Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-3517-23T4

		CRIMINAL ACTION
STATE OF NEW JERSEY,	:	
Plaintiff-Appellant,	:	On Motion for Leave to Appeal Granted from an Interlocutory Order of the Superior Court of New Jersey,
v.	:	Law Division, Hudson County.
KE WANG,	:	Sat Below: Hon. Mitzy Galis-Menendez, P.J.Cr.
Defendant-Respondent.	:	

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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September 23, 2024

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[1] The included photographic defense and State exhibits were acquired directly from the trial court.

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[2] This video shows a fridge in front of the second floor's kitchen door, and personal items, that were not there when the search warrant was executed. (5T37-17 to 39-20; Sa49 to 50).

[3] This video also shows personal items that were not there when the search warrant was executed. (5T48-10 to 49-23; Sa52 to 53).

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"Sa" refers to the State's appendix to this appellant's brief.
"Cma" refers to the State's confidential appendix to this appellant's brief.
"Pb" refers to the State's appellant brief.
"1T" refers to the suppression-motion proceedings on October 13, 2022.
"2T" refers to the suppression-motion proceedings on October 18, 2022.
"3T" refers to the dismissal-motion proceedings, on speedy-trial grounds, on January 31, 2023.
"4T" refers to the reconsideration-motion proceedings on May 11, 2023.
"5T" refers to the reopened suppression-motion proceedings on December 15, 2023.
"6T" refers to the reconsideration and dismissal-motion proceedings on May 1, 2024.
"7T" refers to the suppression-motion proceedings on September 22, 2022.
"8T" refers to the suppression-motion proceedings on January 5, 2023.

[4] The State labeled the transcripts so that the transcript citations would be consistent for all briefs for this appeal and Docket No. A-3522-23T1.

PRELIMINARY STATEMENT

This case involves the distribution of child sexual abuse and exploitation material (CSAEM), where the IP address being used to file-share known CSAEM files, by an unknown user over BitTorrent, was traced, and a warrant was acquired authorizing the search of "132 Tuers Avenue"—the IP address's service address. Based on the facts known to police at the time they acted, the police reasonably executed the warrant believing an unmarked door to the third floor, on the same left side of the two-family house, was part of 132 Tuers Avenue. Therein, the police seized defendant's running laptop from his bedroom on the third floor, as it contained CSAEM files and the same BitTorrent software used to share CSAEM.

The motion judge's ruling, ultimately suppressing all the State's evidence seized under this validly issued and reasonably executed search warrant, erred in two critical ways. First, the judge made a clearly mistaken fact-finding that tainted her entire ruling. Contrary to the objective photographic and video evidence of the property's structure, the judge mistakenly believed that the door to the third floor was on the other side of the two-family house, i.e., the 130 Tuers Avenue side. The judge therefore questioned why the police did not breach a door on the first floor, that in fact faced into the 130 Tuers Avenue side, and yet opened the door to the third

floor. With an accurate understanding of the facts, the answer to that question is simple: the police reasonably believed that the locked door on the first floor faced into 130 Tuers Avenue (which it did); and that the interior door to the third floor was still part of 132 Tuers Avenue (which was the targeted location of the search warrant and where the evidence was seized).

Second, the judge erroneously conflated the two motions pending before her. In finding that there needed to be a remedy for the inadvertently late disclosure of the diagram that related to the warrant's execution, but was discovered and considered while the suppression motion was still pending, the judge improperly suppressed all the State's evidence seized under the warrant, using a "palpable negligence" standard that was not based on the reasonableness of the police's conduct during the warrant's execution.

However, the appropriate standard for the motion being reconsidered, to suppress the evidence seized under the warrant, should have strictly involved a Fourth Amendment inquiry into the reasonableness of the police's conduct during the warrant's execution, based on the information the police knew at the time they acted. And conducting the appropriate Fourth Amendment analysis should have led to a denial of the motion to suppress. Accordingly, this Court should reverse the judge's suppression of the State's evidence seized under the valid and reasonably executed search warrant.

STATEMENT OF PROCEDURAL HISTORY

Following the execution of a search warrant on November 5, 2021, defendant Ke Wang was arrested and charged on the same date with two counts of endangering the welfare of a child (EWOC) under N.J.S.A. 2C:24-4(b) (for Possession of Child Sexual Abuse and Exploitation Material, and Maintaining Child Sexual Abuse and Exploitation Material via a File-Sharing Program). (Sa1 to 7).

On June 21, 2022, defendant filed a pre-indictment motion to suppress the evidence seized under the warrant. (Sa8). On October 13, and 18, 2022, the Honorable Mitzy Galis-Menendez, P.J.Cr., held an evidentiary hearing and heard testimony on the motion. (1T; 2T). Following argument on September 22, 2022, January 5, 2023, and January 31, 2023, (3T; 7T; 8T), Judge Galis-Menendez denied the motion to suppress on January 31, 2023, in an order and written opinion. (Sa9 to 13).

On February 13, 2023, defendant moved for reconsideration of the denial of his suppression motion. (Sa14). After hearing oral argument on May 11, 2023, Judge Galis-Menendez denied the reconsideration motion on the record. (Sa15; 4T).

Thereafter, on June 21, 2023, a State Grand Jury returned Indictment No. 23-06-0080-S, against defendant, charging him with two counts: second-

degree EWOC for maintaining twenty-five or more items depicting the sexual abuse or exploitation of a child via a file-sharing program, in violation of N.J.S.A. 2C:24-4(b)(5)(a)(iii) (Count One); and third-degree EWOC for possessing child sexual abuse or exploitation material, in violation of N.J.S.A. 2C:24-4(b)(5)(b)(iii) (Count Two). (Sa18 to 19).

On September 1, 2023, defendant filed a second motion to reconsider his motion to suppress. (Sa21; Sa31). In support of that motion, defendant submitted a certification, dated September 7, 2023, from private investigator, Robert Hovan, who had interviewed the property owner, Jean Haedrich, in August 2023. Hovan reviewed a photograph provided by defense counsel "depict[ing] the door that le[d] to [defendant]'s then attic apartment," opining that the police had likely used a Halligan Tool to open it. (Sa22 to 25).

On December 15, 2023, Judge Galis-Menendez held an evidentiary hearing on the reconsideration motion, hearing additional testimony from the State, as well as testimony from Haedrich. (5T). The defense, however, did not call Hovan to testify. (5T).

During Detective-Sergeant Joseph Villalta-Moran's testimony, who testified at the reopened December 15, 2023 hearing, but not the initial October 2022 hearings, it was revealed that possible "notes" had been taken down by the officer assigned to write the report for the search warrant's

execution, most likely by Detective John Barnett. (5T124-21 to 126-13). The prosecutor did not have such notes and was unaware that such notes existed. (6T15-10 to 16-21; 6T19-7 to 22; 6T44-17 to 46-24). She immediately contacted Detective Barnett and asked if he made or kept any notes. (6T16-7 to 21). Barnett responded that he did and provided her with the notes, which were a two-paged diagram of the searched location. (See Sa26 to 27). Upon receiving the diagram, the prosecutor promptly turned it over to defense counsel on January 4, 2024. (6T13-17 to 19; 6T16-13 to 21; Sa32 to 33).

The diagram indicated the following: "Closet door outside kitchen was breached. No indication it was separate from the residence. Door led to 3rd Floor loft." (Sa26). The diagram did not provide how this door was "breached," unlike the front door to 132 Tuers Avenue (which the diagram noted was "[b]reached with [a] ram"). (Sa26); (see also 5T31-3 to 34-16).

On January 6, 2024, defendant filed a motion to dismiss the indictment, with prejudice, on Brady[5] grounds. (Sa28). Judge Galis-Menendez heard argument on both motions—reconsideration of the suppression motion and to dismiss the indictment—on May 1, 2024. (6T).

On May 20, 2024, Judge Galis-Menendez issued a written opinion and order on both motions. (Sa29 to 41). As to defendant's motion to dismiss the

[5] Brady v. Maryland, 373 U.S. 83 (1963).

indictment, the judge found a Brady violation; but, in considering what happened, the judge determined that a dismissal of the indictment, with prejudice, was not warranted. (Sa33 to 37). The judge nonetheless suppressed all the State's evidence seized under the warrant, using a "palpable negligence" standard that was not based on the reasonableness of the police's conduct during the warrant's execution. (Sa37 to 38). As to the motion to suppress, the judge also reconsidered her prior denial and granted the motion in the alternative.[6] (Sa38 to 41).

On June 6, 2024, the State filed a Notice of Motion for Leave to Appeal, in this Court, challenging the judge's suppression of the evidence seized under the warrant that quashed the majority of the evidence against defendant. (Sa42).

On June 10, 2024, defendant also filed a Notice of Motion for Leave to Appeal, Docket No. A-3522-23T1, in this Court, separately challenging the judge's denial to dismiss the indictment with prejudice for the inadvertently delayed discovery of the location diagram. (Sa43 to 44).

On July 15, 2024, this Court granted both the State's and defendant's motions for leave to appeal, calendaring the cases back-to-back. (Sa45 to 48).

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[6] The State summarized each of the judge's rulings in the Statement of Facts. See (Pb21 to 28).

STATEMENT OF FACTS

This case stems from a New Jersey State Police investigation into a traced IP address that was file-sharing known files of child sexual abuse and exploitation materials (CSAEM) on BitTorrent. (1T31-23 to 42-23; Cma4; Cma7 to 11). In tracing the IP address, the police determined that its service address was "132 Tuers Avenue," and thereafter secured a warrant to search therein for the devices that were unlawfully sharing CSAEM. (Cma1 to 21). The details of how that search warrant was acquired and executed follow.

A. The motion-to-suppress facts.

The below facts are derived from the search-warrant application and search warrant for 132 Tuers Avenue, the testimony of defendant, Jean Haedrich, Detective Anthony Eggert, Detective-Sergeant First Class Joseph Villalta-Moran, Detective John Barnett, and Yuxing Chen, and the photographic and video motion exhibits of the searched property's structure.

In September 2021, the New Jersey State Police (NJSP)'s Internet Crimes Against Children (ICAC) Unit began an investigation into the distribution of CSAEM via the internet, using online, peer-to-peer, file-sharing networks. (1T31-23 to 42-23; Cma4; Cma7 to 11).

Specifically, on September 22, 2021, Detective Anthony Eggert, using investigative BitTorrent software, directly connected to a device that was file-

sharing known CSAEM files using a specific IP address. (Cma9 to 10; 1T35-9 to 40-6). Eggert was able to download thirty-five items of CSAEM from the suspect device. (Cma10). By checking the American Registry for Internet Numbers and serving a subpoena on the IP address's Internet Service Provider, the police determined that the device's IP address had a service address of 132 Tuers Avenue, in Jersey City, New Jersey, and that Jean Haedrich was the registered subscriber. (Cma10; 1T39-17 to 41-6).

Detective Eggert thereafter contacted the U.S. Postal Inspector's Office, which advised that two individuals received mail at 132 Tuers Avenue. (Cma10). Detective Eggert also conducted a DMV inquiry, revealing that a total of five individuals potentially resided at the address. (Cma10 to 11). Further surveillance of the location revealed that "132" Tuers Avenue was part of a two-family building, with "130" being the other unit. (1T42-24 to 47-25; Cma1 to 2; Cma11). Detective Eggert observed, from the outside, that the building appeared to be "divided vertically," with a front door on the far left bearing the number, "132," and a front door on the far right bearing the number, "130." (1T42-24 to 47-25; Cma1 to 2; Sa56). There was one small, black metal mailbox next to 130's front door; 132's front door had a mailbox

slot.[7] (1T47-8 to 25; Cma2; Sa56 to 57). There were no names on any mailbox. (5T175-3 to 16; Cma2; Sa56 to 57).

Accordingly, Detective Eggert drafted a search-warrant application for 132 Tuers Avenue, which included the following description of the location to be searched:

> The residence to be searched the left side of a two family, three-story home, divided vertically. The house consists light gray siding. There is a brick front porch leading to both doors of the residence. When facing from the street, address 132 Tuers Avenue would be the left door and 130 is the right door. Also on the porch are three windows with black metal bars. Both doors are covered by white metal awnings. A white metal fence surrounds the porch and another separates the sidewalk from the property. The back of the residence has a wood porch on the ground level with a door and large window covered by a metal guard**.** [(Cma1 to 2) (emphasis added).]

Detective Eggert also included photographs of the front and back of the residence in the search-warrant application. (Cma2; 1T42-24 to 45-16). Based on the above investigation, and his years of law-enforcement training and experience that included ICAC BitTorrent training as well as the methods used by CSAEM possessors and distributors, Eggert indicated that he had probable cause to believe that an individual, using a device or devices connected to the traced IP address at 132 Tuers Avenue, unlawfully had and distributed

[7] The search warrant's photograph of the front of the property confirms that there was only a metal mailbox next to 130's front door, though Haedrich testified that she "used to have the two mailbox outside the door [for] . . . 130 and 132." (5T175-3 to 175-16; Cma2; Sa56 to 57).

CSAEM, and that evidence of these crimes would still be present or found on a device located therein. (Cma4 to 12). Eggert also noted his experience that "computer evidence is extremely vulnerable to inadvertent or intentional modification or destruction (either from external sources or from destructive code embedded in the system as a 'booby trap')," thereby requiring a controlled environment to completely analyze its data. (Cma12 to 13).

On November 3, 2021, the Honorable Vincent Militello, J.S.C., granted the search warrant, which repeated the same description quoted above.[8] (Cma17 to 20). The warrant specifically authorized the police, "with the necessary and proper assistance[,] to enter and diligently search 132 Tuers Avenue, Jersey City, Hudson County, New Jersey 07306, by first knocking and announcing [their] presence, and then by force if necessary, to seize and search evidence pertaining to the crime" of the distribution and possession of CSAEM. (Cma18). The warrant also authorized law enforcement to conduct an on-scene, forensic examination of the electronic devices that were allowed to be seized, such as "[a]ny and all computers." (Cma18; Cma20).

