

No. A-1697-24

IN THE SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

STATE OF NEW JERSEY,

Appellee,

v.

TYREE I. DWYER,

Appellant

On Appeal from the
Superior Court of New Jersey, Criminal Division, Essex County
Indictment Nos. 2023-09-1913-I et al. (P23002807 et al.)
(Hons. Thomas A. Callahan, Jr., J.S.C., and Lori Ellen Grifa, J.S.C.)

Brief of Appellant Tyree I. Dwyer

Counsel for Appellant

Alex G. Leone (212572017)
LEONE LAW LLC
195 Maplewood Avenue, P.O. Box 1274
Maplewood, New Jersey 07040
alex@juvenilejusticeattorney.com
(908) 787-5581

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TABLE OF CONTENTS (BRIEF)

	<u>Page</u>
PRELIMINARY STATEMENT.....	6
FACTUAL BACKGROUND AND PROCEDURAL HISTORY	7
LEGAL ARGUMENT.....	12
I. N.J.S.A. 2C:35-14’S TEXT AND LEGISLATIVE HISTORY PROVE THAT ALLEGATIONS OF NON-VIOLENT CONSTRUCTIVE POSSESSION CANNOT BAR TRACK ONE CANDIDATES FROM RECOVERY COURT, AND THE RULE OF LENITY LEADS TO THE SAME CONCLUSION. (Raised below, <i>see, e.g.</i> , Da23).....	12
II. THE SENTENCING COURT ABUSED ITS DISCRETION BY, INTER ALIA, FAILING TO EXPLAIN CLEARLY WHY AN AGGRAVATING OR MITIGATING FACTOR PRESENTED BY THE PARTIES WAS FOUND OR REJECTED AND HOW THE FACTORS WERE BALANCED TO ARRIVE AT THE SENTENCE. (<i>no opportunity to raise below</i>).....	16
III. THE COURT ABUSED ITS DISCRETION BY REPEATEDLY RELYING ON AN IMPERISSIBLE BASIS AND CONSIDERING IRRELEVANT AND INAPPROPRIATE FACTORS. (<i>no opportunity to raise below</i>).....	19
CONCLUSION.....	22
APPENDIX.....	(Da1)

TABLE OF CONTENTS (APPENDIX)

<u>Document</u>	<u>Beginning Page</u>
Judgments of Conviction for Mr. Dwyer.....	Da1
P23002087 (January 7, 2025).....	Da1
P23009763 (January 7, 2025).....	Da4
P24001177 (January 7, 2025).....	Da8
Docket Entries in P23002807 (Indictment No. 2023-09-1913-I) (January 16, 2023 to July 25, 2024).....	Da11
Order and Opinion of the Honorable Thomas A. Callahan, Jr., J.S.C. (July 25, 2024).....	Da19
Mr. Dwyer’s Motion for Reconsideration (June 14, 2024)	Da23
Order of the Honorable Thomas A. Callahan, Jr., J.S.C. (June 5, 2024).....	Da24
Letter of Admission to Inpatient Substance Abuse Treatment Program (April 30, 2024).....	Da25
Mr. Dwyer’s Recovery Court Eligibility Appeal Motion (March 19, 2024)	Da26
Indictment No. 2024-6-1245, <i>State v. Tyree I. Dwyer et al.</i> (June 27, 2024).....	Da31
Indictment No. 2024-6-1246, <i>State v. Tyree I. Dwyer et al.</i> (June 27, 2024).....	Da43
Indictment No. 2024-4-725-I, <i>State v. Tyree I. Dwyer</i> (April 24, 2024).....	Da45
Indictment No. 2023-9-1913-I, <i>State v. Tyree I. Dwyer et al.</i> (September 29, 2023).....	Da48
Indictment No. 2023-9-1918-I, <i>State v. Tyree I. Dwyer</i> (September 29, 2023).....	Da62

Indictment No. 2023-9-1921-I, *State v. Tyree I. Dwyer*
(September 29, 2023).....Da64

Complaint No. 0714-W-2024-1716, *State v. Tyree I. Dwyer*
(February 4, 2024).....Da66

Complaint No. 0714-W-2023-15199, *State v. Tyree I. Dwyer*
(November 16, 2023).....Da73

Complaint No. 0714-W-2023-3512, *State v. Tyree I. Dwyer*
(March 21, 2023).....Da89

Complaint No. 0714-S-2023-696, *State v. Tyree I. Dwyer*
(January 16, 2023).....Da102

Complaint No. 0714-W-2019-9823, *State v. Tyree I. Dwyer*
(July 25, 2019).....Da109

Complaint No. 0714-W-2019-1169, *State v. Tyree I. Dwyer*
(January 23, 2019).....Da122

TABLE OF JUDGMENTS, ORDERS, AND RULINGS

<u>Document</u>	<u>Beginning Page</u>
Order of the Honorable Lori Ellen Grifa, J.S.C., (January 7, 2025).....	Da1
Order of the Honorable Lori Ellen Grifa, J.S.C., (January 7, 2025).....	Da4
Order of the Honorable Lori Ellen Grifa, J.S.C., (January 7, 2025).....	Da8
Order and Opinion of the Honorable Thomas A. Callahan, Jr., J.S.C. (July 25, 2024).....	Da19
Order of the Honorable Thomas A. Callahan, Jr., J.S.C. (June 5, 2024).....	Da24

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Bosland v. Warnock Dodge, Inc.</i> , 197 N.J. 543 (2009)	12
<i>Posey v. Bordentown Sewerage</i> , 171 N.J. 172 (2002)	13, 16
<i>State v. Bell</i> , 250 N.J. 519 (2022)	13, 15
<i>State v. Bolvito</i> , 217 N.J. 221 (2014)	18, 19
<i>State v. Cambrelen</i> , 473 N.J. Super. 70 (App. Div. 2022)	18, 19, 20
<i>See State v. Case</i> , 220 N.J. 49 (2014)	16, 17
<i>State v. Des Marets</i> , 92 N.J. 62 (1983)	13, 14
<i>State v. Figaro</i> , 462 N.J. Super. 564, 571 (App. Div. 2020)	13
<i>State v. Gomes</i> , 253 N.J. 6 (2023)	14, 15
<i>State v. Harris</i> , 466 N.J. Super. 502 (App. Div. 2021)	passim
<i>State v. Hyland</i> , 238 N.J. 135 (2019)	13, 14, 22
<i>State v. McFarlane</i> , 224 N.J. 458 (2016)	17, 19
<i>State v. Regis</i> , 208 N.J. 439 (2011)	15
<i>State v. S.N.</i> , 231 N.J. 497 (2018)	passim
<i>State v. Spivey</i> , 179 N.J. 229 (2004)	14
<i>State v. Torres</i> , 246 N.J. 246 (2021)	16
<i>State v. Trinidad</i> , 241 N.J. 425 (2020)	16, 17
<u>Statutes</u>	<u>Page(s)</u>
N.J.S.A. 2C:35-10	9
N.J.S.A. 2C:35-14	passim
N.J.S.A. 2C:39-5	9
N.J.S.A. 2C:44-1	9, 11, 16

PRELIMINARY STATEMENT

This Appeal presents “novel statutory interpretation issues” rooted in the “cornerstone for New Jersey’s [Recovery] Court Program:” Under N.J.S.A. 2C:35-14, a Track One candidate is eligible for Recovery Court only if he “did not possess a firearm at the time of the present offense and did not possess a firearm at the time of any pending criminal charge.” There is no dispute that the statute does not define “possess a firearm” and can be disambiguated to include *actual* possession or *constructive* possession. Citing only Model Jury Instructions and a case interpreting the Graves Act, the Court below rejected Mr. Dwyer’s interpretation of N.J.S.A. 2C:35-14a(5), ruled “that possession under 2C:35-14(a)(5) includes both actual and constructive possession,” and denied Mr. Dwyer’s Recovery Court application. Stated simply, that ruling runs directly contrary to the statutory text and “all sources of legislative intent” and, ultimately, the rule of lenity. Mr. Dwyer respectfully requests that this Court correct that grave error of statutory interpretation that will affect thousands, if not millions, of Recovery Court applicants and permit his Recovery Court application to proceed on “remand . . . for reconsideration” and “fact-finding.” Alternatively, Mr. Dwyer raises two multifaceted arguments that he respectfully submits require him to be accorded a new sentencing hearing.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Mr. Dwyer is a 27-year-old young man with no violent criminal history.¹ Prior to his incarceration,² Mr. Dwyer was enrolled at the National Career Institute pursuing education in HVAC technology.

