SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1756-22T2

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of
v.	:	New Jersey, Law Division, Camden County.
DALIA D. FIGUEROA,	:	
		Indictment No. 16-04-00058-S
Defendant-Appellant.	:	
	:	Sat Below:
	:	Hon. John T. Kelley, J.S.C. and a Jury; Hon. Francisco Dominguez, J.S.C. and
	:	a Jury; Hon. Christine Orlando, J.S.C.; Hon. Kurt Kramer, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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Dated: September 9, 2024

DEFENDANT IS CONFINED

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[1] An earlier version of this brief was marked as deficient by case management for omitting the October 10, 2017 motion transcript. That transcript was received after all but one of the other transcripts. It is a 6-page, unopposed scheduling motion and it is not cited to in the brief.

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STATEMENT OF FACTS AND PROCEDURAL HISTORY[2]

Dalia Figueroa became addicted to phencyclidine—PCP—when she was 19 years old. (PSR at 10) She had been struggling with sobriety since 2004, after the death of the grandmother who had raised her. (7T 17-15 to 16, 46-18 to 23) One of her cousins introduced her to cigarettes that had been dipped in liquid PCP, often known as "wet." (7T 17-18 to 22) Figueroa relapsed around 2011; as she explained in her trial testimony, she suffers from lupus, and PCP offered her some relief from the pain. (7T 46-23 to 47-6) Figueroa testified that Tracy Murphy, a former coworker, knew of her struggle and told her that she knew someone who could obtain more PCP if she needed. (7T 17-23 to 18-2)

This case stems from the arrest of both women at Murphy's house on July 3, 2013. (18T 3-14 to 20) New Jersey State Troopers watched Murphy accept and Figueroa hold a package that contained PCP. (18T 3-21 to 23) An officer also saw a small vial of PCP in Figeroa's car and seized it. The State's theory was that Figueroa had entered a conspiracy with Murphy to have a package containing PCP sent to Murphy's home. Murphy would receive $100 or $200 for receiving the package, and Figueroa was to be paid $1000 upon delivering the package to an individual who she knew as Jimmy. (18T 3-25 to 6) At the

[2] Due to their overlapping nature, the facts and procedural history are presented together for the convenience of the Court.

first trial, Figueroa testified about her addiction and admitted to possessing PCP for personal use, but denied any role in a distribution scheme. The jury returned a conviction based on the smaller amount of PCP found in her car, but was hung with respect to the distribution charges related to the larger package of PCP. Figueroa was convicted of the remaining distribution counts after a second jury trial. (Da 13-18)

A. Events of July 3, 2013

In 2013, the New Jersey State Police had received information that a package containing contraband was set to be delivered to 1714 South 8th Street in Camden, and that the package was addressed to "Jennifer Ball." (12T 218-7 to 219-3) State Police Detective Sergeant Garret Cullen was the lead investigator, under the supervision of Sergeant Erik Hoffman. (12T 215-3 to 7, 222-22 to 223-5) After searching law enforcement databases, Cullen concluded that there was no person named Jennifer Ball associated with that residence. (12T 221-12 to 222-17)

On July 3, 2013, the day of the anticipated delivery, several officers surveilled the house from their vehicles. (12T 223-6 to 17) Cullen and Hoffman were in a vehicle watching the front of the house, and Trooper Ricardo Diaz was watching the back. (12T 223-18 to 22; 14T 41-21 to 24)

Cullen testified that surveillance began around 8:00 a.m. and that a UPS truck delivered a package to a woman in the residence around 10:30 a.m. (12T

224-12 to 19) Cullen's report of the incident, however, stated that the delivery took place around 1:30 p.m. (12T 228-9 to 13) Cullen would go on to testify that this was a mistake in the report, and the package had arrived closer to 10:36 a.m. (12T 230-10 to 231-5)

Around 1:30 p.m., Cullen and Hoffman approached the house and knocked on the door, which was answered by Tracy Murphy. (12T 231-6 to 15) The officers recognized her as the woman who had accepted the package from UPS. (12T 231-8 to 12) Murphy was alone in the house and allowed the officers to come into her residence. (12T 233-12 to 16, 234-5 to 6) Cullen testified that Hoffman advised Murphy of her Miranda[3] rights before asking about the package. (12T 233-13 to 20)

At a certain point, Murphy became "cooperative" with the investigation. (12T 234-1 to 4; 15T 29-1 to 4) When officers asked Murphy about the package, she retrieved it from a first-floor closet. (12T 234-8 to 13) Murphy denied ownership of the box and said that it belonged to her friend. (13T 100-18 to 102-4) Despite claiming that she did not own the box, the officers asked Murphy for her consent to open the package and had her sign a consent-to-search form.[4]

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

[4] The State lost the consent form signed by Murphy, meaning the original form was not presented at the motion regarding the search's constitutionality. (T 13-3 to 12)

(12T 235-1 to 239-21) After Murphy consented to the search of the box, officers opened the package and found two paint cans that they believed contained a large amount of liquid PCP. (12T 240-19 to 241-13; 13T 101-14 to 22) Cullen testified that the officers knew it was PCP because of the strong, distinctive smell.[5] (13T 103-1 to 106-14)

Murphy also consented to a search of her cell phone. (6T 208-3 to 21; 14T 136-4 to 20) She showed officers her text message exchange with a contact in her phone labeled Dalia Figueroa. (13T 124-2 to 4) The relevant texts began on June 12, 2013, when Murphy texted Figueroa's number: "Find out when your cousin is coming [so] I can be home." (13T 124-5 to 10; 14T 155-1 to 5) Figueroa responded affirmatively and wrote back: "Should be next Tuesday." (13T 124-8 to 13) The text messages between Murphy and Figueroa do not mention packages, deliveries, or PCP. (13T 125-12 to 15, 127-1 to 6) Rather, the texts discussed a cousin's arrival at Murphy's house, with Murphy texting on June 18: "Check to see if your cousin is still coming, I want to BR [sic] here so she won't just be sitting outside." (13T 125-4 to 9)

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[5] Witnesses had difficulty describing the odor of PCP. At the first trial, Cullen testified that "PCP smells like PCP" and cannot be compared to any other odor. (5T 12-12 to 13-18) Diaz described the smell as "overwhelming" and headache-inducing. (5T 168-11 to 19, 174-23 to 175-5) Detective Michael Flory testified that PCP has a "horrible" smell, which he described as "paint thinner . . . times ten." (4T 82-13 to 83-8) Hoffman also compared PCP's odor to paint thinner. (6T 153-17 to 154-20) Murphy did not describe the smell. (14T 137-12 to 22)

On June 27, Figueroa texted that the cousin would arrive on Thursday of next week. (13T 126-4 to 13) After exchanging other messages, Figueroa messaged Murphy on July 2: "Hey, cousin just hit me, she [gonna come] through tomorrow for sure, okay." (13T 127-16 to 20) Murphy replied: "Okay, I'll take her out to get something to eat." (13T 127-19 to 21) On July 3, Murphy sent a message to Figueroa at 10:41 a.m. reading: "She came, we are talking now." (13T 128-5 to 15) Figueroa replied: "K, I'll be through to kick it with y'all once I get off work." (13T 128-16 to 18)

At 2:01 p.m., after the officers had entered the house, Murphy's phone received another text from Figueroa: "Bout to get off now, I'll be over in a few." (13T 129-4 to 22) Murphy replied, "Okay" at 2:03 p.m. (13T 129-23 to 130-2) Cullen and Hoffman decided to wait in Murphy's house to see if someone was coming to retrieve the box. (13T 130-3 to 11) The officers resealed the box and placed it somewhere in or near the kitchen. (13T 108-9 to 19, 130-15 to 133-9; 15T 41-11 to 16) Cullen and Hoffman hid themselves in a nearby bathroom. (13T 133-8 to 134-6; 15T 41-25 to 42-7) Another trooper was waiting upstairs or on the stairs leading to the second floor, and Trooper Michael Davis was in the living room with Murphy. (13T 134-7 to 24)

Figueroa arrived at Murphy's house close to 2:30 p.m. She entered the house through the backdoor, which led directly into the kitchen. (13T 214-7 to

19) Murphy testified that she went to the back door to let Figueroa inside.[6] (14T 139-2 to 22, 213-22 to 214-10) Davis testified that he was able to see the package from his position in the living room. (13T 213-1 to 214-6) Davis said he saw Murphy briefly converse with Figueroa before Figueroa picked up the box and started to walk back towards the rear of the house. (13T 214-17 to 215-7) After she had been holding the box for several seconds (7T 40-8 to 13; 15T 257-16 to 21), Cullen and Hoffman exited the bathroom and stopped Figueroa from leaving the house. (13T 215-1 to 5; 15T 43-2 to 14)

Hoffman testified that he advised Figueroa of her Miranda rights before asking her what was inside the box. (15T 43-15 to 25) Although the details of what followed are contested, Hoffman testified that Figueroa agreed to cooperate with the officers and call the package's intended recipient, "Jimmy" from Philadelphia, and ask him to come pick up the package himself in Camden. (15T 45-4 to 46-11) An officer escorted Figueroa to her car so that she could retrieve her cell phone and make the call from inside Murphy's house. (1T 54-24 to 55-3, 71-16 to 72-9) When Figueroa opened her car door, the officer saw

[6] The witness testimony differed regarding Murphy's location when Figueroa arrived. Cullen testified that Murphy remained in the living room and did not return to the kitchen. (13T 134-18 to 136-8) Davis testified that she left the living room for the kitchen. (13T 230-17 to 233-5)

a small vial that appeared to contain PCP in the car's center console. (1T 55-4 to 8, 72-10 to 15) The vial was seized. (1T 55-7 to 8)

Figueroa also consented to a search of her cell phone; the consent-to-search form indicated that she gave her consent at 2:45 p.m. (15T 46-16 to 48-10) Figueroa dialed a contact she had listed in her phone as "Bra;" she explained that this name meant "brother." (7T 54-18 to 24) Hoffman heard Figueroa speaking to "Jimmy" on speakerphone. (15T 48-17 to 51-3) Cullen testified that Figueroa did as officers requested and spoke with a man on the phone, telling him her car broke down so he needed to go and pick up the package himself. (13T 40-1 to 20)

By 3:45 p.m., no one else had arrived at Murphy's house to claim the package. (13T 38-20 to 39-1; 15T 56-4 to 7) Officers arrested Murphy and Figueroa and transported them to their trooper barracks for processing. (13T 40-17 to 41-2; 15T 56-4 to 13) Figueroa's call log reflects a missed call from "Bra" at 4:08 p.m., but she was already under arrest at this time. (15T 55-13 to 56-1) According to Hoffman, both women declined to give recorded formal statements at the station. (15T 57-1 to 11)

Cullen wrote the police report for this investigation, which included the remark that the officers saw the delivery take place at 1:30 p.m. (13T 70-5 to 17; 15T 211-12 to 24) Cullen had not brought a recording device to capture the

questioning of Figueroa, and his report did not include a verbatim transcript. (13T 76-3 to 79-23)

B. Indictment, motions, and first trial.

On April 19, 2016, a Camden County grand jury returned Indictment No. 16-04-00058-S, indicting Figueroa and Murphy for offenses related to their July 3, 2013 arrests. (Da 1-6) The charges against Figueroa were:

- Possession with intent to distribute a controlled dangerous substance (CDS), first degree, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(6) (Count 1)
- Conspiracy, second degree, N.J.S.A. 2C:5-2 (Count 2)
- Possession with intent to distribute a CDS within 1,000 feet of school property, third degree, N.J.S.A. 2C:35-7(a) (Count 3)
- Possession with intent to distribute a CDS within 500 feet of certain public property, second degree, N.J.S.A. 2C:35-7.1(a) (Count 4)
- Possession with intent to distribute a CDS, second degree, N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(7) (Count 5) (Da 1-6)

Count 5 was limited to the vial of PCP found in Figueroa's car; the count was later amended to third-degree simple possession, N.J.S.A. 2C:35-10. (18T 4-21 to 25) Murphy was also indicted on Counts 1 through 4, which pertained to the PCP recovered from the package. Murphy's case was resolved in 2016 by a guilty plea to one count of third-degree possession with intent to distribute near school property. (Da 7-10; 14T 130-20 to 131-2) In exchange for the plea

and a promise to testify against Figueroa, Murphy received a three-year probationary sentence. (6T 99-19 to 102-6; 14T 131-3 to 5, 132-21 to 133-1)

On February 14, 2017, the Hon. John T. Kelley, J.S.C., denied Figueroa's motion to suppress both the package delivered to Murphy's house and the vial of PCP found in Figueroa's car. (1T 72-16 to 22; Da 11) On April 10, 2017, the court denied the defense's motion to suppress Figueroa's statements allegedly made to police. (2T 70-12 to 25; Da 12)

Judge Kelley presided over the first jury trial, which began on August 23, 2018. (4T) Mandelle Hunter, a scientist qualified as an expert in forensic chemistry, testified that the paint cans found in the package contained 841.6 grams, or about 70 ounces, of material that tested positive for PCP.[7] (5T 145-22 to 146-5, 152-10 to 11) Hunter did not test the vial retrieved from Figueroa's car because the State lab's procedure is to stop testing once they have passed the weight threshold for the top distribution charge; she still concluded that the vial contained 9.07 grams of PCP. (5T 152-25 to 153-12)

Murphy testified at the first trial as a witness for the State. Murphy's testimony led with an admission that she was a part of a plan to ship drugs into

[7] Beyond testing positive for PCP, Hunter did not testify about the specimen's composition. In that regard, her testimony did not address how pure or adulterated it was; accordingly, she did not testify to how many effective doses the specimen from the package represented.

New Jersey; for receiving the package and giving it to Figueroa, she was to receive $200. (6T 21-16 to 18, 38-25 to 39-6, 84-15 to 25) On cross-examination, however, she claimed not to know what was in the box. (6T 48-6 to 9, 50-10 to 51-12, 52-17, 73-6) On numerous occasions, Murphy said she did not know what was inside the package before it had arrived at her house. (14T 158-13 to 160-11) As part of her guilty plea in 2016, Murphy had stated under oath that she knew the box contained narcotics when she received it. (Da 7-10; 14T 169-3 to 171-4) On cross-examination, Murphy unequivocally denied selling drugs:

> [MURPHY]: I told you I don't sell.
>
> [COUNSEL]: I'm sorry.
>
> [MURPHY]: I told you I don't sell anything.
>
> [COUNSEL]: You don't now, because you're on probation, and it's a crime, and they'd put you in prison for it. But back in 2013, when you were selling it, where did you keep the objects that you used to process it?
>
> [MURPHY]: I never sold, sir.
>
> [COUNSEL]: Never?
>
> [MURPHY]: Never.
>
> [COUNSEL]: Never sold any drugs anywhere?
>
> [MURPHY]: I never sold any PCP.
>
> [COUNSEL]: Never sold any drugs anywhere?

