

For the reasons expressed, the State respectfully requests that the Appellate Division affirm the Law Division's order denying defendant's motion to suppress.

Respectfully submitted,

/s/ Marisa D. Pescatore
Marisa D. Pescatore
Assistant Prosecutor

Cc: Zachary G. Markarian, Esq.