In two cases alleging “present offense[s],” *see* N.J.S.A. 2C:35-14a(5), the State charged Mr. Dwyer with firearm possession based solely on a theory of constructive possession: It is uncontested that he did not actually “possess a firearm at the time of any pending criminal charge;” and there is no evidence Mr. Dwyer touched any weapon “at the time of [any] present offense.” *See* N.J.S.A. 2C:35-14a(5). For instance, regarding Indictment 2024-6-1245-I, the Superior Court found with respect to a weapon that was hidden in a storage compartment in a co-defendant’s vehicle: “[T]he weight of the evidence against [Mr. Dwyer] is noticeably weak and . . . much of the evidence proffered by the State in support of the motion to detain points to an alternative offender.” (*See* Da 28-29). Similarly, regarding Indictment 2023-9-1913-I, weapons that had no prior connection to Mr.

¹ Mr. Dwyer’s minimal history of indictable convictions includes two CDS-related offenses and a non-violent weapon-possession offense.

² On February 16, 2024, Mr. Dwyer consented to detention without prejudice as he and his family worked to enroll him in health insurance and identify an inpatient substance abuse treatment facility in New Jersey. *See, e.g., State v. Harris*, 466 N.J. Super. 502, 554-55 (App. Div. 2021). Mr. Dwyer was admitted to an inpatient substance abuse treatment program (*see* Da25) but the court below did not grant his request to be released to that program to begin treatment.

Dwyer were hidden among other persons' property in other persons' apartment, including on "the roof" where another person "toss[ed]" a weapon without Mr. Dwyer's knowledge, on top of the kitchen cabinets in someone else's kitchen, and "next to an air mattress" where someone else slept and Mr. Dwyer had never been.

As described below, Mr. Dwyer ultimately took responsibility for constructive firearm possession under Indictment 2024-6-1245-I (*see* Da1-3), and the other Indictment was dismissed as part of the plea deal. The State's other charges against Mr. Dwyer included a variety of offenses; all of them were ultimately dismissed except two CDS possession charges. (*See* Da4-10).

On February 5, 2024, Mr. Dwyer filed a complete and timely Application to Recovery Court and Records Release Authorization, which noted Mr. Dwyer's having received counseling treatment for substance abuse issues, and provided the name and address of a medical provider. Mr. Dwyer has consistently argued in connection with his Recovery Court application that he "meet[s] all the prerequisites for special probation set forth in N.J.S.A. 2C:35-14." *See State v. Harris*, 466 N.J. Super. 502, 523 (App. Div. 2021).³

³ Mr. Dwyer was a "Track One candidate" for Recovery Court because certain "present offense(s)" (non-violent weapon offenses) would, if proven, generally require a "mandatory term of parole ineligibility." *See Harris*, 466 N.J. Super. at 551.

On February 29, 2024, the State provided a “Recovery Court Rejection Letter” that “parrot[ed] [legalese] language, and present[ed] bare assertions regarding [Mr. Dwyer]’s amenability to” Recovery Court. *See, e.g., State v. Roseman*, 221 N.J. 611, 627 (2015). On March 19, 2024, Mr. Dwyer filed a motion appealing the State’s “Recovery Court Rejection Letter.” (Da26.) On June 5, 2024, the court below denied Mr. Dwyer’s motion after oral argument. (*See* Da24.) On June 14, 2024, Mr. Dwyer moved for reconsideration, which was denied on July 25, 2024 (*see* Da19-22). Mr. Dwyer moved for leave to appeal on this issue, which was denied.

On November 15, 2024, Mr. Dwyer reached a plea agreement to take responsibility for two counts of possession of cocaine, N.J.S.A. 2C:35-10a(1), and one count of constructive handgun possession, N.J.S.A. 2C:39-5b(1); the State would recommend six years, with 42 months of parole ineligibility, on the handgun charge and “five years flat” on the possession charges, all concurrently. (*See* Trans. 8:6-23).⁴ On January 7, 2025, Mr. Dwyer attended a sentencing at which he asked the Court to “impose a 5-year sentence with 42 months of parole ineligibility to run concurrent to the other two 5-year terms” (Trans. 4:13-15) and to find several mitigating factors including factors (1) and (2) of N.J.S.A. 2C:44-1b: “The defendant’s conduct neither caused nor threatened serious harm; [and] (2) The

⁴ There is one volume for this Transcript of the January 7, 2025 proceeding. *See R. 2:6-8.*

defendant did not contemplate that the defendant's conduct would cause or threaten serious harm." (*See* Trans. 4:3-20:4).

In support of a finding on those factors, Mr. Dwyer observed with respect to the handgun offense that there was "no allegation that it was used at any point or that the gentleman even touched it at any point, let alone threaten someone with it or caused harm with it or that anyone felt threatened by it." (Trans. 7:10-13). With respect to the other charges, the Court suggested that Mr. Dwyer's CDS possession convictions were indicative of "being engaged in the drug trade," and thus "threaten[ing] serious harm," and Mr. Dwyer clarified that "the two offenses that the gentleman did take responsibility for under the 725 and 1245 dockets, do not involve distribution, they are just possession." (Trans. 7:72-8:7). Mr. Dwyer also "respectfully submit[ted] that the allegations that related to other charges that are going to be dismissed or that are dismissed as part of this deal . . . cannot be used against the gentleman[] constitutional[ly]" because "the gentleman's presumption of innocence does remain intact on them." (Trans. 8:12-15 & 9:18-24). Further, Mr. Dwyer reiterated, as documented by his Recovery Court application and appeal, that he "did suffer from substance abuse issues . . . that do explain why he was in possession of small amounts of drugs on these occasions, and would explain . . .

why the gentleman was in an area where he felt he might have need to have access to a handgun,” even if he never touched it. (Trans. 11:5-10).⁵

In sum, the Court “reject[ed] all of the mitigating factors that the defendant has provided here” and “f[ound] no mitigation.” (Trans. 32:11-12). After sua sponte asking the State, “[W]hy wouldn’t I consider aggravating factor number 1?” and “What about factor 5?” the Court found aggravating factors (1), (3), (5), (6), and (9). (Trans. 23:15 & 32:13-20). Other than repeatedly using unproven allegations against Mr. Dwyer—including referencing “six additional Indictments,” which were dismissed as part of the plea deal (Trans. 14:17-15:15)⁶—the Court did not provide any “reasons for imposing such sentence including findings pursuant to the criteria for withholding or imposing imprisonment or fines under N.J.S.A. 2C:44-1 to 2C:44-3.” *See R. 3:21-4(h)*.

The Court then imposed the custodial “term of six (6) years with forty two (42) months of parole ineligibility pursuant to the Graves Act,” and the two concurrent five-year terms (*see* Da1-10), and Mr. Dwyer timely appealed.

⁵ Mr. Dwyer also observed that he submitted “four mitigating letters” and a letter “regarding the substance abuse treatment program the gentleman wanted to attend” for the Court’s consideration at sentencing. (*See* Trans. 17:16-19).

⁶ The Court even suggested these dismissed, unproven allegations show “he did reoffend.” (*See* Trans. 16:18)

LEGAL ARGUMENT

I. N.J.S.A. 2C:35-14’S TEXT AND LEGISLATIVE HISTORY PROVE THAT ALLEGATIONS OF NON-VIOLENT CONSTRUCTIVE POSSESSION CANNOT BAR TRACK ONE CANDIDATES FROM RECOVERY COURT, AND THE RULE OF LENITY LEADS TO THE SAME CONCLUSION. (Raised below, *see, e.g.*, Da23)

This Court “review[s] a . . . court’s interpretation of the relevant statutes and the Drug Court Manual de novo.” *See State v. Harris*, 466 N.J. Super. 502, 553 (App. Div. 2021). Here, Mr. Dwyer respectfully submits that on several levels the court below erred in interpreting N.J.S.A. 2C:35-14a(5)’s “possess a firearm” to include mere constructive possession of a firearm, and so Mr. Dwyer should be permitted to withdraw his pleas and pursue a Recovery Court application on remand.

“Our task in statutory interpretation is to determine and effectuate the Legislature’s intent.” *See, e.g., Bosland v. Warnock Dodge, Inc.*, 197 N.J. 543, 553 (2009). As a general matter, precedential caselaw has repeatedly reaffirmed that the Recovery Court statutory framework and its amendments reflect the Legislature’s “incentive and confidence to amend N.J.S.A. 2C:35-14 to *expand the circumstances* when sentencing courts may eschew imprisonment in favor of rehabilitative treatment.” *See, e.g., Harris*, 466 N.J. Super. at 531 (emphasis added). The Legislature’s successive amendments of the Recovery Court statute demonstrate “an effort ‘to permit additional offenders who may benefit from the [Recovery Court] program to be diverted into the program *instead of being sentenced to a term of*

incarceration.” See, e.g., *Hyland*, 238 N.J. at 145 (quoting S. Budget & Appropriations Comm. Statement to S. 881 1 (L. 2012, c. 23) (emphases added)). Some “groundbreaking legislative revisions” have gone “*much further . . . in broadening* the reach of the [Recovery] Court program.” See, e.g., *Harris*, 466 N.J. Super. at 531. This Court has even “repeat[edly]” observed that “the Legislature has moved *inexorably* toward expanding” access to Recovery Court. See, e.g., *Harris*, N.J. Super. at 531; *State v. Figaro*, 462 N.J. Super. 564, 571 (App. Div. 2020). Those Legislative actions and their corresponding acknowledgement by this Court reflect “[t]he proven success of the [Recovery] Court program and the broad recognition by all three branches that it promotes public safety.” See, e.g., *Harris*, 466 N.J. Super. at 531; see also, e.g., Eric Kiefer, *Essex County ‘Recovery Court’ Celebrates Victories Over Addiction*, PATCH (Aug. 8, 2024, 7:33 a.m.).

