NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2569-11T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EVAN REECE,

Defendant-Appellant.

Argued January 29, 2013 - Decided August 28, 2013

Before Judges Fisher, Alvarez and Waugh.

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Municipal Appeal No. 18-11.

Justin T. Loughry argued the cause for appellant (Loughry and Lindsay, LLC, attorneys; Mr. Loughry, on the briefs).

Bethany L. Deal, Assistant Prosecutor, argued the cause for respondent (Robert D. Bernardi, Burlington County Prosecutor, attorney; Ms. Deal, of counsel and on the brief).

The opinion of the court was delivered by

ALVAREZ, J.A.D.

Defendant Evan Reece[1] was convicted, after a trial de novo in the Law Division, of two disorderly persons offenses: obstructing the administration of law, N.J.S.A. 2C:29-1(a), and resisting arrest, N.J.S.A. 2C:29-2(a). He appeals. We now reverse the former conviction and affirm the latter. As to resisting arrest, defendant was ordered to pay a total of $158 in fines, penalties, and court costs.

We reiterate the proofs relied upon by the Law Division judge. On January 7, 2009, Pemberton Police Department Sergeant Peter Delagarza, a ten-year veteran, was directed to defendant's home to respond to a dropped 9-1-1 call. Upon arrival, the uniformed officer walked around defendant's home, observing three vehicles in the driveway. The time was approximately 4:30 p.m.; it was starting to get dark. Delagarza knocked and asked defendant if he had called for assistance; defendant told the officer that he was home alone and denied making any such call. Defendant's demeanor "was fine and everything seemed pretty normal." Leaving the front door ajar, defendant walked back to a coffee table to retrieve his portable home phone, scrolling through the caller I.D. to see if he could find a 9-1-1 call.

[1] We note that in Judge Fisher's dissent, he mentions defendant's status as an Air Force captain. At the time of the events at issue, the officers knew nothing about defendant, who was wearing cargo pants and a sweat shirt.

Finding none, he returned to the doorway and handed the phone to Delagarza, who radioed dispatch to confirm the information he had been given. Delagarza and defendant listened while the dispatcher repeated the originating number of the call, defendant's home phone. Delagarza asked defendant how he acquired a small abrasion visible on his right hand, which Delagarza said at the municipal court trial was in the knuckle area, similar to an injury resulting from a thrown punch.

As Delagarza looked past defendant into the interior of the house, he saw nothing unusual or suspicious. Still concerned about the dropped call, Delagarza asked defendant whether he was married. Defendant responded that it was not any of Delagarza's business. At that juncture, Delagarza asked if he could enter the house and look around. Defendant refused.

Delagarza radioed two patrolmen, John Hall and Jason Gant, who were seated in their cars in front of the house, asking them to assist. Once the officers joined him at the doorway, Delagarza again told defendant that they needed to check the house, at which point defendant slammed the door and attempted to lock it. A "scuffle" ensued as the officers pushed the door open.

Delagarza announced that defendant was under arrest. Although they diverged as to the details, all the officers

agreed that defendant attempted to shut the door as they were attempting to push their way in. The officers and defendant fell to the ground, defendant positioned on top of Delagarza, whom defendant head-butted during the struggle; he in turn was repeatedly punched in the face. The judge did not believe that defendant went "limp" or "did nothing" as the officers attempted to arrest him. Defendant insisted that as he attempted to shut the door, his feet slipped on the wooden floor and he lost his footing, and the officers then pushed into his house.

Although Delagarza was in uniform, defendant said he was suspicious about the officer's bona fides. Even after hearing the dispatcher's voice confirming the dropped 9-1-1 call came from his line, defendant was still unsure if Delagarza really was a police officer.

In municipal court, defendant was acquitted of simple assault upon Delagarza. He was convicted, however, of disorderly persons simple assault upon Hall, whose knee ligaments were torn during the altercation, N.J.S.A. 2C:12-1(a)(1), and of the obstructing and resisting arrest offenses.

The municipal court judge found the State's witnesses to be credible, while finding defendant not credible. He reached that conclusion because defendant was "a bit too glib," and had "too many ready explanations for obvious inappropriate behavior, to

explain away certain things that had occurred." In support of his conclusion that defendant was not believable, the judge specifically mentioned defendant's doubts that Delagarza was an actual police officer, despite the fact all the officers were in uniform.

The municipal court judge was also troubled by defendant's testimony that he was not resisting arrest:

> [B]ut only trying to tell the officers to stop, yet the testimony from the officers was clear that he was trying to pull Sergeant Delagarza's hands away and that he had refused to allow his hands to be taken by the other two officers who were present.

He added:

> that the testimony presented indicated that [defendant] was advised that he was under arrest on more than one occasion . . . . [I]t is abundantly clear to anyone and certainly to [defendant] that if you're being told to stop resisting, that you should in fact stop resisting and allow yourself to be placed under arrest.
>
> I also heard testimony from the officers indicating that they had advised him that he was under arrest on more than one occasion.

The Law Division judge on de novo review also found Delagarza's testimony credible, namely, that upon entry into the home, Delagarza immediately told defendant he was under arrest. That judge likewise noted that defendant acknowledged hearing on

several occasions that he needed to "stop resisting." As he said,

> if [defendant] had "gone limp" or "did nothing" as he suggests, the whole matter would have been completed within a very short period as opposed to a several minute physical struggle on the floor with defendant's face being struck and bruised. The testimony of the defendant is simply not worthy of belief.

The Law Division judge therefore found defendant guilty of resisting arrest. He relied upon the emergency aid doctrine in convicting defendant of obstructing. The judge said, when discussing State v. Frankel, 179 N.J. 586, cert. denied, 543 U.S. 876 (2004), overruled in part by State v. Edmonds, 211 N.J. 117 (2012), and the emergency aid doctrine:

> The [e]mergency [a]id [d]octrine is derived from the common sense understanding that exigent circumstances may require public safety officials such as police, firefighters or paramedics, to enter a dwelling without a warrant for the purpose of protecting or preserving life or preventing serious injury.
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> The Supreme Court clearly indicated that it avoided viewing the events through the distorted prism of hindsight, recognizing that those who must act in the heat of the moment do so without the luxury of time for calm reflection or sustained deliberation. Public safety officials are required to possess an objectively reasonable basis to believe — not certitude — that there is a danger and a need for prompt action.

He acquitted defendant of the remaining simple assault charge, however, because there was no evidence that defendant's conduct in causing Hall's injury was intentional.

I

The function of the Law Division on an appeal from the municipal court is not to search the record for error, or to assess whether there was sufficient credible evidence to support a conviction. Rather, the Law Division decides the case completely anew on the record made before the municipal judge, "giving due, although not necessarily controlling, regard to the opportunity of the" judge to evaluate witness credibility. State v. Johnson, 42 N.J. 146, 157 (1964); see also State v. Cerefice, 335 N.J. Super. 374, 382-83 (App. Div. 2000). In other words, the judge in a "trial de novo must 'make his own independent findings of fact.'" State v. Avena, 281 N.J. Super. 327, 333 (App. Div. 1995) (quoting State v. Ross, 189 N.J. Super. 67, 75 (App. Div.), certif. denied, 95 N.J. 197 (1983)).

In contrast, we review the Law Division's decision employing the "substantial evidence rule." State v. Heine, 424 N.J. Super. 48, 58 (App. Div.), certif. denied, 211 N.J. 608 (2012). We ask whether the Law Division's findings "could reasonably have been reached on sufficient credible evidence present in the record." Johnson, supra, 42 N.J. at 162; see

also Avena, supra, 281 N.J. Super. at 333. Once satisfied that the findings and conclusions of the Law Division meet that criterion, our "task is complete[,]" and we "should not disturb the result" even if we "might have reached a different conclusion" or if the result was a "close one." Johnson, supra, 42 N.J. at 162.

Indeed, the Supreme Court has stated:

> [D]eference is more compelling where . . . two lower courts have entered concurrent judgments on purely factual issues. Under the two-court rule, appellate courts ordinarily should not undertake to alter concurrent findings of fact and credibility determinations made by two lower courts absent a very obvious and exceptional showing of error.
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> [State v. Locurto, 157 N.J. 463, 474 (1999).]

In this case, both judges found that defendant's testimony, that he did not hear the officers advise him he was under arrest, was not credible.

II

We disagree with the Law Division judge that, as a matter of law, the information available to Delagarza was enough to trigger the emergency aid doctrine. Thus we vacate the obstructing conviction.

Delagarza simply lacked sufficient information from which to conclude someone in the home was at risk of immediate danger. It is undisputed that three vehicles were in the driveway, but Delagarza heard no noise emanating from the house as he circled it before knocking on the door and inquiring into the dropped 9-1-1 call.