[MURPHY]: Never sold, sir.[8]

[(6T 114-15 to 115-3).]

Later, Detective Hoffman would testify that officers did not search Murphy's home for any other evidence of PCP distribution. (6T 208-22 to 209-25)

Figueroa testified in her own defense at the first trial, contesting many of the facts alleged by Murphy and other witnesses. (7T 12-8 to 125-7) For example, Hoffman had testified that after reading her the Miranda warnings, Figueroa had told him that she knew the package contained PCP. (6T 160-3 to 8) Figueroa, however, testified that she never referred to the box's contents because she did not know what was in it. (7T 48-21 to 49-9) Rather, she had told officers that the vial retrieved from her car contained PCP. (7T 48-15 to 49-9) Figueroa testified that Murphy had been regularly selling her $50 worth of PCP every couple of days. (7T 17-23 to 19-13) On July 3, 2013, soon after Murphy let her in the house, Figueroa testified that Murphy took a box from a table in the kitchen and placed it in Figueroa's hands. (7T 39-12 to 39-21) Figueroa testified that she said, "What's this?" and had held the box for several seconds before Cullen and Hoffman came out of the bathroom and began

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[8] In 1994, 19 years before the offense here, Murphy was convicted in California for possession with intent to distribute, for which she received probation. (6T 5-22 to 13-10) The defense was not permitted to introduce that conviction for impeachment purposes at the first trial. (6T 13-11 to 14-23) See Point III.

questioning her. (7T 39-22 to 41-17) She testified that she did not know anyone named Jimmy and that her phone contact labeled "Bra" was, in fact, her brother. (7T 54-11 to 58-24, 59-23 to 60-13)

Figueroa also testified that the text messages presented in the State's exhibits were "jumbled," and some messages between her and Murphy were missing. (7T 23-12 to 24-25, 56-6 to 23, 74-16 to 75-1, 78-13 to 24) Figueroa testified that the missing text messages would have shown that her cousin visited Camden on at least one occasion before July 2nd; her cousin had met up with her and Murphy to buy and smoke PCP. (7T 94-3 to 98-25)

Although she denied the bulk of the charges, Figueroa admitted that she possessed the vial of PCP in her car for personal use. (7T 49-1 to 20)

In closing, the defense emphasized two main arguments. First, Murphy's lack of credibility: she was found in possession of 70 ounces of PCP and had pled guilty to a distribution offense, but was evasive while testifying and refused to say she knowingly received the package of drugs. (7T 139-6 to 25, 156-7 to 157-21) Second, the sole "true and accurate" police report about the incident said that the package was delivered at 1:30 p.m.—if true, that would mean Murphy's text about the "cousin" arriving at 10:41 a.m. could not have been about the package. (7T 145-11 to 146-21) While arguing there was reasonable doubt surrounding Murphy's testimony and the time of the delivery, the defense

essentially conceded Count 5, arguing the State had failed to prove anything beyond Figueroa's knowing possession of the vial in her car for personal use. (7T 161-6 to 25)

The jury returned a guilty verdict on Count 5, but could not reach a verdict with respect to any of the four counts relating to the package. (8T 24-12 to 25-7, 25-8 to 16) The court accepted the partial verdict on August 31, 2018. (8T 26-1 to 28-24)

C. Erroneous for-cause removals in second trial's jury selection.

During jury selection for the second trial, the State introduced two supplemental questions. (9T 9-11 to 14) The first question was whether jurors knew anyone with a serious problem resulting from drug use, and if so, whether that would affect their ability to be fair and impartial. (9T 9-19 to 22) More critically, the second question asked at the State's request was: "Would you give greater, lesser, or equal weight to a cooperating witness [who] is receiving [a] benefit from the State for their testimony?" (9T 9-11 to 20) During jury selection, the State moved to have five prospective jurors removed for cause because they answered "less" to the cooperating witness question. Defense counsel objected to each removal motion. The following is a summary of the voir dire with the five prospective jurors who the court removed for cause:

1. Juror M.S.

M.S. said they had close relationships with individuals in law enforcement and victims of crime, but that they could still be fair and impartial in this case. (10T 105-1 to 21) When asked if they believed the criminal justice system is fair and effective, M.S. said yes, explaining: "Because it's a great system that has been in effect for a very long time and I believe that people go through the due process and they have a right to their attorney and the process is fair and hopefully the outcome is what is supposed to happen." (10T 107-7 to 11) When asked if they believed they would be a good juror for this case, they said yes again: "Because I believe I could be impartial and think carefully of the evidence." (10T 107-16 to 17)

On the cooperating witness question, M.S. answered: "I'd like to say equal but I think I would say lesser." (10T 106-5 to 6) There was no further inquiry about the topic. The State moved to remove M.S. for cause and the court granted the motion over defense's objection. (10T 107-22 to 109-7)

2. Juror L.J.

In response to the cooperating witness question, L.J. gave a one-word answer: "Less." (10T 133-11 to 14) There was no follow-up questioning. (10T 133-14 to 135-5) L.J.'s other answers indicated that they would abide by the court's rulings and that their life experiences would not affect their ability to be

fair and impartial. (10T 133-15 to 134-13) L.J. was removed for cause, over defense objection, on the State's motion. (10T 134-21 to 135-5)

3. Juror L.S.

L.S. was asked both supplemental questions. They said that they did not know anyone with a drug problem that could affect their ability to be fair and impartial in this case. (11T 27-23 to 28-2) L.S. tried to talk through their reasoning on the cooperating witness question. Rather than inquiring further, the court indicated that it expected a one-word answer:

> THE COURT: All right. So turning to the supplemental questions, would you give greater, less or equal weight to a cooperating witness who's receiving a benefit from the State for their testimony? Greater, less or equal.
>
> THE JUROR: I guess I would have to – I'd like to think that I would be neutral but if they're getting a benefit out of it, I would maybe think that they're going to answer the way that they feel that they're supposed to answer and not the way -- not what –
>
> THE COURT: Okay. But the question is, what weight would you give to their testimony? Would you give greater weight, would you give less weight or would you give it equal weight?
>
> THE JUROR: Would I give it?
>
> THE COURT: Correct. What weight would you gave their testimony, greater, less or equal?
>
> THE JUROR: I'd probably give it less weight.
>
> THE COURT: Less weight. Okay.
>
> [11T 27-4 to 23]

There was no further discussion on the matter. The State moved to remove L.S. for cause; that motion was granted over objection. (11T 28-7 to 17)

4. Juror J.S.

J.S., who worked as a police officer in Camden County, told the court that he could be a fair and impartial juror. (11T 75-20 to 76-4) In response to the cooperating witness question, J.S. replied to the court: "Less, sir."[9] (11T 76-11 to 15) The court confirmed that it had heard J.S. say "less," and then asked no further questions on the topic. (11T 76-16 to 17)

Defense counsel expressly stated that it would not use a peremptory challenge against J.S. despite his career in law enforcement. (11T 77-2 to 4) Nonetheless, the State moved to have him excused for cause, and the court granted the motion over the defense's objection. (11T 77-5 to 11)

5. Juror P.D.

P.D. said they could be fair and impartial in response to the question about knowing a person with a drug problem. (11T 90-20 to 25) In response to the cooperating witness question, they said: "For that one, I put probably less if they were getting something. I don't know if I would trust them." (11T 90-13 to 19) There were no additional questions on the topic. The State moved to have P.D.

[9] This is mistakenly transcribed as "Yes, sir."

excused for cause, and the court granted that motion over the defense's objection. (11T 91-4 to 15)

Following the second trial, the defense moved a new trial. (18T) The defense raised several points, including the court's five removals for cause. The Hon. Kurt Kramer, J.S.C., agreed that there had been error in the trial court's decision to excuse the five jurors for cause based on their answers and with no follow-up questioning from the court or the attorneys.[10] (18T 14-3 to 15-15) Judge Kramer explained that, while it is routine for voir dire questions to assess potential bias and the juror's ability to impartially follow the court's instructions, it was also true that "jurors are actually permitted to give lesser weight to witnesses who receive a benefit from their testimony." (18T 14-16 to 22) Striking a juror for cause "based on their preliminary opinion that they are less likely to believe a witness receiving a benefit for testifying, a factor that they are permitted to consider when weighing the credibility of a witness's testimony, without more, was error." (18T 15-10 to 15)

Because the trial court had failed to make sufficient inquiries of the jurors before granting the State's motion to remove them for cause, it had erred, "thus

[10] Additionally, two prospective jurors were excused for cause after answering that they would give greater weight to a witness receiving a benefit for their testimony. (18T 5-19 to 6-2) The motion court did not deem those removals to be error.

depriving Defendant of a representative jury and a fair trial." (18T 14-3 to 7) Despite that finding, Judge Kramer concluded that the error did not rise to the level that required reversal. (18T 15-16 to 17) Rather, he concluded the error was harmless because the State had five unused peremptory challenges, which could have been used to strike the same five jurors if the State's motions had been denied. (18T 15-16 to 17-4)

D. Second trial and sentencing.

The Hon. Francisco Dominguez, J.S.C., presided over the second trial, which began on September 25, 2019. (12T) The State introduced two new pieces of evidence. The first was an additional cell phone extraction. (9T 19-9 to 16) The second was a record from UPS which, it argued, proved that the package was delivered at 10:36 a.m. (12T 225-13 to 226-21; 15T 236-11 to 237-8)

Murphy testified again at the second trial. This time, Murphy testified that she expected to be paid between $100 and $200 for receiving the package. (14T 134-16 to 20) She initially testified that she did not know why Figueroa wanted her to receive a package or referred to it as a "cousin" over text, because she "didn't want to know." (14T 124-18 to 125-10, 249-15 to 20) As with the first trial, Murphy denied knowing what was in the package before it was delivered, contradicting the sworn statement from her guilty plea that she knew

it contained narcotics when she received it.[11] (14T 169-24 to 170-5, 240-10 to 241-9) Murphy also denied having an agreement with Figueroa to receive an illicit package, instead claiming that she only knew the package was illegal when officers knocked on her door. (14T 175-3 to 7, 176-1 to 5, 238-10 to 239-14) Murphy's recollection was inconsistent regarding whether she told Figueroa where to find the package. (14T 216-1 to 217-25) At the first trial, Murphy had testified that she could hear the conversation between Figueroa and the officers after they stopped her; Murphy's testimony had matched with Hoffman's (6T 160-3 to 8) in saying she heard Figueroa say that there was PCP in the package. (6T 36-6 to 10, 93-4 to 94-17) During the second trial, Murphy claimed she was in the living room when officers stopped Figueroa and could not hear their conversation. (14T 142-1 to 13, 227-24 to 231-9)

At one point, Murphy could not recall when the package was delivered; after refreshing her recollection with Cullen's police report, she testified that it arrived around 1:30 p.m. (14T 196-16 to 198-12) Following a break in the trial proceedings, Murphy revised her testimony and stated that the package had arrived closer to 10:30 a.m. (14T 199-22 to 200-19; 15T 215-1 to 16)

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[11] For some reason, the State elicited testimony from Murphy that she did not know there was something illegal in the box when she received it, then argued in closing that Murphy was "guilty" and "a drug dealer." (14T 246-11 to 15; 15T 243-17 to 244-6)

Figueroa's recorded testimony from the first trial was played for the jury. (14T 258-7 to 260-18; 15T 6-8 to 13-3) Her testimony had been redacted to omit a reference to Murphy's criminal record (9T 25-12 to 25), as well as references to the possession conviction from the first trial. (9T 23-19 to 27-18) The recording was played a second time at the jury's request during deliberations. (16T 66-20 to 67-13, 69-25 to 70-11)

On October 4, 2019, the jury returned guilty verdicts on all four remaining counts. (17T 6-3 to 10-4)

The defense moved for a new trial in 2019 after a juror reached out to Figueroa on social media and sent messages suggesting that the jury's deliberations may have been improperly influenced by her decision not to testify at the second trial. (18T 7-16 to 9-4) The State moved to compel the juror to testify. (18T 9-5 to 7) Following an in camera hearing with the juror, the Hon. Christine Orlando, J.S.C., denied the State's motion to compel the juror's testimony. The court concluded that the juror's comments during the in camera hearing did not establish that the jury ignored the court's instruction about the defendant's right to remain silent. (18T 9-14 to 11-1)

The defense's motion for a new trial was denied by the Hon. Kurt Kramer, J.S.C., on February 15, 2022. (18T 25-18 to 24) As previously discussed, the court found error in the jury selection process because of the cooperating witness

question, but concluded that the error was harmless. (18T 3-14 to 25-24) Regarding the other two points raised by the defense—the juror's communications suggesting that the deliberations were tainted by improper considerations, and the State's purported improper references to other crimes in closing—the court found no error. (18T 17-5 to 25-21)

On March 31, 2022, Judge Kramer sentenced Figueroa. (19T) The court found aggravating factors 5 (involved in organized criminal activity), and 9 (deterrence). (Da 20-23; 19T 77-24 to 80-24) The court found several mitigating factors, giving moderate weight to factor 7 (defendant's long period of law-abiding behavior), minimal weight to 8 (offense took place under circumstances unlikely to reoccur), some weight to 9 (character and attitude of defendant indicate unlikely to commit another crime), and some weight to 11 (imprisonment would entail excessive hardship for defendant or their dependents). (19T 80-25 to 84-22) The court found the mitigating factors to "minimally outweigh" the aggravating factors. (19T 84-23 to 85-1) Although the balance of factors favored the defendant, the court rejected Figueroa's request for a downgraded sentence because it did not find the mitigating factors to substantially outweigh the aggravating. (19T 84-23 to 85-20)

Figueroa was sentenced to 13 years on the first-degree possession of CDS with intent to distribute conviction. (19T 86-1 to 8) Counts 2, 3, and 5 were

merged. (Da 20-23) She was also sentenced to a concurrent five-year term on Count 4. (Da 20-23; 19T 86-3 to 5)

A notice of appeal was filed as within time on February 16, 2023. (Da 24-27)

LEGAL ARGUMENT

POINT I

THE ERROR IN THE SECOND TRIAL'S JURY SELECTION—DISMISSING FOR CAUSE THOSE JURORS WHO RESPONDED TO A CONFUSING QUESTION THAT THEY MAY GIVE LESS WEIGHT TO A COOPERATING STATE WITNESS RECEIVING A BENEFIT FOR THEIR TESTIMONY—WAS NOT HARMLESS. (10T 107-22 to 109-7; 10T 134-21 to 135-5; 11T 28-7 to 17; 11T 77-5 to 10; 11T 91-4 to 15; 18T 12-14 to 17-4)

At the motion for a new trial, defense counsel again raised the issue that there had been error in striking jurors for cause after they had answered unfavorably to one of the State's proposed supplemental questions. At the State's request, prospective jurors were asked: "Would you give greater, lesser, or equal weight to a cooperating witness [who] is receiving [a] benefit from the State for their testimony?" (9T 9-16 to 22) Five jurors were removed this way over the defense's objections. (10T 107-22 to 109-7; 10T 134-21 to 135-5; 11T 28-7 to 17; 11T 77-5 to 10; 11T 91-4 to 15) The court hearing the motion for a new trial found error in the trial court's decision to excuse jurors who answered

"lesser," with no follow-up questioning from the court or the attorneys. (18T 14-3 to 15-15) The motion court, however, considered the error to be harmless because the number of jurors erroneously removed for cause matched the State's remaining peremptory challenges; thus, the State "could have" exercised those challenges and resulted in the same jury. (18T 15-16 to 17-4)

The motion court recognized that the error from these removals was partly due to the voir dire court's reliance on one-word answers, with no further examination, given in response to an ambiguous question that confused multiple prospective jurors. The five removed jurors were likely expressing their ability to be fair and impartial when considering the factors that weigh on a witness' credibility. The court's action in granting the motions deprived Figueroa of a representative jury and harmed her right to a fair trial. Because this constitutional error cannot be proven harmless beyond a reasonable doubt, this court should reverse the convictions from the second trial. U.S. Const. amends. VI and XIV; N.J. Const. art. 1, pars. 1, 9, 10.