Within that “inexorable” context, the Legislature did not specify in N.J.S.A. 2C:35-14 or any Recovery Court statute that “possess[ing] a firearm” includes mere constructive “possession”⁷ of a firearm. See N.J.S.A. 2C:35-14a(5); see also, e.g., *State v. Bell*, 250 N.J. 519, 523 (2022) (relying on the “well-settled principle of statutory construction that looks to a statute’s plain language as the best indicator of

⁷ The concept of constructive possession is a “legal fiction,” see, e.g., *Posey v. Bordentown Sewerage*, 171 N.J. 172, 184 (2002) (discussing the “legal fiction of constructive possession”); *State v. Schmidt*, 110 N.J. 258, 269 (1988) (same), and itself must be interpreted narrowly, see, e.g., *State v. Des Marets*, 92 N.J. 62, 84 (1983) (noting “the common law rule of strict construction of criminal laws”).

legislative intent”). Although in the Graves Act statutory framework actual and constructive possession are generally treated similarly, there are nonetheless different considerations that apply to each kind of possession, *see, e.g., State v. Spivey*, 179 N.J. 229, 239 (2004) (“For example, a person [in New Jersey] could constructively possess . . . a hunting rifle in a California home.”), as there are also clearly distinct purposes that underlie each statutory framework, *see, e.g., State v. Des Marets*, 92 N.J. 62, 72-73 (1983) (discussing the Legislature’s “very specific means” and “confirm[ing] the obvious intent of the Graves Act to deter the use and possession of firearms by criminals for the purpose of reducing the number of persons killed or injured by such weapons”). Here, the Legislature’s successive amendments of the Recovery Court statute demonstrate “an effort ‘to permit additional offenders who may benefit from the [Recovery Court] program to be diverted into the program *instead of being sentenced to a term of incarceration.*’” *See, e.g., Hyland*, 238 N.J. at 145 (quoting S. Budget & Appropriations Comm. Statement to S. 881 1 (L. 2012, c. 23) (emphases added)).

“When interpreting different statutory provisions, we are obligated to make every effort to harmonize them, even if they are in apparent conflict.” *See State v. Gomes*, 253 N.J. 6, 15 (2023). This Court can do so cleanly here by correctly recognizing the Legislature’s intent to “expand the circumstances when sentencing courts may eschew imprisonment in favor of rehabilitative treatment,” *see, e.g.,*

Harris, 466 N.J. Super. at 531 (emphasis added), and interpreting N.J.S.A. 2C:35-14a(5)'s nondescript "possess a firearm" accordingly. *See, e.g., Gomes*, 253 N.J. at 31 (requiring courts "harmoniz[e] statutes to determine an overarching consistent and logical construction that carries out manifest legislative intent").

"Finally, this interpretation of [N.J.S.A. 2C:35-14a(5)] is in harmony with the doctrine of lenity." *See, e.g., Bell*, 250 N.J. 519, 523 (2022). "[L]enity is an important principle of statutory construction; if a statutory ambiguity cannot be resolved by analysis of the relevant text and the use of extrinsic aids, the rule requires that the ambiguity be resolved in favor of the defendant." *State v. Regis*, 208 N.J. 439, 451 (2011). N.J.S.A. 2C:35-14a(5)'s reference to "possess" without specification is "at best, ambiguous, yielding two possible interpretations." *See, e.g., State v. Gelman*, 195 N.J. 475, 480 (2008). Although here Mr. Dwyer respectfully submits that "the relevant text and . . . extrinsic aids" like Legislative history directly support his interpretation of N.J.S.A. 2C:35-14a(5) and resolve this issue, *see id.*, any remaining "ambiguity cannot inure to the benefit of the State." *See State v. Alexander*, 136 N.J. 563, 573 (1994). In *State v. Sein*, for instance, the Supreme Court of New Jersey ruled that suddenly "snatching" a purse, even if in some sense literally a "use of force upon another," was not "force upon another" in the sense required for robbery. *See, e.g.,* 124 N.J. 209, 218 (1991). Any "reasonable doubt" regarding the extent of N.J.S.A.'s 2C:35-14a(5)'s nondescript "possess a firearm"

must similarly be “decided in favor of [Mr. Dwyer as he is] subjected to a criminal statute.” *See, e.g., State v. D.A.*, 191 N.J. 158, 164 (2007) (quoting 3 *Sutherland Statutory Construction* § 59.3 (6th ed. 2001)).

Accordingly, to “effectuate the Legislature’s intent,” thousands if not millions of people should not be excluded from Recovery Court merely for constructively “possessing” firearms in terms of a “legal fiction.” *See, e.g., Bosland*, 197 N.J. at 553; *Posey*, 171 N.J. at 184; *Schmidt*, 110 N.J. at 269. Mr. Dwyer respectfully submits that this Court should correct the lower court’s error and permit his Recovery Court application to proceed on remand.

II. THE SENTENCING COURT ABUSED ITS DISCRETION BY, INTER ALIA, FAILING TO EXPLAIN CLEARLY WHY AN AGGRAVATING OR MITIGATING FACTOR PRESENTED BY THE PARTIES WAS FOUND OR REJECTED AND HOW THE FACTORS WERE BALANCED TO ARRIVE AT THE SENTENCE.
(no opportunity to raise below)

This Court reviews sentencing for abuse of discretion, *see State v. Torres*, 246 N.J. 246, 272 (2021), but review is “deferential” or “limited” only if “the trial judge follows the Code and the basic precepts that channel sentencing discretion,” *see State v. Trinidad*, 241 N.J. 425, 453 (2020). For instance, Rule 3:21-4(h) requires that the sentencing court provide “reasons for imposing such sentence including findings pursuant to the criteria for withholding or imposing imprisonment or fines under N.J.S.A. 2C:44-1 to 2C:44-3;” and binding precedent requires the sentencing court “to explain clearly why an aggravating or mitigating factor presented by the

parties was found or rejected and how the factors were balanced to arrive at the sentence.” *See State v. Case*, 220 N.J. 49, 66 (2014).

Here, for two main reasons, Mr. Dwyer respectfully submits that remand for resentencing is required.⁸ First, “the trial judge [did not] follow[] the Code and the basic precepts that channel sentencing discretion.” *See Trinidad*, 241 N.J. at 453. The Court declared with no reference to the record: “Mitigating factors. I reject the defense’s argument that there are mitigating factors for the defendant’s conduct.” (Trans. 31:12-14 & 32:11-12). Thus the court’s sentencing decision “merely enumerate[d]” the factors, at best, and “forgoes a qualitative analysis,” providing “little insight into the sentencing decision.” *See Case*, 220 N.J. at 65. The Court committed the same error with respect to aggravating factors: “I find aggravating factors. I find factor 1B, 3, 5B, 6 . . . And 9.” (Trans. 32:13-15); *see Case*, 220 N.J. at 65. The Court never provided “an explicit and full statement of aggravating and mitigating factors and how they are weighed and balanced.” *See State v. McFarlane*, 224 N.J. 458, 466 (2016). The Court also failed to distinguish which factors it was finding with respect to which offenses. *See id.* Accordingly, Mr. Dwyer respectfully submits that remand for resentencing is appropriate for the lower court to “explain and make a thorough record of their findings to ensure fairness and facilitate

⁸ For the reasons provided above regarding interpretation of N.J.S.A. 2C:35-14, reversal is required, and Mr. Dwyer should be permitted to withdraw his pleas. Accordingly, these arguments regarding resentencing are offered in the alternative.

review.” *See State v. Comer*, 249 N.J. 359, 404 (2022); *State v. Fuentes*, 217 N.J. 57, 74 (2014) (“A clear and detailed statement of reasons is thus a crucial component of the process conducted by the sentencing court, and a prerequisite to effective appellate review.”).