When Delagarza first asked defendant about the dropped call, he observed him to be calm and responsive. Defendant spontaneously walked over to pick up his phone from the coffee table, showed it to Delagarza, and said that the dispatcher's report must have been a mistake. When Delagarza peered past defendant into the house, he heard and saw nothing that indicated an altercation had taken place.

Therefore, once defendant became annoyed at being asked if he was married and attempted to shut the door, Delagarza lacked enough information to force his way in. The unexplained dropped call and defendant's lack of cooperation were the only two factors that were untoward. Hence we find no objectively reasonable justification for Delagarza's decision to enter the home. See State v. Vargas, 213 N.J. 301, 326 (2013).

Under the statute, obstructing occurs when an individual "prevents or attempts to prevent a public servant from lawfully performing an official function by means of flight,

intimidation, force, violence, or physical interference or obstacle, or by means of any independently unlawful act." N.J.S.A. 2C:29-1(a) (emphasis added). In the absence of facts triggering the emergency aid doctrine, which would make police entry lawful, defendant's refusal to allow Delagarza to enter his home was not an act of obstructing. He was entitled to refuse to cooperate. We do not suggest, however, that Delagarza's concern was unwarranted, only that the circumstances did not justify a forced entry. If the entry was unlawful, defendant's conduct in refusing to admit the officers is not an act of "obstructing."

Clearly, a citizen's home is entitled to the highest level of constitutional protection. See State v. Johnson, 193 N.J. 528, 553-54 (2008). It is equally clear that the emergency aid doctrine permits intrusions into the home to preserve and protect human life. Vargas, supra, 213 N.J. at 326 (explaining that police need "an objectively reasonable basis to believe that an emergency require[s] immediate action to protect life or prevent serious injury" to enter or search a home under the community caretaking doctrine (internal quotation marks omitted)).

Such intrusions are sanctioned where there is "an objectively reasonable basis to believe that an emergency

requires . . . immediate assistance," in addition to a "reasonable nexus between the emergency and the area . . . to be searched." Edmonds, supra, 211 N.J. at 132. Although Delagarza only wanted to walk through the house, a reasonable request in light of the dispatch regarding the 9-1-1 call, there was simply nothing to justify his belief that immediate action was necessary to protect human life. Because there were not enough objective circumstances to constitute a crisis, Delagarza should not have side-stepped the need for a warrant before he and the other officers attempted to gain entry into defendant's home.

The emergency aid and community caretaking doctrines are judicial creations that value the safety of members of the public over the individual constitutional rights which we ordinarily zealously protect. Such rights weave the necessary framework for an orderly and free society.

But officers weigh and balance these interests minute-to-minute and day-to-day on the street in carrying out their responsibilities with little time for reflection. From our distant perspective, we evaluate Delagarza's decision and find fault with his conclusion that defendant's conduct was so suspicious that when joined with the 9-1-1 dropped call, the situation was an emergency. Given the peculiar combination of circumstances with which he was faced, however, it is

understandable that Delagarza did not merely drive away. See Frankel, supra, 179 N.J. at 599 (acknowledging that police who "must act in the heat of the moment do so without the luxury of time for calm reflection or sustained deliberation" afforded the courts). He made the legally incorrect choice – but this author finds no fault with his conclusion that the dropped 9-1-1 call could not be ignored. Delagarza had reason to be concerned, and may have been judged to be derelict in his duties if he had merely driven away, and an injured person later located in defendant's home.

III

Defendant's pre-arrest conduct was not unlawful; he was entitled to deny the officers entry into his home. He was not, however, entitled to resist arrest, even if it was unjustified. The arrest was made under "color of . . . official authority" and was announced. N.J.S.A. 2C:29-2(a); see also State v. Brennan, 344 N.J. Super. 136, 143 (App. Div. 2001), certif. denied, 171 N.J. 43 (2002); State v. Kane, 303 N.J. Super. 167, 182 (App. Div. 1997). That suffices.

Here we respectfully part company with our dissenting colleague. There was ample basis for both the municipal court and Law Division judges to find Delagarza, Gant, and Hall credible and defendant incredible. If the officers had some

improper motive, some prior contact with defendant, some reason which might explain their willingness to insist upon entry into the home for other than their stated justification, perhaps we would agree.[2] But we view the credibility determinations made by the municipal court and Law Division judges in this case deferentially, as we are required to do. See Locurto, supra, 157 N.J. at 474. In our opinion, their conclusions are supported by the record.

In contrast, defendant's conduct, at least initially based on his suspicions regarding the officers' credentials, is inexplicable. The municipal court judge observed that while on the witness stand, defendant's responses were dubious and "glib." Our independent review of the record supports this conclusion; for example, defendant gave two different versions of events as the officers pushed into his home. On direct, he stated that they were able to do so only because he fell to his knees in his stocking feet on the slippery floor as he was trying to slam the door. On cross-examination, he said that the officers suddenly attacked him, and threw him to the ground.

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[2] Defendant argues on appeal, among other things, that Delagarza's testimony that he saw an abrasion on defendant's hand in the knuckle area when the cut was at the base of his thumb, establishes his lack of credibility. We do not agree. That fact alone is a minor detail, particularly since on cross-examination he admitted that Delagarza asked him about the injury while they were talking in his doorway.

And, as the Law Division judge observed, had defendant gone limp, the struggle would have ended quickly. It took several minutes, after which defendant and at least one of the officers was injured.

Defendant contends on appeal that unlawful force was employed against him, and for that reason he cannot be convicted of resisting arrest. See State v. Simms, 369 N.J. Super. 466, 472-73 (App. Div. 2004); State v. Casimono, 250 N.J. Super. 173, 182-85 (App. Div. 1991), certif. denied, 127 N.J. 558 (1992). Given that defendant's version of the initial moments of the struggle was not found credible by the municipal court and Law Division judges, we do not agree that the officers employed unlawful force when they entered the home. Officers who had reason to believe some injured person in the house had reached out for help, attempted to push their way into a doorway as defendant tried to keep them out. Defendant slipped on the floor, landing on top of Delagarza and head-butting him in the process. The entry into the house, during which the fact defendant was being arrested was announced, simply did not constitute unlawful force.

The Legislature, by enacting N.J.S.A. 2C:29-2(a), concluded that a citizen must submit even where a "law enforcement officer was acting unlawfully in making the arrest, provided he was acting under color of his official authority and provided the law enforcement officer announces his intention to arrest prior to the resistance." The statutory language embodies the legislative judgment that it is preferable to avoid breaches of the peace and injuries to officers and citizens at the point of arrest, and to sort through the legalities and liabilities at a later point in time. See State v. Mulvihill, 57 N.J. 151, 155-56 (1970) (citing State v. Koonce, 89 N.J. Super. 169, 184 (App. Div. 1965)). It is, in its most basic terms, an expression of legislative policy that public safety must at times take priority over a citizen's individual right to refuse to submit to law enforcement directives.

We also conclude that defendant's challenge on appeal to Delagarza's credibility is not meritorious. All three officers, credible witnesses, stated that Delagarza announced that defendant was under arrest upon making the initial entry. Defendant was well aware that the officers wanted to arrest him; he struggled because he did not want to submit. Even he testified that he was repeatedly told to stop resisting, a phrase which when uttered by police is commonly well-understood

to mean stop resisting arrest. Therefore defendant is guilty of resisting arrest.

Affirmed in part; reversed in part.[3]

I hereby certify that the foregoing is a true copy of the original on file in my office.

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[3] We also respectfully disagree with our colleague about the relevance of Rule 1:36-2(d) to this case. Precedents regarding the law of arrest are abundant and will not benefit by the publication of this opinion, issued on an unusual combination of circumstances. Dissemination of unpublished opinions via the Judiciary website has brought them up from "the underworld of unpublished opinions" into the light of day.

WAUGH, J.A.D., concurring.

For the reasons expressed in Judge Alvarez's opinion, the panel reverses defendant Evan Reece's conviction for obstructing the administration of the law, N.J.S.A. 2C:29-1(a), and affirms his conviction for resisting arrest, N.J.S.A. 2C:29-2(a). While I concur with the latter decision for the reasons stated by Judge Alvarez, I write separately to concur in the reversal of the obstruction conviction on the grounds that, although the police officers had lawful reason to enter Reece's residence without a warrant or his consent, Reece's refusal of their request that he consent to a warrantless search was not a violation of N.J.S.A. 2C:29-1(a).

The overall procedural and factual background is fully set forth in Judge Alvarez's opinion. The issue as to which I disagree with my colleagues involves the application of the facts as found by the Law Division judge on trial de novo to the law established by our Supreme Court. The question at issue is whether the police officers who sought to enter Reece's residence "possess[ed] an objectively reasonable basis to believe" that a prompt walk through of the residence was necessary to meet imminent danger related to the dropped 9-1-1

call[1] they were investigating. I believe that the Law Division judge correctly held that they did.