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[8] Judge Millitello had previously issued a warrant to search 132 Tuers Avenue on October 21, 2021, but the State was unable to execute it due to a State of Emergency, from severe weather and flash flooding, being declared on the date of its planned execution. (Cma4; 1T42-5 to 18). In reviewing the sufficiency of the November 2021 warrant, this Court should refer to the warrant's corresponding November 2021 application, which has been provided in the State's confidential appendix. (Cma1 to 21).

On November 5, 2021, around 5:30 a.m., members of the NJSP, from the ICAC Unit and the Technical Emergency and Mission Specialists (TEAMS) Unit, were briefed at the Hudson County Prosecutor's Office in preparation for the warrant's execution that morning. (1T42-5 to 44-10; 1T48-1 to 50-2; 1T67-10 to 21; 1T78-25 to 79-22; 1T87-3 to 17; 5T71-6 to 73-6). As explained at the hearings, the TEAMS Unit is the NJSP's tactical SWAT unit which makes the initial entry for any search warrant, securing the perimeter, conducting the "knock and announce," and clearing the subject property first to render it safe. (1T49-25 to 50-20; 1T54-17 to 19). The TEAMS Unit thus conducted the initial entry before the ICAC detectives entered to perform the actual search for evidence pursuant to the warrant. (1T48-1 to 51-6; 1T75-22 to 80-15).

Shortly after the briefing, the officers drove to the property, and members of the TEAMS Unit made entrance through the front door of 132 Tuers Avenue after knocking and announcing several times. (1T50-3 to 51-17; 1T79-23 to 82-20; 5T73-10 to 76-9). Detective Eggert, the lead investigator, was not part of the initial entry and entered after the TEAMS unit deemed the premises safe and secure. (1T48-16 to 51-10; 1T54-17 to 55-3; Sa30).

Detective John Barnett was a member of the TEAMS Unit, specifically the security team. (1T75-15 to 80-15). Detective-Sergeant Villalta-Moran and

Detective Barnett explained that the TEAMS Unit breaks up its members into different teams to complete certain tasks in executing a warrant. (1T79-10 to 80-15; 5T68-4 to 77-2; 5T91-11 to 19). Each group has a "team leader"; and the overall operation has a "squad leader," who is usually a sergeant first class. (5T18-7 to 19-2; 5T67-10 to 69-13). As part of the security team, Detective Barnett was the first TEAMS group deployed to secure the property's perimeter; but he was the last TEAMS group to enter 132 Tuers Avenue, following in after the breach and entry teams. (1T79-23 to 80-15; 1T87-18 to 23; 5T15-24 to 18-6; 5T73-10 to 77-9).

When no one answered the door after the breach team knocked and announced several times, and waited, 132's front door was forcibly breached with a ram; the TEAMS groups then entered to clear 132 Tuers Avenue and render it safe. (1T80-20 to 82-20; 5T16-10 to 18-6; 5T29-4 to 31-25; 5T34-9 to 37-5; 5T73-10 to 77-22). Upon entering 132's front door, there was a stairwell that winded up to the second floor. (1T51-11 to 22; 1T82-6 to 20; Sa56 to 57; Sa67 at 0:00:01 to 0:00:13). The second floor had a hallway, with unnumbered bedrooms and a bathroom, that ran from the front of the property to its rear and led into a kitchen. (1T51-11 to 52-5; 1T61-15 to 20; 1T71-14 to 15; 5T136-17 to 137-11; Sa26; Sa49). At the rear of the kitchen was another door on the left, that faced the left side of the property. (5T136-17 to 24;

Sa49).

Because of the tactical flow of clearing the area, Detective Barnett was at the kitchen door when the police encountered it. (1T87-18 to 89-8; 5T10-16 to 12-14; 5T40-19 to 41-21). The kitchen door was closed but not locked, with no dead bolts or markings, and Barnett understood the door to be an interior door. (1T82-21 to 83-20; 1T88-7 to 24; 5T10-16 to 12-23; Sa49 to 50).

The kitchen door faced the left side of the property, and opened onto a rear stairwell landing. (Sa49 to 50). Across from the kitchen door was another interior door that had no markings that would have indicated it was a separate apartment; and there was no locking mechanism, like a deadbolt, on the door other than a locking doorknob, which looked like another bedroom's doorknob on the second floor. (1T51-11 to 52-2; 1T60-20 to 22; 1T90-12 to 16; 2T77-1 to 9; 5T10-16 to 12-18; 5T59-3 to 60-11; 5T90-14 to 91-4; Sa50; Sa54; Sa68 at 0:00:20 to 0:00:26; Sa67 at 0:00:27 to 0:00:30; Sa62). This door lead into the attic area on the third floor, (Sa69 at 0:00:01 to 0:00:24; Sa53); and, like the kitchen door, the door faced further into the left side of the property. Compare (Sa49 to 50) with (Sa66 at 0:00:15 to 0:00:23; Sa59 to 60); Compare (Sa49; Sa68 at 0:00:11 to 0:00:22) with (Cma2). Opening the door to the third floor would reveal stairs, ascending on the left side of the property. (Sa50).

The motion judge found that the door to the third floor was closed when

the police encountered it.[9] (Sa39). When the kitchen door was first encountered, the officers "held there" for a moment, called over the squad leader, and waited to proceed further.[10] (1T102-13 to 103-7; 5T10-16 to 14-3; 5T42-13 to 17; 5T48-20 to 24; 5T78-11 to 80-11; 5T105-1 to 10; 5T107-9 to 111-10). Detective-Sergeant First Class Villalta-Moran, the squad leader that day who was present inside and watching what was happening, granted the team permission to do so. (5T13-22 to 14-3; 5T43-8 to 16; 5T64-13 to 24; 5T67-10 to 17; 5T70-9 to 19; 5T76-10 to 82-10).

Detective-Sergeant Villalta-Moran explained that he authorized

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[9] At the reopened evidentiary hearing on December 15, 2023, Detective Barnett testified that the door to the third floor was "closed" and "unlocked." (5T12-1 to 13-4; 5T19-3 to 21-11).

At the October 13, 2022, hearing, Detective Barnett testified that he believed this door may have been "opened" or "unlocked," because there was no stopping as he was "mov[ing] up" with the team in a train and he was not the first officer up the stairs. (1T90-7 to 21; 1T97-5 to 98-9; 1T101-17 to 105-22). Barnett mistakenly recalled that the door for the third floor was at the top of the stairway. (1T88-7 to 90-16; 1T97-5 to 98-9; 1T101-17 to 105-22). But at the December 2023 hearing, Barnett recalled the door for the third floor was in the second-floor hallway by the kitchen door. (5T12-1 to 13-4).

Detective-Sergeant Villalta-Moran's testimony, referenced in the judge's opinion at (Sa32), was about the kitchen door, noting it was "unlocked" and "[t]here was no need to breach it." (5T77-23 to 82-10; 5T101-20 to 120-20). Villalta-Moran did not recall if a tool was used to open the door to the third floor, or if anyone had to kick it open. (5T128-21 to 130-8).

[10] Detective Barnett did mention at the October 13, 2022, hearing too that the team stopped to seek permission to continue beyond the kitchen door. (Compare 1T100-13 to 105-22 with 5T13-5 to 14-3; 5T19-3 to 21-11).

continuing with the entry because, based on what they knew from the operations plan and search warrant, the subject property "was a two-family and it should typically include the second and third floor." (5T79-15 to 21). He further noted that the TEAMS Unit will also generally clear common areas, like a stairway, for officer safety, because "the expectation is that those areas are accessible by anyone and everyone in the residence" and that "someone could have fled into that." (5T79-15 to 80-17). Villalta-Moran also explained that if the team knows they are in the correct area, they have authorization to forcibly open a door if it needed to be—whether because the door was locked, barricaded, and/or being held closed by a person. (5T119-16 to 120-23).

At the bottom of the stairs was a locked door, facing into the right side of the property, that the police believed went into 130 Tuers Avenue; thus, the officers did not enter that door. (1T88-7 to 90-12; 1T97-8 to 98-9; 1T100-13 to 101-9; 2T37-15 to 38-6; 2T74-16 to 75-9; 5T12-15 to 17; 5T82-2 to 7). There was also an unnumbered exterior door, with a deadbolt, that exited to the property's back porch and yard. (2T32-19 to 34-9; 2T76-17 to 25; Cma2; Sa66 at 0:00:01 to 0:00:22; Sa69 at 0:01:04 to 0:01:45).

The stairs beyond the door to the third floor, facing into the left side of the property, winded up to a "loft area" that was centered over the building. (Sa50; Sa69 at 0:00:01 to 0:00:47; 1T71-1 to 15; 1T94-5 to 96-21; Sa51 to 53).

It began with, what Detective Barnett described as, a "small kitchen." (1T94-5 to 96-21; Sa69 at 0:00:01 to 0:00:24; Sa53). But unlike the second floor, which had a full kitchen with an oven and washer-dryer unit for which the kitchen door, across from the door to the third floor, was unlocked, (Sa49; Sa67 at 0:00:31 to 0:00:39), the third floor (kitchen, so to speak) at most had a temporary stovetop, that could be "just put . . . on the table," with a fridge and sink. (Sa53; Sa69 at 0:00:01 to 0:00:24; 5T139-6 to 140-4; 5T156-13 to 157-8). And it appeared to the police that the third and second floors were in fact part of one residence. (1T94-15 to 96-21; Sa26).

The third floor had two more bedrooms, one that was occupied by defendant, located at the end of an open hallway, and another that was empty. (1T61-15 to 62-2; Sa69 at 0:00:01 to 0:00:47; Sa52 to 53). Specifically, defendant's bedroom was located at the front of the house, in the "dead center" (i.e., midpoint) of the building where the roof comes to a peak. (1T71-1 to 15; Sa51 to 53).

Upon being encountered, defendant was brought down to a bedroom on the second floor, and placed with the three occupants that had been found on the second floor. (1T58-11 to 59-4; 1T91-6 to 96-22; 1T99-3 to 16; 2T47-24 to 48-16). Detective Eggert noted that there was "a bit of a language barrier" in trying to speak with the occupants. (1T58-11 to 60-11; 1T91-6 to 93-9).

Detective Barnett estimated that clearing the residence took about two to three minutes. (1T101-17 to 19). Defendant, though he first claimed he was asleep, testified that he was awake when the search warrant was executed and had been touching his laptop. (2T39-9 to 23; 2T69-1 to 12). Defendant estimated that about ten or twenty seconds after he heard a "loud bang" that he "thought was thunder outside," he "heard somebody walking on the third floor outside of the corridor to [his] room." (2T39-9 to 40-6; 2T69-1 to 17; 2T77-15 to 24). About two seconds later, defendant testified that someone "opened [his] [bed]room door," which was unlocked. (2T38-15 to 40-6).

After the TEAMS Unit cleared the subject property and rendered it safe, Detective Eggert entered through the front door of 132 Tuers Avenue. (1T48-1 to 51-17; 1T62-9 to 14; 1T86-6 to 20). He stated there were no locked doors or obstructions as he moved along from the front door to the third floor. (1T51-18 to 52-11; 1T90-20 to 91-2). In conducting the search authorized by the warrant, defendant's laptop was found turned on, running, and accessible (i.e., unlocked) in his bedroom; at that time, detectives were able to "pretty quickly" ascertain that it contained the same BitTorrent software that was sharing CSAEM, as well as CSAEM files.[11] (1T54-17 to 56-5; 1T60-3 to 10;

[11] A later examination by the Regional Computer Forensic Laboratory discovered sixty-three videos, equal to 630 items of CSAEM, on defendant's laptop computer.

1T72-25 to 74-7; 2T67-4 to 69-12). The police were thus able to determine that defendant was their suspect due to what was on his laptop, and arrested him. (1T56-6 to 57-8; 1T58-11 to 60-10; 1T72-25 to 74-4; 2T68-4 to 18).

Pursuant to the search warrant, the police seized several electronic devices from defendant's room for further analysis, including multiple hard drives, two laptops, a thumb drive, and a cellphone. (1T64-10 to 17; 2T47-2 to 10). When the officers were finished, they left the same way that they entered, through 132's front door. (5T57-21 to 58-3).

At the December 15, 2023, hearing, Jean Haedrich, the property owner of 132 and 130 Tuers Avenue, who resided at 130 Tuers Avenue, testified that she considered "[t]he part on the second floor and the part on the third floor" of the building as all one apartment, noting, "Yeah, that's all the ways that go to the first floor, second floor, all you -- the inside, it goes everywhere."[12] (5T131-16 to 133-17; 5T157-13 to 158-10). She referenced that there was a "common space" on the second floor that she would go into to make sure it was clean. (5T174-7 to 14). And she acknowledged that the third floor can be accessed by either using the rear stairwell or by going through the front doors of 132. (5T154-18 to 156-7). Haedrich explained that the third-floor attic was

[12] Haedrich rented out individual rooms on the second and third floor who separately paid her rent. (5T174-9 to 18).

an unregistered, illegal apartment space that she was not supposed to rent, and that there would not have been any notification to the "State" or "City" that someone was living there. (5T158-23 to 159-24).

To receive mail, Haedrich used "130 Tuers Avenue" as her address and did not specify it as "130, first floor." (5T154-18 to 155-18). Defendant, a tenant of the third-floor living area, which was not supposed to be rented, addressed his mail to "130 Tuers Avenue," or "130 Tuers Avenue Floor 3," that Haedrich would give to him. (1T6-19 to 13-22; 2T75-18 to 76-1; 5T177-3 to 12).