Jury selection is "an integral part of the process to which every criminal defendant is entitled." State v. Tinnes, 379 N.J. Super. 179, 183 (App. Div. 2005) (quoting State v. Singletary, 80 N.J. 55, 62 (1979)) An accused is constitutionally guaranteed the right to trial by an impartial jury by the Sixth and Fourteenth Amendments to the United States Constitution and Article I,

paragraph 10 of our State Constitution. State v. Fortin, 178 N.J. 540, 575 (2004); State v. Williams, 113 N.J. 393, 409 (1988) (Williams II). The jury selection procedures adopted in this state, by statute and rule, are aimed at producing a jury in each case that is "as nearly impartial as the lot of humanity will admit." State v. Tinnes, 379 N.J. Super. 179, 183 (App. Div. 2005) (quoting State v. Williams, 93 N.J. 39, 60 (1983) (Williams I)). These constitutional guarantees thus provide defendants "the right to trial by a jury drawn from a representative cross-section of the community." State v. Andujar, 247 N.J. 275, 305 (2021) (quoting State v. Gilmore, 103 N.J. 508, 524 (1986)). "That principle is meant to promote impartiality, by having jurors with 'diverse beliefs and values' interact, and to enhance public respect for the court process." Id. at 300 (quoting Gilmore, 103 N.J. at 525). Reviewing courts have generally given deference to a trial court's decisions within the voir dire process "except to correct an error that undermines the selection of an impartial jury." State v. Winder, 200 N.J. 231, 252 (2009).

"The process of voir dire -- of questioning prospective jurors -- is intended to identify and exclude people who cannot be impartial." Andujar, 247 N.J. at 305. A defendant's right to a properly selected jury is "precious[;]" the court's questioning plays an important role in safeguarding that right. Id. at 315. For example, merely "perfunctory" questioning by the court risks depriving all

parties of the chance to exercise their peremptory challenges effectively. Williams II, 113 N.J. at 408. The peremptory challenge is "a creature of statute designed to eliminate extremes of partiality on both sides, [and] to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them and not otherwise." Tinnes, 379 N.J. Super. at 185 (quoting State v. DiFrisco, 137 N.J. 434, 468 (1994)) (internal quotations omitted). So even where peremptory challenges are being exercised, they still must be aimed towards the ultimate end of a fair trial before an impartial jury. The voir dire questioning that precedes the challenges must share that aim, as well.

A. The voir dire question was problematic because it was both imbalanced and confusing.

In State v. Little, 246 N.J. 402 (2021), our Supreme Court considered a voir dire question introduced by the State in an aggravated assault and weapons case. Because the State anticipated that it would not find the handgun allegedly used during the offenses, the State asked that voir dire include a question on whether a prospective juror's "ability to serve . . . would be affected if the State did not produce the weapon that defendant allegedly used." Id. at 407. The State exercised peremptory challenges to excuse those who said they would be less likely to convict a defendant if no weapon were admitted into evidence. Ibid.

Finding the case to present several matters of apparent first impression, the Court found the question touched on a legitimate area of inquiry, but saw a clear problem with the imbalanced way the issue was presented to jurors. Questions can be asked to determine if jurors will be able to "follow the court's instructions and deliberate with an open mind," but such questioning cannot be "partisan" or "indoctrinate prospective jurors in favor of either side's position." Ibid. Not only did prospective jurors express confusion, but the question in Little only addressed the aspect of the legal standard that assisted the State, potentially creating bias or minimizing the State's burden of proof. Id. at 417-420. "The trial court is charged to scrutinize the language of a question proposed by counsel and to reject or reformulate that question if it crosses the line from inquiry to advocacy." Id. at 417. The State's question obscured that the law also permitted the jurors "to consider the State's inability to produce the handgun at issue as a factor when it decided whether the State had met its burden to prove beyond a reasonable doubt the elements of each offense." Id. at 419 (emphasis added). Consequently, the Court concluded that the defendant was entitled to a new trial. Id. at 420.

The cooperating witness question asked before Figueroa's second trial is, at best, ambiguous. Like the question in Little, "some of the prospective jurors' responses demonstrated that the court's inquiry confused them." Little, 246 N.J.

at 419-20. But while the defendant in Little had their right to a fair trial jeopardized by the State's peremptory challenges, the trial court's for-cause removals here are even more alarming. Not only did the trial court spare the State the need to use its challenges, but it also suggested to the jury that the court had weighed Murphy's credibility and found it to be roughly equal to that of the other witnesses.

The record here amply demonstrates the juror confusion caused by the voir dire question. Here, on at least one occasion where a prospective juror asked for clarification, the court simply repeated the question. (10T 128-5 to 25) Other jurors seemed not to understand the question because, presented with three options—greater, equal, or lesser—they answered "yes" or "no." (10T 70-9 to 15, 80-10 to 13, 128-5 to 15) Had the court tried to clarify, its explanation would have depended on how it interpreted the ambiguous question: whether it was assessing the juror's ability to logically assess credibility as directed in the model charges ("Do you believe that receiving a benefit for testimony is a factor that makes a witness more or less likely to be credible?"), or whether it was bluntly asking if the juror has an outright bias ("Do you believe that cooperating witnesses are always less reliable than other witnesses?"). The answers on the record suggest that the five jurors removed for cause thought that receiving a benefit would be a factor, not a reason to automatically discredit the witness.

As Judge Kramer noted in his finding of error, a witness's interest in the outcome of a case "is a factor a jury may consider in weighing credibility and does not itself justify excluding [jurors] for cause." (18T 14-23 to 15-15) See also Model Jury Charges (Criminal), "Criminal Final Charge" (rev. Sept. 1, 2022).[12]

In response to the juror's request for clarification, the voir dire court could have explained just what Judge Kramer said: a witness' interest in the case is something worth considering, but it doesn't automatically mean the testimony is valid or invalid. This simple idea, a part of every criminal final charge, is obfuscated by the unqualified framing of State's question. Consequently, it was

[12] The version of the Criminal Final Charge instruction available on the New Jersey courts website is marked as last revised on September 1, 2022. The portion of the "standard charge" described by Judge Kramer has been reworded, but its substance remains the same:

> As the judges of the facts, you are to determine the credibility of the witnesses and, in determining whether a witness is worthy of belief and therefore credible, you may take into consideration: [. . .] the witness' interest in the outcome of the trial if any; [. . .] the possible bias, if any, in favor of the side for whom the witness testified; [. . .] and any and all other matters in the evidence which serve to support or discredit his or her testimony.
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> [Criminal Final Charge at 5-6.] The current charge is available online at njcourts.gov/sites/default/files/charges/cfccomp.pdf (last visited Sept. 4, 2024).

error for the question to be asked of prospective jurors while it was so imbalanced and unclear.

B. The for-cause removals were error.

Setting aside the cooperating witness question, not one of the five jurors removed on the State's motion presented a compelling case for removal for cause. For example, M.S.'s other answers made it appear unlikely that their comment about giving less weight to a cooperating witness's testimony was an expression of unfair prejudice. M.S.'s responses to the court's open-ended questions expressed a belief in due process, the right of defendants to have counsel, and the importance of impartiality. (10T 107-7 to 11, 107-16 to 17)

Similarly, L.S. tried to explain their reasoning and could have been asked to clarify whether their answer meant they could follow the court's instructions and remain impartial. (11T 27-4 to 23) Instead, the court repeated the cooperating witness question back to them. (11T 28-7 to 17) This made it appear that the court was primarily concerned not with the potential for bias, but with quickly obtaining a one-word answer.

The possibility that jurors meant they would consider witness benefits as a factor is arguably at its strongest in the case of J.S., who was employed as a police officer in Camden. Although the record does not detail their length of service or experience, J.S.'s answer is consonant with the witness credibility instruction that juries should consider if a witness has an interest in the case's

outcome. (11T 76-3 to 77-4) The State's motion to excuse J.S. implicitly argues, based on a one-word answer, that a police officer is unfairly prejudiced against State cooperating witnesses because he has "automatically" decided on her credibility in advance.

The for-cause removals were error that impacted the fairness of the jury selection process. It is not a new idea that equal protection under the law requires fairness in jury selection. See, e.g., Strauder v. State of W. Virginia, 100 U.S. 303 (1879) (invalidating state statute providing that only white men could serve as jurors). Flaws in jury selection risk causing harm which "extends beyond the defendant," and even beyond "the excluded juror." Andujar, 247 N.J. at 316. For decades, courts have recognized that prohibited discrimination in voir dire "touch[es] the entire community" and "undermine[s] public confidence in the fairness of our system of justice." Ibid. (alterations in original) (quoting Batson v. Kentucky, 476 U.S. 79, 87 (1986)). In the same way we expect a court conducting voir dire to curb the effect of unfair prejudice—not to perpetuate that prejudice—it must also protect the defendant's right to due process. Accordingly, decisions about fairness cannot be resolved purely by the arithmetic of tallying up the number of the trial court's errors and comparing that to the remaining count of peremptory challenges. Rather, the reviewing

court should be looking at the qualitative effect of the lower court's decisions to determine if it could have deprived a defendant of due process.[13]

There is no prejudice to the State if jurors are saying that they will evaluate the facts about a witness' potential biases in a manner that is expressly permitted by the standard model charge used in all criminal cases. The State, without seeking clarification, argued that the first juror it moved to have excluded for cause revealed an unfair prejudice against State witnesses because they were "automatically making an assumption about credibility." (10T 108-20 to 25) Although that is probably not the case, we do not know exactly what the removed jurors thought—the trial court failed to ask any follow-up questions that would have allowed these prospective jurors to participate in this essential civic service. The court's method of handling the question and the removals constitutes error.

[13] In one respect, this case presents a novel question. Neither counsel nor the court could find any cases addressing this exact manner of for-cause removals favoring the State based on a deeply flawed supplemental question. (19T 97-21 to 99-8) As defense counsel observed after sentencing, this question is also likely to reoccur. (19T 98-24 to 99-8) Following Figueroa's convictions, one can easily imagine "that going forward, there will be other cases where prosecutors will ask that jurors make some pronouncement as to whether or not a cooperating witness's testimony is to be treated differently than the testimony of other persons." (19T 99-2 to 8) Despite its novelty, this question can be resolved by reference to the longstanding principles guiding voir dire.

C. The error was not harmless.

Judge Kramer's findings on the motion for a new trial recognized that there was error, but also understated the magnitude of the error. In that regard, Judge Kramer's harm analysis was limited to counting the State's number of remaining peremptory challenges and concluding that the five challenges would have been used to excuse the individuals who were improperly removed for cause. (18T 15-16 to 17-4) Although it is convenient to match the five removals to the five challenges, this belies how jury selection worked in this case. It is not as if the State used its peremptory challenges all at once and only after it had become acquainted with the entire jury pool: jurors were being seated one after another. When a party has few peremptory challenges left, they may have strategic reasons for acquiescing to a juror they might otherwise challenge—just in case they want to save a peremptory where it may be especially valuable. Had the court denied the motions for removal, the State may have exhausted its peremptory challenges. The State's position on some prospective jurors may

well have shifted as they approached their last few challenges.[14] Instead, members of the public were removed from the jury pool for an answer that likely was meant to express their willingness to follow the court's instructions and fairly consider possible biases when assessing witness credibility.

Moreover, the cooperating witness question was aimed not at ensuring an impartial jury, but at bolstering Murphy's testimony, which was critical to the State in several ways. She was the only person to testify that she and Figueroa had agreed to use "cousin" as a code word in furtherance of a drug distribution conspiracy. Murphy was also far from a perfect witness: she had issues recalling many details and made repeated remarks that contradicted her previous sworn testimony. At the allocution for her guilty plea, Murphy testified that she knew the package contained narcotics when she received it. (15T 231-8 to 232-13) But at trial, she testified that she did not know what the box contained when she received it. (14T 158-13 to 160-11) It may be the case that Murphy lied during her factual allocution to secure a non-custodial probationary sentence to resolve

[14] For example, J.S. was the fourth prospective juror removed for cause. (11T 77-5 to 11) Had the State been required to use its peremptory strikes with the first three individuals, then they would have had to weigh the potential cost of using their second-to-last strike on a Camden police officer. Facing that decision, it would have been even more important for the State to ask follow-up questions. In all likelihood, the State would have been keen to clarify whether J.S. held an automatic prejudice against State witnesses, or if he meant he would assess their credibility using the factors described in the model jury charges used in every criminal trial.

a first-degree charge; it may be that she lied during Figueroa's trial. Nonetheless, the State knew from her first trial testimony that Murphy's credibility was a weak point that threatened to introduce reasonable doubt regarding their theory of the case. (6T 47-25 to 48-9, 50-10 to 51-3, 69-1 to 18) After her contradictions were highlighted at length in the second trial, the prosecutor remarked in summation that the jurors "[do not] have to listen to Tracy Murphy," or other witnesses, because evidence such as the cell phone logs could speak for themselves. (15T 251-10 to 18) The supplemental question could not have been about any other witness. Jurors who were likely to fairly assess Murphy's testimony were erroneously removed for cause, depriving Figueroa of a fair trial.

Figueroa has a constitutional right to a properly impaneled jury. Of course, a fair voir dire process is always important, but the stakes were particularly high for Figueroa. A conviction practically guaranteed separating her from her three children for years. (PSR at 14) Even knowing that her convictions may eventually be reversed, those years cannot be given back to Figueroa or her children. Moreover, what happened here did not serve the intended aims of jury selection. It did not promote impartiality, and it did not foster fairness by having jurors with "diverse beliefs and values" interact. Rather than enhancing "public respect for the court process," the State's conduct

here, sanctioned by the trial court's grant of their motions, smacked of the opposite. Andujar, 247 N.J. at 300.