Our role in an appeal such as this one is limited, in that we "consider only the action of the Law Division and not that of the municipal court." State v. Oliveri, 336 N.J. Super. 244, 251 (App. Div. 2001) (citing State v. Joas, 34 N.J. 179, 184 (1961)). The Law Division determination is de novo on the record from the municipal court. R. 3:23-8(a). We are ordinarily limited to determining whether the Law Division's de novo findings "could reasonably have been reached on sufficient credible evidence present in the record." State v. Johnson, 42 N.J. 146, 162 (1964). In addition, under the two-court rule, only "a very obvious and exceptional showing of error" will support setting aside "concurrent findings of facts and credibility determinations made by" the Law Division and the municipal court. State v. Locurto, 157 N.J. 463, 474 (1999). Nevertheless, our review of purely legal issues is plenary. State v. Goodman, 415 N.J. Super. 210, 225 (App. Div. 2010), certif. denied, 205 N.J. 78 (2011).

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[1] A dropped, or "abandoned," 9-1-1 call "means a call placed to 9-1-1 in which the caller disconnects before the call can be answered" by the public safety answering point. N.J.A.C. 17:24-1.2.

The Law Division judge set forth his findings of fact, which were consistent with those of the municipal judge, as follows:

> The facts are that on January 7, 2009, Pemberton Police received a [9-1-1] call that was unanswered by the caller or "dropped." The call contained no verbal communication but was clearly a [9-1-1] call with no voice response to the [9-1-1] dispatch operator. As a result, Pemberton Police Sgt. Peter Delagarza, a ten year officer, was sent to defendant's residence to investigate the abandoned [9-1-1] call.
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> Delagarza, upon arrival, saw a simple family home with three cars in the driveway. The cars had, what he called, military decals on them. He was alone, it was approximately 4:30 p.m., and Delagarza walked around the side of the house and looked in the rear to check. He found nothing suspicious. He saw a few lights on inside the home and nothing else. It was starting to get dark.
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> The officer knocked on the door. He was in uniform and had arrived in a marked police vehicle. Defendant Reece answered the door and Delagarza asked him if he had placed a [9-1-1] call. Delagarza told defendant that was why he was there, an abandoned [9-1-1] call from this residence.
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> Defendant said he did not make the call and went to a nearby inside room and grabbed a phone and brought it to Delagarza. He scrolled through the call list and said "I didn't call anyone." At this time, the officer said defendant's demeanor was fine and everything seemed pretty normal. As a result, Delagarza used his police radio while standing with the defendant. He asked control dispatch to relay the number from

the abandoned [9-1-1] call. Delagarza said that Reece was close enough to hear the radio transactions between himself and the dispatcher. The number came up to defendant's phone number, which defendant admitted was his.

Delagarza continued to talk with Reece and noticed a "fresh" abrasion on defendant's hand. It looked like "some skin was missing." After seeing the abrasion, Delagarza asked more questions of defendant. Was he married or single? He was influenced by the three cars in the driveway. Defendant said he was alone when asked if anyone else was in the home. Defendant's demeanor began to change upon being questioned by Delagarza. He told Delagarza that he didn't see what business it was of his whether he was married or not.

Delagarza said to defendant "there are three cars in the driveway and just to make sure everything is OK, may I come in and look around and, if everything is fine, I'll leave." Delagarza said, as a result of the dropped [9-1-1] call from the home; the three cars in the driveway; the attitude of defendant becoming defensive when questioned and that he seemed frustrated, I had a rise in my suspicions of what was going on.

Defendant denied Delagarza's request saying "You're not coming in my house." During this time at the door, two other marked patrol cars arrived at the defendant's home. Officers Hall and Gant were parked directly in front of the house.

Delagarza called them to the front door because of the status of the situation and the change in defendant's demeanor. Delagarza said he wanted them there because "I knew we were going to go in the house to check and make sure everything was OK" in view of the abandoned [9-1-1] call.

> Delagarza explained to defendant why they needed to enter the residence. Defendant then asked for written proof that the number of the call was his number. Delagarza told him that he had heard the dispatcher verify that. Defendant became totally defensive and became agitated, according to Delagarza.
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> Delagarza was again telling defendant why he had to let them inspect the premises when defendant slammed the door and tried to lock it, denying entry to the police officers. The police officers, however, were able to push the door open.

In reaching his legal conclusion, the judge relied on the Supreme Court's decision in State v. Frankel, 179 N.J. 586, cert. denied, 543 U.S. 876, 125 S. Ct. 108, 160 L. Ed. 2d 128 (2004), in which the Court outlined a three-part test for determining whether a police officer may engage in a search without a warrant under the emergency-aid doctrine.

> [T]he public safety official must have an objectively reasonable basis to believe that an emergency requires that he provide immediate assistance to protect or preserve life, or prevent serious injury; his primary motivation for entry into the home must be to render assistance, not to find and seize evidence; and there must be a reasonable nexus between the emergency and the area or places to be searched.
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> [Id. at 600 (footnote omitted).]

In State v. Edmonds, 211 N.J. 117, 131-34 (2012), the Court modified that test to conform to federal precedents precluding

reliance on the subjective intent of the officer. The revised test

> for a warrantless search to be justified by the emergency-aid doctrine, [is that] the State must prove only that (1) the officer had "an objectively reasonable basis to believe that an emergency requires that he provide immediate assistance to protect or preserve life, or to prevent serious injury" and (2) there was a "reasonable nexus between the emergency and the area or places to be searched."
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> [Id. at 132 (quoting Frankel, supra, 179 N.J. at 600).]

In State v. Vargas, 213 N.J. 301, 323-24 (2013), which did not involve a 9-1-1 call, the Court reiterated that two-part test, citing both Edmonds and Frankel.

Both Edmonds and Frankel took place in the context of the investigation of 9-1-1 calls. In Frankel, the Court outlined the significance of that context.

> In determining the legality of the search in this case, we must decide what weight to accord an open line 9-1-1 call. In assessing that issue, we first survey the purpose and use of 9-1-1 as an emergency response mechanism. 9-1-1 is "the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance." 47 U.S.C.A. § 251(e)(3). "A 9-1-1 call is one of the most common . . . means through which police and other emergency personnel learn that there is someone in a dangerous situation who urgently needs help." United States v. Richardson, 208 F.3d 626, 630 (7th Cir.),

cert. denied, 531 U.S. 910, 121 S. Ct. 259, 148 L. Ed. 2d 188 (2000); see also United States v. Holloway, 290 F.3d 1331, 1339 (11th Cir. 2002) ("911 calls are the predominant means of communicating emergency situations."), cert. denied, 537 U.S. 1161, 123 S. Ct. 966, 154 L. Ed. 2d 897 (2003).

New Jersey has a detailed statutory and regulatory scheme for the implementation of the 9-1-1 system throughout the State. See N.J.S.A. 52:17C-1 to -16; N.J.A.C. 17:24-1.1 to -11.4. See also N.J.S.A. 52:17C-3a, -3b, -8a (establishing Office of Emergency Telecommunications Services to implement "an enhanced 9-1-1 system," to "explore ways to maximize the reliability of the system," and to expedite communications of emergencies to "law enforcement, fire fighting, emergency medical services, or other emergency services"). Telephone companies are required to forward the telephone number and street address of any telephone used to place a 9-1-1 call to 9-1-1 dispatchers "for the purpose of responding to emergency calls." N.J.S.A. 52:17C-10a. Upon receiving such a call, the dispatcher must answer with a response such as "9-1-1, where is the emergency?" N.J.A.C. 17:24-2.3(a)(5). "The police maintain records of 9-1-1 calls not only for the purpose of responding to emergency situations but to investigate false or intentionally misleading reports." State v. Golotta, 178 N.J. 205, 219 (2003); see also N.J.S.A. 52:17C-10a. Moreover, the use of 9-1-1 to falsely report an emergency is a crime. N.J.S.A. 2C:33-3e (providing that "[a] person is guilty of a crime of the fourth degree if the person knowingly places a call to a 9-1-1 emergency telephone system without purpose of reporting the need for 9-1-1 service"). A 9-1-1 call carries "a fair degree of reliability," because "it is hard to conceive that a person would place himself or herself at risk of a criminal

charge by making such a call," unless there was a true emergency. Golotta, supra, 178 N.J. at 219 (internal quotation marks omitted).