Haedrich also testified about the damage that she alleged the police had caused during the search warrant's execution. (5T143-10 to 5T151-20; 5T169-2 to 173-4). She explained that she replaced 132's front door, that tape was used to fix cracks for a bedroom door on the second floor, and that a metal bracket was installed on the door to the third floor to address the cracking near the door handle.[13] (5T143-10 to 5T153-16; 5T166-13 to 23; Sa61 to 64). Haedrich was in her living space while the search warrant was being executed,

[13] Before 132's front door was replaced, the front doors for 132 and 130 Tuers Avenue were both the same except for their marked numbers. (Cma2; Sa56 to 57). After the replacement, the front doors for 132 and 130 Tuers Avenue were different colors, and the mailbox that was next to 130's front door was moved next to 132's new front door, which no longer had a mail slot. (Sa51; Sa59; 1T42-24 to 47-25; 5T144-14 to 145-7).

and did not witness the clear. (5T141-9 to 144-8; 5T159-25 to 161-5).

Defendant testified at the October 2022 evidentiary hearing, asserting he lived at 130 Tuers Avenue, third floor and that it was "on the top of 130." (1T6-19 to 22; 1T22-2 to 24-9). According to defendant, the door to the third floor was "[a]lways locked," and he testified that the landlord had told him that the police had broken its lock to get to the third floor. (1T26-24 to 27-13; 2T35-18 to 39-3). He pointed out how he would address his mail, (1T6-19 to 14-9), and alleged that he was the only tenant with a key, which was marked "130, 3 Fl" on his keychain that he kept with several similar looking keys. (1T26-24 to 27-18; 2T41-25 to 43-20; Sa65).

Defendant further testified that the property's rear exterior door was his "main entrance to the building." (2T33-8 to 34-5; 2T37-15 to 20). This rear exterior door, to the right of the windows with a metal guard, is located on the 132 Tuers Avenue side of the building. (Sa66 at 0:00:01 to 0:00:22; Cma2). And defendant acknowledged that the rear exterior door was unnumbered. (2T76-17 to 25). Defendant also acknowledged that the door to the third floor was not marked with a "3" or "130." (2T77-1 to 9).

When defendant's friend, Yuxing Chen, who also testified for the defense, was at the property about a month after the search warrant's execution to gather items for defendant, Chen stated that the landlord, Haedrich, met him

outside the building and accessed defendant's space by going through 132's front door and the second floor, (1T4-10 to 12; 2T6-3 to 10; 2T23-15 to 27-2), just as the police did when executing the warrant.

B. The judge's first ruling on the motion to suppress.

After the October 2022 evidentiary hearing on defendant's motion to suppress, where testimony was presented from Detective Eggert, Detective Barnett, defendant, and his friend Chen, the judge heard additional argument on January 5 and 31, 2023. (3T; 8T). Notably, the prosecutor urged that the relevant inquiry was what the officers knew, or could have reasonably found out, about the interior's layout before the warrant was executed, and not at the time they were clearing the house for potential dangers or other persons who may be armed. (8T17-17 to 20-8). The prosecutor further pointed out that the door to the third floor had no markings, and that it was "fairly illogical to assume that floors one and three [we]re part of one apartment and [that] floor two [wa]s part of another apartment . . . ." (8T18-21 to 19-3). The prosecutor noted that had the landlord, Haedrich, chosen to assign defendant "132" as his mailing address instead of "130, floor 3," for which there were no delineations on a mailbox, "[w]e wouldn't be here having this argument." (8T18-6 to 19-3; 8T33-21 to 34-11).

Relying on State v. Hendricks, 145 N.J. Super. 27 (App. Div. 1976), the

prosecutor emphasized "there was no way for [the police] to know the interior layout of the building." (8T17-17 to 19-25). She further noted that the State's argument would not change whether the door to the third floor was locked or unlocked. (8T33-21 to 34-11).

The judge below recognized at the January 5, 2023, hearing: "Once [the police] have a warrant they're allowed to go through the whole house even if that means break[ing] in locked doors unfortunately. And that's my understanding of a warrant, whether we like it or no[t]." (8T40-13 to 41-22). The judge noted that what the police cannot do is "go into buildings and break down doors . . . in buildings we know they're separate units. So then the question becomes, how would [the police] have known that that was a separate unit"? (8T40-13 to 42-2).

In answering that question, the judge, in a written opinion on January 31, 2023, found that "[t]he police made their way to Defendant's room without any indication that the room was not a part of 132 Tuers Avenue, [and that] it appeared to be an extension of the interior space of 132 Tuers Avenue." (Sa10). The judge noted that State v. Marshall, 199 N.J. 602, 611 (2009), held that "when a multi-unit building is involved, the affidavit in support of the search warrant must exclude those units for which police do not have probable cause . . . to prevent general searches"; and, here, "[d]efendant ha[d] not

provided any supporting facts to conclude the search warrant resulted in a general search of the building[.]" (Sa21).

The judge found that the search warrant "articulated with sufficient particularity the place to be searched," identifying 132 Tuers Avenue as "the left side of a two family, three-story home, divided vertically," and thus specifying the part of the home to be searched within the multi-unit home as required by Marshall. (Sa11 to 13). Critically, the judge also found that "[d]efendant's room was in the attic accessed from the left side of the home, and it was reasonable for the police officers executing the warrant to believe [d]efendant's room was a part of 132 Tuers Avenue." (Sa12) (emphasis added). While the judge believed the attic door was unlocked in initially denying the suppression motion, the judge also found that "the officers could not have known the interior layout of the home," and that the attic door "appear[ed] to be an interior door similar to the [kitchen] door shown in S-3." (Sa12 to 13). The judge thus denied the motion to supress. (Sa9 to 13).

C. The judge's ruling denying reconsideration.

On February 13, 2023, defendant, after acquiring new counsel, moved for reconsideration of the denial of his suppression motion, for which the judge heard argument on May 11, 2023. (Sa14; 4T). In urging for reconsideration, defense counsel inaccurately represented that the door to the third floor was

"on the far right of the house." (4T41-25 to 42-24). (But this is factually inaccurate, as shown by the photographic and video evidence of the building's structure. See (Pb13)).

Notably, however, defense counsel acknowledged that the door to the third floor was not marked, that the attic space was "an illegal apartment," and that the police would not have known the interior layout from the outside. (4T10-18 to 12-5; 4T15-19 to 21; 4T18-22 to 19-1). Defense counsel also acknowledged that, from the outside, the building appeared to be divided vertically. (4T14-23 to 15-1).

After hearing oral argument, the judge denied the reconsideration motion on the record. (Sa15; 4T51-7 to 54-19). The judge clarified that when she found that the police did not leave the left side of the house to get to defendant's room, she meant that they went in through 132 "and kept going through to reach the top" without making a new point of entry towards the right-hand side. (4T4-1 to 10; 4T54-3 to 17). The judge further noted that the only fact that would make a difference to her was whether the door to the third floor was locked and the police broke into it, (4T52-6 to 54-23), even though the breach of a locked door does not mean that the area following it was not lawfully within the scope of the authorized search warrant. The judge advised defense counsel that she would entertain a motion to reopen the hearing if she

"d[id]n't have the correct facts as to the breach of a door[.]" (4T54-20 to 23).

D. The judge's second ruling on the motion to suppress.

On September 1, 2023, defendant filed a second motion to reconsider his motion to suppress, submitting a certification from private investigator Hovan, opining that the police had likely used a Halligan Tool to open the door to the third floor. (Sa21 to 25; Sa31).

On December 15, 2023, the judge held an evidentiary hearing on the reconsideration motion, hearing additional testimony from the State as well as testimony from Haedrich. (5T). The defense did not call Hovan to testify. (5T). During Detective-Sergeant Villalta-Moran's testimony, it was revealed that possible "notes" had been taken down by the officer assigned to write the report for the search warrant's execution, most likely by Detective Barnett. (5T124-21 to 126-13). The prosecutor was unaware that such notes existed, and immediately contacted Detective Barnett asking if he made or kept any notes. (6T15-10 to 16-21; 6T19-7 to 22; 6T44-17 to 46-24). Barnett responded that he did and provided her with the notes, which were a two-paged diagram of the searched location that the prosecutor promptly turned over to defense counsel upon receipt. (See Sa26 to 27); (6T13-17 to 19; 6T16-13 to 21; Sa32 to 33).

In relevant part, the diagram provided the following: "Closet door

outside kitchen was breached. No indication it was separate from the residence. Door led to 3rd Floor loft." (Sa26). The diagram did not indicate how this door was "breached," unlike the front door to 132 Tuers Avenue (which the diagram notes was "[b]reached with [a] ram"). (Sa26); (see also 5T31-3 to 34-16).

Thereafter, defendant filed a motion to dismiss the indictment, with prejudice, on Brady grounds. (Sa28). After the judge heard oral argument on both motions, (6T), the judge issued a written opinion on May 20, 2024, denying the motion to dismiss the indictment but granting the suppression motion. (Sa29 to 41).

As to defendant's motion to dismiss the indictment, the judge ruled that Brady had been violated; but, in considering what happened, the judge determined that dismissal of the indictment, with prejudice, was not warranted. (Sa33 to 37). While the judge ruled that what happened, including Detective Barnett's testimony, was palpably negligent, the judge found that she "[could] not say that the [State's] conduct was willful or outrageous." (Sa37 to 38).

Still, for the "palpable negligence in this case," the judge suppressed all the CSAEM evidence that was seized under the warrant, as a penalty for the inadvertently delayed discovery. (Sa37 to 38). This is so even though the judge had recognized that the delayed diagram had been turned over while they

were "still in the middle of the motion," while they were "still litigating the case," and while they were still at a point "where [the judge] c[ould] deal with it and fix it[.]" (6T47-13 to 48-6).

After ruling on defendant's motion to dismiss the indictment, the judge then alternatively addressed the merits of defendant's motion to suppress, ultimately finding that the door to the third floor had been locked and breached. (Sa38 to 41). In doing so, the judge also made a clearly mistaken fact-finding that "the doored staircase leading from the second to the third floor was on the opposite side (right side) of the dwelling from the front door of 132 Tuers Avenue." (Sa40). The photographic and video motions exhibits of the property's layout show that this finding was clearly mistaken. See (Pb13). The judge based this finding on a misunderstanding of the testimony from Detective Barnett at the October 2022 evidentiary hearing, where he noted that the door to enter the third floor was "on the opposite end" of where they made entry (meaning, at the rear of house—the opposite end of where the officers entered via 132 Tuers Avenue's front door—not the 130 side of the house). See (1T98-19 to 22).

The judge's clearly mistaken finding tainted her entire suppression ruling. Based on it, the judge concluded that the breach of the attic door to the third floor was outside the lawful bounds of the search warrant, considering

"how the TEAMS unit declined to breach the first-floor door . . . and then proceeded to breach Defendant's third-floor door when both doors were locked and are physically similar[.]" (Sa40 to 41). The judge found that both the first-floor door and the third-floor door were locked and "did not have any identifiable markings." (Sa40). But in mistakenly believing that the third-floor door was on the right side, i.e., 130 Tuers Avenue side, of the property, the judge "question[ed] why the first-floor door, with no identifiable markings, was not breached and [why] Defendant's third-floor door, also with no identifiable markings, was breached." (Sa40). The judge thereby determined, based on a clearly mistaken finding of fact, that "when the TEAMS unit reached the locked door to Defendant's third-floor apartment, a further inquiry was necessary [than what was done] to determine whether the door was within the bounds of the search warrant." (Sa40).

Under the mistaken circumstances that the judge found, she ruled, "[i]n the alternative, [that] the breach of Defendant's third floor apartment was outside the lawful bounds of the search warrant." (Sa38 to 41). This interlocutory appeal follows.

LEGAL ARGUMENT

POINT I

THE OFFICERS PROPERLY EXECUTED THE SEARCH WARRANT BASED ON THEIR REASONABLE BELIEF THAT THE UNMARKED INTERIOR DOOR TO THE THIRD FLOOR, FACING FURTHER INTO THE LEFT SIDE, WAS PART OF 132 TUERS AVENUE, THE LOCATION TO BE SEARCHED UNDER THE WARRANT (SA29 TO 41).

The central question before this Court is whether the police, when they opened the door to the third floor that faced further into the left side, i.e., the 132 Tuers Avenue side, of the property, and continued to clear and search there pursuant to the authorized search warrant, was reasonable. Based on the facts known to the police at the time they acted—about the house's physical structure and the position of the unmarked door itself—this determination was not only reasonable, but indeed correct.

In ultimately granting the suppression motion, however, the judge erroneously made a clearly mistaken fact-finding that tainted her entire ruling. Contrary to the photographic and video evidence of the property's structure, the judge mistakenly believed that the door to the third floor was on the right side of the property, i.e., the 130 Tuers Avenue side, and therefore questioned why the police did not breach a door on the first floor, that in fact faced into the property's right side, and yet opened the door to the third floor. With an accurate understanding of the facts, the answer to that question is simple: the

police reasonably believed that the locked door on the first floor, facing into the right side of the property, went into 130 Tuers Avenue; and that the interior door to the third floor, facing further into the left side of the property to which entering the front door, marked "132," led, was, in fact, part of 132 Tuers Avenue, the location authorized to be searched under the warrant.

Under the circumstances, the judge's clearly mistaken fact-finding warrants this Court's correction and a reversal of the judge's suppression ruling. So do the judge's mistaken legal conclusions and conflation of defendant's Brady motion with the search-and-seizure issues under review.

A. The police's execution of the search warrant was reasonable in light of the facts known to them at the time they acted.

This is a CSAEM case where the IP address being used to file-share CSAEM by an unknown user over BitTorrent was traced, and a warrant was obtained authorizing the search of 132 Tuers Avenue—the IP address's service address. The warrant sufficiently described the location to be searched with particularity. And based on the facts known to police at the time they acted, the police reasonably executed the warrant believing the unmarked door to the third floor, facing further into the left side of the property, i.e., the 132 Tuers Avenue side, was, in fact, part of 132 Tuers Avenue.