Finally, it bears repeating that these jurors were struck for their apparent agreement with a perfectly rational position: if someone has a stake in the case's outcome, that might affect their testimony. There's good reason that this logical notion is a part of the model charges designed to be read at any criminal trial before a jury in New Jersey. The public's confidence in Figueroa's convictions ought to be shaken when it learns that potentially five of twelve jurors were excluded by the court because they expressed a sentiment that complies with the model charges and the common-sense way jurors are encouraged to work through problems. The error was not harmless, and it warrants reversing Figueroa's convictions from the second trial.

POINT II

THE PACKAGE SHOULD HAVE BEEN SUPPRESSED BECAUSE THE OFFICERS HAD NO REASONABLE BASIS TO RELY ON THIRD-PARTY CONSENT FOR A WARRANTLESS SEARCH WHEN THE CO-DEFENDANT DENIED OWNERSHIP OF THE PACKAGE. (1T 51-13 to 72-22)

Testimony from the officers suggests they had advance information that the package at the center of this case contained contraband, but they did not know the details until they knocked on Murphy's door and began asking her

questions about the delivery they had watched her receive. (T 7-2 to 24) In that moment, officers had reason to believe Murphy owned the box. Murphy, however, immediately disclaimed any ownership and purported to identify its actual owner, saying that it belonged to Figueroa. (T 9-15 to 10-14) Officers nonetheless asked Murphy for consent to open the box; after she signed the consent-to-search form, they searched it and found the suspected PCP inside. (T 10-22 to 12-25; 12T 235-1 to 13; 15T 29-1 to 30-24, 31-19 to 33-17)

Following a suppression hearing, the court ruled the box and its contents admissible at Figueroa's trial. (Da 11) The court found that Murphy told officers that the package belonged to Figueroa before she was given the consent-to-search form. (1T 52-24 to 53-10) In making its decision not to suppress, however, the trial court failed to properly analyze the fact that Murphy had disclaimed ownership of the package to officers—which meant they knew she could not consent to a search. It was not reasonable to believe that Murphy had apparent authority to lawfully consent to a search of something she insisted that did not belong to her. Accordingly, this Court should reverse the convictions and remand with instructions to suppress the package with respect to any retrial of Figueroa. U.S. Const. amends. IV and XIV; N.J. Const. art. 1, pars. 1, 9, 10.

Under certain circumstances, a law enforcement officer may rely on the apparent authority of a person consenting to a search without it constituting an

unreasonable warrantless search. "Apparent authority arises when a third party (1) does not possess actual authority to consent but appears to have such authority and (2) the law enforcement officer reasonably relied, from an objective perspective, on that appearance of authority." State v. Cushing, 226 N.J. 187, 199-200 (2016). Under that doctrine, if an officer "at the time of the search erroneously, but reasonably, believed that a third party possessed common authority over the property to be searched, a warrantless search based on that third party's consent is permissible under the Fourth Amendment." State v. Suazo, 133 N.J. 315, 320 (1993). In assessing an officer's reliance on a third party's consent, reviewing courts "consider whether the officer's belief that the third party had the authority to consent was objectively reasonable in view of the facts and circumstances known at the time of the search." Ibid. Accordingly, "[w]hen circumstances suggest that the property to be searched belongs to someone other than the consenting party, the validity of the third-party consent becomes questionable." Id. at 322.

Appellate courts "review the trial court's determination of [a] defendant's motion to suppress under a deferential standard." State v. Miranda, 253 N.J. 461, 474 (2023). "Appellate courts reviewing a grant or denial of a motion to suppress must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the

record." State v. Lamb, 218 N.J. 300, 313 (2014). Reversal is warranted when the trial court's determination is "so clearly mistaken that the interests of justice demand intervention and correction." Ibid. (quoting Elders, 192 N.J. at 244) (internal quotations omitted). Further, the reviewing court owes no deference to "the trial court's legal conclusions and its determination of the consequences that flow from established facts." Miranda, 253 N.J. at 475 (citing State v. Nyema, 249 N.J. 509, 526-27 (2022), and State v. Hubbard, 222 N.J. 249, 263 (2015)).

Here, the motion testimony about what followed Hoffman and Cullen's early interaction with Murphy demonstrates why the suppression motion should have been granted. Initially, officers had reasonable grounds to believe Murphy was able to consent to a search of the package because they watched her receive the delivery. (T 7-2 to 24) Murphy, however, immediately disclaimed any ownership interest in the package. (T 9-15 to 10-25) Hoffman, Cullen, and Murphy would all later testify that she told officers, without delay, that the package belonged to Figueroa. (12T 234-1 to 10; 13T 26-24 to 29-6; 14T 135-8 to 21) Consequently, officers knew exactly who to ask for lawful consent to search the package. At this point, officers had no "objectively reasonable" belief that Murphy had the authority to consent. See Miranda, 253 N.J. at 477. They

had the option of seizing the package pending a search warrant application, but instead they sought Murphy's consent while knowing it was invalid.

The trial court's analysis of Murphy's ability to consent to the search of a package she denied owning is flawed. In its decision, the court stated that even if it interpreted Murphy as disclaiming her ownership right of the package,

> Murphy's consent to the search is valid, because defendant objectively relinquished her expectation of privacy in the object search by addressing the package to a name other than her own, and sending the package to an address that is not her own. . . . Murphy did possess a proper authority to grant consent to search the package because she had a reasonable expectation of . . . privacy in a package that was addressed to her residence and that she took possession of. In fact, Murphy had more of a legal right over the package than the defendant, because [the] package was in her possession at her residence and linked to her address.
>
> [(1T 68-3 to 17)]

This reasoning overlooked whether the officers had an objectively reasonable belief that Murphy could consent to the search. Murphy informed officers that she had agreed to receive a "cousin" on behalf of Figueroa, her friend. (T 17-7 to 23; 14T 124-18 to 125-10) The State argued that it was reasonable for officers to see the text messages between Murphy and Figueroa, hear Murphy's explanation, and proceed on the belief that she was truthfully cooperating. (15T 239-8 to 240-12) Murphy testified, however, that she had told the officers she knew to expect and receive the package because Figueroa had told her about it. (14T 181-7 to 182-5) That meant Murphy knew Figueroa had an interest, and a

reasonable expectation of privacy, of that package. Murphy conveyed this to the officers, who reviewed Murphy's texts and concluded that Figueroa was in fact going to claim the package later that day. (T 17-12 to 19-1) Cullen relayed all of this at the suppression hearing, establishing that the officers knew that Murphy disclaimed ownership in the package. (T 9-20 to 18-4) But rather than seeking a warrant or obtaining consent from Figueroa, the putative owner, the officers sought and obtained consent from a person who had already explained why she was in no position to validly consent to a search. This was not just invalid consent—the officers knew it was invalid, lacking apparent or actual authority, before they proceeded with the search. That rendered the warrantless search unlawful.

Accordingly, it was error to deny the suppression motion. This Court should reverse and remand for further proceedings without allowing package to be used in the case against Figueroa.

POINT III

IT WAS ERROR TO PROHIBIT THE DEFENSE FROM INTRODUCING EVIDENCE THAT THE STATE'S COOPERATING WITNESS HAD PRIOR DRUG DISTRIBUTION CHARGES, IN CONTRADICTION OF HER SWORN TESTIMONY. (6T 5-16 to 14-23; 12T 26-18 to 27-24)

As noted, the jury's assessment of Murphy's credibility was important to the outcome of this case. Before she testified in the first trial, the court heard argument and decided that Murphy's California conviction for possession with intent to distribute, from 19 years before the instant offense, was too remote to be explored in front of the jury. (6T 14-15 to 23) The error in this ruling became apparent later that day when Murphy proceeded to testify that she had never sold drugs anywhere. (6T 114-22 to 115-3) The defense abided by the court's ruling at the first trial and did not impeach Murphy with the prior conviction. (12T 6-1 to 18) Prior to the second trial, defense counsel brought a "reverse 404(b)" motion seeking to admit evidence of Murphy's criminal history. (12T 5-19 to 25) The second court denied the motion, concluding that Murphy's history was not relevant to the charges against Figueroa. (12T 26-18 to 27-24) In doing so, the trial court abused its discretion in prohibiting the defense to explore Murphy's past crimes before the jury. Consequently, this court should reverse Figueroa's convictions. U.S. Const. amends. V, VI and XIV; N.J. Const. art. 1, pars. 1, 9, 10.

"A defendant enjoys a fundamental constitutional right to a fair trial, which necessarily includes the right to present witnesses and evidence in his own defense." State v. Jenewicz, 193 N.J. 440, 451 (2008). "The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Ibid. (quoting Washington v. Texas, 388 U.S. 14, 19 (1967)). In New Jersey, the fundamental right of an accused to present a defense is protected not only by the Federal Constitution but also by Article 1, paragraph 1 of the State Constitution. N.J. Const. art. 1, par. 1. Although defendants do not have an "unfettered right" to offer evidence that is "incompetent, privileged, or otherwise inadmissible under standard rules of evidence," it remains the case that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." Ibid. (first quoting Taylor v. Illinois, 484 U.S. 400, 410 (1988), and then quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973)).

Under N.J.R.E. 609(a)(1), evidence of a witness's conviction of a crime generally "shall be admitted" for the purpose of attacking the witness's credibility. Admission of a criminal conviction remains subject to N.J.R.E. 403. State v. Balthrop, 92 N.J. 542, 544-45 (1983). Further, when the conviction is more than ten years old, the party seeking to bring it in must establish that the

crime's probative value outweighs its prejudicial effect. N.J.R.E. 609(b)(1). The remoteness of the conviction in time is just one of several factors that the court may consider when determining admissibility of an older conviction. See N.J.R.E. 609(b)(2)(i) to (iv). While admissibility of a witness's older conviction requires that the court find that the probative value of the evidence outweighs its prejudicial effect, N.J.R.E. 609(b)(1), the prejudice to the defendant—not just the witness—must be a significant factor in the equation. Balthrop, 92 N.J. at 544-47. Even when convictions are not admissible under N.J.R.E. 609, however, a witness's credibility may also be attacked "by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives." Davis v. Alaska, 415 U.S. 308, 316 (1974).

The many issues with Murphy's testimony do not need to be repeated here. The State's case depended in large part on Murphy's explanation that the text messages between Figueroa and her were coded messages about drugs. The jury's evaluation of Murphy's credibility mattered a great deal, and Figueroa had a right to present evidence that made it appear more likely that she was not a credible witness. That right was significantly prejudiced by the trial court's two erroneous decisions regarding the admissibility of Murphy's prior record for impeachment purposes, particularly her prior conviction for possession of drugs with intent to distribute. The second court's error was not only more

consequential, but far more grievous: the decision was made with the benefit of knowing Murphy's testimony from the first trial claiming that she had never sold drugs. That testimony was clearly misleading, and even deceptive, based on her prior record. Although Murphy's prior conviction may have been dated, that was not a complete bar to its admissibility. The probative value of Murphy's prior record, in light of her contradictory testimony, outweighed any apparent prejudice to her or the State, and preclusion of that evidence served only to substantially prejudice Figueroa. Consequently, this Court should reverse Figueroa's convictions.

POINT IV

DEFENDANT'S 13-YEAR SENTENCE IS EXCESSIVE. (19T 77-25 to 86-8)

The trial court sentenced Figueroa to 13 years of incarceration. (19T 86-1 to 8) At sentencing, Figueroa's counsel argued for a downgraded sentence, pointing to her lack of a criminal record, the devastating impact a long incarceration would have on her three children, and the disparity with her co-defendant's plea to probation on the same charges to avoid jail time altogether. (19T 70-9 to 73-10) Under N.J.S.A. 2C:44-1(f)(2), if the court is clearly convinced that the mitigating factors substantially outweigh the aggravating and that the interest of justice demands it, a defendant may be sentenced one degree lower than their first- or second-degree conviction would otherwise allow. See

State v. Megargel, 143 N.J. 484 (1996). The court should have given greater weight to the mitigating factors it found and determined that Figueroa—as she stood before the court on sentencing day—was not so culpable that a sentence in the first-degree range was warranted. The court instead imposed a 13-year sentence based on an unsupported finding that the offense involved organized criminal activity; that error contributed to the court's improper balancing of the aggravating and mitigating factors. The resulting sentence appears unlikely to serve any of the sentencing goals outlined by the Code. Because the sentencing court's errors resulted in an excessive sentence, this Court should remand for resentencing. N.J.S.A. 2C:44-7; State v. Roth, 95 N.J. 334, 363-66 (1984); Megargel, 143 N.J. at 494-95; U.S. Const. amend. XIV; N.J. Const. art. 1, pars. 1, 9, 10.

A. The court's finding of aggravating factor 5, "a substantial likelihood that the defendant is involved in organized criminal activity," was not supported by the record.

A sentencing court's finding of aggravating and mitigating factors must be based on sufficient "competent and credible evidence in the record." State v. Fuentes, 217 N.J. 57, 70 (2014). "[W]here the Legislature has already taken certain aspects of the nature and circumstances of the offense into account in grading, the judge may not consider those same aspects again as aggravating factors." State v. Soto, 340 N.J. Super. 47, 71 (App. Div. 2001) (citations omitted).

Here, the sentencing court erred when it applied aggravating factor 5, which required finding "a substantial likelihood that the defendant is involved in organized criminal activity." N.J.S.A. 2C:44-1(a)(5). (19T 79-10 to 80-8) The court's finding rested on the fact that Figueroa appeared to be a "step in the chain" moving a substantial amount of PCP from producers in California to distributors in Pennsylvania. (19T 79-12 to 22)

The Legislature has made its attitude towards possession with intent to distribute abundantly clear—after meeting the weight threshold, those convicted are exposed to the highest ordinary sentencing range provided for in the Code. Although distribution offenses inherently involve the defendant's participation in something resembling a chain of commerce, that does not mean aggravating factor 5 is appropriate in every case where the accused is not simultaneously acting as producer, distributor, and dealer.

Here, there was no testimony presented to show that Figueroa was affiliated with a criminal organization. None of her texts were construed to suggest—even as code—that she was acting to assist a criminal organization. At most, the State had convinced a jury that there had been a conspiracy involving four people: the package's sender in California; Murphy; Figueroa; and "Jimmy." The State presented no evidence connecting one of those four to

any gang, club, or cartel. No evidence was presented to suggest that Figueroa, let alone the others, were part of any organization whatsoever.

The sentencing court itself acknowledged that Figueroa was not "a leader or an otherwise significant participant" in a criminal organization. (19T 79-23 to 80-8) There was no evidence presented suggesting she was even an affiliate of such an organization. Under the circumstances, the court's finding of aggravating factor 5 was unsupported by the record. At best, it was inappropriate double-counting of the element of the charged offenses involving an intent to distribute. This error warrants a remand for resentencing.

B. The mitigating factors substantially outweighed the aggravating factors, and the interests of justice supported a downgrade.