More than ninety-five percent of all 9-1-1 calls received by police departments are a result of a person dialing that number. That only two to five percent of such calls are generated accidentally by non-human means in no way diminishes the probability that a 9-1-1 call is the signal of an emergency. See Richardson, supra, 208 F.3d at 630 ("Many 911 calls are inspired by true emergencies that require an immediate response."). An open line 9-1-1 call, by its very nature, may fairly be considered an SOS call, a presumptive emergency, requiring an immediate response. That presumption must apply because the dispatcher does not know whether the caller is a stroke or heart attack victim, a child in need of assistance, a person overcome by smoke or, more generally, a person whose life is endangered but unable to speak. That presumption is rebuttable and may be dispelled by any number of simple explanations given by the homeowner to the responding police officer. A mother may explain that her child, who appears at the door with her, impishly dialed the number. A resident, who otherwise raises no suspicions, may state that he intended to call 4-1-1 but pushed the wrong digit and due to distraction inadvertently left the telephone off the hook. Those circumstances when viewed in their totality would likely persuade a reasonable police officer that there is no need for further investigation. Conversely, the circumstances con-fronting the public safety official may corroborate the existence of an emergency. For example, smoke escaping from under a door might be a clear sign of a fire.

We reject the State's request that we "find, as a matter of law, that the receipt of a 9-1-1 open-line, abandoned or hang-up call alone gives the police the 'reasonable belief' grounds necessary to enter a home to investigate the nature of the emergency." (Emphasis added.) Likewise, we cannot accept defendant's position that an open line 9-1-1 call, followed by callbacks by the dispatcher that only elicit busy signals and a visit to the home by a police officer whose knock on the door goes unanswered, would never be sufficient to justify entry as part of the officer's emergency caretaking function. We eschew the absolute positions advanced by both the State and defendant for a more nuanced approach that properly weighs the competing interests under a totality of the circumstances standard.

It does not require a flight of imagination to picture circumstances in which a person who suddenly takes ill dials 9-1-1 and is incapacitated and unable to speak. The police officer at the door, of course, cannot know what type of emergency, if any, lies inside --all he knows is that the caller has dialed an emergency response number. In light of the presumptive emergency, we cannot conclude that the officer is bound to ignore the warning and walk away. Each case must be decided on the totality of the circumstances confronted by the public safety official, who must weigh the competing values at stake, the privacy interests of the home versus the interest in acting promptly to render potentially life-saving assistance to a person who may be incapacitated. There is no bright line or magic formula to be applied across the board. A fact-sensitive analysis must be applied to each case.

[179 N.J. at 603-06 (footnote omitted).]

The Court reached the following general conclusion from its analysis:

> A 9-1-1 call is tantamount to a distress call even when there is no verbal communication over the telephone to describe the nature of the emergency. The responding police officer is not required to accept blindly the explanation for the 9-1-1 call offered by the resident answering the door, but must base his decision on the totality of the circumstances. Courts are loath to second-guess decisions made in good faith with the intent of protecting life when the circumstances clearly reveal a legitimate emergency that will not abide delay.
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> [Id. at 608-09.]

In Edmonds, the police were responding to an anonymous 9-1-1 call from a payphone, which concerned an allegation of domestic violence involving a weapon. 211 N.J. at 146. The Court concluded that, under the circumstances, the police officers were justified in entering the home without a warrant to determine whether there had been domestic violence.

> We do not take issue with the immediate response of the police to the 9-1-1 call. Domestic violence is an acute problem in our society. Allegations of domestic violence, even if coming from a seemingly anonymous source, cannot be breezily dismissed and must be investigated. The police had a duty to look behind the denials by [the mother] while her son remained potentially in jeopardy in the apartment. See Wildoner v. Borough of Ramsey, 162 N.J. 375, 392-93 (2000) (recognizing that victims of domestic violence are not always forthcoming with police). Therefore, we do not question the

> decision made by the police to enter the home to assure [the son's] safety.
>
> [Id. at 140.]

Nevertheless, the Court concluded that, having determined there were no objective signs of domestic violence once they got inside the home, the officers were not justified in searching it for weapons. At that point, because "there was no longer an objective basis to believe that an emergency was at hand, '[t]he privacy interests of the home [were] entitled to the highest degree of respect . . . . '" Ibid. (alteration in original) (quoting State v. Evers, 175 N.J. 355, 384 (2003)). "Having investigated and failed to corroborate the report of domestic violence, the police officers had fulfilled their community-caretaking function. If the officers wished to search the apartment for a gun, they had to apply for a warrant supported by probable cause." Id. at 143.

In this case, Delagarza was investigating a dropped 9-1-1 call from the landline at Reece's residence. When he arrived, he noted that there were three cars in the driveway. The presence of three cars suggested that there was more than one person in the house.[2] He knocked on the door. Reece answered

[2] Unlike my colleagues, I view the fact that there was no noise coming from the house as a neutral fact. Someone injured or in (continued)

and was cordial at first. He showed Delagarza a portable telephone and demonstrated that it had not recorded the making of a 9-1-1 call. That fact, however, did not exclude the possibility that the call had been placed by a different telephone in the house that was also connected to the landline.

Delagarza then verified the information he received from dispatch. Reece heard the dispatcher repeat the number to Delagarza, and conceded that it was his home number. At that point, Delagarza noticed a "fresh" abrasion on Reece's hand. Although there was a dispute concerning the location of the mark, there was no dispute that there was one. As noted by Judge Alvarez, Delagarza testified it was "similar to a bruise resulting from a thrown punch." (Slip op. at 3).

When Delagarza asked whether Reece was married and whether anyone else was in the house, Reece's attitude changed. He told Delagarza that his marital status was none of his business. Reece then refused Delagarza's request to "come in and look around," which had been coupled with Delagarza's assertion that, "if everything is fine, I'll leave." After the other officers joined Delagarza at the front door, he again explained to Reece his concerns and why the officers wanted to "inspect the

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(continued)
peril inside a building is not necessarily able to create noise, especially when unable to complete a 9-1-1 call.

premises." Reece's response was to shut the door in an effort to prevent entry.

Applying those facts to the law set forth in Frankel,[3] the Law Division judge determined that the police officers had a sufficient basis to insist on a walk through of the residence to determine whether there was, in fact, an emergent situation requiring their assistance or intervention. In my view, that finding is equally justified under Edmonds, which merely modified the Frankel test to exclude the subjective element involving the police officer's motivation.

The dropped 9-1-1 call from Reece's landline amounted to a presumptive emergency under Edmonds and Frankel. The three cars in the driveway, the fresh injury on the hand, and Reece's refusal to disclose whether there were others in the house added to the objective basis for Delagarza's decision that there was a need for further investigation. The Supreme Court held in Frankel, supra, 179 N.J. at 609, that "[t]he responding police officer is not required to accept blindly the explanation . . . offered by the resident answering the door." The request to "check" the house to "make sure everything was OK" demonstrated the required "reasonable nexus" between the presumptive emergency and the scope of the search. See id. at 600.

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[3] Edmonds had not yet been decided.

Of course, we know from hindsight that Reece was alone in the house and that there was no domestic violence or other emergency. At the time of the incident, however, Delagarza and the other officers did not know that. As the Supreme Court observed in Frankel, "[t]he police officer at the door, of course, cannot know what type of emergency, if any, lies inside--all he knows is that the caller has dialed an emergency response number. In light of the presumptive emergency, we cannot conclude that the officer is bound to ignore the warning and walk away." Id. at 572. Based on the facts as found by the Law Division judge, the police officers in this case had "a duty to look behind [Reece's] denials" and, as a consequence, "we [ought] not question the decision made by the police to enter the home to assure [a potential occupant's] safety." See Edmonds, supra, 211 N.J. at 140.

Because the actions of the police officers in this case were consistent with the test established by Frankel and modified by Edmonds, their request to enter Reece's house was lawful. Consequently, I respectfully disagree with my colleagues' conclusion to the contrary. Nevertheless, I concur in their reversal of Reece's conviction under N.J.S.A. 2C:29-1(a) on constitutional grounds.

The Court in Frankel observed that

[a] homeowner has a right under our federal and state constitutions to insist that a police officer obtain a warrant before entering and searching his house. See State v. Bolte, [115 N.J. 579, 583-84, cert. denied, 493 U.S. 936, 110 S. Ct. 330, 107 L. Ed. 2d 320 (1989)]; see also Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043-44, 36 L. Ed. 2d 854, 858 (1973) (discussing consent exception to warrant requirement); State v. Suazo, 133 N.J. 315, 319-20 (1993) (same). The assertion of that constitutional right, which protects the most basic privacy interests of our citizenry, is not probative of wrongdoing and cannot be the justification for the warrantless entry into a home. See United States v. Alexander, 835 F.2d 1406, 1409 n.3 (11th Cir. 1988) (stating that "defendant's refusal to consent to search cannot establish probable cause to search"); United States v. Prescott, 581 F.2d 1343, 1350 (9th Cir. 1978) (stating that defendant's refusal to consent to entry and search by police officers "cannot be a crime" and cannot "be evidence of a crime"); see also Craig S. Lerner, The Reasonableness of Probable Cause, 81 Tex. L. Rev. 951, 966 (2003) (noting that courts "have suggested that allowing the police to weigh a refusal to consent impermissibly 'burdens' the exercise of the Fourth Amendment right to be free from unreasonable searches"). While we in no way suggest that the public should not cooperate with the police, a person's assertion of a constitutional right should not be used to cast suspicion on him and serve as the excuse to diminish that right.