Both the United States and New Jersey Constitutions require that a warrant be based on probable cause, supported by oath or affirmation, and

"particularly describ[e] the place to be searched and . . . things to be seized." U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7. "[A] search executed pursuant to a warrant is presumed to be valid," and "a defendant challenging its validity has the burden to prove 'that there was no probable cause supporting the issuance of the warrant or that the search was otherwise unreasonable.'" State v. Jones, 179 N.J. 377, 388 (2004) (quoting State v. Valencia, 93 N.J. 126, 133 (1983)). In reviewing such challenges, appellate courts "'accord substantial deference to the discretionary determination resulting in the issuance of the [search] warrant.'" State v. Boone, 232 N.J. 417, 427 (2017) (quoting Jones, 179 N.J. at 388-89 (noting if there is doubt as to warrant's validity, such doubt should "ordinarily be resolved by sustaining the search")).

The purpose of the particularity requirement is to prevent general searches by sufficiently curbing an officer's discretion in executing a warrant. State v. Feliciano, 224 N.J. 351, 366 (2016) (holding purpose of requirement was to prevent general searches and "wide-ranging exploratory searches"); State v. Marshall, 199 N.J. 602, 611 (2009). It requires that "the warrant specifically describe the search location so that an officer can reasonably 'ascertain and identify the place intended' to be searched, as authorized by the magistrate's probable cause finding." State v. Bivins, 226 N.J. 1, 11 (2016) (quoting Steele v. United States, 267 U.S. 498, 503 (1925)). Pinpoint

precision is not required. State v. Wright, 61 N.J. 146, 149 (1972); State v. Schumann, 156 N.J. Super. 563, 565-66 (App. Div. 1978).

"[W]hen a multi-unit building is involved, the affidavit in support of the search warrant [only] must exclude those units for which police do not have probable cause." Marshall, 199 N.J. at 611; see also Schumann, 156 N.J. Super. at 567 (recognizing "[a] single warrant may cover several different places or residences in a single building" for which probable cause has been shown for searching each residence). Notably, where CSAEM is involved, and being accessed or file-shared from a specific IP address, that is traced to a specific service address, probable cause logically exists to believe that related evidence would be found on an electronic device within the service address—and to fully search therein for such evidence. See, e.g., United States v. Vosburgh, 602 F.3d 512, 526-27 (3d Cir. 2010); United States v. Clark, 673 F. Supp. 3d 1245, 1252-54, 1271 (D. Kan. 2023) (holding traced IP address sharing CSAEM by unknown user to specific residence, provided probable cause to search for and seize electronic devices within that home, wherein multiple people resided); United States v. Sigouin, 494 F. Supp. 3d 1252, 1258, 1265-66 (S.D. Fla. 2019); Commonwealth v. Green, 265 A.3d 541, 551-52 (Pa. 2021) (traced IP address file-sharing CSAEM via BitTorrent); In re Austin B, 208 A.3d 1178, 1188-91 (R.I. 2019); Sloan v. State, 224 N.E.3d 362,

366-72 (Ind. Ct. App. 2023); see also State v. Evers, 175 N.J. 355, 365-66, 380, 382-84 (2003) (holding billing address of Internet screen name that had shared CSAEM was "a logical place to search for evidence of the identity of the holder of the screen name and evidence of the crime").

The test for sufficient particularity is not whether, based on 20/20 hindsight, the police accurately described the layout of a dwelling, but whether the officers reasonably described the dwelling based on the facts they knew or reasonably could have known at the time the search warrant was sought. See State v. Hendricks, 145 N.J. Super. 27, 33-34 (App. Div. 1976) (holding police did not discover, nor could have reasonably discovered, before executing warrant that first floor had been converted into "separate apartments" "by reason of interior alterations" and, by that time, "it was too late for them . . . to have retreated and obtained a new warrant"). See also State v. Ratushny, 82 N.J. Super. 499, 506 (App. Div. 1964) (recognizing that "the search warrant must [only] contain as specific a description of the particular area to be searched as the nature of the circumstances reasonably permit"); Schumann, 156 N.J. Super. at 567 (explaining that Ratushny's holding "anticipated that instances would arise where it would be impossible to know just where to search, and that further inquiry would be highly unwise").

Where the outward appearance of a house, in conjunction with what the

police knew about access to the house, "furnished no basis for a reasonable belief that incriminating or illegal objects would be found in only a specific identifiable portion of the interior of the building, particularization of such a portion in the warrant is not necessary." State v. Aiello, 91 N.J. Super. 457, 467-68 (App. Div.), certif. denied, 48 N.J. 138 (1966), cert. denied, 388 U.S. 913 (1967). And "the mere fact that a structure contains several residents who are not related to one another does not automatically convert its rooms into [separate and private] subunits." State v. Sheehan, 217 N.J. Super. 20, 29 (App. Div. 1987).

As for "[e]valuating the constitutionality of police conduct in executing a warrant, the basic test under both the Fourth Amendment . . . and Article I, Paragraph 7, of the New Jersey Constitution is the same: was the conduct objectively reasonable in light of the facts known to law enforcement at the time of the search." State v. Rockford, 213 N.J. 424, 441 (2013); see also Maryland v. Garrison, 480 U.S. 79, 85 (1987) (holding courts must judge "constitutionality of [police] conduct in light of the information available to [the police] at the time they acted"). "If police actions in executing a warrant are objectively reasonable, there is no constitutional violation." Rockford, 213 N.J. at 441.

As a preliminary matter, this search warrant complied with the

particularity requirement because it plainly allowed the police to ascertain the identity of the place for which there was probable cause to search—the entirety of 132 Tuers Avenue—the service address of the traced IP address that was being used to file-share CSAEM by an unknown user. There were only two front doors for the two-family house, one on the far left that was marked "132" and one on the far right that was marked "130." And the warrant unmistakably specified, "[w]hen facing from the street, address 132 Tuers Avenue would be the left door and 130 is the right door," including a photograph of the front of the house. (Cma1 to 2). The warrant also specified that the residence to be searched was "the left side of a two family, three-story home, divided vertically," which was based on the property's outward appearance and what the police could reasonably discover about the house without jeopardizing their investigation before the warrant's execution.

Under the circumstances of this CSAEM case, probable cause existed to search the whole inside of 132 Tuers Avenue, subdivided or not, for the electronic devices that had been file-sharing or could be storing CSAEM. And the police's execution of the search warrant was reasonable in light of the facts known to them at the time of the search.

To execute the warrant, the police entered via 132 Tuers Avenue's front door, marked "132," beyond which was a stairwell to the second floor, on

which floor the police came across the door for the third floor. The door to the third floor, which the motion judge found was closed when the police encountered it, was an interior door that faced further into the left side, or the 132 Tuers Avenue side, of the property—with no markings and with no locking mechanisms, e.g., a deadbolt—besides a locking doorknob, that looked like another bedroom's knob on the second floor. Opening the door to the third floor also revealed stairs ascending on the left side of the property.

Under the circumstances of what the police knew at the time that they acted, the officers reasonably believed that this interior door, facing further into the left side of the property, was part of 132 Tuers Avenue. In preparing for the warrant's execution, the TEAMS Unit anticipated there could potentially be four occupants in 132 Tuers Avenue, (Sa26); and at the time they encountered the door to the third floor, they had only come across three occupants. It also appeared to police that the third and second floors were part of one residence. Unlike the second floor, which had a full kitchen with an oven and washer-dryer unit, the third floor did not. And the third floor's door was directly across from the kitchen door, that was unlocked on the day of the warrant's execution and granted access to the only washer-dryer unit available.

While defendant later claimed that he lived at "130 Tuers Avenue, third floor," none of this was reasonably apparent from the property's exterior or

internal structure. Plus, the property owner herself testified that she considered the parts on the second floor and third floor of the building as one apartment. Defendant himself acknowledged that the door to the third floor was not marked "130" or with a "3." And he also acknowledged that the rear exterior door he alleged to use as his main entrance to the building—which was on the 132 Tuers Avenue side of the property—was unnumbered. The property owner also testified that there would not have been any notification to state or city officials that someone was living in the third-floor attic that she was not supposed to rent.

Under the totality of the foregoing circumstances, whether the door to the third floor was locked or unlocked, the police's entry there was reasonable to execute the search warrant for the entirety of 132 Tuers Avenue. The law recognizes that "[a] lawful search of fixed premises generally extends to the entire area in which the object of the search may be found . . . ." State v. Watts, 223 N.J. 503, 515 (2015) (favorably quoting United States v. Ross, 456 U.S. 798, 820 (1982)); see also State v. Jackson, 268 N.J. Super. 194, 208-10 (Law Div. 1993). And it is usually "not limited by the possibility that separate acts of entry or opening may be required to complete the search." Ross, 456 U.S. at 820-21. The law also recognizes that "officers executing search warrants on occasion must damage property in order to perform their duty,"

Dalia v. United States, 441 U.S. 238, 258 (1979), and may break open locked interior doors in carrying out a search warrant. See Lynch v. City of Mount Vernon, 567 F. Supp. 2d 459, 467 n.5 (S.D.N.Y. 2008) (quoting Dalia and rejecting "argument that it was unreasonable for the officers to break down locked interior doors in carrying out the search [warrant]"); Simmons v. Loose, 418 N.J. Super. 206, 217-18, 227, 229-30 (App. Div. 2011) (quoting Dalia and holding damage inflicted to five, locked interior doors was consistent with a reasonable execution of search warrant under review).

Both Garrison and Hendricks reveal the flaws in defendant's argument under the circumstances of this case. In Garrison, the police had a warrant authorizing the search of a drug suspect's third-floor apartment, and did not discover that the third floor actually contained two apartments until the warrant was executed and they already had seized illegal drugs from the unknown apartment. 480 U.S. at 80-81. Holding that courts must judge the "constitutionality of [the police's] conduct in light of the information available to [the police] at the time they acted," the United States Supreme Court upheld the search of the unknown apartment. Id. at 85.

Garrison is thereby instructive in two ways. First, it shows that the police officers' conduct should be judged based on the information available to them when they acted. And at the time the warrant was executed, the police

here could not reasonably have known about defendant's mailing arrangement, i.e., that the property owner would get his mail for residential space that she was illegally renting, or about any other arbitrary designation of the attic space as "130, third floor." The additional-inquiry examples that the motion judge noted in her ruling, including "knock[ing] on the door," or talking to the occupants about their living arrangements (where they were encountered in what the police reasonably believed to be 132 Tuers Avenue), are impracticable and do not address the real safety issues presented in executing a search warrant.

Second, Garrison upheld the search of the apartment that the police did not know about beforehand, as well as the drugs that were seized before they realized they were in the unknown apartment. Consequently, pursuant to Garrison, defendant's argument here, that he lived at "130 Tuers Avenue, third floor," is inconsequential because, at the time that defendant's laptop—with CSAEM files and the same BitTorrent software—was seized, the police reasonably believed they were, in fact, still in 132 Tuers Avenue.

Hendricks further reveals the flaws in defendant's argument. Indeed, in Hendricks, this Court upheld the warrant search of a two-family residence's first floor where the police did not discover, nor could have reasonably discovered, before executing the warrant, that the first floor had been

converted into "separate apartments" "by reason of interior alterations," noting by that time "it was too late for them . . . to have retreated and obtained a new warrant." 145 N.J. Super. at 33-34. The same rationale should apply here.

As for the motion judge's ruling, in discussing Garrison, the judge ultimately focused on a footnote—commenting that if the police know there are two apartments beforehand, but do not know from which apartment drugs are being sold, then "[a] search pursuant to a warrant authorizing a search of the entire floor under those circumstances would present quite different issues from the ones before [the Court]" in Garrison. See (Sa38); Garrison, 480 U.S. at 89 n.13. That commentary, however, is wholly inapposite to this case, where the police attempted to determine who occupied 132 Tuers Avenue beforehand, but had no reasonable way of knowing the property's interior structure before the warrant's execution. The police also had probable cause to search the entirety of 132 Tuers Avenue under the circumstances of this CSAEM case—which was provided by the police's tracing of the IP address being used to file-share CSAEM, by an unknown and unidentifiable user, to its specific service address, for which it was probable that the electronic device illegally file-sharing CSAEM would be found therein. In honing in on the irrelevant footnote from Garrison, the motion judge ignored the rest of the United States Supreme Court's opinion and also failed to address Hendricks,

which the State repeatedly relied on below.

To the extent that the motion judge was relying on the facts of Marshall for her suppression ruling, such reliance was misplaced. In Marshall, unlike here, the police were conducting a drug investigation and knew beforehand that a building contained two apartments, but did not know from which apartment a known suspect was dealing drugs. 199 N.J. at 606-08. The magistrate judge, aware of this, granted a warrant authorizing the search of the apartment to which the suspect "ha[d] possession, custody, control or access," which the Court found invalid since the warrant was conditioned on the police verifying circumstances that had yet to occur to give rise to probable cause. Id. at 606, 608, 613.

Nothing of the sort happened here. Unlike Marshall, the probable-cause determination for the warrant here, to search 132 Tuers Avenue, could have been made within the four corners of the warrant application, and did not contain conditions that had to be satisfied after the warrant was issued for probable cause to exist. 199 N.J. at 613. What's more, defendant's motion for reconsideration did not challenge the probable-cause basis to issue the search warrant; the questions before this Court concern the warrant's execution.

The motion judge's further reliance on United States v. Ritter, 416 F.3d 256, 267 (3d Cir. 2005), is also unavailing, as the facts are plainly

distinguishable. There, in a drug case not involving a traced IP address, the officers made a firm determination there were multiple apartments within a larger building (for which they did not have probable cause to search), but searched the apartments anyway. Id. at 259-60, 265-67. Here, the police did not consider or realize, based on how the interior looked and on the unmarked door to the third floor facing further into the left side of the property, that the second floor and third floor were separate, and reasonably believed they were part of one residence—132 Tuers Avenue. This is clearly reflected in Detective Barnett's diagram, where he recorded around the time of the search warrant's execution, "no indication separate from residence," in reference to the door to the third floor. (Sa26). Indeed, even the property owner, Haedrich, considered the second and third floors of her building as all one apartment.