Second, the Court made findings “not based upon competent credible evidence in the record.” *See State v. Bolvito*, 217 N.J. 221, 228 (2014). Based on dismissed, unproven allegations, the Court suggested that Mr. Dwyer was “being engaged in the drug trade,” and thus “threaten[ing] serious harm,” even though “the two offenses that the gentleman did take responsibility for under the 725 and 1245 dockets, do not involve distribution[;] they are just possession.” (*See Trans. 7:25-8:7*). This error apparently led the Court not to find mitigating factors (1) and (2)—and to find aggravating factors (1) and (5) on all three charges, despite there being not a shred of evidence suggesting any “organized criminal activity” or “especially heinous, cruel, or depraved manner” in any respect.⁹ Further, the Court considered Mr. Dwyer’s “six additional Indictments,” which were dismissed as part of the plea deal, as evidence of “risk he’s going to reoffend” (*Trans. 14:17-15:15*). These errors straightforwardly violated the sentencing rules, *see Bolvito*, 217 N.J. at 228, as well as the presumption of innocence, *see State v. Cambrelen*, 473 N.J. Super. 70, 85

⁹ The Judgments of Conviction, apparently erroneously, suggest the Court found one mitigating factor. (*See Trans. 32:11-12* (“reject[ing] all of the mitigating factors that the defendant has provided here” and “find[ing] no mitigation”)).

(App. Div. 2022) (acknowledging that “allegations” are “unproven” and constitutionally indistinguishable from “acquitted conduct”). The Court’s own Presentence Report includes a Disclaimer acknowledging this common sense: “This summary of the State’s Allegations includes descriptions of charges of which the defendant may not have been found guilty by a jury or may not have pled guilty to. No inference of guilt or wrongdoing should be drawn from dismissed charges.” (*See, e.g.,* Trans 9:22-24 (“[I]t would violate the constitution to use acquitted conduct or dismissed conduct against the gentleman at this or any stage.” (citing *Cambrelen*)).

“Proper sentencing . . . requires an explicit and full statement of aggravating and mitigating factors and how they are weighed and balanced.” *See McFarlane*, 224 N.J. at 466. Here, the sentencing court did not come close to complying with that rule and made numerous clear errors. *See Bolvito*, 217 N.J. at 228. Accordingly, Mr. Dwyer respectfully submits that reversal and remand for “[a] clear and detailed statement of reasons” is required. *See Fuentes*, 217 N.J. at 74.

III. THE COURT ABUSED ITS DISCRETION BY REPEATEDLY RELYING ON AN IMPERISSIBLE BASIS AND CONSIDERING IRRELEVANT AND INAPPROPRIATE FACTORS.

(no opportunity to raise below)

An abuse of discretion is “relying on an impermissible basis,” “relying upon irrelevant or inappropriate factors,” “failing to consider all relevant factors,” or “making a clear error in judgment.” *See State v. S.N.*, 231 N.J. 497, 500 (2018).

Here, the sentencing court repeatedly relied on an impermissible basis and considered irrelevant and inappropriate factors.

A leading example of these errors is the Court's repeated reliance on dismissed, unproven allegations against Mr. Dwyer: Over Mr. Dwyer's express objections, the Court relied on "six indictments that your client has collected over basically a two-year period." (*See* Trans. 8:16-21 & 14:21-15:4; *see also id.* 24:11 (referencing "his number of arrests")). *To be clear, those "indictments" were dismissed as part of the plea deal and the allegations underlying them were never proven. See Cambrelen*, 473 N.J. Super. at 85 (acknowledging that "allegations" are "unproven" and constitutionally indistinguishable from "acquitted conduct"). Accordingly, even if "relevant" in some sense, relying on the dismissed, unproven allegations to disadvantage Mr. Dwyer at sentencing was straightforwardly "impermissible." *See id.*; *S.N.*, 231 N.J. at 500.

In addition, in connection with its sua sponte interest in "aggravating factor number 1," the court confusingly suggested that there being "no allegation or suggestion made by the defense that he was living [where he was arrested]," and because he "just happened to be . . . merely present," meant the court can find "aggravating factor number 1"—a "clear error in judgment" with no factual or legal basis. *See id.*; (Trans. 22:7-14). Similarly, the court sua sponte expressed interest in "factor five," asserted with zero legal or factual basis that "the nature of the

[unspecified] crime requires organized activities,” and relied on unspecified “proofs based on sworn affidavits that there would be guns and drugs found” in the place where Mr. Dwyer was arrested, with no explanation of how Mr. Dwyer was even arguably involved in any organized criminal activity at any time. (*See* Trans 23:15-24:7). There is zero basis for either aggravating factor: These errors constituted a mix of consideration of irrelevant and inappropriate factors as well as clear errors in judgment. *See S.N.*, 231 N.J. at 500.

The sentencing court also arguably evidenced hostility to Mr. Dwyer’s right to be heard in accordance with due process: When counsel politely asked toward the end of the hearing, “Judge, may I just briefly just address a couple things?” the court bristled, responding, “I’m sorry, why would I allow to continue to speak?” and “[W]hy would I allow you to make an additional record, sir?” (*See* Trans. 39:18-40:6). (Mr. Dwyer went on to clarify confusion resulting from the Court suggesting that there are “residual elements of this case still pending” despite resolution with sentencing. (*See* Trans. 27:2-3)). And although not substantial on its own, in this context it is noteworthy that the court pressured counsel “to take your coat off,” even though he was “comfortable” wearing it during January; the court then remarked that counsel “look[ed] like a pilot . . . circa 1944.” (Trans. 4:18-5:10). Consideration of counsel’s winter attire was an irrelevant or inappropriate, and suggesting Mr. Dwyer

did not have the right to briefly address the Court on issues remaining after sentencing was an additional “clear error in judgment.” *See S.N.*, 231 N.J. at 500.

Accordingly, the Court abused its discretion in numerous respects and remand for resentencing is required.

CONCLUSION

Mr. Dwyer respectfully requests that, in light of the text, legislative history, and rule of lenity, this Court clarify the proper interpretation of N.J.S.A. 2C:35-14a(5), permit Mr. Dwyer to withdraw his pleas, and “remand . . . for reconsideration” of a Recovery Court application and “fact-finding.” *See, e.g., Harris*, 466 N.J. Super. at 554-56; *Hyland*, 238 N.J. at 147.

Mr. Dwyer also respectfully requests that the Court alternatively reverse and remand for a new sentencing hearing.

* * *

Respectfully submitted,
/s/ Alex G. Leone
Alex G. Leone (212572017)
LEONE LAW LLC
195 Maplewood Avenue
Suite 1, P.O. Box 1274
Maplewood, New Jersey 07040
alex@juvenilejusticeattorney.com
(908) 787-5581

Dated: May 2, 2025

OFFICE OF THE ESSEX COUNTY PROSECUTOR

THEODORE N. STEPHENS, II
ESSEX COUNTY PROSECUTOR

ESSEX COUNTY VETERANS COURTHOUSE, NEWARK, NEW JERSEY 07102

Tel: (973) 621-4700

Fax: (973) 621-5697



ALEXANDER B. ALBU
FIRST ASSISTANT PROSECUTOR

MITCHELL G. McGUIRE III
CHIEF OF DETECTIVES

Hannah Kurt – No. 279742018
Assistant Prosecutor
Appellate Section
Of Counsel and on the Brief

July 7, 2025

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

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

Re: State of New Jersey (Plaintiff-Respondent) v.
Tyree I. Dwyer (Defendant-Appellant)
Docket No. A-1697-24

Criminal Action: On Appeal from a Judgment of Conviction, entered in the Superior Court of New Jersey, Law Division, Essex County.

Sat Below: Hon. Lori E. Grifa, J.S.C.

Honorable Judges:

Pursuant to Rule 2:6-2(b) this letter brief is submitted on behalf of the State.

Table of Contents

Counter-Statement of Procedural History and Facts 1

Legal Argument 3

Point I

 In the context of the Code, and thus N.J.S.A. 2C:35-14, “possession” includes both actual and constructive possession 4

Point II

 The sentencing court properly explained its reasons for accepting or rejecting presented mitigating and aggravating factors 7

Point III

 The sentencing court relied on proper competent credible evidence in the record 13

Conclusion 16

Counter-Statement of Procedural History and Facts¹

A search warrant was issued for 14 Harding Terrace on March 21, 2023, and officers found three handguns, one with an extended magazine, all with hollow-point live rounds. (Da99). Tyree Dwyer (“defendant”), along with other individuals, was in the apartment at the time of the search. (Da99). During sentencing, the State supplied, “[t]his was a stash house, there were drug deals being made out of that house which is why a search warrant was in fact being executed on that house.” (T23:7-12).²

Defendant applied to Recovery Court and a hearing was held on June 5, 2024, on his legal eligibility. (Da20). The court ultimately denied defendant’s motion on the grounds that N.J.S.A. 2C:35-14(a)(5) statutorily barred defendant from special probation. (Da20).