[179 N.J. at 611; see also State v. Heine, 424 N.J. Super. 48, 64 (App. Div.), certif. granted and certif. denied, 211 N.J. 608 (2012).]

Reece argues that, even if the warrantless search was lawful, his exercise of his Fourth Amendment rights to refuse his consent ought not be criminalized. I agree.

In Prescott, supra, 581 F.2d at 1346-47, 1350, cited by the Supreme Court in Frankel, supra, 179 N.J. at 611, the prosecution sought to introduce evidence that Prescott, harboring a felony suspect, refused to unlock her door to let police conduct a warrantless search of her apartment. The court held she could not be penalized for "passively asserting" her right to refuse the warrantless entry. Prescott, supra, 581 F.2d at 1351.

> "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search." Bumper v. North Carolina, 1968, 391 U.S. 543, 550, 88 S. Ct. 1788, 1792, 20 L. Ed. 2d 797. When, on the other hand, the officer demands entry but presents no warrant, there is a presumption that the officer has no right to enter, because it is only in certain carefully defined circumstances that lack of a warrant is excused. Camara v. Municipal Court, 1967, 387 U.S. 523, 528-29, 87 S. Ct. 1727, 18 L. Ed. 2d 930. An occupant can act on that presumption and refuse admission. He need not try to ascertain whether, in a particular case, the absence of a warrant is excused. He is not required to surrender his Fourth Amendment protection on the say so of the officer. The Amendment gives him a constitutional right to refuse to consent to entry and search. His asserting it cannot be a crime, Camara, supra, 387 U.S. at 532-33, 87 S. Ct. 1727[, 18 L. Ed. 2d at

> 937-38]. Nor can it be evidence of a crime. District of Columbia v. Little, 1950, 339 U.S. 1, 7, 70 S. Ct. 468, 471, 94 L. Ed. 599[.]
>
> [Id. at 1350-51.]

In State v. Berlow, 284 N.J. Super. 356, 358 (Law Div. 1995), an anonymous 9-1-1 caller reported a woman shot and injured at a specific address. When the responding police officer found no victim at the address, he obtained information that the victim might be at a nearby rooming house. Ibid. The officer knocked on the door of a building meeting the description of the rooming house, and Berlow answered. Ibid. When the officer explained his purpose and asked to search the house, Berlow refused to allow the search without a warrant, after which he "slammed the door and locked it." Ibid. Once the officers "broke through the door" and entered the home, Berlow did nothing else to prevent their search of the premises. Id. at 359.

Judge Albert Garofolo found that the State had proven the elements of the obstruction statute, N.J.S.A. 2C:29-1(a), but nevertheless held that Berlow could not be convicted of obstruction for constitutional reasons. Id. at 362, 365. He distinguished cases involving resisting arrest from those involving alleged obstruction based on closing and locking the door to one's home:

The State argues that public safety considerations require that citizens not have the ability to impede police officers under such circumstances and cites the principle which requires submission to an arrest even if that arrest is unlawful. See State v. Casimono, 250 N.J. Super. 173 (App. Div. 1991), cert. denied, 127 N.J. 558 (1992) and State v. Koonce, 89 N.J. Super. 169 (App. Div. 1965). However, that principle is based upon society's interest in the protection of police officers who might otherwise be injured in attempting in good faith, although mistakenly, to perform their duties in making an arrest. Resisting arrest by its nature involves physical confrontation that places police officers and arrestees at risk of injury or death and may also place third parties at such risk. These risks do not normally attend the refusal of a citizen to allow entry by the police to a constitutionally-protected area, especially where, as here, no personal obstruction was offered. I am not persuaded that the principle requiring citizens to yield to unlawful arrests should be extended to require them to submit to warrantless searches, with or without probable cause, or suffer the pain of criminal conviction.

It must be recalled that defendant's conduct in this case, while sufficiently affirmative to impede the police officers, was the absolute minimum he could do to effect his denial to police entry, i.e., closing and locking the door. Once the police made their forcible entry, defendant did nothing to impede their progress any further. It may be argued that a citizen's obligation under such circumstances is to yield to police authority, since there are available remedies if a right to privacy is violated: i.e., a suppression of evidence in a criminal proceeding or damages in the civil context. However, to require citizens to yield to police demands for entry into

> private dwellings in all circumstances would unfairly relegate the exercise of their constitutional right to an after-the-fact judicial process and would place upon them an undue burden to undertake litigation in order to seek redress. To qualify the exercise of a Fourth Amendment right in that fashion would essentially eviscerate the purpose of that amendment, which is to stop governmental intrusion at the door. One cannot be penalized for passively asserting that right. Camara v. Municipal Court, [387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967)]. Had this defendant done something further than to orally deny entry to the police and close and lock his door, a contrary result might be required.
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> [Id. at 363-64 (footnotes omitted).]

There is no doubt that, unlike Berlow, Reece engaged in "something further" than verbally denying entry and attempting to shut and lock his door, but only after the police had entered the house. His further acts form the basis for his conviction for resisting arrest under N.J.S.A. 2C:29-2(a). Even though the police acted lawfully in entering Reece's home, Reece's invocation of his Fourth Amendment rights and his passive attempt to deny entry cannot form the basis of an additional criminal conviction for obstruction.

The facts of this case, involving a conviction for obstruction based on refusing entry to one's own home, distinguish it from cases involving investigatory stops in a public place. See State v. Williams, 192 N.J. 1 (2007); State

v. Crawley, 187 N.J. 440 (2006). As the Supreme Court made clear in Crawley, supra, 187 N.J. at 451-52,

> the Legislature, in enacting the current version of N.J.S.A. 2C:29-1, did not intend that a person involved in a police encounter should have an incentive to flee or resist, thus endangering himself, the police, and the innocent public. . . . [W]hen a police officer is acting in good faith and under color of his authority, a person must obey the officer's order to stop and may not take flight without violating N.J.S.A. 2C:29-1.

Consequently, I join in the result reached by my colleagues, which is the reversal of the conviction. In doing so, I do not suggest that Delagarza was required to delay his effort to verify that there were no exigent circumstances under the emergency-aid doctrine while awaiting a warrant, but only that Reece's refusal of entry and attempt to shut the door was not unlawful under N.J.S.A. 2C:29-1(a).

Accordingly, I concur with my colleagues in reversing the conviction for violation of N.J.S.A. 2C:29-1(a), but respectfully disagree with their reason for reaching that result. I join that portion of Judge Alvarez's opinion affirming the conviction for violation of N.J.S.A. 2C:29-2(a).

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

FISHER, P.J.A.D., concurring in part and dissenting in part.

This relatively simple case, involving disorderly persons convictions and small monetary sanctions, presents a clash of important rights and policies. I join in Judge Alvarez's opinion insofar as it expresses the court's decision to reverse defendant's conviction for obstructing the administration of law, N.J.S.A. 2C:29-1(a). I write separately for the specific reason that I disagree with my colleagues' affirmance of defendant's conviction for resisting arrest, N.J.S.A. 2C:29-2(a), and for the more general reason that the court's decision in that regard fails to give sufficient weight or consideration to facts that were not fully considered or properly analyzed in the trial court, namely, that defendant's alleged resistance was: to an unlawful arrest; arguably in self-defense to an excessively forceful arrest occurring as defendant attempted to stand his ground in his own home; and preceded by the arresting officers' unlawful entry into defendant's home.

I

On January 7, 2009, a police sergeant went to the home of the defendant, Air Force Captain Evan Reece, on the assumption that a 9-1-1 call was placed from that home but disconnected

before the caller spoke.[1] Defendant answered the door and responded to the sergeant's questions. Defendant replied that he had made no such a call, and he retrieved his telephone to show the sergeant the phone's call list, which did not reveal such a call had been made. This evidence was convincing enough for the sergeant to call his dispatcher, who allegedly confirmed defendant's home was the location from which the 9-1-1 call was placed. As a result, the sergeant continued his inquiry.