B. The judge not only erred by making a clearly mistaken fact-finding that the door to the third floor was on right side of the building, but also for penalizing the State—by quashing all its evidence seized pursuant to a warrant—as a penalty for inadvertently delayed discovery.

The judge's legal conclusions, and clearly mistaken fact-finding about the location of the door to the third floor that tainted her entire ruling, should be corrected by this Court on appeal. While appellate courts must defer to fact-findings that are "supported by sufficient credible evidence in the record," "[they] are not required to accept findings that are clearly mistaken' based on [thei]r independent review of the record." Watts, 223 N.J. at 516. Indeed, "[a]

trial court's fact findings should be disturbed . . . if they are so clearly mistaken that the interests of justice demand intervention and correction," as here. State v. Robinson, 200 N.J. 1, 15 (2009). Legal conclusions are reviewed de novo. Watts, 223 N.J. at 516.

"'Whether the facts found by the trial court are sufficient to satisfy the applicable legal standard is a question of law subject to plenary review on appeal.'" State v. Jessup, 441 N.J. Super. 386, 389-90 (App. Div. 2015) (quoting State v. Cleveland, 371 N.J. Super. 286, 293, 295 (App. Div. 2004)). "If the trial judge misconceives the applicable law or misapplies it to the factual complex [as here], . . . it is the duty of the reviewing court to adjudicate the controversy in light of the applicable law . . . ." State v. Steele, 92 N.J. Super. 498, 507 (App. Div. 1966); see also State v. Mann, 203 N.J. 328, 337 (2010) (holding "appellate court must apply the law as it understands it"); State v. Taylor, 440 N.J. Super. 515, 521 (App. Div. 2015).

In initially denying the motion to suppress, the motion judge properly understood that the door to the third floor was facing further into the left side of the property and reached the correct result. She properly found that the search warrant articulated with sufficient particularity the place to be searched, identifying 132 Tuers Avenue as "the left side of a two family, three-story home, divided vertically," and thus specifying the part of the home to be

searched within the two-family home. (Sa11 to 13). She also properly found that "the officers could not have known the interior layout of the home," and that the third-floor door "appear[ed] to be an interior door similar to the [kitchen] door shown in S-3." (Sa12 to 13; Sa50). And, in critically realizing that "[d]efendant's room was in the attic accessed from the left side of the home," the judge properly concluded that "it was reasonable for the police officers executing the warrant to believe [d]efendant's room was a part of 132 Tuers Avenue." (Sa12).

But in granting the motion to suppress, the judge mistakenly believed and found that the door to the third floor was on the right side, i.e., the 130 Tuers Avenue side, of the property, which tainted her entire suppression ruling, and caused her to question why the police decided not to breach a door on the first floor, that actually faced into the property's right side, and yet opened the door to the third floor. (Sa40 to 41). This finding is clearly mistaken given the photographic and video evidence of the property's structure, (see Pb13), and warrants this Court's correction given how it impacted the judge's ultimate suppression ruling. With an accurate understanding of the facts and applicable law, this Court should conclude, as the motion judge initially did, that the police's execution of the search warrant was reasonable, in light of the facts known to them at the time they acted.

Another fault with the judge's decision is that the two issues before the court—an alleged Brady violation and reconsideration of the suppression ruling—were entirely conflated, despite that they are distinct, both factually and legally, with wholly different remedies. Bending the legal analysis of the suppression motion being reconsidered (which strictly involved a Fourth Amendment inquiry concerning the reasonableness of police conduct) to suppress the State's evidence seized under a warrant as a remedy for inadvertently delayed discovery was entirely improper. This is especially so when the judge noted that the delayed diagram had been turned over while the case was in the middle of the motion still being litigated, and was still at a point where she could address the discovery issue and fix it.

This conflation is obvious in the judge's discussion of remedy under the Brady analysis. Despite declining to dismiss the indictment, ultimately finding that the State's conduct was not willful or outrageous, the judge nevertheless characterized what transpired as "palpably negligent" and ruled: "Defendant must have a remedy. Therefore, Defendant's Motion to suppress must be granted." (Sa38) (emphasis added). In doing so, the judge ultimately formulated a "palpable negligence" standard (in relation to the police testimony and the inadvertently delayed discovery of the diagram), that was not based on the reasonableness of the police's conduct during the warrant's execution. The

judge then used that standard to justify suppressing all the State's evidence seized under the warrant—where conducting the appropriate Fourth Amendment analysis should have led to a denial of the motion to suppress.

Brady's standards and remedies are inapplicable in the Fourth Amendment context, and must remain separate and distinct. Because the motion judge below did not adhere to this principle, her ruling should be corrected by this Court.

Under the circumstances of this CSAEM case, probable cause existed to search the entirety of 132 Tuers Avenue for the electronic devices that had been file-sharing or could be storing CSAEM. And based on the facts known to the police at the time they acted, the police reasonably executed the search warrant believing that the unmarked door to the third floor, facing further into the left side, i.e., the 132 Tuers Avenue side, of the property was, in fact, part of 132 Tuers Avenue. Accordingly, this Court should reverse the judge's suppression ruling, which erroneously resulted from a clearly mistaken understanding of this case's facts and misapplied law.

CONCLUSION

Based on the foregoing, the State asks this Court to reverse the judge's suppression of the State's evidence seized under a valid and reasonably executed search warrant, and erroneous grant of the motion to suppress.

Respectfully submitted,

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OF COUNSEL AND ON THE BRIEF

Dated: September 23, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

STATE OF NEW JERSEY	**: Indictment No. 23-06-00080-S**
	: App. Dkt. No. A-003517-23T1
v.	**: Sat Below:**
	: Hon. Mitzy Galis-Menendez, Pr.Cr.
KE WANG	**:**
	: Criminal Action

BRIEF IN OPPOSITON AND APPENDIX ON BEHALF OF RESPONDENT, KE WANG

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RESPONDENT IS ON PRETRIAL RELEASE

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LIST OF PARTIES

Party Name	Appellate Party Designation	Trial Court Party Role	Trial Court Party Status
Ke Wang	Respondent	Defendant	Participated
State of New Jersey	Appellant	Plaintiff	Participated

PRELIMINARY STATEMENT

This matter arises out of an egregious Brady violation in which New Jersey State Police Detective John Barnett ("Barnett") intentionally withheld Brady material before taking the stand twice and perjuring himself to try and save an unlawful search from suppression. Weeks after Barnett's second time taking the stand the State produced Barnett's own notes - which only came to light when Barnett's supervisor testified about their existence - which directly undermined Barnett's testimony and unequivocally demonstrated his deceit regarding the most critical issue in the motion requiring supression.

On November 5, 2021, Barnett was part of a team responsible for executing a search warrant. Ke Wang ("Respondent") challenged the constitutionality of the search arguing the officers exceeded the bounds of the search warrant by unlawfully entering his locked and separate apartment. In support of this contention Respondent argued that the door to his apartment was breached with a Halligan tool and was clearly outside the conscripts of the search warrant.

To quash Respondent's theory, and his motion to suppress, Barnett testified in two separate hearings before the trial court that the door to Respondent's apartment was not breached and was instead wide-open, leading him to believe it was a continuation of the unit described in the search warrant. Two weeks after Barnett testified for the second time the

State produced Barnett's notes which unequivocally stated that the door to Respondent's apartment was breached.

On appeal, the State ignores these paramount issues that the trial court correctly relied and instead boldly argues that the trial court erred by (1) mistakenly believing that the door to Respondent's apartment was on the left side of the dwelling and (2) the officers reasonably believed that the door to Respondent's apartment was covered by the search warrant. Both these arguments flunk.

First, the State argues that the door to Respondent's apartment was on the left side of the dwelling. This is incorrect. It was undisputed that Respondent's apartment was on the right side of the dwelling. Regardless, this was not the basis for which the trial court granted the motion to suppress. The trial court granted the motion to suppress because the officers exceeded the bounds of the search warrant and lied about breaching the door to Defendant's separate apartment to cover-up their malfeasance.

Second, the State disingenuously argues that the officers reasonably believed the door to Respondent's separate apartment was covered by the search warrant. In making this argument the State engages in revisionist history and ignores the testimony, record and evidence below. The State completely ignores the fact Barrett twice testified that the reason he thought Respondent's apartment was part of 132 Tuers was because the door was open. For the first time, and

contrary to the officers' testimony and arguments below, the State now argues that it is irrelevant if the front door to Respondent's apartment was locked and breached. Unlike Respondent's position, which has been consistent throughout, the State's arguments have waivered and varied like a flag in the wind in a desperate attempt to save their improper search.

For the foregoing reasons the instant appeal should be denied.

COUNTERSTATEMENT OF PROCEDURAL HISTORY[2]

On November 5, 2021, Respondent was charged on Complaint-Warrant 0906-W-2021-003802 with two counts of Endangering the Welfare of a Child in violation of N.J.S.A. 2C:24-4(b)(5)(a)(i) and 2C:24-4-4(b)(5)(b)(iii). [Da001].

On June 21, 2022, Respondent filed a Motion to Suppress evidence ("First Motion to Suppress"). [Da002]. On January 31, 2023, Respondent's Motion to Suppress was denied. [Da003-007].

On February 13, 2023, Respondent filed a Motion for Reconsideration. [Da008]. On May 11, 2023, Respondent's Motion for Reconsideration was denied. [Da009].

[2] "1T" refers to the transcript dated 10/13/22 of Hearing
"2T" refers to the transcript dated 10/18/2022 of Hearing
"3T" refers to the transcript dated 5/11/2023 of Motion
"4T" refers to the transcript dated 12/15/2023 of Hearing
"5T" refers to the transcript dated 1/31/2023 of Motion
"6T" refers to the transcript dated 5/1/2024 of Motion

On June 28, 2023, an Indictment was returned charging Respondent with two counts of Endangering the Welfare of a Child in violation of N.J.S.A. 2C:24-4(b)(5)(a)(i) and 2C:24-4-4(b)(5)(b)(iii). [Da011-012].

On September 1, 2023, Respondent filed a Motion to Suppress ("Second Motion to Suppress"). [Da013]. On September 12, 2023, Respondent filed a confirmatory letter regarding outstanding discovery. [Da014-015]. On January 6, 2024, Respondent filed a Motion to Dismiss the Indictment for a Brady Violation. [Da016].

On May 20, 2024, the trial Court found that the State committed a Brady violation and granted Respondent's Motion to Suppress while denying his Motion to Dismiss. [Da017-029].

COUNTERSTATEMENT OF FACTUAL HISTORY

a. First Motion to Suppress

In September 2021, Det. Anthony Eggert ("Eggert") of the New Jersey State Police Internet Crimes Against Children Unit was investigating the electronic transfer of Child Sexual Abuse Materials ("CSAM"). 1T: 31:23-32:24; 36:2-13. During the investigation Eggert believed that an Internet Protocol ("IP Address") registered to 132 Tuers Avenue, Jersey City, New Jersey 07306 ("132 Tuers") belonging to a Jean Haedrich ("Haedrich") was involved in the electronic transfer of CSAM. 1T: 38:16-41:6. Eggert conducted some background investigation into 132 Tuers and concluded that it was a multi-unit

residence. 1T: 41:7-42:4. The U.S. Postal Inspector's Office advised that Chungying Tsai and Weihua Hao received mail at 132 Tuers. Da033-046. A DMV inquiry revealed that Chungying Tsai, Yin Zhou, Weihua Hao, Ronald Illagan and Zhenfei Liang may reside at the address. Id.

Eggert prepared a search warrant in furtherance of the investigation. 1T: 42:5-12; Da033-046. The search warrant was for 132 Tuers which was described as the left-hand side of a two-family, three-story home, divided vertically. 1T: 44:7-16; Da033-046. On November 5, 2021, law enforcement executed the search warrant. 1T: 48:1-:14.

At the time the search warrant was executed Eggert was the lead investigator. 1T: 48:16-21. As the lead investigator, Eggert was not part of the initial entry into the dwelling but only entered after the TEAMS unit deemed the premise secure and safe at which point he entered and conducted his search for evidence. 1T: 49:1-13. Barnett was a member of the TEAMS unit that made initial entry in the execution of the search warrant at 132 Tuers. 1T: 75:22-76:2; 78:25-79:9.

Barnett claimed announcements were made on the front door before breaching it, but he conceded that the main levels that were to be secured were far away from the breach point, so it was probably impossible for anybody on the second or third floor to hear it well. 1T:81:24-82:2; 85:15-86:5. Upon making entry, the TEAMS unit encountered a staircase that went straight to a second-floor apartment that

had three occupants and a kitchen. 1T: 82:16-18; 91:6-24; Da049; Da.050.

The kitchen had a door, which was closed but not locked, that led to a downward staircase. 1T: 87:24-88:24. When the TEAMS unit went down the stairs, they found a door leading to another area that was locked and assumed it went into 130 Tuers. 1T: 100:18-22; 101:3-9; Da051.

Across from the kitchen door was another door that contained a staircase that continued up to the third floor where there was a small kitchen which Respondent's room and a second bedroom adjoined. 1T: 90:1-91:5. Normally, the TEAMS unit would make additional knock and announcements when "there's a level change going down or up", but Barnett could not recall any knock and announcement was made at "that particular level change". 1T:84:16-85:14. The doored staircase leading from the second to the third floor was on the opposite side (right side) of the dwelling from the front door for 132 Tuers. 1T: 98:19-22.

Barnett testified that the interior front door did not contain a lock. 1T: 103:8-15. Barnett further testified that the door was either closed but unlocked or opened and there was **no need to breach the door and if they did breach the door, they would have needed permission because they questioned whether the third-floor was covered by the search warrant.** 1T: 104:4-22; 4T: 12:24-13:19; 57:13-17; Da052. Barnett admitted that the third-floor looked "like a small apartment up top". 1T:90:14-16.