In Megargel, our Supreme Court recognized that a downgrade may be appropriate where the sentencing court is "clearly convinced that the mitigating factors substantially outweigh the aggravating ones and that the interest of justice demand a downgraded sentence." 143 N.J. at 496. When considering a downgraded under 2C:44-1(f)(2), "a court must apply the basic principles that are applicable to all sentencing decisions under the Code." Megargel, 143 N.J. at 500. This includes considering both "the surrounding circumstances of an offense" and "facts personal to the defendant." Id. at 500-501. Additionally, the court needed to consider "whether there is a compelling reason to downgrade

defendant's sentence in the interest of justice under [N.J.S.A. 44-1(f)(2)]." Megargel, 143 N.J. at 501.

At the outset, the sentencing court failed to conduct a thorough analysis of the downgrade request, as required by N.J.S.A. 2C:44-1(f)(2) or Megargel, before rejecting it and imposing a sentence in the normal first-degree range. At a minimum, the sentencing court's failure to conduct the proper analysis requires a remand for resentencing.

Had the court conducted a thorough analysis, it would have recognized that a downgraded sentence within the second-degree range was appropriate. Notably, the sentencing court's error in applying aggravating factor 5 contributed to its improper balancing of the applicable aggravating and mitigating factors.[15] Had that factor not been considered, it was clear that the balance of the mitigating factors substantially outweighed the sole applicable aggravating factor, aggravating factor 9, which arguably applies in every case and should have been given little weight here.

[15] For ease of reference, the court found aggravating factors 5 (likely involved in organized criminal activity), and 9 (deterrence). (19T 77-24 to 80-24) The court also found mitigating factors 7 (defendant's long period of law-abiding behavior), 8 (offense took place under circumstances unlikely to reoccur), 9 (character and attitude of defendant indicate unlikely to commit another crime), and 11 (imprisonment would be excessive hardship for defendant or their dependents). (19T 80-25 to 84-22)

Figueroa was being sentenced in 2022 for a crime that had taken place in 2013. In that period, she had given birth to two children, complied with all the terms of her release on bail, made her court appearances, and avoided any further trouble with the law. (PSR at 6-7, 14) The woman standing before the court at sentencing was a 38-year-old caretaker of three children who had stayed out of trouble for a decade and was seeing a therapist to address her addiction issues. (19T 76-5 to 16)

By 2022, it was clear that there was minimal need, if any, to deter Figueroa from reoffending. Her pre-sentence report showed no indictable offenses, municipal charges, or even arrests after 2013. (PSR at 6-7) And there was no reason to dispute her role as caretaker of her three children, or the significant hardship that her imprisonment would entail for all four people. Instead, the sentencing court's decision included no acknowledgement of person standing before it in 2022; the court did not expressly consider the passage of time and Figueroa's long law-abiding life. Had the court conducted a thorough, appropriate downgrade analysis, it would have found that the interests of justice demanded a downgraded sentence. The sentencing court erred when it concluded that the mitigating factors did not substantially outweigh the aggravating factors; there was a compelling case for downgrading the sentence.

In sum, a thorough Megargel downgrade analysis would have reached the conclusion that Figueroa should have been given a sentence below the first-degree range. Figueroa's sentence should be vacated and her matter remanded for sentencing within the second-degree range.

C. The excessive sentence imposed does not reflect the stated goals of sentencing outlined in the Criminal Code.

"[T]he stated purposes of sentencing in N.J.S.A. 2C:1-2(b), in their totality, inform the sentence's fairness." State v. Torres, 246 N.J. 246, 272 (2021). In particular, the sentencing goals of deterrence, incapacitation, and proportionality, spelled out in subsections (3) and (4) of N.J.S.A. 2C:1-2(b) are highly relevant to the court's sentencing determination; that determination must also "take into account the single person being subjected to the sentence imposed," "in the interest of promoting proportionality for the individual who will serve the punishment." Id. at 271, 273. Additionally, a sentencing court must consider social science relevant to sentencing, as one of the purposes of the Code is "[t]o advance the use of generally accepted scientific methods and knowledge in sentencing offenders." N.J.S.A. 2C:1-2(b)(7).

The sentencing court was thus required to consider whether Figueroa's 13-year-long sentence, for someone with no criminal history and who had since demonstrated that she required minimal deterrence from any future criminality, was proportional to the sentence of probation given to her co-defendant with a

previous distribution offense on her record. Even if the State is correct that Figueroa invited Murphy into the scheme, she was still a world away from being a kingpin or top-level distributor. Taking all of these matters into consideration, the court should have sentenced Figueroa to a lower sentence with a focus on maximizing her rehabilitative efforts, particularly given the outsized role that her struggles with substance abuse played in the offense. (19T 76-11 to 16) Accordingly, a remand for resentencing is required.

CONCLUSION

For the reasons set forth in Points I, II, and III, Dalia Figueroa's convictions should be reversed and she should be granted a new trial. Otherwise, for the reasons set forth in Point IV, the sentence should be vacated and the case should be remanded for resentencing.

Respectfully submitted,

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Dated: September 9, 2024

Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-1756-22T2

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Final Judgment of Conviction of the Superior Court of New Jersey, Law Division, Camden County.
v.	:	
DALIA D. FIGUEROA,	:	Sat Below: Hon. John T. Kelley, J.S.C., and a Jury; Hon. Francisco Dominguez, J.S.C., and a Jury; Hon. Christine Orlando, J.S.C., and Hon. Kurt Kramer, J.S.C.
Defendant-Appellant.	:	

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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February 3, 2025

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Da – defendant's appendix
Sa – State's appendix

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[1] Defendant identified the first transcript as "T" and began numbering with the second transcript. Although the State does not know the reason for this numbering convention, it will follow it for the sake of clarity.

[2] This transcript was filed with the Court at the direction of the Clerk after defendant's brief was filed and is not cited by either party.

[3] This transcript was not uploaded to the docket by defendant but includes arguments relating to one of the issues raised on appeal. Undersigned counsel therefore provided it to the Court when I discovered the omission while preparing this brief.

COUNTER-STATEMENT OF PROCEDURAL HISTORY

On April 12, 2016, a State Grand Jury returned Indictment Number 16-04-00058-S, charging defendant Dalia Figueroa and co-defendant Tracy Murphy with first-degree possession with intent to distribute more than ten grams of a controlled dangerous substance (CDS), in violation of N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(6) (count one); second-degree conspiracy to distribute more than ten grams of CDS, in violation of N.J.S.A. 2C:5-2 (count two); third-degree possession with intent to distribute CDS within 1,000 feet of school property, in violation of N.J.S.A. 2C:35-7(a) (count three); and second-degree possession with intent to distribute CDS within 500 feet of certain public property, in violation of N.J.S.A. 2C:35-7.1(a) (count four). (Da1-5; Da20). Defendant was also charged with second-degree possession with intent to distribute CDS, in violation of N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(7), which was later amended to third-degree possession of CDS, in violation of N.J.S.A. 2C:35-10(a)(1) (count five). (Da6; Da20; Da23).

On June 27, 2016, defendant filed a motion to suppress the drugs, which the Honorable John T. Kelley, J.S.C., denied on February 11, 2017, following a hearing. (0T; 2T51-13 to 72-22; Sa1; Da11).

On July 17, 2016, co-defendant Murphy pled guilty to count three, third-

degree possession with intent to distribute CDS within 1,000 feet of school property, and was sentenced to three years' probation in exchange for her truthful testimony at defendant's trial. (Da7).

Defendant was tried by a jury sitting before Judge Kelley from August 23 to 31, 2018. (4T-8T). At the conclusion of that trial, the jury convicted defendant of count five as amended, third-degree possession of CDS. (8T25-8 to 16; Da23). The jury was unable to reach a verdict on the remaining four counts. (8T24-12 to 25-7).

Defendant was retried before a second jury sitting before the Honorable Francisco Dominguez, J.S.C., from September 25 to October 4, 2019. (12T-17T). On October 4, 2019, the second jury convicted defendant of the remaining four counts. (17T6-4 to 10-24; Da13-18; Da20; Da23). On October 14, 2019, defendant filed a motion for a new trial, which the Honorable Kurt Kramer, J.S.C., denied on February 15, 2022. (18T; Sa2-4; Da19).

On March 31, 2022, Judge Kramer sentenced defendant to thirteen years' imprisonment on count one, first-degree possession with intent to distribute CDS, and a concurrent five years' imprisonment on count four, possession with intent to distribute CDS within 500 feet of certain public property. (19T86-1 to 5; Da20). Counts two and five merged into count one, and count three merged with count four. (19T6-21 to 7-9; Da20). Defendant

filed a notice of appeal on February 16, 2023. (Da24-27).

COUNTER-STATEMENT OF FACTS

In July 2013, a confidential informant notified New Jersey State Police that a suspicious package addressed to Jennifer Ball was going to be delivered to 1714 South 8th Street in Camden on July 3. (12T218-7 to 12; 12T219-1 to 3; 15T16-19 to 22). Detective Sergeant Garrett Cullen searched various police databases and determined that no one by that name lived at or had ever been associated with that address. (12T221-13 to 222-17). Based on that information, the State Police set up surveillance at that address at 8:00 a.m. on July 3. (12T115-7 to 13; 12T118-13 to 119-9; 12T223-14 to 17; 12T224-12 to 14; 15T16-22 to 25).

At 10:36 a.m., a UPS delivery driver knocked on the door and handed a package to the woman who answered. (12T165-15 to 23; 12T224-17 to 19; 12T226-18 to 20; 12T227-1 to 4; 15T20-23 to 21-4). The troopers continued surveillance for several hours to see if anyone else entered or left the house with the package. (12T120-2 to 7; 12T121-1 to 5; 12T227-5 to 21; 15T21-13 to 17). When no one had done so by 1:30 p.m., Detective Cullen and Detective Sergeant Erik Hoffman approached the house and knocked on the door. (12T231-6 to 15; 15T21-18 to 22-2; 15T24-21 to 25-4).

The woman who had accepted the package from the UPS driver, later identified as co-defendant Tracy Murphy, answered. (12T17-17 to 22;

12T231-6 to 15; 15T25-6 to 17). When the troopers explained that they were investigating the package, Murphy invited them in. (12T233-13 to 15). She was advised of her rights and retrieved the package, which was unopened, from a closet. (12T233-17 to 20; 12T234-1 to 4; 12T234-13 to 18; 15T27-10 to 12; 15T29-10 to 14). The package was addressed to Jennifer Ball and had been shipped from Los Angeles. (12T240-11 to 20). Murphy said she had agreed to accept the package for someone else, with whom she was communicating by text. (15T34-10 to 15).

Murphy consented to the search of the package and her cell phone, and the troopers opened the package. (12T234-1 to 13; 15T21-2 to 8). Inside was a smaller box, then another box, then two paint cans. (12T240-11 to 20). The cans were opened and contained a liquid the troopers immediately recognized from its strong odor as PCP. (15T32-5 to 1).

Murphy's phone contained text messages with a person identified as "Dalia" discussing the arrival of Dalia's "cousin" at Murphy's house. (13T8-20 to 9-7; 13T16-10 to 27-3). At 10:41 a.m., five minutes after the package was delivered and during the time when no one entered the house, Murphy had texted Dalia that the "cousin" had arrived. (13T25-22 to 26-16; 15T36-2 to 5). Dalia responded that she would be over after work to pick her up. (13T26-19 to 23).

The troopers decided to wait for "Dalia" to come for the package. (13T29-2 to 6; 15T38-25 to 39-12). They resealed the box and left it on the kitchen table, then resumed their surveillance inside and outside the house. (13T29-7 to 22; 13T31-8 to 16; 15T41-1 to 16). At 2:00 p.m., Dalia texted that she was on her way. (13T27-1 to 3; 15T38-2 to 12). Shortly thereafter, defendant let herself into the kitchen by the back door, picked up the package, and turned to leave. (13T33-1 to 18). She was stopped by Detective Sergeant Cullen. (13T33-17 to 18). After waiving her Miranda[4] rights, defendant told the troopers the box contained PCP but that it was not hers. (13T33-23 to 35-1; 15T43-23 to 44-2). She said she was picking it up for a man named "Jimmy" who lived in Philadelphia and who paid her $1,000 to bring boxes over the bridge to him. (13T35-4 to 7; 15T44-25 to 45-6).

Defendant said she was supposed to call Jimmy when she got the box and bring it to him intact. (13T35-8 to 11). At the request of the troopers she agreed to call him, so Sergeant Ricardo Diaz escorted her to her car to get her cell phone. (4T130-3 to 8; 4T164-14 to 16; 4T165-14 to 166-3; 13T35-2 to 15). When she opened the car door to retrieve the phone, Sergeant Diaz saw a vial of PCP in the center console and seized it. (4T169-5 to 170-1; 7T44-6 to

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

9). Once back inside, defendant called Jimmy and told him that her car broke down and asked him to come pick the package up in Camden, but no one ever arrived. (13T39-14 to 40-22; 13T42-18 to 43-4; 13T48-12 to 16).

Defendant's phone was also searched. In addition to the text messages with Murphy, there were texts on July 3 with the number she called at the request of the troopers in which the other party asked when she was picking up "auntie" and indicated that he would be on Broad Street. (13T43-13 to 44-25). That phone number was registered to a person named Paul Sampson with a post office box in Irvine, California. (13T52-2 to 53-2; 13T54-21 to 55-2).

As a condition of her plea agreement, Murphy testified for the State. She testified that the "cousin" referred to in the text messages was code for the package. (14T123-18 to 24). She said that she was home on July 3 waiting for a package that belonged to defendant, and when UPS delivered it, she put it in the closet and texted defendant that "she" had arrived. (14T121-16 to 23; 14T129-16 to 130-9; 14T134-1 to 6). Defendant was supposed to pay her $100 to $200 for accepting the package. (14T134-16 to 20).

Murphy's house was within 1,000 feet of a school and 500 feet of a public park. (13T58-17 to 59-12). Laboratory analysis of just one of the two cans of PCP showed that it contained 842.6 grams, or just under 30 ounces, of

PCP.[5] (13T50-18 to 51-12). A narcotics expert testified that amounted to 186,000 individual doses and a total street value in Camden of approximately $1.6 million. (15T177-1 to 21).

[5] Because the weight of one can exceeded the threshold for a first degree offense, the laboratory did not test and weigh the contents of the second can. (5T149-12 to 22; 5T153-2 to 9).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL BECAUSE FIVE JURORS WERE EXCUSED FOR CAUSE BASED ON THEIR ANSWER TO A SUPPLEMENTAL JURY QUESTION.

Defendant first argues that Judge Kramer erred in denying her motion for a new trial because the trial judge granted the State's request to remove for cause five jurors who said they would give less weight to the testimony of a cooperating witness who was receiving a benefit for their testimony. Because defendant did not object to the question when the State requested it and the State could have achieved the same result using its peremptory challenges, Judge Kramer properly denied the motion for a new trial.