At trial, the sergeant professed concern because he noticed three vehicles in defendant's driveway and a fresh abrasion on defendant's knuckles, suggesting a recently thrown and landed punch.[2] The sergeant testified, however, that he could see into the home, that no other person appeared to be present, and that nothing seemed wrong. Unsatisfied, the sergeant continued to probe and inquired whether defendant was married or single.

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[1]At least, that is what I assume was meant by what has been referred to as "a dropped 9-1-1 call." I also note that the only proof that a 9-1-1 call was placed from defendant's home came from the inadmissible hearsay from one of the testifying officers. No telephone records or the testimony of the dispatcher who allegedly received the 9-1-1 call were offered by the state. I am mindful, however, that defendant did not object to the admission of this evidence.

[2]The significance of three vehicles with military decals in the driveway — although suggestive but hardly conclusive that more than one person might be in the home — eludes me. And the sergeant's claim that defendant had a bruise on his knuckles was inaccurate, as will be discussed later in this opinion; indeed, that claim was not adopted by the Law Division judge.

According to the Law Division judge's findings, at this point defendant responded that he did not see how that was of any interest to the police. This change in defendant's demeanor only fueled the sergeant's curiosity. According to the Law Division judge's findings, the sergeant then said to defendant that "there are three cars in the driveway and just to make sure everything is OK, may I come in and look around and, if everything is fine, I'll leave." Defendant denied that request, saying, "you're not coming in my house." By this time, additional patrol cars arrived, and the sergeant called the other officers to the front door because, according to the sergeant, defendant had become "defensive when questioned," "agitated," and "frustrated." The sergeant's curiosity was apparently further piqued by defendant's request for proof that the 9-1-1 call came from his home.

According to the Law Division judge, as the sergeant again told defendant "why he had to let them inspect the premises," "defendant slammed the door and tried to lock it, denying entry to the police officers." The officers, however "were able to push the door open" and a "scuffle inside the door happened." The Law Division judge found that defendant was told he was

under arrest and should stop resisting.[3] The judge also found that "[a]fter a few minutes of physical struggle, with the police hitting the defendant in the face, he was controlled and cuffed."

As Judge Alvarez's opinion recognizes, and I agree, defendant had every right to end the conversation and close the door on the police officers, and the officers had no right to insist on entering. The officers did not possess a warrant; they were not in hot pursuit; defendant certainly did not consent; probable cause was lacking; and there were no grounds for utilizing the community caretaker or emergency aid exceptions to the constitutional warrant requirement. When the officers forced their way into defendant's home, they acted unlawfully – a fact that precludes a conviction of obstructing pursuant to N.J.S.A. 2C:29-1(a).[4]

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[3]The Law Division judge's findings do not reveal precisely when the announcement of an arrest occurred; I will assume it occurred after defendant closed the door but prior to the scuffle that ensued once the officers forced their way in.

[4]In my view, an affirmance of the obstructing conviction would be tantamount to adopting the approach specifically rejected in State v. Frankel, 179 N.J. 586, cert. denied, 543 U.S. 576, 125 S. Ct. 108, 160 L. Ed. 2d 128 (2004). In Frankel, the Court rejected "the State's request that we 'find, as a matter of law, that the receipt of a 9-1-1 open-line, abandoned or hang-up call alone'" gives police sufficient grounds to enter a home to investigate. Id. at 605. Here, it is suggested that the 9-1-1 call is buttressed by the presence of three vehicles in (continued)

Although there were factual disputes about the details of what followed once the officers entered, the version described by the Law Division judge reveals that defendant was unable to stand his ground in keeping the door closed on the officers.[5] The Law Division judge found the officers "push[ed] the door open" and a "scuffle inside the door happened." The officers

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(continued)
defendant's driveway and a bruise on defendant's hand. The three-vehicle argument, however, is a red herring because that circumstance does not reasonably or logically suggest the presence inside of one person for every vehicle outside the home. And the claim that defendant's hand had a bruise that suggested he had recently thrown a punch was neither found as a fact by the Law Division judge nor can be shown to be true. In short, there was no basis for the officers' entry other than the dropped 9-1-1 call, and the upholding of his conviction for obstruction on that singular basis would run counter to what the Court held in Frankel.

[5]It is well understood that the constant repetition of a story, not only from witnesses but from those examining a static record, may evoke different images of what may have actually occurred. See, e.g., Edith Wharton, Ethan Frome (1911) (observing, in the novel's opening sentence: "I had the story, bit by bit, from various people, and, as generally happens in such cases, each time it was a different story"). I have endeavored to base my description of events solely on the Law Division judge's findings and not on whatever testimony may support my conclusions about the issues presented. On the other hand, my colleagues have on occasion referred to witnesses' testimony that the Law Division judge never endorsed. For example, my colleagues have referred to the sergeant's testimony that defendant had a bruised hand "similar to a bruise resulting from a thrown punch." The transcript contains that testimony, but the Law Division judge, in observing that defendant had a bruised hand, did not find it was caused by or suggestive of a thrown punch. As later discussed in this opinion, the record demonstrably reveals that the bruise was nowhere near the place on defendant's hand that the sergeant claimed.

succeeded in grappling defendant to the ground, and, during this melee, the sergeant ended up on his own back but with his arms around defendant from behind. While defendant was restrained in this position, the other two officers repeatedly punched defendant in the face.

There is no evidence that defendant was an aggressor; indeed, the Law Division judge's findings strongly suggest that the officers were the aggressors. The Law Division judge found that defendant did not punch, strike or kick any of the officers at any time or that he threatened to do so.[6] There is no finding that defendant did anything other than attempt to protect himself from the onslaught.

Once defendant was fully restrained, the home was searched. The officers found nothing amiss.

The jail would not accept defendant until he was medically cleared. Defendant was taken to the hospital to be treated for his injuries. He ultimately spent the rest of the night in

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[6]As another example of the majority's departure from the Law Division's version of the events, the majority opinion states that defendant "head-butted" the sergeant. The Law Division judge made no such finding and, as noted above, concluded that defendant was not an aggressor. It cannot be seriously argued that this so-called "head-butting" was anything other than a consequence of defendant being punched in the face by one of the officers as the sergeant bear-hugged him from behind.

jail. Defendant was later examined by a flight surgeon and placed on "duty not involving flight" because of his injuries.

II

Defendant was charged with the disorderly persons offenses of simple assault (two counts), N.J.S.A. 2C:12-1(a)(1), and one count each of obstruction, N.J.S.A. 2C:29-1(a), and resisting arrest, N.J.S.A. 2C:29-2(a)(1). At the conclusion of a municipal trial, the judge convicted defendant of one of the simple assault charges,[7] as well as obstruction and resisting arrest.

Defendant appealed. The Law Division acquitted defendant of the assault charge, but convicted him of obstruction and resisting arrest. This court is unanimous in concluding that the obstruction conviction cannot stand, albeit for differing reasons. My colleagues also believe we should affirm the resisting-arrest conviction; I disagree.

I would reach a different result on the resisting-arrest conviction because: (a) the majority's view overlooks an individual's right to defend against a physically excessive

[7]On the assault charge, which was premised on the assertion that defendant head-butted the sergeant while being held by the sergeant on the floor, the municipal judge found defendant's head came into contact with the sergeant likely because the other officers were punching defendant in the face at the time.

arrest; (b) the majority's judgment disregards that the unlawful arrest in question occurred after an equally unlawful entry into defendant's home; and (c) unlike the majority, I am not willing to defer to the factfinder regarding the circumstances surrounding the arrest because I am "thoroughly satisfied" that the credibility findings are "clearly . . . mistaken" and "so plainly unwarranted that the interests of justice demand intervention and correction." State v. Johnson, 42 N.J. 146, 162 (1964).

A

To explain why I believe my colleagues have implicitly applied an incorrect legal principle in upholding defendant's resisting-arrest conviction, it is helpful to briefly observe the common law understanding of an individual's rights in this circumstance.

It was well-established in England, long before the adoption of our federal constitution, that it was not only lawful for an individual to resist an illegal arrest, but others — in defense of the important right to be free from illegal arrest and incarceration guaranteed by Magna Carta — could aid in that resistance. The Queen v. Tooley, 92 Eng. Rep. 349, 352 (1709) (holding that "if one be imprisoned upon an unlawful authority, it is a sufficient provocation to all people out of

compassion; much more where it is done under a colour of justice, and where the liberty of the subject is invaded, it is a provocation to all the subjects of England"). This same principle was imported here. Indeed, this Nation was born of the people's resistance and overthrow of English authority, and any attempt to unlawfully deprive an individual of freedom has always been anathema to deeply held American principles.