After the tactical team deemed the premise safe Eggert entered the dwelling through the left door marked 132 Tuer. 1T: 51:11-17. Upon entering the dwelling Eggert observed a small foyer and staircase leading to the second floor where there were multiple bedrooms and a kitchen. 1T: 51:18-25. By the time Eggert had entered the dwelling the tactical team had taken everyone out of their rooms and put them in one group for safety purposes in addition all the doors were already opened by the TEAMS unit. 1T: 58:20-59:4; 60:23-25. There was a door in the kitchen on the second floor that led to a small doorway on the right side of the building, where there was another door separating the second and third floors that led to a staircase to the third floor where Respondent's room was also located on the right side of the building and a second room was on the left. 1T: 53:1-54:12; 55:2-9; 60:20-22; 61:24-62:2; 72:1-5. Both Yuxing Chen and Respondent also confirmed Respondent's apartment was on the right-hand side of the dwelling. 1T:22:16-21; 23:23-24; 2T:10:25-11:3

At that point Respondent's electronics were seized and he was placed under arrest. 1T: 55:15-57:4; 71:1-72:5. The whole search, from breaking in, searching, going through the house, seizing Respondent's electronics, arresting him, and then leaving the house, took approximately an hour. 1T:66:16-67:9.

b. Trial Court denies the First Motion to Suppress

On January 31, 2023, the trial court denied Respondent's Motion to Suppress. [Da003-007]. In denying Respondent's motion the trial court, in pertinent part, held that the officer's made their way to Respondent's room without any indication that it was not part of 132 Tuers Avenue and without any impediments or obstacles. Id. In arriving at this conclusion, the trial court found Eggert and Barnett's testimony credible with respect to reaching Respondent's apartment with no obstructions. Id. More specifically, the trial court accepted Barnett's representation that he did not encounter any locked doors. Id.

c. Motion for Reconsideration

Respondent filed a Motion for Reconsideration in which he challenged the trial court's findings. [Da008]. The trial court denied Respondent's Motion for Reconsideration. 3T. Despite denying the motion, the trial court unequivocally stated, **"I think the only dispositive fact that would, I think, change my opinion would be that if [Respondent's] door was actually locked and someone broke it. That would be – that would be a fact that would make a difference… The testimony that was presented to this Court, they just kept walking through without breaking any doors. So unless the door was broken, that would be an altering factor for this Court, for sure."** 3T: 53:5-24 (emphasis added). The court further indicated, "[i]f you find that it's important to reopen because I don't have the correct facts as to the breach of a door… let me know and I will entertain the application. 3T: 54:20-23.

d. Second Motion to Suppress

On September 1, 2023, Respondent filed a second Motion to Suppress based on newly found information from a retired police officer which indicated, for the first time, that door to Respondent's apartment had damage to it which was consistent with it being breached with a Halligan tool. [Da016].

On December 15, 2023, the court below heard testimony regarding this issue. Barnett testified for a second time. For the first time, and unlike his initial testimony, Barnett testified that there was confusion about whether the door which led to Respondent's apartment was part of the search warrant. 4T: 19:3-18. As a result of the confusion the Sgt. First Class was called. Id. According to Barnett the Sgt. First Class granted permission to go through the door and up the third floor where Respondent's apartment was located. 4T: 13:5-14:3.

New Jersey State Police Sgt. First Class Joseph Villalta-Moran ("Villalta-Moran") was the squad leader. 4T: 67:10-17. Villalta-Moran contradicted Barnett. Villalta-Moran indicated that the only door that he had a conversation about going past was the kitchen door which led from 132 Tuers Avenue into the common egress and not the door that led to Respondent's third floor separate apartment. 4T: 115:19-118:25; 129:2-3. Villalta-Moran explained that they will always clear common areas like the stairwell in this case because it is accessible to anyone. 3T:79:22-80:6.

Both Barnett and Villalta-Moran agreed that the team was in possession of a Halligan tool to breach doors. 4T: 14:4-17; 82:23-83:2. A Halligan tool is used to pry open a locked door by sliding it into the door jamb between the door and frame and crack it open. 4T: 22:2-17; 23:18-24:14. If the door to Respondent's apartment was locked, as it was, you would need a Halligan tool to break into it. 4T: 119:1-11. If a Halligan tool was used, you would see damage around the area of the locking mechanism because that is where you would pry it from. 4T: 126:6-12. Villalta-Moran reaffirmed that they should knock and announce on any locked door inside the building, but there was no such additional knock and announcement here. 4T:81:1-23.

Haedrich lives at and owns the property. 4T: 133:5-17. Haedrich and her son never heard the knock announcement but were awoken by noise upstairs. Both believed there was a robbery against their building, so they called Jersey City Police Department to report this robbery. 4T:141:9-142:16. Haedrich indicated that, in addition to other damage throughout the property, the door to Respondent's third floor apartment was damaged. 4T: 149:5-150:9. More specifically, Haedrich indicated that that there was damage around the locking mechanism, scratch marks to the door frame, and cracking. Id. Haedrich indicated that her handyman

placed a metal bracket on the door near the locking area[3] to maintain the integrity of the door. Id; Da.053; Da054; Da055.

Despite being confronted with this damage, **Barnett was unequivocal that the door to Respondent's separate third floor apartment was "never breached" and that the Halligan tool was not used on any interior door of the property**. 4T: 20:2; 39:24-40:2; 42:13-23. Villalta-Moran testified that he never authorized any officer to kick down or damage any doors and that a tool was not used to breach any doors. 4T: 84:17-21; 119:16-22

e. Discovery Requests

On September 12, 2023, Respondent provided the State with a discovery deficiency/request letter. [Da014-015]. Request number eight asked the State to provide the identity of all officers that made up the TEAMS unit… and identify which officer breached the door to Respondent's apartment. [Da015]. Request number nine requested the identity of the officers who possessed a Halligan tool. [Da015].

On September 18, 2023, the State responded. [Da046-048]. With respect to request number eight, the State indicated that the relevant officers were identified on Barnett's report and ignored the request to identify the officer who breached Respondent's door. With respect to request nine, the State ignored Respondent's request to identify the

[3] In contrast, Barnett testified that the door did not contain a lock. 1T: 103:8-15.

officers who possessed a Halligan tool and again directed Respondent to Barnett's report for all pertinent details. [Da047].

f. Barnett's Notes

On January 4, 2024, some two years after Respondent was charged, eighteen months after Respondent filed his first motion to suppress, eleven months after Respondent filed for reconsideration, over six months after Respondent was Indicted, four months after Respondent filed his second suppression motion and three weeks after the Court concluded a second evidentiary hearing, the State provided Barnett's notes for the first time which, contrary to his testimony, indicate that the door to Respondent's separate third floor apartment was breached. [Da044-045]. Barnett's notes further indicate that that Respondent's apartment had its own kitchen, bathroom as well as two bedrooms. Id.

g. Court's Decision

On May 20, 2024, the trial court issued a written decision that held that the State's failure to turn over Barnett's notes constituted a Brady violation. [Da019-031]. The trial court held that the Brady violation did not warrant dismissal. Id. The trial court did, however, find that that the officer's exceeded the bounds of the search warrant and suppressed the evidence that was seized. Id.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN GRANTING THE MOTION TO SUPPORESS AS THE OFFICERS EXCEEDED THE BOUNDS OF THE SEARCH WARRANT AND CONCOTED A PERJURE LADEN STORY WHICH INCLUDED WITHHOLDING EXCULPATORY EVIDENCE IN AN EFFORT TO SAVE THEIR ILLEGAL SEARCH

In its Motion for Leave to Appeal the State argued that the trial court erred by: (1) falsely concluding that the door to Respondent's apartment was locked; (2) relying on the Hovan certification; (3) conflating the Brady violation with the Motion to Suppress; and (4) confusing and misapplying the relevant law. The State has now abandoned most of these arguments.

In its newly minted arguments, the State argues that Respondent's apartment door was on the left side of the house. This is factually incorrect. The door to Respondent's apartment is in fact on the right side of the dwelling which is the same side that the entrance to 130 Tuers is on[4]. This was not an issue that was in dispute below. See, State v. Legette, 227 N.J. 460, 467 (2017) (declining to consider a new argument by the State not raised to the trial court when it had the opportunity);

[4] Eggert testified unequivocally that the doorway off the kitchen was on the right side of the dwelling. 1T: 71:16-72:5. Likewise, Yuxing Chen and Respondent testified that Respondent's apartment was on the right-hand side. 1T: 23:18-22; 24:4-7;2T: 10:25-11:3. Even Barnett answered "the opposite side" to a question about what side of the building was Respondent's apartment door. 1T: 98:19-22.

State v. Witt, 223 N.J. 409, 419, 126 A.3d 850 (2015) (finding "it would be unfair, and contrary to our established rules," to decide an issue when the respondent was "deprived of the opportunity to establish a record that might have resolved the issue"). The State did not contest this before the trial court. Likewise, the State did not contest this issue in its Motion for Leave to Appeal and should be barred from doing so here for the first time.

The State also no longer contests that Respondent's door was locked and breached. In doing so, the State attempts to distance itself from the fact that Barnett lied to the trial court at two separate testimonial hearings and withheld his notes. The State does not appeal the trial court's findings that a Brady violation occurred but instead argues that the trial court conflated the Brady issue and the suppression issue. This too is inaccurate. The trial court's opinion addressed the Brady issue and the suppression issue independently and on the merits.

The irony in the State's argument is palpable. They accuse the trial court of conflating the issues but shirk all responsibility for their own malfeasance. It is not the trial court's fault that it was forced to deal with these two distinct issues. It is the State's fault for allowing Barnett to twice perjure himself and then by committing a gross Brady violation by withholding his notes until their existence was revealed. The State points the finger at the trial court for the predicament it finds itself in while refusing to accept any responsibility.

A. The trial court correctly granted the Motion to Suppress and did not err in applying the facts or law

It is best to start with what is most troubling with the State's argument. The State repeatedly and continuously boldly asserts that the officers acted reasonably and in good faith. Although this is what the State would like, this Court to believe this notion is belied by the record. The State fails to cite any portions of the testimony in arguing that the officers acted in good faith. The State fails to acknowledge or even mention Barnett's perjured testimony which became evident when his notes were revealed, which included the following:

1) Barnett testified that the door to Respondent's apartment did not contain a lock. 1T: 103:8-15. This was a lie.

2) Barnett testified that the door to Respondent's apartment was either closed but unlocked or opened and there was no need to breach the door. 1T: 104:4-22; 4T: 12:24-13:19; 57:13-17; Da052. This was a lie.

3) Barnett testified unequivocally that the door to Respondent's separate third floor apartment was "never breached." 4T: 20:2; 39:24-40:2; 42:13-23. This was a lie as evidenced by his own notes.

The State further ignores the fact that the trial court, in denying Respondent's Motion for Reconsideration, unequivocally stated, "I think the only dispositive fact that would, I think, change my opinion would be that if [Respondent's] door was actually locked and someone broke it. That would be – that would be a fact that would make a difference… The testimony that was presented to this Court, they just kept walking through

without breaking any doors. So unless the door was broken, that would be an altering factor for this Court, for sure." 3T: 53:5-24.

The State was in receipt of this specific instruction and on notice of what the trial court was laser focused on when it put Barnett on the stand for the second time when he maintained his perjured testimony. This Court, as the trial court did, has considered whether a door is locked or unlocked as a reasonable predictor of reasonable expectation of privacy. State v. Nunez, 333 N.J. Super. 42, 51 (App. Div. 2000).

The State fails to mention Barnett testified that there was legitimate confusion about whether the door which led to Respondent's apartment was part of the search warrant. 4T: 19:3-18. The State also fails to mention that Villalta-Moran, who was the squad leader, testified that the only door that he had a conversation about going past was the kitchen door and not the door that led to Respondent's third floor separate apartment and that he never authorized any officer to kick down or damage any doors and that a tool was not used to breach any doors. 4T: 67:10-17; 84:17-21; 119:16-22.

When you consider these facts, which the State conveniently failed to apprise this Court of, the argument that the officers acted reasonably evaporates. What is clear, as the trial court concluded, is that the officers were concerned that Respondent's apartment was not covered by the search warrant and they breached the door with a Halligan tool and then needed to concoct a story that would not jeopardize the search. Barnett

twice testified that Respondent's door was not breached. During both those hearings Barnett's own notes, which had been withheld from Respondent, proved he was lying. People lie when they have something to cover up and hide. In this case Barnett lied to cover up his, and other officers, unauthorized conduct, which even the squad leader was unaware, in searching Respondent's apartment. Barnett's actions in and of themselves are proof positive that the conscripts of the search warrant were violated.

The trial court did not err in applying the law. The instant search constituted a general search as proscribed by our Supreme Court requiring suppression. State v. Marshall, 199 N.J. 602, (2009). In State v. Hendricks, 145 N.J. Super. 27 (App. Div. 1976), this Court upheld a search of the first floor of a building that was believed to be one unit but had been altered so it consisted of four separate rooms, a common kitchen and bathroom. Id. at 31. In upholding the search, the court found that, although each room may have been separately occupied, at least two rooms as well as the common hallway, bathroom, and kitchen, were used as a single living unit. Id. at 33.

These facts are readily distinguishable from the instant case. 132 Tuers only constituted the second-floor apartment of the structure. 132 Tuers or the second-floor apartment had multiple units that all shared the same common space. Respondent's third-floor apartment did not share any common space designed for living, sleeping, cooking or eating, with

the second-floor apartment of than common egress stairs. These facts are confirmed by the notes that the State withheld which clearly indicate that Respondent's apartment had its own kitchen and bathroom. 132 Tuers and 130 Tuers, 3rd Floor did not even share the same entrance. The third-floor apartment was only accessible through the structure's rear entrance and had its own locked interior door.

This is consistent with New Jersey's statutory scheme which describes an apartment as "an enclosed space consisting of one or more rooms occupying all or part of a floor or floors in a building of one or more floors or stories, but not the entire building… provided it has a direct exit thoroughfare or to a given common space leading to a thoroughfare." N.J. Stat. §46:8A-2. New Jersey's administrative code also supports this in so far as it defines a dwelling unit as "any room or group of rooms or part thereof located within a building and forming a single habitable unit with facilities which are used… for living sleeping, cooking and eating. N.J. Admin. Code, § 5:28-1.2.

The State attempts to discredit these facts by arguing that the second-floor apartment had a full kitchen while Respondents apartment had an inferior kitchen and no washer or dryer. This is irrelevant. Barnett's notes clearly noted that Respondent's apartment had a kitchen and bathroom. Likewise, it was revealed that the washer and dryer, which are irrelevant in the analysis, were not present at the time of the search.

More ironically, even Barnett himself admitted that the third floor was "a small apartment." 1T:90:14-16.

The State's theory, and issue with the trial court's findings, serves to rewrite the law. To uphold the instant search, this Court would have to find that any apartment that simply shares egress stairs with another apartment is subject to a lawful search as a "continuation" of the other apartment. This defies logic and is contrary to our well settled law. Even Barnett knew that and concocted a lie to try and mitigate his constitutional violations.

What is more, and most telling, is Eggert's background investigation concluded that the structure was a multi-unit dwelling as DMV records he procured noted at least five individuals, none of which were Defendant, as being tenants of 132 Tuers. Despite knowing this Eggert still sought a general search.

In Maryland v. Garrison, 480 U.S. 79, 89 (1987) our Supreme Court specifically noted, in a footnote, that if the police know a single address might contain multiple units, but do not know which one contains illegal activity, then "[a] search pursuant to a warrant authorizing a search of the entire floor… would present quite different issues" than if they only learn of the multiple units upon entry.

In United States v. Ritter, 416 F.3d 256, 267 (3d Cir. 2005), the Government and Court both agreed "once the officers discovered that the house had multiple dwelling units, they could no longer rely on the

warrant to justify their search of the building" and that the only evidence that can be admitted is that which was recovered before the officers exceeded the bounds of the warrant.

In United States v. Bedford, 519 F.2d 650, 655 (3d Cir. 1975), the court held "a search warrant directed against an apartment house will usually be held invalid if it fails to describe the particular apartment to be searched with sufficient definiteness to preclude a search of other units located in the building and occupied by innocent persons."

In United States v. Busk, 693 F.2d 28, 31 (3d Cir. 1982), the court specified "[a] warrant authorizing entry into all apartments in a multiple dwelling house when probable cause has been shown for the search of only one of them does not satisfy the particularity requirement of the fourth amendment."

The trial court did not err in its application of the law. Amazingly, the State does not argue that the trial court erred in applying the law in denying Defendant's first Motion to Suppress. The trial court relied on the same law at that time. Likewise, the State did not object to the trial court noting that it was laser focused on whether or not Respondent's door was locked. The only thing that changed was that the State's deceit and gamesmanship was unmasked. The trial court did not err in applying the relevant law as the State would like this Court to believe.

In addition, the trial court's determination that the officers exceeded the bounds of the search warrant by knowingly entering

Respondent's separate apartment also establishes that suppression is warranted for the officer's failure to properly 'knock and announce.'

In Tatman v. State, 320 A.2d 750 (Del. 1974), which this Court analyzed in Nunez, supra, 333 N.J. Super. at 47, the police had a search warrant for a second floor apartment and when they arrived they knocked at the locked front door but did not knock on the separate and distinct apartment they searched. Id. The court in Tatman found that the knock on the building's front door was ineffective because it failed to provide any realistic potential of notifying the occupants of the apartment of the police presence and suppressed the evidence. Id. In State v. Caronna, 469 N.J.Super. 462, 489 (App. Div. 2021), this Court held that the exclusionary rule applies to violations of a search warrant's knock and announce requirement.

Here, the officers, in addition to exceeding the bounds of the search warrant, also failed to comply with 'knock and announce' requirements. It is undisputed that the only door the officers allege to have 'knocked and announced' was the street level door that battered in with a ram. Although the officers breached Respondent's locked from door to his apartment they did not knock and announce their presence in doing so. Barnett and Villalta-Moran both conceded that they should have knocked and/or announced their presence at Respondent's locked door under the circumstances. 1T: 84:16-85:14; 4T: 81:1-23.

The trial court's findings regarding the motion to suppress should be affirmed.

B. The trial court correctly evaluated the Motion to Suppress and the Brady violation independently and did not conflate the issues

The trial court did not conflate the Brady and suppression issues. The trial court conducted a complete and thorough analysis of the Brady violation, which the State does not dispute in its appeal, and conducted a thorough analysis of the suppression issue on the merits. The trial court granted Respondent's motion to suppress based on Barnett's outrageous lies and deceit which were intended to cover-up the unconstitutional search. It is the State attempting to conflate the two issues in the instant appeal as a desperate attempt to undo Barnett's irreparable conduct.

As an aside, and as argued in his cross appeal, Respondent agrees that the trial court erred in finding the Brady[5] violation was negligence. Barnett's conduct in this case was outrageous, malicious, and in bad faith. There is nothing more egregious than an officer taking the stand and lying under oath. In this case Barnett took the stand twice and perjured himself about one of the most critical facts in the case at the time. Although Barnett's deplorable Bardy violation should have resulted in a

[5] For purposes of brevity, and given that the Brady issue was fully briefed in his cross appeal, Respondent relies on the arguments found in his cross appeal regarding the Brady violation.

dismissal it had no bearing on the trial court granting the motion to suppress.

CONCLUSION

For the forgoing reasons the trial court's decision to grant Respondent's motion to suppress should be affirmed.

Respectfully yours,

s/ Joel Silberman

Joel Silberman, Esq.

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

The 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-Appellant) v.
KE WANG (Defendant-Respondent),
Docket No. A-3517-23T4

Criminal Action: On Motion for Leave to Appeal Granted from an Interlocutory Order of the Superior Court of New Jersey, Law Division, Hudson County.

Sat Below: Hon. Mitzy Galis-Menendez, P.J.Cr.

Honorable Judges:

Pursuant to Rule 2:6-2(b) and Rule 2:6-5, please accept this letter brief in lieu of a formal reply brief on behalf of the State of New Jersey.

TABLE OF CONTENTS

TABLE OF CITATIONS[1]

"Da" refers to defendant's appendix to his respondent's brief, filed October 14, 2024, for this appeal.
"Db" refers to defendant's respondent's brief for this appeal.
"Pb" refers to the State's appellant's brief, filed September 23, 2024, for this appeal.
"Sa" refers to the State's appendix to its appellant's brief for this appeal.
"Cma" refers to the State's confidential appendix to its appellant's brief for this appeal.
"1T" refers to the suppression-motion proceedings on October 13, 2022.
"2T" refers to the suppression-motion proceedings on October 18, 2022.
"3T" refers to the dismissal-motion proceedings, on speedy-trial grounds, on January 31, 2023.
"4T" refers to the reconsideration-motion proceedings on May 11, 2023.
"5T" refers to the reopened suppression-motion proceedings on December 15, 2023.
"6T" refers to the reconsideration and dismissal-motion proceedings on May 1, 2024.
"7T" refers to the suppression-motion proceedings on September 22, 2022.
"8T" refers to the suppression-motion proceedings on January 5, 2023.

[1] The State labeled the transcripts so that the transcript citations would be consistent for all briefs for this appeal and Docket No. A-3522-23T1.

STATEMENT OF PROCEDURAL HISTORY AND FACTS

The State relies on the statements of procedural history and facts included in its appellant's brief, filed on September 23, 2024, in support of its appeal, and incorporates them by reference herein. (Pb3 to 28).

LEGAL ARGUMENT

POINT I[2]

THE POLICE REASONABLY EXECUTED THE SEARCH WARRANT BASED ON THE FACTS KNOWN TO THEM AT THE TIME OF THE WARRANT'S EXECUTION.

In his respondent's brief, defendant completely ignores the test for evaluating police conduct in executing a warrant. The "basic test" for "[e]valuating the constitutionality of police conduct in executing a warrant, . . . under both the Fourth Amendment . . . and Article I, Paragraph 7, of the New Jersey Constitution is the same: was the conduct objectively reasonable in light of the facts known to [l]aw enforcement . . . at the time of the search." State v. Rockford, 213 N.J. 424, 441 (2013); see also Maryland v. Garrison, 480 U.S. 79, 85 (1987) (holding courts must judge "constitutionality of [police] conduct in light of the information available to [the police] at the time they acted"). The State's argument has consistently been that the central question before this

[2] This Point replies to both Point I.A and Point I.B of defendant's respondent's brief for this appeal.

Court is whether the police's execution of the warrant was reasonable.

Here, under the circumstances of this CSAEM case, probable cause existed to search the entirety of 132 Tuers Avenue for the electronic devices that had been file-sharing or could be storing CSAEM. And based on the facts known to the police at the time they acted, the police reasonably executed the search warrant for 132 Tuers Avenue believing that the unmarked door to the third floor, facing further into the left side, i.e., the 132 Tuers Avenue side, of the property was, in fact, part of 132 Tuers Avenue.

On appeal, among making other factual mistakes about the record, defense counsel continues to inaccurately represent that the door to the third floor was on the right side, or 130 Tuers Avenue side, of the two-family house. See (Db13). But the objective photographic and video evidence of the building's structure shows this is factually incorrect. See (Pb13).

The photographs, at (Sa59) and (Sa60), show that a parking lot is to the left of the two-family house; while another residence, just as tall as the two-family house, is to its right. The video at (Sa67) shows that, upon entering 132 Tuers Avenue's door on the left side, there was a stairwell that winded up to the second floor; and that the second floor had a hallway, that ran from the front of the property to its rear, and led into a kitchen shown in (Sa49). The photographs, (Sa49) and (Sa50), further show that this kitchen, in the rear of

the property, had a door on the left, that faced the left side of the property, and opened onto the rear-stairwell landing.[3] (Sa49)—which is a crime-scene photograph taken on the day of the search warrant's execution, (1T51-18 to 53-14)—also shows that there was a washer-dryer unit present in the second floor's kitchen when the warrant was executed.[4]

Across from the kitchen door was the door to the third floor, that also faced further into the left side of the property. Compare (Sa49 to 50) with (Sa66 at 0:00:15 to 0:00:23; Sa59 to 60); Compare (Sa49; Sa68 at 0:00:11 to 0:00:22) with (Cma2). This is indisputable, because of the location of the rear-stairwell window shown in the photograph, (Sa50); and what the video, (Sa66 at 0:00:15 to 0:00:23), shows it overlooks. The window in the rear stairwell is across from the kitchen door; and (Sa66 at 0:00:15 to 0:00:23) shows it overlooks the parking lot that is on the left side of the home, as depicted in the photographs (Sa59) and (Sa60). In other words, the objective photograph and video evidence shows that the door to the third floor was on the left side, i.e., the 132 Tuers Avenue side, of the property, and not the right side as defendant erroneously asserts. The photographic and video evidence also shows that

[3] On appeal, the State refers to this door as the "kitchen door."

[4] Defense counsel's claim that it was "revealed" this washer-dryer unit was not present at the time of the warrant search is thus incorrect. See (Db18; Sa49).

upon opening the door to the third floor, it would have revealed stairs, ascending further into the left side, as depicted in (Sa50).

The judge thus made a clearly mistaken finding of fact that "the doored staircase leading from the second to the third floor was on the opposite side (right side) of the dwelling from the front door of 132 Tuers Avenue," (Sa40)— which she based on a misunderstanding of Detective Barnett's testimony, (1T98-19 to 22), that defendant continues to rely on to inaccurately urge the door to the third floor was on the right side of the property. But Barnett's testimony at (1T98-19 to 22), where he noted that the door to enter the third floor was "on the opposite end" of where they made entry (meaning, at the rear of house—the opposite end of where the officers entered via 132 Tuers Avenue's front door—not the 130 side of the house), does not support that the door to the third floor was on the right side. Nor is such supported by Detective Eggert's testimony, Yuxing Chen's testimony, or defendant's testimony cited by defendant in his brief at (Db13 n.4).[5] In fact, defendant

[5] At (1T71-1 to 72-5), Detective Eggert was referring to the open hallway on the third floor leading to defendant's bedroom, shown in (Sa53), explaining it went along the "right" side of the building and led to defendant's bedroom, at the front of the house, that was in the "dead center" of the residence. At (1T23-18 to 24-7), defendant, referring to the photographs at (Sa51 to 53), claimed his bedroom on the third floor was solely "on the west side on the top of 130," which is unsupported by those photographs and by the video evidence, at (Sa69), showing his bedroom is in the center of the building as Eggert testified. At (2T10-22 to 11-3), Chen, defendant's friend, also was

completely ignores the objective video and photographic evidence showing that the door to the third floor was on the left side, i.e., the 132 Tuers Avenue side, of the property.

Contrary to defendant's assertion, the State—in its very first brief in opposition to defendant's motion to suppress, filed on August 4, 2022—asserted to the judge, in its statement of facts, that the stairwell leading to the third floor was "contained on the left side of the house[.]"[6] And in every opposition brief to defendant's reconsideration motions thereafter, the State incorporated the facts from its August 2022 submission.[7] The State also incorporated the judge's fact-findings from her initial ruling denying the motion to suppress, which correctly found that "[d]efendant's room was in the attic accessed from the left side of the home, and [that] it was reasonable for

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referring to defendant's bedroom and represented that it "should be on the third floor on [the] right-hand side." Neither defendant, Eggert, or Chen was referring to the door to third floor, located on the second-floor landing across from the kitchen door, that the video and photographic evidence shows faced further into the left side of the property.

[6] The State's opposition brief, filed on August 4, 2022, is accessible on eCourts. On page 2 of the brief, the State asserted: "[T]he TEAMS unit proceeded to the attic, through a stairwell contained on the left side of the house, to find another bedroom, belonging to the defendant."

[7] These briefs were filed on May 4, 2023, September 29, 2023, January 30, 2024, and February 9, 2024, and are all accessible on eCourts. The State incorporated the facts from its August 2022 submission, and the judge's fact-findings from her initial ruling, on page 1 of each brief.

the police officers executing the warrant to believe [d]efendant's room was a part of 132 Tuers Avenue." (Sa12) (emphasis added). Defendant's present claim that the State did not assert below that the door to the third floor was on the left side of the property is simply untrue. Nor has the State waived pointing out to this Court how the photographic and video evidence show the judge's ultimate finding, that the door to the third floor was on the right side of the property, was clearly mistaken and warrants this Court's correction.

This Court granted leave to appeal from the judge's order and opinion suppressing the evidence seized under the search warrant. Importantly, in reviewing that order and opinion on appeal, this Court applies a standard of review for the judge's fact-findings. While appellate courts give deference to fact-findings that are "supported by sufficient credible evidence in the record," "[they] are not required to accept findings that are 'clearly mistaken' based on [thei]r independent review of the record." State v. Watts, 223 N.J. 503, 516 (2015). Indeed, "[a] trial court's [fact] findings should be disturbed . . . if they are so clearly mistaken that the interests of justice demand intervention and correction," as here. State v. Robinson, 200 N.J. 1, 15 (2009).

That the objective video and photographic evidence shows that the motion judge made a clearly mistaken fact-finding (that the door to the third floor was on the right side of the property) was fully briefed in the State's

merits brief for this appeal, which defendant had ample opportunity to address in his respondent's brief. Defendant also had ample opportunity below to make a record of the property's structure. In fact, the videos, and many of the photographs, on which the State relies for the building's structure were entered by defendant below as defense exhibits for that very purpose. See (Pbiii to iv).

Critically, there is only one reasonable inference to factually draw from the objective video and photographic evidence: that the door to the third floor was on the left side, i.e., the 132 Tuers Avenue side, of the property. Because of this, the judge's clearly mistaken fact-finding warrants this Court's correction. See State v. Nieves, 476 N.J. Super. 405, 422-24 (App. Div. 2023) (correcting a clearly mistaken fact-finding from which only one reasonable inference could be drawn from a video recording). "Where a recording does not support more than one reasonable inference, and a trial court's 'factual findings' based on its interpretation of a recording 'are so clearly mistaken—so wide of the mark—that the interests of justice demand intervention[,]' a reviewing court owes no deference to [even] a trial court's fact findings drawn from [a] recording," let alone a misunderstanding of witness testimony. Ibid.

In considering the structure of 132 Tuers Avenue, this Court should not rely upon the drawing included in defendant's appendix at (Da50). This drawing, that defendant purports shows the interior of 132 Tuers Avenue, was

first presented to the court in defendant's motion-for-reconsideration brief filed on February 13, 2023. As defense counsel explained to the judge at the reconsideration hearing on May 11, 2023, this drawing is not to scale, was created by counsel's sister in architecture school, and counsel himself questioned whether the stairs were "exactly straight." (4T5-18 to 6-3). The drawing is not evidence, is inconsistent with the actual photographic and video evidence of the building's structure, and thus the drawing should not be relied upon by this Court due to its factual inaccuracy.

As to Detective Barnett's testimony that there was "confusion" regarding the door to the third floor, this term was first used by Barnett at the December 2023 motion hearing after it was injected into a cross-examination question by defense counsel. (5T19-3 to 24; 5T48-20 to 24). Whether there was confusion or not, however, this consideration is not relevant to whether the police's conduct was objectively reasonable under the totality of circumstances. See State v. Brown, 216 N.J. 508, 531 (2014) ("The subjective belief of the officer is not a relevant consideration, and thus courts should not delve into th[is] murky area[.]"). Even our State Constitution has primarily "eschewed any consideration of the subjective motivations of a police officer in determining the constitutionality of a search or seizure." State v. Gonzales, 227 N.J. 77, 81, 98 (2016) (holding "the fact that the officer does not have the state of mind

[that] is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action"); see also State v. Bacome, 228 N.J. 94, 103 (2017). The proper inquiry is whether the officer's conduct was objectively reasonable under the totality of circumstances "without regard to his or her underlying motives or intent." State v. Bruzzese, 94 N.J. 210, 219 (1983), cert. denied., 465 U.S. 1030 (1984). And here, as explained in the State's appellant's brief, the police's conduct in executing the search warrant was reasonable objectively based on the facts and circumstances they were aware of at the time the officers acted.

The same standards apply to Detective-Sergeant Villalta-Moran's testimony highlighted in defendant's brief. As the State explained in the statement of facts for its appellant's brief, Villalta-Moran did not recall if a tool was used to open the door to the third floor, or if anyone had to kick it open. (5T128-21 to 130-8); (Pb14 n.9). Villalta-Moran also explained that if the team knows they are in the correct area, the team has authorization to forcibly open a door if it needed to be—whether because the door was locked, barricaded, and/or being held closed by a person. (5T119-16 to 120-23).

As for defendant's claim that the door to the third floor was breached specifically with a Halligan tool, the testimony and crime-scene photograph,

(Sa50), overall do not support this. Detective-Sergeant Villalta-Moran did not recall a Halligan tool being used during the search warrant's execution. (5T83-22 to 91-4). In referring to the kitchen door, which was a "typical interior" door like the door to the third floor and not "the most expensive solid door you could purchase," Villalta-Moran explained that the use of a Halligan tool on such a door would have caused "significant damage to that door" and its locking mechanism, with "debris . . . all over the floor[.]" (5T90-14 to 91-4). But the crime-scene photograph, (Sa50), shows no such debris or damage. Detective Barnett similarly testified that a Halligan tool was not used anywhere in the interior. (5T14-4 to 15-12; 5T52-10 to 14). Nevertheless, the use of a Halligan tool to open the unmarked, interior door to the third floor would not have changed the reasonableness of the warrant's execution.

The police also complied with the knock-and-announce requirement, by announcing themselves at 132 Tuers Avenue's exterior, front door, before executing the warrant for 132 Tues Avenue. Contrary to defendant's assertion, the officers were not required to re-knock and announce before entering the unmarked, interior door to the third floor that they reasonably believed was, in fact, part of 132 Tuers Avenue.[8] The judge correctly found, in her initial

[8] On appeal, this claim is raised for the first time in defendant's respondent's brief. (Db20 to 21). It had also been re-raised below in the supporting brief for his second reconsideration motion, filed on September 12, 2023.

ruling denying the motion to suppress, that the argument that "the police officers did not first 'knock and announce' before entering" and executing the search warrant lacked merit. (Sa13).

The knock-and-announce rule requires the police to first "state [their] authority and purpose for demanding admission" before forcibly entering the target location subject to a search warrant. See Rockford, 213 N.J. at 441; see also Wilson v. Arkansas, 514 U.S. 927, 929 (1995). Overall, the objective reasonableness of the officer's conduct is assessed in light of the facts known to law enforcement at the time of the search. Rockford, 213 N.J. at 441.

The knock-and-announce rule in New Jersey is coextensive with federal law. Rockford, 213 N.J. at 440-41. It is satisfied when the police announce themselves, at the target location's exterior door, as was done here—and the rule does not require the police to re-announce themselves at every interior door therein. See, e.g., United States v. Bragg, 138 F. 3d 1194, 1194-96 (7th Cir. 1998) (noting knock-and-announce rule applies "per house rather than per door," and reasoning fresh re-knock-and-announce sequence on interior doors "would give criminals extra time to dispose of evidence or prepare to attack the police"); United States v. Harwell, 426 F. Supp. 2d 1189, 1201-02 (D. Kan. 2006) (collecting cases).

"Even when the knock-and-announce rule governs, it is not absolute."

Rockford, 213 N.J. at 442 n.1. The Supreme Court has carved out exceptions to the rule when: "(1) immediate action is required to preserve evidence; (2) the officer's peril would be increased; or (3) the arrest [or seizure of evidence] would be frustrated." Ibid. (alteration in original).

Here, the police knocked and announced on the front door to 132 Tuers Avenue several times before entering to execute the warrant. (1T79-23 to 82-20; 5T73-10 to 76-9). Detective-Sergeant Villalta-Moran testified that the breach team's shield operator will approach with a ballistics shield—that has a "large police emblem" on it, and gives "visual identification" as to whom the police is—to conduct the knock and announce, either knocking on the door with his fist or foot and then clearly stating, "in a loud, firm voice," "State Police, search warrant." (5T74-20 to 76-9). Villalta-Moran explained this was done three separate times to knock and announce, before the breach team's leader authorized the entry. (5T75-4 to 77-6).

Contrary to defendant's assertion, neither Detective-Sergeant Villalta-Moran nor Detective Barnett ever "conceded" that they should have knocked and announced their presence at the door to the third floor. (Db21). Villata-Moran also did not testify that the police should knock and announce on any locked door inside the building. (Db10). At (5T80-18 to 81-20), Villalta-Moran's testimony was that, if it looks like a door leads to a completely

separate apartment, the unit will stop and call up a detective, who may then ask them to knock, announce, and explain that the officers are conducting an investigation. And at (1T84-9 to 85-14), Barnett testified about the officers' practice to announce, "state police search warrant," when there is a level change, or when they are going into a common area, or into an unknown area where they cannot see anyone. He also affirmed that this announcement would have been stated multiple times during the warrant's execution, though he could not recall if it was specifically done around the rear-stairwell area. (1T84-9 to 85-14).

The knock-and-announce circumstances here are unlike Tatman v. State, 320 A.2d 750, 751 (Del. 1974), that defendant relies on, where police had a search warrant for a specific apartment on the second floor of a building, that they knew about beforehand, and did not knock and announce on the known-apartment door. Unlike Tatman, the officers here had a warrant for the entirety of 132 Tuers Avenue and reasonably believed that the unmarked, interior door to the third floor, facing further into the left side, i.e., 132 Tuers Avenue side, of the property was, in fact, part of 132 Tuers Avenue. After satisfying the knock-and-announce requirement at 132 Tuers Avenue's exterior, front door, the police reasonably did not re-knock-and-announce at the unmarked, interior door to the third floor (that they fairly believed was part

of 132 Tuers Avenue). Holding to the contrary is illogical under the objective reasonableness standard, which considers the police's conduct based on the facts known to them at the time of the search warrant's execution.

As to defendant's insertion of his Brady[9] claims into the suppression issues presented in this appeal, the State addressed why Brady was not violated in its respondent's brief for Docket No. A-3522-23T1, that has been calendared back-to-back with this matter. The State kept these issues separate, and did not conflate them, because they necessarily require different legal analyses. The State also addressed Detective Barnett's testimony in its respondent's brief for Docket No. A-3522-23T1, which it summarized for this appeal at page 14 of its appellant's brief.[10] See (Pb14 n.9).

Irrespective of the witness testimony about whether the door to the third floor was closed, locked, or breached, the objective photographic and video evidence showed that the unmarked door to the third floor faced further into

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[9] Brady v. Maryland, 373 U.S. 83 (1963).

[10] The judge noted at the motion-to-dismiss hearing that she was not going to hold Barnett to his testimony because he testified that he was not first in line in the train, see (1T90-7 to 21; 1T97-5 to 98-9; 1T101-17 to 105-22), recognizing that "[h]e was like behind in the line" and had no personal knowledge of how the door to the third floor was (or was not) breached. (6T41-22 to 43-9). This was pointed out throughout the hearings by defendant's former and current defense counsel, and commented on by the judge. (4T19-16 to 21-5; 4T22-5 to 6; 4T26-16 to 23; 8T7-9 to 25; 8T12-10 to 13-2; 8T23-2 to 24-4; Sa30 to 31).

the left side, i.e., the 132 Tuers Avenue side, of the property; that the house appeared to be divided vertically from the outside; and that there were only two front doors for the two-family house, one on the far left marked "132" and one on the far right that was marked "130." And based on the facts known to the officers at the time they acted, which are more fully explained in the State's appellant's brief for its appeal, the police reasonably believed the unmarked door to the third floor, facing further into the left side of the property, was part of 132 Tuers Avenue that was authorized to be searched under the warrant. For defendant's remaining arguments, the State relies on its appellant's brief, as they have already been adequately addressed therein.

CONCLUSION

For these reasons, the State asks this Court to reverse the judge's suppression of evidence seized under a valid and reasonably executed search warrant, and erroneous grant of the motion to suppress.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-APPELLANT

BY: /s/ *Sarah D. Brigham*
Sarah D. Brigham
Deputy Attorney General

c: Joel S. Silberman, Esq.

CERTIFICATION

1. Confidential Information / Confidential Personal Identifiers (must select one). I certify that I have reviewed Rules 1:38-3, 1:38-5, and 1:38-7 and:

☒ This document or pleading does not contain any confidential information or any confidential personal identifiers, **or**

☐ This document or pleading previously contained confidential information or confidential personal identifiers, which have been redacted or anonymized, including through the use of fictitious first names or initials. The cover of the redacted version of the document or pleading contains the word "REDACTED." I acknowledge that a non-redacted version must be filed contemporaneously with the redacted version in matters where the confidential information is necessary to the disposition of the matter.

2. Return and Resubmission. I certify that if any confidential information is discovered in this submission and brought to the court's attention, the court will return the document or pleading to me, and I will be responsible to redact or anonymize the confidential information before resubmission. I understand the court may impose sanctions, including suppression of the brief, dismissal in extraordinary cases, and other measures for a failure to accurately make this certification or for the discovery of confidential information in a document that has been filed.

3. Briefs Posted Online. I understand that the presence of confidential information or confidential personal identifiers in a document that has been posted

on the Judiciary's public website will be grounds for the removal of such online posting, pending correction by the filing party, on an expedited timeline. The court in its discretion may postpone further proceedings pending the resubmission of the document.

/s/ *Sarah D. Brigham*
Sarah D. Brigham
Deputy Attorney General

DATED: November 1, 2024