Defendant then filed a motion for reconsideration which was also denied on July 25, 2024. (Da20-22). Defendant moved for leave to appeal the trial court’s decision on August 15, 2024. This Court denied defendant’s motion on September 5, 2024, and the Supreme Court likewise denied defendant’s following motion for leave to appeal on November 12, 2024. (Pa 1-2).

¹ Because these are intertwined, the State has combined them for the Court’s convenience

² “T” refers to the transcript dated January 7, 2025

“Da” refers to defendant’s appendix

“Pa” refers to the State’s appendix

After lengthy negotiations, defendant pled guilty on November 18, 2024, to second-degree unlawful possession of a weapon, and two counts of third-degree possession of CDS stemming from three separate indictments for a recommended aggregate sentence of six years in state prison with 42 months of parole ineligibility. (T25:17-27-1). Defendant was sentenced pursuant to the plea agreement on January 7, 2025. (T33:13-36:3).

Legal Argument

Contrary to defendant's assertion, this is not a novel legal issue that requires this Court's intervention. Defendant was charged with, and then pled guilty to, second-degree unlawful possession of a weapon, along with further drug charges. (T25:17-27-1). He was therefore statutorily barred from Recovery Court. See N.J.S.A. 2C:35-14(a)(5) (requiring for admission to Recovery Court a finding that "the person did not possess a firearm at the time of the present offense and did not possess a firearm at the time of any pending charges....").

Defendant's main claim is that his possession was at most "constructive" and therefore the statute's use of the term "possession" does not apply to him, but only those who actually (i.e. not constructively) possessed a firearm. The law draws no such distinction, and it has been long-accepted that "possession" in the context of the Code includes both active and constructive possession.

Additionally, the trial court properly sentenced defendant in accordance with his plea agreement, and defendant's sentence is neither excessive nor should it shock the judicial conscience. The court properly considered and balanced the aggravating and mitigating factors, which was thoroughly laid out on the record.

Point I

In the context of the Code, and thus N.J.S.A. 2C:35-14, “possession” includes both actual and constructive possession.

Defendant argues this Court should narrowly interpret the definition of “possession” in N.J.S.A. 2C:35-14(a)(5) to exclude constructive possession, limiting the bar to those who possessed a firearm. “The law recognizes three distinct forms of possession, actual, constructive, and joint.” State v. Morrison, 188 N.J. 2, 14 (2006). Had the Legislature intended to limit the statutory bar to those in actual possession of a firearm, it, knowing full well the long-accepted definition of “possession” to include actual and constructive, it would have very simply said so. While “the Legislature ‘has moved inexorably toward expanding [N.J.S.A. 2C:35-14] as a sentencing alternative,’” that does not change the long-standing and accepted definition of possession. State v. Harris, 466 N.J. Super. 502, 531 (App. Div. 2021) (alteration in original).

“A person has actual possession of ‘an object when he has physical or manual control of it.’” Morrison, 188 N.J. at 14 (citing State v. Spivey, 179 N.J. 229, 23 (2004)). However, “[a] person constructively possesses an object when, although he lacks ‘physical or manual control,’ the circumstances permit a reasonable inference that he has knowledge of its presence, and

intends and has the capacity to exercise physical control or dominion over it during a span of time.” Spivey, 179 N.J. at 236-37.

As the trial judge properly noted, “possession” in the context of the Code, including the provisions governing the unlawful possession of weapons, includes both active and constructive possession. (Da21). The trial court noted “under 2C:39-5(b), possession is defined as as ‘a conscious, knowing possession, either actual or constructive.’” See Model Jury Charges (Criminal), “Unlawful Possession of a Handgun (Second-Degree), N.J.S.A. 2C:39-5 (rev. 6/11/18).

N.J.S.A. 2C:2-1(c) provides that possession constitutes a voluntary act punishable under the Code “if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.” In State v. Spivey, the Court found that N.J.S.A. 2C:39-4.1 includes constructive possession when defining “possession.” 179 N.J. at 236-39.

While defendant relies only on the fact that 2C:35-14(a)(5) only states “the person did not possess a firearm,” without specifying constructive possession, neither is it specified in any area by the Legislature or our courts. Defendant does not point to a place in the Code that specifies constructive possession of a firearm in order for a court to recognize the law of constructive

possession. Including both constructive and actual possession under 2C:35-14(a)(5) is consistent with our case law, and the Legislature's intent.

For those reasons, the trial court properly concluded that defendant was statutorily barred from Recovery Court.

Point II

The sentencing court properly explained its reasons for accepting or rejecting presented mitigating and aggravating factors.

After lengthy negotiations, defendant was sentenced in accordance with his plea deal. The sentencing court found that defendant's substantial criminal record undermined his application to deviate from the negotiated plea by ordering a lesser sentence.

“It is well settled that when reviewing a trial court's sentencing decision, ‘[a]n appellate court may not substitute its judgment for that of the trial court.’” State v. Evers, 175 N.J. 355, 386 (2003) (quoting State v. Johnson, 118 N.J. 10, 15, (1990); State v. O'Donnell, 117 N.J. 210, 215 (1989)). This Court may only modify a sentence when the trial court's discretion was “clearly mistaken.” Ibid.; State v. Jabbour, 118 N.J. 1, 6 (1990); State v. Jarbath, 114 N.J. 394, 401 (1989). With this limitation in mind, an appellate court can:

- (a) review sentences to determine if the legislative policies, here the sentencing guidelines, were violated;
- (b) review the aggravating and mitigating factors found below to determine whether those factors were based upon competent credible evidence in the record;
- and (c) determine whether, even though the court sentenced in accordance with the guidelines, nevertheless the application of the guidelines to the

facts of this case makes the sentence clearly unreasonable so as to shock the judicial conscience.

Evers, 175 N.J. at 387; Jabbour, 118 N.J. 1, 6 ; State v. Roth, 95 N.J. 334, 364–65 (1984). “[I]n sentencing, the Code ‘channel[s] the discretion of trial courts’ by focusing on the gravity of the offense rather than the offender's blameworthiness or capacity for rehabilitation.” Evers, 175 N.J. at 387; Jabbour, 118 N.J. at 6; State v. Hodge, 95 N.J. 369, 375 (1984); Roth, 95 N.J. at 355.

“A sentence imposed pursuant to a plea agreement is presumed to be reasonable because a defendant voluntarily ‘[waived] . . . his right to a trial in return for the reduction or dismissal of certain charges, recommendations as to sentence and the like.’” State v. Fuentes, 217 N.J. 57, 71 (2014) (quoting State v. Davis, 175 N.J. Super. 130, 140 (App. Div. 1980)); see also State v. Bell, 250 N.J. 519, 542 (2022) (stating a sentence imposed pursuant to a plea agreement is presumed reasonable “because it is predicated on the defendant's voluntary, knowing waiver of his constitutional rights.”)

“In determining what sentence to impose, the judge ‘must identify any relevant aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and (b) that apply to the case’ and ‘[t]he finding of any factor must be supported by competent, credible evidence in the record.’” State v. Mahoney,

444 N.J. Super. 253, 260 (App. Div. 2016) (quoting State v. Case, 220 N.J. 49 (2014)).

During sentencing, defendant argued that mitigating factors 1, 2, 4, 8, 9, 10, 11, and 14 applied to this case. (T7:6-19:21). First, factors 10 and 14 do not apply to defendant since probation was not part of the plea deal he negotiated with the State, and he was not under the age of 26 when he committed these offenses. N.J.S.A. 2C:44-1(b)(10), (14). Defendant's assertion that the court made no reference to the record and simply rejected his arguments that any mitigating factors applied is contradicted by the record.

The court stated defendant's criminal history was "of serious concern, and I believe intensely relevant not only to the plea that the State negotiated, but also to the aggravating and mitigating factor analysis that has gone on here in this courtroom, and it also in my view undermines counsel's application that I deviate from the negotiated plea to the benefit of the defendant." (T28:17-23).

After discussing defendant's lengthy criminal history, spanning from 2017 to the present offense, the court summarized, "So the defendant has 13 known arrests, 3 prior indictable convictions, 2 disorderly persons convictions, 2 prior bench warrants, [and] 2 violations of probation." (T28:14-31:5).

As to the mitigating factors put forth by defendant, the court held:

The defendant did get the benefit of probation, and if all of this was driven by a drug problem, the time to have addressed it was in 2020 when he was placed on probation, and that apparently never happened.

And then when he was out on the first of these indictments and subject to pretrial detention, that would have been an additional time he could have sought treatment, but he didn't.