In any event, it is worth noting that, over a century ago, the highest court of the land recognized that if an "officer had no right to arrest, the other party might resist the illegal attempt to arrest him, using no more force than was absolutely necessary to repel the assault constituting the attempt to arrest." Bad Elk v. United States, 177 U.S. 529, 535, 20 S. Ct. 729, 731, 44 L. Ed. 874, 876 (1900). In 1965, when we rejected this common-law rule in State v. Koonce, 89 N.J. Super. 169, 184 (App. Div. 1965) — declaring that "[t]he concept of self-help" is "in decline" because it "is antisocial in an urbanized society," "potentially dangerous to all involved," and "no longer necessary because of the legal remedies available" — this new rule was decidedly in the minority. See Annotation, Modern Status of Rules as to Right to Forcefully Resist Illegal Arrest, 44 A.L.R.3d 1078 (1972). Now, it appears most states follow an approach similar to Koonce, although it is not universally

accepted and the extent to which an individual is required to submit to an unlawful arrest varies from state to state. See authorities cited in State v. Wiegmann, 714 A.2d 841, 849-50 (Md. 1998).

It suffices for present purposes to observe that our Supreme Court followed our departure from Bad Elk, five years after Koonce was decided, in State v. Mulvihill, 57 N.J. 151 (1970), and State v. Washington, 57 N.J. 160 (1970), both decided the same day. And the concept outlined in Koonce was later incorporated in Title 2C through the criminalization of resistance to even unlawful arrests. N.J.S.A. 2C:29-2(a), on which defendant stands convicted, expressly declares, with two limitations,[8] that "[i]t is not a defense to a prosecution under this subsection that the law enforcement officer was acting unlawfully in making the arrest."

Despite the statute's elimination of the lawfulness of an arrest as a critical factor in a resisting-arrest prosecution, which forms the basis for my colleagues' affirmance of defendant's conviction, that conclusion misapprehends other established legal principles not considered by the Law Division

[8]To convict an individual for resisting an unlawful arrest, the State must prove that the officer "was acting under color of his official authority" and that "the law enforcement officer announce[d] his intention to arrest prior to the resistance." N.J.S.A. 2C:29-2(a).

or municipal judges. That is, N.J.S.A. 2C:29-2(a) does not completely foreclose self-defense, as my colleagues apparently hold. When subjected to an unlawful arrest, an individual may resist with such reasonable force as necessary to prevent injury to himself or others; that is, in describing the limitations "on justifying necessity for use of force," the Legislature declared that "[t]he use of force is not justifiable . . . [t]o resist an arrest which the actor knows is being made by a peace officer in the performance of his duties, although the arrest is unlawful, unless the peace officer employs unlawful force to effect such arrest." N.J.S.A. 2C:3-4(b)(1)(a) (emphasis added).

As explained by Justice Francis for the Court in Mulvihill, this court's holding in Koonce – that "a private citizen may not use force to resist arrest by one he knows or has good reason to believe is an authorized police officer engaged in the performance of his duties, whether or not the arrest is illegal under the circumstances obtaining," Koonce, supra, 89 N.J. Super. at 184 – means that "in our State when an officer makes an arrest, whether or not that arrest is lawful, it is the duty of the citizen to submit and, in the event the arrest is illegal, to seek recourse in the courts for the invasion of his right to freedom," Mulvihill, supra, 57 N.J. at 155-56. In addition, when an individual refuses to submit to "an apparently

authorized arrest or other apparently lawful restraint by a police officer," then "the officer is not only justified in but has the duty of employing such force as is reasonably necessary to overcome the resistance and accomplish the arrest." Id. at 156.

Notwithstanding, the Court explained that these principles are "not dispositive in all cases of an arrestee's right to claim self-defense . . . ." Ibid. As the Court recognized, the individual's duty to "submit quietly without physical resistance . . . even though the arrest is illegal" can be redressed "through legal processes." Ibid. But "the rule permitting reasonable resistance to excessive force of the officer, whether the arrest is lawful or unlawful, is designed to protect a person's bodily integrity and health and so permits resort to self-defense." Id. at 156-57. That is, as the Court further explained:

> the law recognizes that liberty can be restored through legal processes but life or limb cannot be repaired in a courtroom. And so it holds that the reason for outlawing resistance to an unlawful arrest and requiring disputes over its legality to be resolved in the courts has no controlling application on the right to resist an officer's excessive force.
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> [Id. at 157 (emphasis added)]

The facts were never analyzed in light of these principles by either the original factfinder or the Law Division judge sitting de novo.[9] As a result, the findings we have been asked to review provide no illumination as to whether defendant acted in the manner left open to him by Mulvihill and N.J.S.A. 2C:3-4(b)(1)(a), in responding to the injustice of an illegal and excessively forceful arrest.

Despite the lack of such an analysis, the Law Division judge's findings leave little doubt that the three police officers were the aggressors. Defendant had every right to close the door to his home and the officers had no right to enter. The officers nevertheless forced their way in and, outnumbering defendant, aggressively attempted to place him under arrest through a misguided view of their authority. In this circumstance, defendant was entitled to at least defend himself from injury. If we are uncertain about the facts relating to self-defense, then we should remand for further clarification from the Law Division judge as to the meaning of his findings rather than, as I believe has been my colleagues' course, to reinterpret the evidence to fit their theory.

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[9]Indeed, those judges sustained the obstruction charge, thereby assuming the arrest was lawful and the officers' entry authorized, additional incorrect assumptions that colored their view of the events that followed.

B

In convicting defendant, the Law Division judge found and my colleagues agree that the illegality of defendant's arrest is irrelevant to the outcome of the resisting-arrest charge and the matter begins and ends with the fact that defendant did not peaceably succumb to an announced, albeit illegal, arrest. I believe this oversimplifies the troubling issues raised by this case, namely, the clear disregard of defendant's Fourth Amendment rights.[10] It is the fact that this event occurred in the home and not elsewhere that prompts my dissent.[11]

The Fourth Amendment guarantees "[t]he right of the people to be secure in their . . . houses," as does Article I, paragraph 7 of our own state constitution. "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed," United States v. U.S. Dist.

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[10]Because defendant has not raised it, there is no need to consider whether the application of N.J.S.A. 2C:29-2(a) to the resisting of an unlawful arrest within the home, following an unlawful entry into the home, may call into question the constitutionality of N.J.S.A. 2C:29-2(a) as applied here. Although not seeking a determination that the statute is constitutionally infirm in this respect, defendant does argue that the unconstitutional entry into defendant's home is meaningful in examining whether the resisting-arrest conviction may stand. I agree.

[11]That is, this case is entirely distinguishable from State v. Williams, 192 N.J. 1 (2007) and State v. Crawley, 187 N.J. 440 (2006), as Judge Waugh also observes in his concurring opinion.

Court, 407 U.S. 297, 313, 92 S. Ct. 2125, 2134, 32 L. Ed. 2d 752, 764 (1972); State v. Vargas, 213 N.J. 301, 312-14 (2013), and "[t]he sanctity of one's home is among our most cherished rights," Frankel, supra, 179 N.J. at 611.[12] This highly valued right rests on the ancient English adage that "a man's house is his castle" and "the poorest man may in his cottage bid defiance to all the forces of the Crown." Miller v. United States, 357 U.S. 301, 307, 78 S. Ct. 1190, 1194-95, 2 L. Ed. 2d 1332, 1337 (1958). Although not mentioned by my colleagues, "[t]he privacy interests of the home are entitled to the highest degree of respect and protection in the framework of our constitutional system," State v. Evers, 175 N.J. 355, 384 (2003), and, thus, the playing field, which my colleagues seem willing to cede to all unlawful police conduct, should tilt instead in favor of the individual when subjected to an illegal governmental invasion into the home. If that is not so, perhaps courts should stop referring to the sanctity of the home as one of our citizens' most cherished rights.

Defendant's alleged failure to submit to the officers' unlawful arrest in his home must be understood in this context. True, no lawyer was standing by to advise the officers of the

[12]Our state constitution provides even "greater protection . . . than the Fourth Amendment." State v. Walker, 213 N.J. 281, 289 (2013).

lawfulness of their conduct as these events rapidly occurred; my colleagues are deferential to the officers' plight in dealing with the circumstances as presented. But defendant was in no better position as events unfolded. More importantly, defendant's instinctive defense of himself and his home, in my view, was far more constitutionally firm – far more grounded on traditional American values – than the officers' decision to break through defendant's front door. My colleagues, however, have concluded otherwise, holding not only that an individual may not stand his ground in his own home and must instead peaceably submit to an unlawful arrest in the form of a physical assault that follows a forceful and unlawful entry into the home,[13] but also that the Fourth Amendment's sanctity for the individual's home must give way to the police, who, as a result of today's judgment, are apparently – and uniquely – placed above the law.[14]

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[13]Also, defendant was not required to retreat from his home rather than defend himself in this circumstance. N.J.S.A. 2C:3-4(b)(3) (declaring, as a general matter, that "a person employing protective force may estimate the necessity of using force when the force is used, without retreating, surrendering possession, doing any other act which he has no legal duty to do or abstaining from any lawful action"); see also N.J.S.A. 2C:3-6.