"[A] motion for a new trial is addressed to the sound discretion of the trial judge, and the exercise of that discretion will not be interfered with on appeal unless a clear abuse has been shown." State v. Armour, 446 N.J. Super. 295, 306 (App. Div. 2016) (alteration in original) (quoting State v. Russo, 333 N.J. Super. 119, 137 (App. Div. 2000)). "The trial court's ruling on such a motion shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law." State v. Perez, 177 N.J. 540, 555 (2003) (quoting R. 2:10–1); R. 3:20-1.

Review of a trial court's conduct of voir dire is deferential. State v. Little, 246 N.J. 402, 413 (2021) (citing State v. Fortin, 178 N.J. 540, 575, 843 A.2d 974 (2004). A trial court has broad discretion in conduction voir dire and and it's decision in that regard will ordinarily not be disturbed on appeal. "except to correct an error that undermines the selection of an impartial jury." Ibid. (quoting State v. Winder, 200 N.J. 231, 252 (2009)) (additional citations omitted). The "court's exercise of discretion in dealing with requests for specific inquiries of prospective jurors in the voir dire examination is subject to reversal only on a showing of prejudice in that the voir dire examination failed to afford the parties an opportunity to select an impartial and unbiased jury." Id. at 413-14 (quoting Pressler & Verniero, Current N.J. Court Rules, cmt. 1.2 on R. 1:8-3 (2021)).

Prior to the start of jury selection for defendant's second trial, the State submitted two supplemental voir dire questions: "Would you give greater, less or equal weight to a cooperating witness who is receiving a benefit from the State for their testimony?" and "Have you know anyone who has had a serious problem as a result of drug use?" (9T9-13 to 22). Defense counsel objected to the second question but specifically stated, "I don't have any objection to the question about cooperating witnesses." (9T10-2 to 3).

During the two days of jury selection, five jurors indicated that they

would give less weight to the testimony of a cooperating witness who was receiving a benefit for their testimony. Each time, the trial judge granted the State's request to remove the juror for cause over defendant's objection. (10T106-1 to 6; 10T107-22 to 109-6; 10T133-6 to 135-3; 11T27-4 to 28-12; 11T76-11 to 77-10; 11T90-13 to 91-13). Two jurors were also removed for cause at defendant's request because they indicated they would give more weight to a cooperating witness's testimony. (10T122-7 to 124-1; 12T88-2 to 89-2).

In denying defendant's motion for a new trial, Judge Kramer found that the trial judge erred in granting the State's motion to excuse the jurors in question for cause without first asking follow-up questions to determine whether they could follow the court's instruction and remain impartial, particularly because jurors are permitted to give less weight to the testimony of cooperating witnesses. (18T13-5 to 15-15). Judge Kramer found, however, that the error was harmless because only five jurors were removed for cause in error and the State had five peremptory challenges remaining at the end of jury selection. (18T15-16 to 17-3).

Defendant first challenges the cooperating-witness question itself as "imbalanced and confusing." (Db25). But defendant did not object to the question during jury selection; quite the opposite, she affirmative acquiesced

to it. (9T10-2 to 3). Not only did defendant no object to the question, she relied on it to move to strike two other jurors for cause, which strikes the judge granted. (10T122-7 to 124-1; 12T88-2 to 89-2). And she did not object to the form of the question in her motion for a new trial. (Sa7-9). Having deprived either Judge Dominguez of the opportunity to reconsider asking the question in the first place or Judge Kramer of the chance to review that decision, she cannot now complain on appeal. State v. Robinson, 200 N.J. 1, 20 (2009) ("[A]ppellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available") (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)).

In any event, State v. Little, on which defendant relies to argument her argument that the question was unbalanced or confusing is readily distinguishable. In Little, the challenged jury question—to which defendant objected—informed the prospective jurors that the State was not required to produce a gun and asked them if the failure to do so would affect their ability as a juror. Id. at 409. The Court found that this question improperly suggested that the jurors should not consider the absence of the gun as a factor in assessing the State's evidence. Id. at 419. Here, however, the question addressed the testimony of a cooperating witness in a neutral manner, even placing the option of "less weight" in the middle where it would likely attract

less attention. Thus, defendant's assertion that the question was unbalanced is unsupported.

Regardless, both the question and the removal of the five jurors was harmless. "A defendant is not entitled to any particular juror, but only to an impartial jury of 12 individuals." State v. Reevey, 159 N.J. Super. 130, 134-35 (App. Div. 1978) (citations omitted). Indeed, a defendant is not even entitled to a new trial where a court erroneously declines a defense request for cause, forcing the use of a defense peremptory challenge, as long as the defendant does not exhaust all of his peremptory challenges. State v. Bey, 112 N.J. 123, 154 (1988). Defendant's bald speculation that the State would have exercised its remaining peremptory challenged differently, resulting in a different jury, is irrelevant. The question in whether the jury actually empaneled was fair and impartial. Defendant does not argue that it was not.

Because any error in removing five jurors for cause whom the State could have removed by way of peremptory strikes did not deprive defendant of an impartial jury, Judge Kramer properly exercised his discretion in denying defendant's motion for a new trial.

POINT II

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS.

Tracy Murphy consented to the search of a package that was in her possession, delivered to her house and addressed to a person who did not exist. Judge Kelley properly denied defendant's motion to suppress the contents of the package and other evidence discovered subsequent to that search because defendant did not have a reasonable expectation of privacy in a package addressed to a fictitious name and mailed to an address unassociated with her. Rather, Murphy, who lived at the address where the package was sent, had authority to consent to the search.

Appellate courts owe considerable deference when reviewing a trial court's denial of a motion to suppress. State v. Zalcberg, 232 N.J. 335, 344 (2018) (citing State v. Hubbard, 222 N.J. 249, 262 (2015)). An appellate court "must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record." State v. Elders, 192 N.J. 224, 243 (2007) (internal quotation marks omitted). "[A] trial court's factual findings should not be overturned merely because an appellate court disagrees with the inferences drawn and the evidence accepted by the trial court or because it would have reached a different conclusion." State v. S.S., 229 N.J. 360, 374 (2017) (quoting State v. Elders, 192 N.J. 224,

244 (2007)). Indeed, a "trial court's findings should be disturbed only if they are so clearly mistaken 'that the interests of justice demand intervention and correction.'" State v. Robinson, 200 N.J. 1, 15 (2009). Only the trial court's legal conclusions are not afforded such deference. State v. Mann, 203 N.J. 328, 337 (2010).

A. Testimony at the suppression hearing.

Detective Cullen testified at the suppression hearing that State Police received information from a confidential informant on July 1, 2013, that a package of possible CDS was going to be delivered to 1714 South 8th Street in Camden. (0T5-15 to 7-4). In addition to the address and date of delivery, the informant provided the tracking number and said the package would be addressed to Jennifer Ball. (0T6-6 to 18; 0T37-14 to 38-4). Detective Cullen searched a law enforcement database to determine whether Jennifer Ball had ever resided at that address or had other records, and determined that no one by that name had ever been associated with that address. (0T6-15 to 24; 0T41-9 to 45-14).

Based on that information, the detective and other State police set up surveillance on July 3 at the identified address, where they saw a UPS driver deliver a package to a woman later identified as Murphy. (0T7-1 to 10). After the package was delivered, Detectives Cullen and Hoffman knocked on the

door and were invited in by Murphy. (0T7-11 to 8-22). Murphy, who was cooperative, was read her Miranda rights and agreed to speak to the detectives about the package. (0T8-23 to 9-22).

Murphy told the detectives that a friend had asked her to get the package delivered to her house. (0T9-23 to 25). She identified the friend as "Dalia" and said she did not know anyone named Jennifer Ball and Dalia did not use that name. (0T10-1 to 14). When the detectives asked where the package was, Murphy retrieved it from a closet and told them they could open the package, which was addressed to Jennifer Ball at Murphy's address, if they wanted to. (0T10-15 to 11-5; 0T54-8 to 9).

Detective Cullen provided Murphy with a consent to search form for both the package and Murphy's cell phone, which she signed. (0T11-6 to 11). There was a text message on the phone between defendant and "Dalia" discussing a package—referred to as a "cousin"—being delivered to the house. (0T16-22 to 17-16; 0T70-22 to 71-11). Detective Cullen asked Murphy what was in the package and she responded that she believed in may contain drugs. (0T17-17 to 23). The detectives then opened the package and discovered the PCP. (0T18-1 to 4).

Based on this testimony, Judge Kelley found that defendant did not have a reasonable expectation of privacy in the package that was mailed to someone

else's address under a fictitious name. (1T60-11 to 21). He acknowledged that New Jersey courts have not addressed "whether a defendant has a reasonable expectation of privacy in a package delivered to another individual at a residence that is not his or her own." (1T57-22 to 25). He noted, however, that other jurisdictions had declined to find a reasonable expectation of privacy in similar circumstances. (1T58-1 to 12) He further recognized that our Supreme Court, in State v Hinton, 216 N.J. 211 (2013), had found that the defendant had no reasonable expectation of privacy in an apartment that he had no legal right to occupy because his mother was deceased and there was a legal eviction. (1T58-13 to 25).

Applying the analysis of those cases, Judge Kelley considered that the package was delivered to an address where defendant did not live and was addressed to a fictitious name that was in no way associated with defendant. (1T60-11 to 21). Thus, defendant had no legal right to the premises where the package was delivered and would not have been able to retrieve it had she gone to pick it up from UPS, as she lacked any identification connecting her to that package. (1T61-1 to 8). He therefore found that defendant had relinquished any expectation of privacy in the package by having it addressed it to a name and address that were not hers and no search had occurred as related to defendant. (1T61-13 to 15; 1T68-6 to 9).

Judge Kelley further found that Murphy had a right to consent because she had at least equal authority over the package. He noted that Murphy told detectives that "Dalia" has asked if she could have packages shipped to her house, but retrieved the package and gave it to the detectives when they asked where it was. (0T57-23 to 68-2). He found that any attempt by Murphy to disclaim ownership did not invalidate her consent because defendant had relinquished any expectation of privacy by sending the package to an address that was not her own. (0T68-3 to 9).

Judge Kelley further noted that Murphy had actual authority to consent because the package was addressed to her residence and she took possession of it. (1T68-10 to 17). Indeed, he found that Murphy had more right over to package than defendant, who was not in possession of it and was not linked to the address where it was sent. (0T28-14 to 19). Finally, he found that defendant assumed the risk that Murphy would turn the package over to law enforcement. (0T68-19 to 21).

B. Defendant did not have a reasonable expectation of privacy in a package addressed to a fictitious name and mailed to another person's address.

"To invoke the protections of the Fourth Amendment and its New Jersey counterpart, Article I, Paragraph 7, defendant must show that a reasonable or legitimate expectation of privacy was trammeled by government authorities."

State v. Evers, 175 N.J. 355, 368-69 (2003). New Jersey law, unlike federal law, confers automatic standing on a defendant "in cases where the defendant is charged with an offense in which possession of the seized evidence at the time of the contested search is an essential element of guilt" or when defendant "has a proprietary, possessory or participatory interest in either the place searched or the property seized." State v. Alston, 88 N.J. 211, 228 (1981). "Although we do not engage in a reasonable expectation of privacy analysis when a defendant has automatic standing to challenge a search, we do so in determining whether a defendant has a protectible Fourth Amendment and Article I, Paragraph 7 right of privacy in a novel class of objects or category of places." State v. Randolph, 228 N.J. 566, 583-84 (2017).

In Randolph, the issue was whether a defendant had a reasonable expectation of privacy in the apartment he had lived in with his mother after the landlord initiated eviction proceedings following her death. The Court noted that the home has traditionally enjoyed a heightened expectation of privacy and declined to engage in an analysis of reasonable expectation of privacy because there were no "unique circumstances" that called for such an analysis. Id. at 584.[6] Where, however, there is a "novel case aris[ing] in

[6] The Court carved out three exceptions to the automatic standing rule for the home: abandoned property, property on which a person is trespassing, and property from which a person has been lawfully evicted. Randolph, 228 N.J.

unusual circumstances," courts will engage in a reasonable expectation of privacy analysis. Hinton, 216 N.J. at 236.

The New Jersey courts have never addressed whether a defendant has a reasonable expectation of privacy in a package delivered to another individual at a residence that is not her own. Thus, in determining whether defendant had a reasonable expectation of privacy in the package, Judge Kelley addressed the question of whether a person can have a reasonable expectation of privacy in a novel class of objects: packages that are not in defendant's possession or control, are not addressed to defendant, and are not addressed to any property in which defendant has an interest.

While our courts have never addressed this issue, other jurisdictions have done so and have declined to find a reasonable expectation of privacy in a package that is not addressed to a defendant or associated with her residence. See United States v. Smith, 39 F.3d 1143, 1145 (11th Cir. 1994) (concluding that the defendant did not have a protected privacy interest in the contents of an envelope when he was not the sender or addressee); United States v. Koenig, 856 F.2d 843, 846 (7th Cir. 1988) (concluding that one of the

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at 585. Thus, the Court addressed whether Randolph had standing, ultimately determining that he did because the searched apartment was not abandoned. Id. at 588-89.

defendants had no privacy right in a package when he was neither the sender nor the addressee of the package); United States v. Givens, 733 F.2d 339, 341-42 (4th Cir. 1984) (holding defendants had no privacy interest in a package that was addressed neither to them, "nor an entity which is their alter ego"); United States v. DiMaggio, 744 F.Supp. 43-45 (N.D.N.Y.1990) (finding no reasonable expectation of privacy where defendants used alias to receive packages at the residence of a business associate who had agreed to accept packages); Duck v. State, 61 S.W.3d 135, 13839 (Ark. 2001) (finding no expectation of privacy in package is addressed to someone else); People v. Lombardo, 549 N.W.2d 596, 600 (Mich. Ct. App. 1996) (holding that defendant lacked standing to challenge the search and seizure of a package addressed to alias unconnected to her); State v. Herbert, 231 N.E.3d 615, 624 (Ohio Ct. App. 2023), appeal denied, 244 N.E.3d 1164 (Ohio 2024) (finding no expectation of privacy where defendant was neither the named sender nor the named recipient of the package); State v. Earl, 770 N.W.2d 755, 760 (Wis. Ct. App. 2009) (finding no reasonable expectation of privacy in package addressed to a fictitious name at a vacant address). In each of these cases, as here, the defendant had no demonstrable property right in the item searched, and in fact had taken steps to disassociate themselves from the package.

Although our Courts have not addressed a similar situation, the Supreme

Court has declined to find a reasonable expectation of privacy where a defendant could not demonstrate a legal right to the searched property. In Hinton, the question was whether defendant had a privacy interest in property left in his deceased mother's apartment after an eviction notice had been clearly posted on the apartment door. 216 N.J. at 223. The Court held that a person has no constitutionally protected rights when he has no legal right to the premises or property to be searched. Id. at 234. The Court reasoned that, because defendant had no legal right to occupy the apartment rented by his deceased mother when there was a legal eviction notice, he had no reasonable expectation of privacy in a box containing narcotics located in the apartment. Id. at 238-39. Consequently, the Court held that there was no search under Article 1, Paragraph 7, of the New Jersey Constitution, and the evidence in the apartment should not be suppressed. Ibid.

Here, all of the facts suggested defendant had no connection to the package: it was not addressed to her; it was not addressed or delivered to her house; and there is little or no indication that she was exercising any control over the package at the time it was searched. Additionally, that addressee, Jennifer Ball, proved to be a fictitious name that was in no way linked to defendant as an alias. As a result, the package was delivered to an addressee other than defendant at an address where she did not live. Thus, defendant had

no recognizable interest in the package, as there was no discernable way to connect it to her. Indeed, had she gone to UPS to pick up the package, she would not have been able to do so because she would not have been able to present any identification associating her with either the name or the address on the package.[7] Judge Kelley therefore properly determined that defendant had no reasonable expectation of privacy in the package.

C. Murphy's consent to search the package was valid.

Because defendant did not have a reasonable expectation of privacy in the package, it is irrelevant if Murphy's consent was valid. Nonetheless, because defendant had the authority to consent to the search of the package in her own right, Judge Kelley correctly determined that the consent was valid.

Consent to a search may be obtained not only from the owner of the property to be searched but also from a third party who has common authority over the property or from a third party whom the police reasonably believe has authority to consent. State v. Miranda, 253 N.J. 461, 476 (2023) (citations omitted). In determining whether an officer properly relied on a third party's consent, the question is whether the belief that the third party had the authority

[7] Similarly, the United States Postal Service is permitted to withhold mail from a person using a fictitious name until that person can prove his/her identity and his/or legal right to receive the mail. 39 U.S. Code § 3003.

to consent was objectively reasonable in view of the all facts and circumstances known at the time of the search. Id. at 477 (citing State v. Suazo, 133 N.J. 315, 320 (1993)).

Here, the totality of the circumstances support Judge Kelley's finding that Murphy had at least equal authority to consent to the search of the package. The package was sent to her home, and she exercised control over it by accepting delivery of it. She further exercised control over it by retrieving it from the closet, giving it to detectives, confirming that she knew it contained something illegal, and volunteering to allow them to open it. While Murphy claimed she just received the package for "Dalia," the package was not addressed to "Dalia," and she admitted that she did not know anyone named Jennifer Ball, the addressee on the package. Under those circumstances, it was reasonable for the detectives to believe that Murphy, the only person they had seen exercise control over the package, had authority to consent. See State v. Kelley, 271 N.J. Super. 44, 48 (App. Div. 1994) (holding that police reasonably relied on consent of co-defendant to search of bag held by defendant where defendants refused to put identification tags on bags at airport).

Judge Kelley found that Murphy had a greater authority over the package because the package was addressed to her residence and she took

possession of it. The judge noted that defendant, who did not have any connection to the package and was not in possession of it, also assumed the risk that defendant would turn it over to law enforcement. (0T69-10 to 22).

Murphy would have been able to present identification to prove her right to retrieve the package from UPS because she lived at the address to which it was shipped. And unlike defendant, who never possessed the package until after it was searched, Murphy was in possession of the package at the time she gave her consent. Thus, Judge Kelley correctly determined that Murphy, as the person to whose house the package was sent, had a sufficient proprietary connection to the package to consent to the search.

Because defendant did not have a reasonable expectation of privacy in a package that was neither addressed to nor delivered to her, and Murphy did have sufficient connection to the package to consent to a search, Judge Kelley properly denied the motion to suppress.

POINT III

THE TRIAL COURT PROPERLY PROHIBITED DEFENDANT FROM INTRODUCING EVIDENCE OF A TWENTY-THREE-YEAR-OLD CONVICTION TO IMPEACH THE COOPERATING WITNESS.

During her first trial, defendant sought to impeach Murphy under N.J.R.E. 609 with a 1994 conviction from California for possession with intent to distribute marijuana for which Murphy had received probation. (6T5-16 to 11-9). Judge Kelley denied that request because the conviction, which occurred twenty-three years before the first trial in this case, was too remote. (6T13-19 to 14-22).

Although that ruling was the law of the case, defendant raised the issue again during her second trial, this time in the guise of a reverse 404(b) motion. (12T5-19 to 25). She argued that Murphy's testimony at the first trial that she did not know the contents of the package containing two paint cans full of PCP made her 1994 California conviction relevant to her state of mind. (12T6-7 to 8-7). Judge Dominguez once again denied the motion. (12T26-18 to 27-24). Defendant now argues that both those rulings were wrong.

"Courts have a gate-keeping role to ensure that unreliable, misleading evidence is not admitted." State v. Chen, 208 N.J. 307, 318 (2011). Evidentiary rulings are entitled to deference on appeal and will ordinarily be upheld absent an abuse of discretion. State v. Williams, 240 N.J. 225, 234

(2019). "Under that standard, a reviewing court must not substitute its own judgment for that of the trial court, unless there was a clear error in judgment—a ruling so wide of the mark that a manifest denial of justice resulted." Ibid. (quoting State v. Perry, 225 N.J. 222, 233 (2016)) (cleaned up).

A trial court has broad discretion in determining whether a prior conviction may be admitted into evidence. State v. Hedgespeth, 464 N.J. Super. 421, 431 (App. Div. 2020) (citations omitted), rev'd on other grounds, 249 N.J. 234 (2021). Under N.J.R.E. 609, the standard for admissibility of a prior conviction for impeachment purposes is more stringent when more than ten years have passed since the conviction or the defendant's release from confinement for it, than when ten years or less have passed. Ibid. N.J.R.E. 609(b)(1) "creates a presumption that a conviction more remote than ten years is inadmissible for impeachment purposes," and the proponent of that evidence bears the "burden of proving 'that its probative value outweighs its prejudicial effect.'" Ibid. (quoting State v. R.J.M., 453 N.J. Super. 261, 266-67 (App. Div. 2018)).

When defendant's first trial began, Murphy's prior conviction was twenty-three years old. Because she was only sentenced to probation, the ten-year clock began to run on the date of conviction. The conviction was thus

presumptively inadmissible, and the burden was on defendant as the proponent of the evidence to show that the probative value of introducing the conviction outweighed its prejudicial effect.

N.J.R.E. 609(b)(2) directs a court to consider four factors in assessing the admissibility of prior crimes that are more than ten years old: "(i) whether there are intervening convictions for crimes or offenses, and if so, the number, nature, and seriousness of those crimes or offenses, (ii) whether the conviction involved a crime of dishonesty, lack of veracity or fraud, (iii) how remote the conviction is in time, [and] (iv) the seriousness of the crime." N.J.R.E. 609(b)(2). Here, it was undisputed that Murphy has no intervening convictions since the 1994 conviction in California, and that a conviction for possession with intent to deliver was not a crime involving dishonesty, lack of veracity of fraud. Moreover, given that Murphy was only sentenced to three years' probation, the crime was not particularly serious. Finally, the conviction, which occurred twenty-three years before defendant's first trial, was very remote in time. Thus, all of the factors in N.J.R.E. 609(b)(2) weighed against admission of Murphy's prior conviction. See State v. Murphy, 412 N.J. Super. 553, 565 (App .Div. 2010) (finding seventeen-year-old conviction for possession with intent to distribute CDS for which defendant received probation inadmissible); State v. Leonard, 410 N.J. Super. 182, 187 (App. Div.

2009) (finding no abuse of discretion in prohibiting cross-examination of witness with fifteen-year-old conviction that did not involve dishonesty); State v. Minter, 222 N.J. Super. 521, 526-27 (App. Div. 1988) (upholding exclusion of two twenty-year-old convictions of a prosecution witness), rev'd on other grounds, 116 N.J. 269 (1989).

Defendant nonetheless argued that the prior conviction was admissible to show the jury that Murphy was a distributor in this case and not an innocent bystander. (6T8-15 to 25). But the jury was already aware of that fact—they were informed that Murphy pled guilty to possession with intent to distribute the PCP in the case for which defendant was on trial. Thus, the twenty-three-year-old conviction for possession of a different controlled substance was not probative of an undisputed fact. Given the lack of probative value of Murphy's prior conviction and that all of the factors in N.J.R.E. 609(b)(2) weighed against admission of this extremely old conviction, defendant failed to meet her burden of establishing that the probative value outweighed its prejudicial effect, and Judge Kelley did not abuse his discretion in denying her request to cross-examine Murphy with the conviction.

Nor did Judge Dominguez abuse his discretion in denying defendant's reverse 404(b) motion during the second trial.[8] "A defendant generally may

[8] Although defendant now attacks Judge Dominguez's ruling as erroneous

introduce 'similar other-crimes evidence defensively if in reason it tends, alone or with other evidence, to negate his guilt.'" State v. Weaver. 219 N.J. 131, 150 (2014) (emphasis added) (quoting State v. Garfole, 76 N.J. 445, 453 (1978)). Under those circumstances, the defendant must demonstrate "simple relevance." Ibid. If the trial court finds that the other-crimes evidence meets the "simple relevance" test, the trial court must still weigh the probative value of the evidence against the factors militating against admission of relevant evidence listed in N.J.R.E. 403. Id. at 151.

Applying this standard, Judge Dominguez correctly found that Murphy's then-twenty-five-year-old conviction for possession with intent to distribute marijuana did not meet the simple relevance test. He noted that the conviction was for a different substance, and the record did not reflect the facts of the earlier conviction or even whether California's law was similar to New Jersey's. (12T26-24 to 27-17). Absent any evidence at all about the

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"because it was made with the benefit of knowing Murphy's testimony from the first trial claiming that she never sold drugs" (Db44), defendant did not ask the court to admit the prior conviction on that basis, and thus, to the extent defendant is raising a separate issue on that point, it is waived. Robinson, 200 N.J. at 20 ("[A]ppellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available"). In any event, defendant does not provide any legal analysis on this issue in her brief and it is waived for that reason as well. See State v. L.D., 444 N.J. Super. 45, 56 n.7 (App. Div. 2016) ("[A]n issue not briefed is waived.").

underlying conviction, defendant's assertion that it demonstrated Murphy's knowledge of how drugs were packaged and transported is pure speculation, particularly since the controlled substances in the two cases were different. Compare State V. Lykes, 192 N.J. 519, 356-37 (2007) (finding conviction for possession of cocaine that was barred as too remote under N.J.R.E. 609 was admissible to show familiarity with packaging of cocaine).

In light of the age of Murphy's prior conviction and the lack of any information suggesting it would show Murphy had knowledge of the packaging and distribution of PCP, as defendant claims, both Judge Kelley and Judge Dominguez properly exercised their discretion in precluding the evidence.

POINT IV

DEFENDANT'S THIRTEEN-YEAR SENTENCE FOR POSSESSION WITH INTENT TO DISTRIBUTE OVER A MILLION DOLLARS WORTH OF PCP SHOULD BE AFFIRMED.

For $1,000, defendant acted as a middleman in the shipment of more than $1.6 million worth of PCP from California through New Jersey to Pennsylvania. She now argues that Judge Kramer erred in sentencing her to thirteen years' imprisonment. Because Judge Kramer properly exercised his discretion in imposing the sentence, the sentence should be affirmed.

Appellate review of sentencing is deferential, and appellate courts are cautioned not to substitute their judgment for those of our sentencing courts. State v. Case, 220 N.J. 49, 65 (2014); see also State v. Roth, 95 N.J. 334, 365 (1984). An appellate court should affirm the sentencing court's findings and balancing of aggravating and mitigating factors if there is sufficient evidence in the record to support them. State v. O'Donnell, 117 N.J. 210, 215-16 (1989). As long as the court follows the sentencing guidelines, the sentence should be affirmed unless it shocks the judicial conscience. Ibid.; Roth, 95 N.J. at 364-65. .

Defendant first claims that the sentencing judge erred in finding aggravating factor five, that there was a substantial likelihood that defendant was involved in organized criminal activity, because there was no evidence

that defendant was involved in a gang, club, or cartel. (Db46-47). Defendant has misconstrued this aggravating factor. To the contrary, both this Court and the Supreme Court have found aggravating factor five applicable without any evidence of such involvement. See State v. Velez, 119 N.J. 185, 188 (1990) (finding possession of cocaine with intent to distribute on two occasions sufficient to support aggravating factor five); State v. Varona, 242 N.J. Super. 474, 491-92 (App. Div. 1990) (upholding finding of aggravating factor five because of the amount of cocaine and because cocaine is grown in Central America); State v. Toro, 229 N.J. Super. 215, 227 (App. Div. 1988) (upholding finding of aggravating factor five based on the amount of cocaine), disapproved of on other grounds by Velez, 119 N.J. 185.

Here, there was ample evidence to support aggravating factor five. Defendant was in possession of an extremely large amount of PCP—841.6 grams, or 186,000 doses, in just one of the two paint cans in the package. This is more than eighty times the amount necessary for the threshold for a first-degree offense. There was also evidence that the PCP had been shipped from California to New Jersey and defendant's own statement that she intended to deliver it to another person in Pennsylvania, supporting Judge Kramer's finding that defendant was "involved in the multi-state transportation of drugs from apparently the originating manufacturing source to the ultimate

distributors." (9T79-18 to 20). Furthermore, defendant made statements to detectives suggesting that this was not the first time she had delivered packages to "Jimmy" in Philadelphia for money. (13T35-5 to 11; 19T79-23 to 24). This was more than sufficient to support aggravating factor five.

Defendant states, without explanation, that Judge Kramer's finding of aggravating factor five was improper double-counting. Because involvement in organized criminal activity is not an element of possession of CDS with intent to deliver, N.J.S.A. 2C:35-5, it was not double-counting for Judge Kramer to find aggravating factor five. See State v. Fuentes, 217 N.J. 57, 74-75 (2014) (discussing a sentencing court's need to avoid double-counting facts that establish the elements of an offense). Furthermore, to the extent defendant's argument is based on Judge Kramer's reliance on the amount of drugs in her possession, this Court has held that it is proper to consider as an aggravating factor that the weight of drugs far exceeded that necessary to prove a first-degree crime. Varona, 242 N.J. Super. at 491. See also State v. Miller, 237 N.J. 15, 30 (2019) (holding that a sentencing court may consider facts that go to the extremes of the prohibited behavior).

Defendant also claims that Judge Kramer should have downgraded her sentence to the second-degree range. N.J.S.A. 2C:44-1(f)(2) provides that where the defendant committed a first- or second-degree crime, a court may

sentence the defendant to a term appropriate to a crime of one degree lower or impose a non-custodial term if the court is (1) "clearly convinced that the mitigating factors substantially outweigh the aggravating factors"; and (2) "the interest of justice demand[s]" a reduction in sentencing. State v. Megargel, 143 N.J. 484, 496 (1996). Our Supreme Court has emphasized that "standard governing downgrading is high." Id. at 500.

To satisfy the "interest of justice" requirement, a defendant must present "compelling" reasons for the downgrade. Id. at 505. Those reasons "must be in addition to, and separate from, the mitigating factors." Id. at 502. The focus of the compelling reasons is on the severity of the crime, not the personal circumstances of the offender. State v. Lake, 408 N.J. Super. 313, 326 (App. Div. 2009). As such, courts do not consider "a defendant's overall character" when evaluating the interests of justice requirement. Id. at 328.

Judge Kramer properly found that defendant did not satisfy either of the statutory requirements needed for a downgrade. As to the first requirement, although Judge Kramer stated that the aggravating and mitigating factors "are close to being in balance," he found the mitigating factors "minimally" outweighed the aggravating factor. (19T84-23 to 85-20). In reaching that conclusion, the judge stated he was finding aggravating factor (9), the need for deterrence, was based on the significant street value the "the potential harm to

society caused by the distribution of significant quantities of drugs," and accorded it moderate weight. (19T80-12 to 19; 19T85-2 to 3). No evidence in the record compelled the judge to find the mitigating factors substantially outweighed the aggravating factors.

Defendant first contends that Judge Kramer did not conduct a thorough analysis of the downgrade request. But a review of the record as a whole clearly explains the reasons for rejecting the request. Immediately before addressing the downgrade, the judge reviewed all of the aggravating and mitigating factors requested by both sides and explained his reasons for finding or rejecting each, as well as the weight he was giving to those he found, and his balancing determination. (19T77-25 to 85-5). Having just explained in detail why the mitigating factors did not substantially outweigh the aggravating factors, there was no reason to repeat that explanation. (19T85-6 to 20). And despite having already found that defendant had failed to meet one of the two requirements for a downgraded sentence, Judge Kramer nonetheless explained that defendant also failed to meet the second requirement—the interests of justice—because of the substantial amount of drugs that defendant was involved in distributing. (19T85-20 to 24).

Defendant argues that the sentencing court erred in finding aggravating factor five and should have given less weight to aggravating factor nine. But

as already discussed, Judge Kramer was correct in finding aggravating factor five. And he explained why he gave the greatest weight to aggravating factor nine: he stressed the significant street value of the drugs involved and the potential harm to society, noting that a light sentence could encourage others to engage in this type of activity given the potential gain and the lessened risk. (19T80-9 to 24). Under the circumstances, it was not an abuse of discretion for Judge Kramer to give significant weight to general deterrence.

Moreover, even if the trial court had balanced the aggravating and mitigating factors differently, defendant still did not establish that a downgraded sentence was in the interest of justice. This Court has made it clear that the "interest of justice requirement focuses not on defendant's overall character but on the offense itself." Lake, 408 N.J. Super. at 328. Thus, Judge Kramer properly focused on the vast amount of PCP involved in finding that the interests of justice would not be served by downgrading defendant's sentence. (19T85-20 to 24). Indeed, defendant does not present any argument to the contrary.

Finally, defendant argues that her sentence was excessive. She argues, with little elucidation, that her sentence was disproportionate to Murphy's and that the court should have imposed a lower sentence to "maximize her rehabilitative efforts" in light of the role her substance abuse played in the

offense. (Db50-51).

"A sentence of one defendant not otherwise excessive is not erroneous merely because a co-defendant's sentence is lighter." State v. Roach, 146 N.J. 208, 232 (1996) (alteration in original) (quoting State v. Hicks, 54 N.J. 390, 391 (1969)). "The question . . . is whether the disparity is justifiable or unjustifiable," for which courts must determine "whether the co-defendant is identical or substantially similar to the defendant regarding all relevant sentencing criteria." Id. at 233. Here, Murphy pled guilty to a single third-degree offense. (Da7). Thus, her substantially lighter sentence was justified.

Furthermore, while Judge Kramer found that defendant was unlikely to reoffend, he expressed concern that she had not presented any evidence that she was in drug rehabilitation or had been drug-free since the crime. (19T82-20 to 83-6). Thus, it is unclear what rehabilitation efforts she would have maximized had she received a lighter sentence.

Given that defendant was convicted of participating in the transportation across multiple states of well over a million dollars of PCP, her low-mid range sentence of thirteen years was not an abuse of discretion. This court should therefore affirm.

CONCLUSION

For the foregoing reasons, the State urges this Court to affirm defendant's convictions.

Respectfully submitted,

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REPLY LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1756-22
INDICTMENT NO. 16-04-00058-S

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of
v.	:	New Jersey, Law Division, Camden County.
	:	
DALIA D. FIGUEROA,		Sat Below:
	:	
Defendant-Appellant.		Hon. John T. Kelley, J.S.C. and a Jury; Hon. Francisco Dominguez, J.S.C. and a Jury; Hon. Christine Orlando, J.S.C.; Hon. Kurt Kramer, J.S.C.

Your Honors:

This letter is submitted in lieu of a formal brief pursuant to R. 2:6-2(b).

DEFENDANT IS CONFINED

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REPLY PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-appellant Dalia Figueroa respectfully relies on the procedural history and statement of facts from her September 9, 2024 brief. (Db 1-21)[1]

LEGAL ARGUMENT

Ms. Figueroa relies on the legal argument from her initial brief. (Db 22-51) She adds the following in reply:

REPLY POINT I[2]

IT WAS HARMFUL ERROR TO DISMISS JURORS FOR CAUSE, TO THE STATE'S BENEFIT, WHEN THEY HAD INDICATED THEIR ABILITY TO BE FAIR AND IMPARTIAL JURORS.

In Point I of her plenary brief, Ms. Figueroa argued the motion court had improperly concluded that the dismissal of jurors during the voir dire proceedings who had said they would make the acceptable inference that a cooperating witness's testimony may be given less weight was harmless error. (Db 22-35) Ms. Figueroa urged this Court to recognize that the constitutional error cannot be proven harmless beyond a reasonable doubt, supporting reversal

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[1] Sb – State's response brief
Db – Defendant's opening Brief
Da – Defendant's appendix to her opening brief
Dra – Defendant's appendix to her reply brief

[2] This Point replies to Point I of the State's brief. (Sb 9-13)

of the convictions from the second trial. (Db 15-16, 23-24) The State responds with three main arguments: First, defendant did not object to the question when it was proposed, so the issue was waived for appeal. (Sb 11-12) Second, the question itself was not imbalanced—and by implication, the jurors could understand what was being asked of them. (Sb 12-13) Third, the question and the five for-cause removals were harmless because the State could have reached the same jury composition by exercising its peremptory challenges, and the jury still could have been impartial. (Sb 13) These arguments are unconvincing.

First, the State reaches to say that trial counsel—despite objecting to all five removals for cause—nevertheless waived the issue by failing to object to the question ex ante. Asking jurors if they would give more or less weight to a cooperating witness is a fair start to a line of questioning aimed at impartiality, but it needed to be the start. The colloquy between counsel at the first motion to dismiss for cause made it clear that defense counsel had not acquiesced to letting the State benefit from for-cause removals.

When the State sought the first removal for cause solely based on a short answer to this question, defense counsel explained why he had not objected to the question's form:

> I don't believe that that's a basis to excuse [the juror] for cause, Judge. The question asked what her impression is of how she would treat certain testimony. She gave I presume an honest answer. The State's got a peremptory challenge they can use but it certainly

> doesn't seem to me to be a basis to excuse her for cause. . . . I don't think that's the reason the question was added. I think it was added so that the State could determine whether or not there were jurors that they should challenge if they were of that mind so I object to her being excused for cause.
>
> [(10T 108-5 to 19).]

By using the question as a for-cause removal mechanism of jurors who were likely expressing their ability to impartially and rationally assess the evidence, the State made a strategic move that allowed it to conserve peremptory strikes, tipping the scales during voir dire. The consistent objections to the question's use, without follow-up, as reason to remove otherwise capable jurors for cause, properly places the issue before this Court.

Second, the State argues the question was properly balanced and the lack of discussion or clarification was appropriate. In that regard, the State seeks to distinguish Little,[3] saying that the question asked there improperly suggested that the jury should not consider the absence of the gun as a factor in the State's case for weapon possession. (Sb 12) It argues that the question here is different because it addressed the testimony of a cooperating witness in a neutral manner, "even placing the option of 'less weight' in the middle where it would likely attract less attention." (Sb 12-13) Of course, the record demonstrates that the State's cooperating witness question was not well-understood by all. On at least

[3] State v. Little, 246 N.J. 402 (2021).

one occasion where jurors sought clarification, the court simply repeated the question. (10T 128-5 to 25) Several jurors responded "yes" or "no" to the multiple-choice question. (10T 70- 9 to 15, 80-10 to 13, 128-5 to 15) No prospective jurors treated the question as if it was asking about a deep-seated bias against State witnesses. And the State's application, seeking and obtaining erroneous for-cause removals, has an easily foreseeable effect of creating an imbalance in voir dire.

Further, the neutral framing and number of options does not make it any less irrational for the court to dismiss capable jurors for cause, sparing the State its need to use challenges. A voir dire court could say to prospective jurors who had otherwise proven capable, "pick a random number between one and ten," and then dismiss all those who chose seven. There were plenty of options and nothing about the question lessens the State's burden at trial, but the question is being used to remove a juror without a sound reason. The question in Figueroa's case, however, had the effect of excluding jurors who were giving a reasonable response to a vague inquiry. The State has no real argument that the excluded jurors, including a Camden police officer, were expressing a harmful prejudice that would have prevented them from being impartial. Rather, the State falls back on the counterfactual claim that the prosecutor would have used peremptory strikes to obtain the exact same jury. This response gives no

consideration to the excluded jurors who were prevented, for no good reason, from taking part in a civic duty that people have fought to obtain, jeopardizing a defendant's right to a fair and impartial jury of their peers.

As has long been acknowledged, unfairness in jury selection risks causing harm which "extends beyond the defendant," including to "the excluded juror" and beyond. State v. Andujar, 247 N.J. 275, 316 (2021). In 1879, the U.S. Supreme Court observed that "the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure." Strauder v. State of W. Virginia, 100 U.S. 303, 308 (1879). Irrational restrictions on jury service deprive criminal defendants of their Sixth and Fourteenth Amendment rights to an impartial jury trial. Taylor v. Louisiana, 419 U.S. 522, 525 (1975) (striking down jury-selection system that systematically excluded women). And this is true without a need to show "that the appellant has been unfairly treated or prejudiced in any way by the manner in which his[sic] jury was selected." Id. at 538-39 (Rehnquist, J., dissenting). Systematic exclusion of community members from the jury pool is an easily identified wrong. What the State defends here, removing willing and capable jurors, is more pernicious. It harms defendants, it harms the excluded juror, and it harms overall trust in the justice system.

Here, Figueroa's second trial took place following the exclusion of five

jurors who had apparently stated that they could fairly assess the evidence in a way that might be to the State's detriment. That violated her right to a fair trial. The State's improper practice of using voir dire to advocate pre-trial, ease its burden of proof, or to strike rule-abiding jurors—between Little and Figueroa and unknown other cases—adds up. With something as important as jury composition, seemingly small violations accumulate as injustice.

For these reasons and those laid out in Ms. Figueroa's initial brief, the convictions from the second trial should be vacated.

REPLY POINT II[4]

THE SENTENCING COURT'S FINDING OF AGGRAVATING FACTOR FIVE IS UNSUPPORTED BY THE RECORD.

In her initial brief, Ms. Figueroa argued that the sentencing court erred in its determination that aggravating factor five, "a substantial likelihood that the defendant is involved in organized criminal activity," applied. (Db 44-47) The State responds that the finding was appropriate because previous findings of the factor have been upheld in cases where large amounts of cocaine were seized. (Sb 32-34) This comparison is not appropriate for the facts of this case.

New Jersey caselaw has not discussed aggravating factor five in detail. In the one decision directly interpreting it, the Law Division held that the factor

[4] This Point replies to Point IV of the State's brief. (Sb 32-38)

was intended to apply where the defendant is involved in organized crime, not merely where defendants have been convicted of an offense commonly associated with organized crime. State v. Merlino, 208 N.J. Super. 247, 256-59 (Law Div. 1984). The Merlino opinion explains that to establish the factor, the State must present "clear and convincing evidence" to support its contention. Id. at 262. This Court should conclude, like the Merlino court, that "the fundamental principles of fairness and due process" requires the State to meet this burden of proof. Ibid.

The State has not presented clear and convincing evidence of organized criminal activity. The drug in question here—PCP—is not manufactured and distributed in the same way as cocaine. The State cites to this Court's observation that "most cocaine is grown in Central America and the importation, processing and distribution of the drug in this country involves an elaborate criminal network." State v. Varona, 242 N.J. Super. 474, 491-92 (App. Div. 1990). The State uses this comparison to evade the lack of record support and the failure of anyone—including law enforcement and the cooperating witness they protected so vigorously—to even hint at what organization, if any, was responsible for creating the PCP seized in this case, let alone the type of organization. And a brief review of the literature suggests that the comparison

between cocaine and PCP manufacture is flawed in several respects.[5] But the most important fact is that neither the jurors nor the court heard anything to give a basis for finding Figueroa connected to organized crime. The State called its expert witness on PCP manufacture and distribution and had its chance to develop this line of inquiry. (6T 297-9 to 299-19) Instead, it focused on eliciting testimony about how much money could be made if all the PCP in this case was sold in the smallest possible increment, for an incredible sum of $1.68 million. (6T 299-21 to 300-20) The State emphasizes the weight and purported value of the PCP seized here because there is nothing in the record to suggest gang, cartel, or mafia involvement. No testimony from Murphy, no gang references in anyone's phones, no gang tattoos—nothing.[6]

In short, the record is devoid of any evidence that Figueroa was engaged

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[5] A 1994 Department of Justice report noted that PCP is not just easy to manufacture, but "production of PCP requires only a slight monetary expenditure for chemicals." The report stated that PCP can be manufactured "for less than $500 per gallon," a figure close to $1,000 today. Although a more recent report would have been preferred, it is understandable why the government publishes relatively little information about how cheap and easy it is to manufacture PCP. See ojp.gov/pdffiles1/Digitization/150910NCJRS.pdf (last visited Feb. 5, 2024) (Page 2 of the document).

[6] Further, the trial court declined to find aggravating factor five when sentencing Murphy. Her cooperation does not change the fact that she possessed the exact same quantity now being offered as prima facie proof of organized criminal activity. Murphy's Judgment of Conviction is submitted with this reply brief. See Dra 1.

in organized criminal activity. Our courts should not be making a finding with such potentially grave consequences if the State does not present clear and convincing evidence to support its contentions. Finding aggravating factor five here is a breach of the trial court's obligation to make findings supported by substantial evidence in the record. Consequently, this Court should vacate and remand for resentencing.

CONCLUSION

For the reasons given in this reply brief and Point I of Ms. Figueroa's initial brief, her convictions from the second trial should be vacated. For the reasons set forth in Points II and III of the initial brief, her convictions require reversal. Otherwise, for the reasons set forth in Point IV of the initial brief and in this reply brief, the sentence should be vacated.

Respectfully submitted,

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Dated: February 7, 2025