I have a copy of a letter from an entity called Catholic Charities Straight and Narrow, Inc., which apparently was a long-term residential program, in which he was subject to -- he was apparently scheduled for admission in a Paterson facility in May of 2024. But in that period, beginning approximately February 16, 2024, he had picked up new indictments...

So perhaps I don't know when this application was made to go into inpatient, but while he was waiting to go in inpatient he was involved in additional illegal activity that resulted in additional indictments now before the Court.

So I reject all of the mitigating factors that the defendant has provided here. I find no mitigation.
[(T31:15-32:12).]

Furthermore, during counsel's argument, the judge asked questions or made statements regarding the presented mitigating factors, explaining further why they were not found by the court. (T7:19-9:25; 12:12-13:2; 14:15-17:12). So, defendant's assertion the court's sentence merely enumerated the factors and failed to conduct a qualitative analysis is meritless.

As for aggravating factors, defendant again fails to note that during the State's argument, the court made comments about aggravating factors 1 and 5. First, after the prosecutor stated, "[a]ny time you are in possession of a handgun at a stash house or any time you're in possession of drugs, harm is being inflicted on somebody," the court asked, "[w]ith specific regard to aggravating factor number 1, you're saying any time that you are in possession of a weapon or – and/or you're at a – you're in a stash house, and there's no allegation or suggestion made by the defense that he was living there . . . why wouldn't I consider aggravating factor number 1?" (T22:1-14).

Regarding aggravating factor 5, the court stated:

The court: What about factor 5?

Prosecutor: Which – I apologize, Your Honor –

The court: Factor 5, the nature of the crime requires organized activities and the activities shown here are a link in the chain of that activity.

Prosecutor: Oh, I absolutely agree with that, Your Honor. This is an ongoing criminal –

The court: I mean the stash house was a target, that's how you got a search warrant, correct?

Prosecutor: Yes.

The court: You made a case to a sitting Superior Court judge who was satisfied that there was sufficient

proofs based on sworn affidavits that there would be guns and drugs found there.

Prosecutor: Correct.

The court: And when the warrant was executed 6 there were guns and drugs found there, correct?

Prosecutor: Correct.
[(T23:15-24:8).]

When sentencing defendant, the court found aggravating factors “1B, 13 3, 5B, 6, the extent of the defendant's prior criminal record and the seriousness of the convicted offenses. There is no probation on the table, but both counsel talked about it. Defendant had the benefit of the probation and his response to that was to commit more crimes.” (T32:13-19). As for factor 9, the court noted that while that factor can be “boilerplate” in some cases, “not here, absolutely not here.” (T32:24-25). Again, defendant has a lengthy criminal history including 13 arrests, 3 prior indictable convictions, 2 disorderly persons convictions, 2 prior bench warrants, and 2 violations of probation, so the finding of this factor was well supported. (T28:14-31:5).

Point III

The sentencing court relied on proper competent credible evidence in the record.³

The court’s reliance on the fact that defendant had six indictments at the time of sentencing was proper. “Adult arrests that do not result in convictions may be ‘relevant to the character of the sentence . . . imposed.’” State v. Rice, 425 N.J. Super. 375, 382 (App. Div. 2012) (quoting State v. Tanksley, 245 N.J. Super. 390, 397 (App. Div. 1991)).

Defendant criticizes the court’s finding that he had six indictments “collected” over a two-year period, arguing that the court impermissibly relied on dismissed, unproven allegations. “We discern no constitutionally significant distinction between a sentencing court’s consideration of acquitted conduct and pending charges to enhance a defendant’s sentence.” State v. Cambrelen, 473 N.J. Super. 70, 85 (App. Div. 2022).

The Court in Cambrelen relied on State v. Melvin, 248 N.J. 321 (2021), and stated, “[w]e invalidate the no-new-charges provision here because . . . the provision unlawfully permits the court to enhance a defendant’s sentence based

³ It should be noted the standard cited by defendant, that “[a]n abuse of discretion is ‘relying on an impermissible basis,’ ‘relying upon irrelevant or inappropriate factors,’ ‘failing to consider all relevant factors,’ or ‘making a clear error in judgment,’” cited by defendant is that for pretrial detention appeals. State v. S.N., 231 N.J. 497, 500 (2018) (“In this appeal, we determine the proper standard for appellate review of pretrial detention decisions.”).

on unadjudicated charges that are unrelated to the admitted crimes,” and thus held, “only a no-new-arrest or no-new-charges portion of a Subin plea provision is void ab initio.” 473 N.J. Super. at 85.

However, the Court did specify, “[t]he State may argue a defendant's arrest on new charges while released pending sentencing should be considered by the trial court when weighing the aggravating and mitigating factors for the crimes to which defendant pled guilty.” Id. at 85 (citing Rice, 425 N.J. Super. at 382).

The court’s use of defendant’s multiple indictments in its determination of aggravating and mitigating factors did not enhance his sentence based on unadjudicated charges. Even though the aggravating factors far outweighed the non-existent mitigating factors, defendant was still sentenced pursuant to his plea agreement. Furthermore, as noted above in Point II, ante, the court discussed its reasons for finding aggravating factors 1 and 5 during its discussion with the prosecutor. (T22:1-14; 23:15-24:8); see Rice, 425 N.J. Super. at 382 (“Adult arrests that do not result in convictions may be ‘relevant to the character of the sentence . . . imposed.’”).

Finally, the court not allowing counsel to continue argument after defendant’s sentence had been given has no bearing on the propriety of his sentence. The court had handed down defendant’s sentence, and there was no

need for further argument. The court stated, “I don’t think – there’s a need for an additional record here.” (T39:24-40:2). And counsel’s complaint that the court asked him “[d]id you want to take your coat off?” also has no bearing on whether the court properly sentenced defendant. (T418-19).

Conclusion

For the foregoing reasons and authorities cited in support thereof, the State respectfully requests that this Court affirm defendant's judgment of conviction in all respects.

Respectfully submitted,

THEODORE N. STEPHENS II
ESSEX COUNTY PROSECUTOR
ATTORNEY FOR PLAINTIFF-RESPONDENT

s/Hannah Faye Kurt - No. 279742018
Assistant Prosecutor
Appellate Section

Of Counsel and on the Brief

No. A-1697-24

IN THE SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

STATE OF NEW JERSEY,

Appellee,

v.

TYREE I. DWYER,

Appellant

On Appeal from the
Superior Court of New Jersey, Criminal Division, Essex County
Indictment Nos. 2023-09-1913-I et al. (P23002807 et al.)
(Hons. Thomas A. Callahan, Jr., J.S.C., and Lori Ellen Grifa, J.S.C.)

Reply of Appellant Tyree I. Dwyer

Counsel for Appellant

Alex G. Leone (212572017)
LEONE LAW LLC
195 Maplewood Avenue, P.O. Box 1274
Maplewood, New Jersey 07040
alex@juvenilejusticeattorney.com
(908) 787-5581

Dated: July 21, 2025

TABLE OF CONTENTS

	<u>Page</u>
LEGAL ARGUMENT.....	1
I. The State’s leading point is fallacious and inconsistent with caselaw.....	1
II. The State asserts that the sentencing court “properly explained its reasons” but does not identify any explanation.....	9
III. The State does not explain how it could have been permissible for the court to use dismissed indictments against Mr. Dwyer at sentencing.....	9
CONCLUSION.....	11

LEGAL ARGUMENT

I. The State’s leading point is fallacious and inconsistent with caselaw.

The State’s leading point is: “In the context of the Code, and thus N.J.S.A. 2C:35-14, ‘possession’ includes both actual and constructive possession.”¹ But there is no single “long-standing and accepted definition of possession;”² there are three definitions, each “distinct.” *State v. Morrison*, 902 A. 2d 860, 867 (N.J. 2006) (citing *State v. Spivey*, 179 N.J. 229, 236 (2004) (emphasis added)). “Possession,” without specification, can be *disambiguated* into any of those “three distinct forms,” depending on context. *See id.* For example, in the context of the Graves Act, “possess” “includes not only actual possession but constructive possession that the defendant is able to convert practically immediately to actual possession.” *See, e.g., State v. Stewart*, 96 N.J. 596, 602-03 (1984).

Only “*in its broadest sense*”—broadly referring to all three forms—does the nonspecific “possession” conceptually include “constructive possession.” *See id.* at 602-03 (emphasis added). The question here is whether “possess” *in N.J.S.A. 2C:35-14 should be* interpreted in its “broadest sense” to encompass all “three distinct forms.” *See Morrison*, 902 A. 2d at 867. Mr. Dwyer respectfully submits the

¹ See Pb i & Pb4.

² See Pb4.

answer is clearly “no.” *Spivey*, on which the State with scant analysis relies nearly exclusively,³ is instructive on that point in at least three ways.

First, *Spivey* reaffirmed that when “possess” is included in a statute without specification regarding the “three distinct forms,” there is a question for judicial interpretation. *See* 844 A. 2d at 517 (“interpretation of N.J.S.A. 2C:39-4.1a”).⁴ Decades earlier, *Stewart* ruled that “possession of a firearm for purposes of the Graves Act includes not only actual possession but constructive possession that the defendant is able to convert practically immediately to actual possession.” 96 N.J. at 603. As *Stewart* did not resolve the question in *Spivey*, *Spivey* does not resolve the question here: *Spivey* did not purport to interpret what “possess” means in every statute—and specifically the case analyzed a statute defining a Graves Act offense, *see id.* at 518 (discussing the required “temporal and spatial link” in the context of N.J.S.A. 2C:39-4.1a.), with a fundamentally different legislative purpose than

³ The State also cites a statute, N.J.S.A. 2C:2-1(c), and Model Jury Charges (Criminal), Unlawful Possession of a Handgun (Second-Degree), N.J.S.A. 2C:39-5 (rev. 6/11/18). *See* Pb4-5. It is unclear how either of those authorities supports the State’s point: N.J.S.A. 2C:2-1(c) suggests that constructive possession “is an act” for the purposes of being “guilty of an offense” but does not suggest that “possess” as it is used in N.J.S.A. 2C:35-14 must include *that* “act”—the question for this Court; and the Model Jury Charges simply reaffirm that “possession is defined as . . . *either* actual *or* constructive,” without shedding light on which interpretation fits N.J.S.A. 2C:35-14’s nondescript text.

⁴ The State seems to agree as it observes, “In *State v. Spivey*, the Court found that N.J.S.A. 2C:39-4.1 includes constructive possession when defining ‘possession.’” *See* Pb5.

N.J.S.A. 2C:35-14 (“Rehabilitation program for persons with a substance use disorder”). Compare, e.g., *State v. Des Marets*, 92 N.J. 62, 72-73 (1983) (discussing the Legislature’s “very specific means” and “confirm[ing] the obvious intent of the Graves Act to deter the use and possession of firearms by criminals for the purpose of reducing the number of persons killed or injured by such weapons”), with *Hyland*, 238 N.J. at 145 (acknowledging the Legislature’s “effort ‘to permit additional offenders who may benefit from the [Recovery Court] program to be diverted into the program *instead of being sentenced to a term of incarceration*’ (emphasis added)) (quoting S. Budget & Appropriations Comm. Statement to S. 881 1 (L. 2012, c. 23)). The State’s vague observation that theoretically “‘possession’ includes both actual and constructive possession,”⁵ then, hardly begins the analysis of what “possess” means in this particular context. Here, in the context of “eschew[ing] imprisonment in favor of rehabilitative treatment,” see, e.g., *Harris*, 466 N.J. Super. at 531, Mr. Dwyer respectfully submits that the Court should reject the State’s punitive disambiguation of N.J.S.A. 2C:35-14’s nonspecific “possess.”

Second, *Spivey* shows how broad—and inconsistent with the Legislative intent behind the Recovery Court Statute—the State’s interpretation of “possess” is here: “For example, a person . . . in a New Jersey home . . . [can] constructively possess a hunting rifle in a California home;” see 844 A. 2d at 518; or “[a] person

⁵ See Pbi & Pb4.

who leaves his tennis racket behind as he goes to work retains constructive possession of that racket so long as he has the intent and ability to exercise control over it some time in the future,” *see id.* at 516. Categorically excluding a non-violent offender from rehabilitative treatment simply because he had the “intent and ability to exercise control over [a firearm at] some time in the future,” *see id.*, would be illogical, potentially unconstitutional, and in any event inconsistent with the Legislature’s “Rehabilitation program for persons with a substance use disorder:” “[T]he Legislature has moved inexorably toward expanding” access to Recovery Court, and N.J.S.A. 2C:35-14’s nonspecific “possess” should not be interpreted to undermine that clear legislative purpose. *See, e.g., Harris*, N.J. Super. at 531; *State v. Figaro*, 462 N.J. Super. 564, 571 (App. Div. 2020).

Third, *Spivey* and its forerunner, *Stewart*, showed that even when “possess” can be interpreted to include constructive possession, “limiting the definition of possession” is appropriate: *Stewart* held that one “possesses” a firearm “only where [his] ability to exercise actual control over the firearm is imminent,” *see* 96 N.J. at 604-05; and *Spivey* held that one “possesses” a firearm only when it is “accessible for use in the commission of [a CDS] crime,” *see* 844 A. 2d at 518. (The State is therefore mistaken to suggest that “constructive possession” is not “specified in any area by the Legislature or our courts.”)⁶ Here, “[l]imiting the definition of

⁶ *See* Pb5.

possession for [Recovery Court] purposes to actual possession,” *see Stewart*, 96 N.J. at 604-05, is appropriate in light of N.J.S.A. 2C:35-14a(5)’s ambiguity and the legislative intent behind the Recovery Court statute, particularly given that the concept of constructive possession is a “legal fiction,” *see, e.g., Posey v. Bordentown Sewerage*, 171 N.J. 172, 184 (2002) (discussing the “legal fiction of constructive possession”); *State v. Schmidt*, 110 N.J. 258, 269 (1988), and itself must be interpreted narrowly, *see, e.g., Des Marets*, 92 N.J. at 84 (noting “the common law rule of strict construction of criminal laws”).

“Finally, [Mr. Dwyer’s] interpretation of [N.J.S.A. 2C:35-14a(5)] is in harmony with the doctrine of lenity,” which the State conspicuously fails to address. *See, e.g., State v. Bell*, 250 N.J. 519, 523 (2022). N.J.S.A. 2C:35-14a(5)’s reference to “possess” without specification is “at best, ambiguous, yielding two possible interpretations.” *See, e.g., State v. Gelman*, 195 N.J. 475, 480 (2008). Here, “the relevant text and . . . extrinsic aids” like Legislative history show N.J.S.A. 2C:35-14a(5) should be interpreted to include only actual possession, *see State v. Regis*, 208 N.J. 439, 451 (2011), as distinct from possession “in its broadest sense,” *see Stewart*, 96 N.J. at 602-03; but anyway the “ambiguity” inhering in the nonspecific “possess” “cannot inure to the benefit of the State.” *See State v. Alexander*, 136 N.J. 563, 573 (1994). The doctrine of lenity “requires that the ambiguity be resolved in favor of the defendant.” *See Regis*, 208 N.J. at 451.

“Our task in statutory interpretation is to determine and effectuate the Legislature’s intent.” *See, e.g., Bosland v. Warnock Dodge, Inc.*, 197 N.J. 543, 553 (2009). The State’s vague suggestion that the Legislature always intends “possess” “in its broadest sense,” *see Stewart*, 96 N.J. at 602-03, is inconsistent with caselaw, *see, e.g., Spivey*, 844 A. 2d at 517; *Stewart*, 96 N.J. at 603, and makes no effort to “harmonize” the unspecific text of N.J.S.A. 2C:35-14a(5) with that statute’s “inexorabl[e]” rehabilitative purposes. *See State v. Gomes*, 253 N.J. 6, 15 (2023); *Figaro*, 462 N.J. Super. at 571; *Harris*, N.J. Super. at 531.

II. The State asserts that the sentencing court “properly explained its reasons” but does not identify any explanation.

Binding precedent required the sentencing court “to explain clearly why an aggravating or mitigating factor presented by the parties was found or rejected[.]” *See State v. Case*, 220 N.J. 49, 66 (2014); R. 3:21-4(h) (requiring “reasons for imposing such sentence including findings pursuant to the criteria for withholding or imposing imprisonment or fines under N.J.S.A. 2C:44-1 to 2C:44-3”). The State does not identify any place in the record the sentencing court stated a clear explanation with respect to any factor; and the record shows that the court conclusorily asserted, “I reject all of the mitigating factors” and, “I find aggravating factors,” which it “merely enumerate[d],” providing “little [to no] insight into the sentencing decision.” *See Case*, 220 N.J. at 65; (1T 32:11-13). The closest the State comes to supporting the claim that the court “properly explained its reasons” is

vaguely observing that “[t]he court stated defendant’s criminal history was ‘of serious concern’”⁷ and that “the court made comments about aggravating factors 1 and 5.”⁸ The law, however, requires clear explanation—not vague “comments.”

The State asserts that “the judge asked questions or made statements regarding the presented mitigating factors” but does not quote any specific example or explain how “ask[ing] questions” or “ma[king] statements” discharges the obligation to provide “*an explicit and full statement* of aggravating and mitigating factors *and* how they are weighed and balanced.” *See State v. McFarlane*, 224 N.J. 458, 466 (2016) (emphases added). Alarmingly, the State suggests that simply because “the court made comments about aggravating factors 1 and 5”⁹ it was permitted to find those factors. The State does not address Mr. Dwyer’s argument—or factual observation¹⁰—that there was no basis for finding those factors to begin with *in*

⁷ See Pb9.

⁸ See Pb11.

⁹ See Pb11.

¹⁰ In other words, the court’s finding “organized criminal activity” and an offense committed in an “especially heinous, cruel, or depraved manner” with respect to aggravating factors one and five was “not based upon competent credible evidence [*or any evidence*] in the record.” *See State v. Bolvito*, 217 N.J. 221, 228 (2014).; *see also* Db18 (“Based on dismissed, unproven allegations, the Court suggested that Mr. Dwyer was ‘being engaged in the drug trade,’ and thus ‘threaten[ing] serious harm,’ even though ‘the two offenses that the gentleman did take responsibility for under the 725 and 1245 dockets, do not involve distribution[;] they are just possession.’ (See Trans. 7:25-8:7). This error apparently led the Court not to find mitigating factors (1) and (2)—and to find aggravating factors (1) and (5) on all three charges, despite there being not a shred of evidence suggesting any

addition to his argument that the Court did not use the required process and explain “how the factors were balanced to arrive at the sentence.” *See Case*, 220 N.J. at 66. The State also has no response to Mr. Dwyer’s observation that the Court failed to distinguish which factors it was finding with respect to which offenses—and why. *See id.* For example, with no basis in the record, the court’s judgments of conviction suggest that the court found that Mr. Dwyer’s merely possessing CDS somehow constituted “especially heinous, cruel, or depraved” conduct warranting a finding of aggravating factor one. (*See Da3; Da6; Da10*).

In sum, the sentencing court did anything but “*explain clearly* why an aggravating or mitigating factor presented by the parties was found or rejected,” *see Case*, 220 N.J. at 66 (emphasis added), and regarding aggravating factors simply “made comments”¹¹ that were “not based upon competent credible evidence in the record,” *see State v. Bolvito*, 217 N.J. 221, 228 (2014), precluding “effective appellate review.” *See State v. Fuentes*, 217 N.J. 57, 74 (2014) (“A clear and detailed

‘organized criminal activity’ or ‘especially heinous, cruel, or depraved manner’ in any respect.”).

¹¹ *See* Pb11. The Court’s comments also failed to acknowledge important record facts and also constituted an abuse of discretion on that basis. *See State v. S.N.*, 231 N.J. 497, 500 (2018); *see, e.g.*, 1T 7:10-13 (observing that there was “no allegation that [a firearm] was used at any point or that the gentleman even touched it at any point, let alone threaten someone with it or caused harm with it or that anyone felt threatened by it”).

statement of reasons is thus a crucial component of the process conducted by the sentencing court, and a prerequisite to effective appellate review.”).

Accordingly, Mr. Dwyer respectfully submits that vacatur and remand for a new sentencing hearing are straightforwardly required.¹²

III. The State does not explain how it could have been permissible for the court to use dismissed indictments against Mr. Dwyer at sentencing.

The State apparently relies on a line in *State v. Cambrelen*, 278 A. 3d 814, 823 (N.J. Super. App. Div. 2022), to suggest it was appropriate for the sentencing court to consider dismissed indictments when sentencing Mr. Dwyer:

The State may argue a defendant’s arrest on new charges while released pending sentencing should be considered by the trial court when weighing the aggravating and mitigating factors for the crimes to which defendant pled guilty. *See, e.g., State v. Rice*, 425 N.J. Super. 375, 382, 41 A.3d 764 (App. Div. 2012) (“Adult arrests that do not result in convictions may be ‘relevant to the character of the sentence . . . imposed.’” (quoting *State v. Tanksley*, 245 N.J. Super. 390, 397, 585 A.2d 973 (App. Div. 1991))).^[13]

¹² *See* Db17 n.8 (“For the reasons provided above regarding interpretation of N.J.S.A. 2C:35-14, reversal is required, and Mr. Dwyer should be permitted to withdraw his pleas. Accordingly, these arguments regarding resentencing are offered in the alternative.”).

¹³ This Court in *Cambrelen* cited *Rice*, which cited *Tanksley*, which cited *State v. Green*, which observed that “an arrest could be relevant [at sentencing] for several reasons. One is that it may lead to factual material *which the defendant does not contest* and which may bear upon the character of the sentence. For example, the arrest may relate to an offense the defendant *does not dispute . . .*” *See* 62 N.J. 547, 571 (1973) (emphases added). To the extent language in *Cambrelen*, *Rice*, or *Tanksley* can be interpreted to suggest that consideration of arrests based on contested and unproven—or even dismissed—conduct is appropriate at sentencing, Mr. Dwyer respectfully requests that this Court provide clear guidance. Notably,

Mr. Dwyer, however, was not “arrest[ed] on new charges while released pending sentencing,” *see id.*, and the sentencing court admittedly considered *dismissed* indictments against Mr. Dwyer at sentencing. (*See, e.g.*, 1T 14:22-15:4 (the court considering “six additional indictments”); *id.* 15:7 (relying on dismissed indictments to suggest that Mr. Dwyer “continued a crime spree”); *id.* 16:1-2 (observing that “Your Honor mentioned the six indictments and other alleged conduct that’s not been proven.”)). The court’s consideration of dismissed indictments straightforwardly violates language in *Cambrelen* based squarely on the Constitutions: This Court stated point-blank that considering “charges . . . result[ing] in . . . dismissal . . . caus[es] an unjust result,” and cited *State v. Melvin*, 248 N.J. 321, 347-52 (2021), for the proposition that “due process principles inherent in Article I, paragraph 1 of the New Jersey Constitution and the doctrine of fundamental fairness protect[] defendant[s] from a sentencing judge’s improper use of facts related to charges for which the defendant was acquitted.”¹⁴ *See Cambrelen*, 278 A. 3d at 823. If the court *also* “enhance[d] his sentence”¹⁵ there would be

Green itself includes confusing, and arguably unconstitutional, language suggesting that even an admittedly “*unwarranted arrest*” can be considered by a court to show that a defendant “was not deterred by that fact from committing a crime thereafter.” *See* 62 N.J. 571 (emphasis added).

¹⁴ Mr. Dwyer respectfully submits that there is “no constitutionally significant distinction between” acquitted and dismissed conduct. *See State v. Cambrelen*, 278 A. 3d 814, 823 (N.J. Super. App. Div. 2022).

¹⁵ *See* Pb14.

another set of legal problems resulting from the court’s abuses of discretion; but the court’s consideration of dismissed charges itself suffices to “caus[e] an unjust result” and requires a new sentencing hearing. *See Cambrelen*, 278 A. 3d at 823. Dismissed charges are “irrelevant” and considering them was clearly an abuse of discretion. *See State v. S.N.*, 231 N.J. 497, 500 (2018).¹⁶

CONCLUSION

Mr. Dwyer respectfully requests that, in light of the text, legislative history, and rule of lenity, this Court clarify the proper interpretation of N.J.S.A. 2C:35-14a(5)’s nondescript “possess a firearm,” permit Mr. Dwyer to withdraw his pleas, and “remand . . . for reconsideration” of a Recovery Court application and “fact-finding.” *See, e.g., Harris*, 466 N.J. Super. at 554-56; *Hyland*, 238 N.J. at 147.

Mr. Dwyer alternatively respectfully requests that the Court reverse and remand for a new sentencing hearing.

¹⁶ The State correctly observes that *State v. S.N.* arose in the context of “appellate review of pretrial detention decisions.” *See* Pb13 n.3. *S.N.* determined the standard that applies in that context: “abuse of discretion.” *See* 176 A.3d 813, 815, 824 (2018). The Supreme Court, however, defined abuse of discretion in *S.N.*—“relying on an impermissible basis,” “relying upon irrelevant or inappropriate factors,” or “failing to consider all relevant factors”—and the State does not cite any legal authority for the proposition that the same definition does not apply here. *See id.* at 815 & 826. *S.N.* itself, when discussing “the proper standard,” cited cases making clear that the abuse of discretion standard is not limited to “pretrial detention decisions.” *See, e.g., id.* at 824 (citing *Flagg v. Essex Cty. Prosecutor*, 171 N.J. 561, 571 (2002); *State v. Baynes*, 148 N.J. 434, 444 (1997); *Clark v. Clark*, 429 N.J. Super. 61, 72 (App. Div. 2012)).

* * *

Respectfully submitted,
/s/ Alex G. Leone
Alex G. Leone (212572017)
LEONE LAW LLC
195 Maplewood Avenue
Suite 1, P.O. Box 1274
Maplewood, New Jersey 07040
alex@juvenilejusticeattorney.com
(908) 787-5581

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