[14]My colleagues' view seems to be chiefly premised on the notion that courts should not "second-guess decisions made [by law enforcement officers] in good faith." Frankel, supra, 179 N.J.

(continued)

In my view, defendant had the right to reasonably resist this forceful and unlawful arrest. Just as Mulvihill and N.J.S.A. 2C:3-4(b)(1)(a) permit an individual to resist an officer's excessive use of force in attempting to affect an unlawful arrest, an individual has the right to resist an unlawful entry into the home – because that entry is, in and of itself, excessive in the eyes of the law. See Casselman v. State, 472 N.E.2d 1310, 1316 (Ind. App. 1985). Accordingly, defendant cannot be convicted – even deferring to the factual findings as mistakenly interpreted by my colleagues – of violating N.J.S.A. 2C:29-2(a) in these circumstances. Koonce and other cases of the era that signaled the end of the common law right to resist an unlawful arrest are based on the concern that a right to resist an unlawful arrest would invite anarchy. See, e.g., State v. Valentine, 935 P.2d 1294, 1304 (Wash. 1997). But, is there anything more anarchic than the sight of police wrongfully breaking into homes without cause in order to illegally arrest innocent citizens?

The principle implicitly endorsed by today's affirmance of defendant's resisting-arrest conviction – that an individual is

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(continued)
at 609. They are unwilling to similarly indulge defendant's instinctive attempt to defend himself and his home.

powerless to defend himself, his family or his home — encourages arrogant and lawless police conduct.

C

Our often mantra-like utterance of the standard of appellate review tends to lead to unquestioned deference to trial court fact findings. We must not, however, lose sight of the fact that this same standard permits rejection of findings when the reviewing court is "thoroughly satisfied" that the findings are "clearly . . . mistaken" and "so plainly unwarranted that the interests of justice demand intervention and correction." Johnson, supra, 42 N.J. at 162. I find this to be one of those instances.

The municipal judge found the police officers were credible and defendant was not because, as the municipal judge said, defendant was too "glib," having "too many ready explanations for obvious inappropriate behavior,[15] to explain away certain things that had occurred." However, in reaching those

[15]That is, the municipal judge based his credibility finding, at least in part, on what he believed was defendant's wrongful refusal to consent to a warrantless search or his closing of the door on the officers. The conclusion reached in Judge Alvarez's opinion, with which I agree, that defendant was entitled to refuse to consent to the officers' entry following the initial discussion between the sergeant and defendant, as well as Judge Waugh's conclusion that defendant had a right to refuse to consent to the officers' warrantless search, undermines the very ground upon which this credibility finding rested.

credibility determinations, to which the Law Division deferred, the municipal judge did not consider a few highly relevant matters that generate serious questions about the sergeant's credibility. See id. at 162 (recognizing that the sense of wrongness a reviewing court requires in declining to defer to trial court findings may arise from "obvious overlooking or under-evaluation of crucial evidence").

First, the sergeant testified that he continued to question defendant at the doorstep because he was troubled by the bruise on defendant's knuckle – a bruise that suggested defendant had recently landed a punch. The photographs admitted into evidence, however, demonstrate there was no bruise or abrasion on defendant's knuckles, only a bruise or abrasion at the base of his thumb – a fact that is hardly consistent with the landing of a punch. This fact, which strikes me as rather critical to the sergeant's credibility – because it was the officer's only observation that even remotely suggested the propriety of an emergency-aid entry into defendant's home – appears not to have been considered when the credibility findings were made.[16]

Second, the other two police officers conceded under oath that they repeatedly struck defendant in the face as the

[16]Faced with this inconvenient fact, the majority simple observes that the sergeant's inaccurate testimony about the bruise was "a minor detail" (slip op. at 13 n.2).

sergeant held defendant on the floor. The sergeant oddly made no mention of this in his report, arguably suggesting a desire to conceal at least some part of what occurred during these sorry events. This lack of candor in the police report was certainly germane to whether the sergeant was truthful in his testimony; it was not, however, considered when the credibility findings were made.

Thus, in one highly important respect – the location of the bruise on defendant's hand – the sergeant's testimony was not truthful, as demonstrated by the photographs in evidence. And, in another – the other officers' repeated punching of defendant during the arrest – the sergeant's filed report was less than forthcoming. Because it is critical to the resisting-arrest charge that the sergeant be found credible when he testified that he told defendant he was "under arrest" before the alleged resistance occurred,[17] those facts that called into question the sergeant's credibility should have been – but apparently were not – considered and weighed. Although a trier of fact could find the sergeant more credible than defendant notwithstanding the questionable portions of the sergeant's testimony, the trier of fact was nevertheless obligated to explain why that is so in

[17]Defendant denied that any officer announced he was under arrest. Without evidence of an announced arrest, defendant could not be convicted of resisting. See N.J.S.A. 2C:29-2(a).

the face of evidence suggesting otherwise. Because the municipal judge simply ignored those items that were damaging to the sergeant's credibility, the Law Division judge was not required to defer to that credibility finding, and, for the same reason, we are not obligated to defer to the Law Division judge's decision to defer to the municipal judge's credibility findings.

III

In the final analysis, I also disagree that the resisting-arrest conviction must be affirmed because I find it unconscionable that defendant could be convicted of resisting such an injustice. See Paul G. Chevigny, The Right to Resist Arrest, 78 Yale L.J. 1128, 1133-34 (1969) (noting that the right to resist an unlawful arrest "does not exist to encourage citizens to resist, but rather to protect those provoked into resistance by unlawful arrests," and "if his impulse to resist is provoked by arbitrary police behavior, it is fundamentally unfair to punish him for giving in to that impulse with measured resistance"). The officers lacked a legitimate basis to make an arrest or to enter defendant's home. Consequently, defendant was entitled to protect himself from this unwarranted and excessive governmental intrusion into his home; more simply put,

I think it is unjust to criminalize defendant's instinctive response to the officers' conduct.

IV

Lastly, I write to express my disapproval of and disagreement with my colleagues' decision to refrain from publishing in this case. The case undoubtedly meets many of the requirements for publication contained in Rule 1:36-2(d). Indeed, Rule 1:36-2(d) mandates publication, declaring that, when one of the requirements is met, the opinion(s) "shall be published" (emphasis added). The mandatory tenor of the Rule was undoubtedly a product of the significant consequence of non-publication. See Rule 1:36-3 (declaring that, when not published, an opinion of this court does not "constitute precedent" and is not "binding upon any court"). That consequence warrants a careful consideration of the guidelines contained in Rule 1:36-2(d) before relegating a decision to the vast underworld of unpublished opinions.

Notwithstanding my belief that Rule 1:36-2(d) compels publication in this case, Rule 1:36-2(a) states that "[o]pinions of the Appellate Division shall be published only upon the direction of the panel issuing the opinion." I interpret this Rule as requiring the approval of a majority of the members of the panel; as a result, my unshared view that the court's

opinions in this case should be published is insufficient to compel publication. That is, the Rule implicitly requires the approval of two panel members for publication, and I am alone in believing publication is warranted here. Because of the majority's contrary view, our decision will be binding only on the parties, and we will have left unsettled the troubling questions this case presented about a citizen's rights in these circumstances.

The panel's decision to decline publication is most unfortunate. To be sure, defendant was convicted of a disorderly persons offense and only minimal monetary sanctions were imposed, but this case is far from trivial. This important case exposes the great dangers of a freewheeling view of the "community caretaker" and "emergency aid" exceptions to the guarantees of the Fourth Amendment and Article I, paragraph 7 of our state constitution. When left unchecked, these exceptions have the potential to swallow up the warrant requirement of our federal and state constitutions. Although the officers had no right to enter Captain Reece's home following their brief discussion with defendant about the dropped 9-1-1 call, my colleagues find no impediment to the resisting-arrest conviction, an event that only occurred because of the officers' unlawful and excessive conduct. That defendant was only

convicted of disorderly persons offenses is irrelevant when compared to the important issues raised in this case. See State v. Lashinsky, 81 N.J. 1 (1979). The court's mission is not to simply decide the issues presented solely for the benefit of the parties but to provide illumination for others as to what the law requires and the constitution protects. I believe the majority has erred in part regarding the former and vastly underestimated the court's role as to the latter.

For these reasons, I cannot join in the affirmance of the resisting-arrest conviction or in my colleagues' decision to withhold publication in this matter.

To summarize, I concur in the reversal of the obstruction conviction but dissent from the affirmance of the resisting-arrest conviction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION