SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3373-22

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of New Jersey,
v.	:	Law Division, Atlantic County.
KEVIN N. DAVIS,	:	Indictment No. 22-06-00989-I
Defendant-Appellant.	:	Sat Below:
	:	Hon. W. Todd Miller, J.S.C., and a jury.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

In New Jersey, possession of a handgun within one's own bedroom – even without a permit – is not a crime. In this case, however, Kevin Davis was convicted of unlawful possession of a handgun based on the State's theory that he constructively possessed a gun found inside a bedroom searched by police. Giving all favorable inferences to the State's evidence that Mr. Davis resided at the home and constructively possessed the items found in the bedroom, his conviction for unlawful possession of a handgun, for which he is serving 48 years, is legally unsound.

When police executed a search warrant at 111 North New Jersey Avenue in Atlantic City, Mr. Davis was not inside the home. The State therefore relied on a theory of constructive possession to prove that the handgun found in a bedroom belonged to Mr. Davis. At trial, the State presented extensive evidence that Mr. Davis resided in the home at 111 North New Jersey Avenue and occupied the bedroom in which the gun and drugs were discovered. The jury then convicted him on all charges related to the illegal items recovered from the bedroom.

However, the jury was never told that if it credited the State's evidence that Mr. Davis lived in the bedroom, then it could not find him guilty of unlawful possession of the handgun. Nor were jurors informed that the same exception

applied to the hollow-nose bullets found in the room. In the absence of that information, the jury convicted Mr. Davis of these offenses.

Jurors were told, however, that Mr. Davis possessed the handgun in question in order to use it against law enforcement officers who would interfere with his drug enterprise. They heard this repeatedly – from the State during opening and closing, and from the State's expert witness – even though there was no evidence that Mr. Davis in fact intended to use a deadly weapon against police officers, and none of the charges required the State to prove he did.

Furthermore, Mr. Davis's extraordinary 48-year prison sentence must be vacated and remanded for reconsideration. The sentencing court arrived at its sentence through a misstatement of Mr. Davis's prior convictions and the improper consideration of pending, unproven charges. The court repeatedly used its inaccurate view of his criminal history as the basis for all three of the aggravating factors it found. Worse, Mr. Davis's prior convictions had already been used to upgrade his second-degree unlawful possession charge to a first-degree offense, to qualify him for an extended term on that first-degree offense, and as a predicate for his conviction under the certain persons not to have a weapon statute. Finally, the court tethered its 48-year sentence to an outmoded metric: the 50-year presumptive term for a first-degree extended-range sentence. For all these reasons, Mr. Davis's near-life sentence for a set of nonviolent,

predominantly possessory crimes cannot stand.

PROCEDURAL HISTORY

On June 23, 2022, an Atlantic County grand jury returned superseding Indictment No. 22-06-00989-I, charging the defendant, Kevin N. Davis, with two counts of fourth-degree resisting arrest by flight, N.J.S.A. 2C:29-2(a)(2) (counts 10 and 11);[1] three counts of third-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(1) (counts 12, 15, and 17); three counts of third-degree possession with intent to distribute CDS, N.J.S.A. 2C:35-5(a)(1) (counts 13, 16, and 18); third-degree possession of property derived from criminal activity, N.J.S.A. 2C:21-25(a) (count 14); first-degree maintaining a CDS production facility, N.J.S.A. 2C:35-4 (count 19); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b) (count 20); second-degree possession of CDS within 500 feet of public property, N.J.S.A. 2C:35-7.1(a) (count 21); third-degree possession of CDS within 1000 feet of school property, N.J.S.A. 2C:35-7 (count 22); second-degree possession of a firearm while committing a CDS crime, N.J.S.A. 2C:39-4.1(a) (count 23); fourth-degree possession of a large capacity ammunition magazine, N.J.S.A. 2C:39-3(j) (count 24); fourth-degree possession of hollow-nose bullets, N.J.S.A.

[1] The court severed counts 1 through 9, 26, and 27 on February 13, 2023, and they are not before this court on appeal.

2C:39-3(f) (count 25); second-degree certain persons not to have a weapon, N.J.S.A. 2C:39-7(b) (count 28); and first-degree unlawful possession of a handgun with a prior NERA conviction, N.J.S.A. 2C:39-5(j) (count 29). (Da 1-32)[2]

After a jury trial before the Honorable W. Todd Miller, J.S.C., on counts 10 through 25, Mr. Davis was acquitted of count 14, possession of property derived from criminal activity, and convicted on all other counts. (Da 85-101) Following the jury's verdict, Judge Miller conducted a bench trial on the certain-persons charge (count 28) and unlawful possession of a handgun with a prior NERA conviction (count 29) and found Mr. Davis guilty on both counts. (7T 163-15 to 18; 166-9 to 17)

Mr. Davis moved for a judgment of acquittal on counts 11, 19, 20, and 23, and argued the motion on May 3, 2023. (8T 4-22 to 11-12) Judge Miller denied the motion and proceeded to sentencing. (8T 26-9 to 11)

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[2] "Da" refers to defendant's appendix. "PSR" refers to the presentence report. The transcript volumes correspond to the following dates:
1T – March 15, 2021 (motion)
2T – February 9, 2023 (motion)
3T – March 3, 2023 (trial)
4T – March 8, 2023 (trial)
5T – March 9, 2023 (trial)
6T – March 10, 2023 (trial)
7T – March 13, 2023 (trial)
8T – May 3, 2023 (motion and sentence)

Judge Miller sentenced Mr. Davis to a 48-year prison term with 24 years of parole ineligibility on first-degree unlawful possession of a handgun with a prior NERA conviction (count 29), after determining that Mr. Davis was subject to a mandatory extended term pursuant to N.J.S.A. 2C:44-3(d) (second offender with a firearm). (8T 32-4 to 14; 79-24 to 80-8) After mergers, Judge Miller imposed sentences on the following counts, all to run concurrent to the 48 years:

- Third-degree possession with intent to distribute CDS (count 16) – 3 years
- Third-degree possession with intent to distribute CDS (count 18) – 3 years
- First-degree maintaining a CDS production facility (count 19) – 10 years with a 5-year parole disqualifier
- Second-degree unlawful possession of a handgun (count 20) – 10 years with a 5-year parole disqualifier, pursuant to the Graves Act
- Second-degree possession of CDS within 500 feet of public property (count 21) – 5 years
- Second-degree possession of a handgun while committing a CDS crime (count 23) – 10 years with a 5-year parole disqualifier, pursuant to the Graves Act[3]

[3] The court ordered the sentence on count 23 to run consecutive to the sentence on count 19, but because the sentence on count 19 was concurrent to the 48-year sentence on count 29, it did not increase Mr. Davis's aggregate sentence. (8T 88-13 to 89-9)

(8T 77-11 to 80-8)

A Notice of Appeal was filed on July 10, 2023. (Da 117-119)

STATEMENT OF FACTS

On October 3, 2019, Atlantic City police officers executed a search warrant on a residence at 111 North New Jersey Avenue. (5T 13-11 to 14-4) While surveilling the home, officers saw an individual later identified as Mr. Davis exit through the front door. (5T 109-1 to 3) Officers testified at trial that Mr. Davis got on a bicycle and cycled away from the home. (5T 109-1 to 18) Two detectives pursued Mr. Davis for approximately five to seven blocks and placed him under arrest. (5T 114-6 to 20) Upon his arrest, drugs and a cell phone were found on his person. (5T 115-5 to 7)

Officers searched the residence, a single-family, two-story home with two bedrooms. (5T 14-19 to 24; 16-7 to 12) In the front bedroom, they found drugs in various stages of packaging, a handgun, two cell phones, and a variety of personal items and clothing. (5T 17-7 to 21-14)

The State pursued a theory of constructive possession to prove that the items found in the bedroom belonged to Mr. Davis, presenting evidence that he resided at 111 North New Jersey Avenue and lived in the bedroom. (4T 67-5 to 7; 67-15 to 21; 69-16 to 17) In its opening statement, the State told jurors that photographs and text messages extracted from the cell phones would lead them

to conclude "that that's his bedroom. The bedroom belonged to him, the fentanyl belonged to him, the packaging materials belonged to him, and the firearm belonged to him." (4T 73-1 to 4) The prosecution continued, "you'll be firmly convinced, after you review those photographs and messages, along with all the other evidence and testimony you're going to receive, that the bedroom in 111 North New Jersey belonged to the defendant." (4T 73-9 to 13)

The State also told jurors in its opening statement that Mr. Davis had a handgun "to protect his fentanyl packaging operation from law enforcement and from any rivals." (4T 70-22 to 25)

Detective Joseph Procopio testified for the State that he saw Mr. Davis exit 111 North New Jersey Avenue and turn around to face the front door. "His actions and motions were consistent with securing the door or locking it." (5T 109-6 to 7) Detective Procopio also introduced the contents of the cell phones. A photo taken on one of the phones in September 2019 depicted Mr. Davis on a bed that Detective Procopio recognized as the same bed that was in the bedroom where the gun and drugs were found. (5T 150-3 to 14; 151-17 to 25) In addition, Detective Procopio read a text message conversation for the jury. The first message read, "Hey, I'm texting for B.G. He said he needs an address on you ASAP. He needs to write/talk to you." (5T 156-18 to 20) The response from a user identified as kevdavis85@icloud.com was "111 North New Jersey Avenue.

Tell him to call or text." (5T 157-1 to 11) On cross-examination, Detective Procopio insisted that "based off the investigation, it revealed that he resided at that residence on New Jersey Avenue." (5T 183-4 to 6)

Detective Chad Meyers was qualified as an expert "in the field of narcotics use, packaging and distribution." (6T 14-19 to 22) Detective Meyers testified that drug dealers have firearms because of the "very dangerous game [they] are involved in," and that they "have to be mindful of law enforcement" and "rival distributors who wish to take their product or take their area of operation." (6T 26-1 to 10)

In closing, the State summarized its theory of the case as follows: "Defendant's bedroom equals defendant's fentanyl and firearm." (7T 18-9 to 12) It returned to the evidence that Mr. Davis resided at 111 North New Jersey Avenue. "[R]ight now I want to go through all of the evidence that demonstrates . . . that the bedroom was his and his alone." (7T 16-11 to 15) The State reviewed the photos recovered from the cell phones and asserted that "they're what proves it's his bedroom, among the other circumstances." (7T 19-5 to 11) The State also emphasized that because a phone registered to him was found in the bedroom, 111 North New Jersey Avenue could not be "just a stash pad," but must be his residence. (7T 23-17 to 19) His toiletries and toothbrush, according to the State, also showed that "[h]e's living there. It's his bedroom." (7T 23-20

to 24-2) The text messages, similarly, demonstrate "[t]hat's where he's living." (7T 24-3 to 12) As to the unlawful possession of a firearm count, the State summarized its proofs: "[y]ou know it's his gun, because everything else in the room is his." (7T 36-16 to 17)

The State also closed by reiterating that Mr. Davis's gun "is a tool of the trade for protection against law enforcement." (7T 36-19 to 21)

On March 13, 2023, the jury acquitted Mr. Davis of possession of property derived from criminal activity (count 14) and returned guilty verdicts on all other counts. (7T 146-1 to 148-18)

The court proceeded to a bench trial on certain persons not to have a weapon, N.J.S.A. 2C:39-7(b(1) (count 28), and unlawful possession of a firearm with a prior NERA conviction, N.J.S.A. 2C:39-5(j) (count 29). (7T 157-22 to 158-4) On count 29, the court and the State relied on the jury's conviction on count 20, unlawful possession of a weapon, N.J.S.A. 2C:39-5(b), to satisfy the element of constructive possession of the handgun. (7T 165-4 to 9; 165-19 to 20) Judge Miller found Mr. Davis guilty of both counts. (7T 163-15 to 18; 166-9 to 17)

LEGAL ARGUMENT

POINT I

BECAUSE IT IS NOT A VIOLATION OF N.J.S.A. 2C:39-5(b) TO POSSESS A GUN IN ONE'S OWN HOME, THE TRIAL COURT ERRED BY (1) DENYING MR. DAVIS'S MOTION FOR A JUDGMENT OF ACQUITTAL ON COUNT 20, UNLAWFUL POSSESSION OF A HANDGUN, OR ALTERNATIVELY, BY (2) FAILING TO INSTRUCT THE JURY THAT IT IS NOT ILLEGAL TO POSSESS AN UNLICENSED GUN IN ONE'S OWN HOME. (Partially Raised Below)

Mr. Davis was charged and convicted of unlawful possession of a handgun contrary to N.J.S.A. 2C:39-5(b)(1) for a firearm found inside the bedroom at 111 North New Jersey Avenue. Because Mr. Davis did not have a gun on his person, the State relied on a theory of constructive possession to prove the gun belonged to him. It presented extensive evidence that Mr. Davis resided at 111 North New Jersey Avenue and that the bedroom where the gun and drugs were found was the bedroom he occupied. But under N.J.S.A. 2C:39-6(e), possessing a gun in one's own home, or on premises that a person "own[s] or possess[es]," does not violate N.J.S.A. 2C:39-5(b)(1). The trial court therefore should have granted Mr. Davis's motion for a judgment of acquittal notwithstanding the verdict on that charge (count 20). In the alternative, this Court should vacate Mr. Davis conviction on count 20 and remand for a new trial where the jury will be instructed on the provisions of N.J.S.A. 2C:39-6(e). In the absence of this

instruction, Mr. Davis was denied his right to a fair trial. U.S. Const. amends. VI & XIV; N.J. Const. art. I, ¶¶ 1, 9, & 10. Finally, any relief granted on Mr. Davis's conviction under N.J.S.A. 2C:39-5(b) must be applied to his conviction under N.J.S.A. 2C:39-5(j).

A. The court erred in denying Mr. Davis's motion for a judgment of acquittal on the charge of unlawful possession of a handgun.

Pursuant to Rule 3:18-2, Mr. Davis moved for a judgment of acquittal notwithstanding the jury's verdict on count 20 on the ground that there was insufficient evidence Mr. Davis resided at 111 North New Jersey Avenue. (8T 6-13 to 21) The State opposed the motion, arguing that "[t]here was ample circumstantial evidence from which the jury could infer that the defendant was maintaining the residence in question here." (8T 8-9 to 11) The court denied the motion, concluding that the jury "had sufficient evidence to come to a conclusion that there was constructive possession and actual living arrangements in that room." (8T 26-9 to 11) What the trial court failed to recognize, however, is that if jurors concluded that Mr. Davis lived in the bedroom at 111 North New Jersey Avenue, then his possession of the gun did not violate N.J.S.A. 2C:39-5(b), and the motion should have been granted.

On a motion for a post-verdict judgment of acquittal, the question is "whether, based on the entirety of the evidence and after giving the State the benefit of all its favorable testimony and all the favorable inferences drawn from

that testimony, a reasonable jury could find guilt beyond a reasonable doubt." State v. Williams, 218 N.J. 576, 594 (2014) (citing State v. Reyes, 50 N.J. 454, 458-59 (1967)). An appellate court reviews the denial of a motion for a judgment of acquittal under Rule 3:18-2 de novo, without "deference to the findings of . . . the trial court." State v. Lodzinski, 249 N.J. 116, 145 (2021).

N.J.S.A. 2C:39-6(e) provides that "[n]othing in subsections b., c., and d. of [N.J.S.A.] 2C:39-5 shall be construed to prevent a person keeping or carrying about the person's place of business, residence, premises or other land owned or possessed by the person, any firearm." In other words, in New Jersey, "[p]ossession of a gun is not always and everywhere criminal. One may possess an unlicensed handgun at home." State v. Petties, 139 N.J. 310, 315-16 (1995) (internal citations omitted); see also Morillo v. Torres, 222 N.J. 104, 121 (2015) ("[T]he statutory exemption in N.J.S.A. 2C:39-6(e) . . . applies to possessing weapons inside one's dwelling or place of business."); State v. Gomez, 246 N.J. Super. 209, 216 n.1 (App. Div. 1991) (holding that the trial judge "correctly instructed the jury that possession of the gun while in defendant's apartment did not constitute a crime, but that carrying the weapon outside of the dwelling would violate N.J.S.A. 2C:39-5b").

The State was unyielding in its efforts to persuade jurors that Mr. Davis resided in the bedroom at 111 North New Jersey Avenue, beginning with its

opening statement. It told the jury that Mr. Davis "came out of his house" and "turned around as though he was locking [the front door] behind him," and that police subsequently conducted "[a] search of the defendant's bedroom." (4T 67-7; 67-15; 68-19 to 20 (emphases added)) The State continued, "the defendant's bedroom was on the second floor to the front of the house." (4T 69-16 to 17 (emphasis added)) It told the jurors about photos and messages found on cell phones that would demonstrate "that that's his bedroom. The bedroom belonged to him, . . . and the firearm belonged to him." (4T 72-10 to 73-4) The State wrapped up by telling the members of the jury "that the bedroom in 111 North New Jersey belonged to the defendant, and all the illegal things in that bedroom were his." (4T 73-12 to 14)

Detective Procopio told jurors about how Mr. Davis appeared to be locking the front door of the home, and about the text messages and photos referenced in the State's opening. (5T 109-6 to 7; 150-3 to 14; 151-17 to 25; 156-18 to 157-11) The detective furthermore testified on cross that "the investigation . . . revealed that [Mr. Davis] resided at that residence on New Jersey Avenue." (5T 183-4 to 6)

The State closed by declaring that "[d]efendant's bedroom equals defendant's fentanyl and firearm," (7T 18-9 to 12) and reviewed "all of the evidence that demonstrates . . . that the bedroom was his and his alone." (7T 16-

11 to 15)

Finally, the State relied on its evidence that Mr. Davis lived in the home to oppose the motion for a judgment of acquittal. "[T]his wasn't like there was an overnight bag there or, you know, a stray item. There was extensive clothing tied to the defendant – numerous different shirts, numerous different pants, numerous different hats – that shows that he was living in that residence, . . . and it also shows that, of course, all of the things in there were his." (8T 8-21 to 9-4) The State pointed out that the jury was instructed that Mr. Davis's mere presence in the home would be insufficient to prove constructive possession, arguing that jurors therefore had considered the mere-presence possibility "and rejected it." (8T 10-1 to 2) By contrast, no evidence suggested that Mr. Davis had carried the gun outside the home; only drugs were found on Mr. Davis's person at the time of his arrest.

In sum, granting all favorable inferences to the State and assuming its theory of the crime is correct – that Mr. Davis resided at 111 North New Jersey Avenue and occupied that particular bedroom – then N.J.S.A. 2C:39-5(b) was not violated. The court erred in denying Mr. Davis's motion for a judgment of acquittal on the charge of unlawful possession of a handgun (count 20).

B. The court's failure to instruct the jury that it is not illegal to possess an unlicensed gun in one's own home entitles Mr. Davis to a new trial.

In the alternative, Mr. Davis is entitled to a new trial because the court

failed to inform the jury that possessing a gun within his residence did not violate the unlawful possession statute. Because a jury instruction on N.J.S.A. 2C:39-6(e) was clearly indicated by the evidence, failure to give the instruction was "clearly capable of producing an unjust result." R. 2:10-2.

Jurors were instructed that "the State must prove more than a defendant's mere presence at the time that the . . . handgun was found. There must be other evidence tying the defendant to the handgun in order for the State to prove constructive possession beyond a reasonable doubt." (7T 98-20 to 25) As explained above, there was no evidence that Mr. Davis carried the handgun outside of 111 North New Jersey Avenue. Accordingly, the jury found that Mr. Davis constructively possessed the gun based on the evidence that he resided in the room where it was found, rather than finding he had merely been present in the room. There is therefore a substantial likelihood that the jury convicted Mr. Davis of unlawful possession of a firearm based on the incorrect assumption that he could be found guilty regardless of where he possessed the gun.

Jury charges are "a road map to guide the jury and without an appropriate charge a jury can take a wrong turn in its deliberations." State v. Martin, 119 N.J. 2, 15 (1990). In criminal cases especially, failure to provide clear and correct jury instructions on material issues is presumed to be reversible error. State v. Jordan, 147 N.J. 409, 422 (1997). "A trial court has an 'independent

duty . . . to ensure that the jurors receive accurate instructions on the law as it pertains to the facts and issues of each case.'" State v. Cooper, 256 N.J. 593, 608 (2024) (quoting State v. Reddish, 181 N.J. 553, 613 (2004)). Thus, even when a defendant has not requested a particular instruction, a court is obligated to give the instruction "when the evidence clearly indicates the appropriateness of such a charge." State v. Singleton, 211 N.J. 157, 183 (2012) (quoting State v. Walker, 203 N.J. 73, 87 (2010)).

Failing to instruct a jury that the conduct alleged by the State at trial may not actually be criminal under the charged statute is clearly capable of producing an unjust result. See, e.g., Cooper, 256 N.J. at 610 ("[B]ecause no such crime exists, the jury's verdict, premised upon the instructions provided by the trial court, is . . . a manifest injustice."); Davis v. United States, 417 U.S. 333, 346 (1974) (finding that if a defendant's "conviction and punishment are for an act that the law does not make criminal," then "such a circumstance inherently results in a complete miscarriage of justice" (internal quotation marks omitted)).

This Court has recognized the need to instruct jurors that possessing a firearm in a home is not illegal. See Gomez, 246 N.J. at 216 n.1 (the trial judge "correctly instructed the jury that possession of the gun while in defendant's apartment did not constitute a crime, but that carrying the weapon outside of the dwelling would violate N.J.S.A. 2C:39-5b"). In Gomez, because the jury

convicted the defendant of possession despite receiving an instruction on N.J.S.A. 2C:39-6(e), the Appellate Division concluded that the "jury obviously found that defendant had taken the handgun from his apartment." Id. Here, by contrast, there is no suggestion, no testimony, and no evidence that the gun ever left 111 North New Jersey Avenue.

Moreover, it was the State's burden to prove that Mr. Davis possessed a handgun in a manner that is criminal. Under New Jersey law, that includes proving that he possessed the handgun outside of his home. The "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970); State v. Delibero, 149 N.J. 90, 99 (1997) ("The State in a criminal prosecution is bound to prove every element of the offense charged beyond a reasonable doubt. That burden cannot be shifted to a defendant, even when a defendant is asserting an affirmative defense." (citing In re Winship, 397 U.S. 358; Mullaney v. Wilbur, 421 U.S. 684 (1975)).

An instruction on N.J.S.A. 2C:39-6(e) was clearly required. It is undisputed that Mr. Davis did not have the gun on his person when he was apprehended outside the residence. Consequently, the jury convicted Mr. Davis for possessing a handgun in his home, which is not a crime under N.J.S.A.

2C:39-5(b). Such a result is "a manifest injustice." Cooper, 256 N.J. at 610. Reversal of Mr. Davis's conviction under N.J.S.A. 2C:39-5(b) (count 20) is required.

C. Under State v. Cromedy, N.J.S.A. 2C:39-5(j) is not a standalone substantive offense, but a grading statute that applies to convictions under N.J.S.A. 2C:39-5(b). Thus, any relief granted on Mr. Davis's N.J.S.A. 2C:39-5(b) conviction necessarily requires reversal of the conviction and sentence imposed under N.J.S.A. 2C:39-5(j).

Mr. Davis's separate conviction under N.J.S.A. 2C:39-5(j) ("subsection (j)") must also be reversed because under State v. Cromedy, 478 N.J. Super. 157, 161 (App. Div. 2024), subsection (j) is not a standalone offense, but rather, a grading statute that increases a violation of N.J.S.A. 2C:39-5(b) ("subsection (b)") to a first-degree crime. Thus, should this Court reverse his conviction under subsection (b), it must also reverse the conviction and sentence imposed under subsection (j).

Rather than a substantive offense, this Court concluded in Cromedy that "[t]he more sensible interpretation of N.J.S.A. 2C:39-5(j) is as a grading statute." 478 N.J. Super. at 167. There, this Court explained that subsection (j) "upgrade[d] [Cromedy's] crime to a first-degree offense" and subjected him to the associated enhanced penalties for his violation of subsection (b). Id. at 168. The Court declined to "endorse the unpublished case law . . . that treated a subjection (j) offense as a 'substantive' crime." Id. at 168 n.1.

Because subsection (j) is not a standalone crime, Mr. Davis's conviction under subsection (j) was based upon the jury's guilty verdict on his violation of subsection (b). Thus, any relief granted pursuant to the arguments made in this Point necessarily applies to the subsection (j) conviction (count 29).[4]

POINT II

THE COURT ERRED BY FAILING TO ENTER A JUDGMENT OF ACQUITTAL ON COUNT 25, POSSESSION OF HOLLOW-NOSE BULLETS, OR ALTERNATIVELY, BY FAILING TO INSTRUCT THE JURY THAT IT IS NOT ILLEGAL TO KEEP HOLLOW-NOSE BULLETS IN ONE'S OWN HOME. (Not Raised Below)

Mr. Davis was charged with and convicted of possessing hollow-nose bullets, in violation of N.J.S.A. 2C:39-3(f)(1) (count 25). For the same reasons expressed in Point I, supra, the court should have entered a judgment of acquittal on this count. See R. 3:18-1 ("At the close of the State's case or after the evidence of all parties has been closed, the court shall, on defendant's motion or its own initiative, order the entry of a judgment of acquittal of one or more offenses . . . if the evidence is insufficient to warrant a conviction." (emphasis added)). In the alternative, the court reversibly erred when it failed to instruct

[4] As explained later in Point IV.D., if this Court declines to vacate Mr. Davis's subsection (b) conviction, Mr. Davis's judgment of conviction must nonetheless be amended to reflect the fact that there can be no separate conviction and sentence for a crime under subsection (j).

the jury that it is not a violation of N.J.S.A. 2C:39-3(f) to keep hollow-nose bullets in one's own home.

N.J.S.A. 2C:39-3(g)(2)(a) provides that "[n]othing in paragraph (1) of subsection f. of this section shall be construed to prevent a person from keeping such ammunition at his dwelling, premises or other land owned or possessed by him." As explained in Point I, the State's presentation at trial rested on the theory that Mr. Davis constructively possessed all the items found in the bedroom at 111 North New Jersey Avenue because he resided in the home and occupied the bedroom in question. For all the reasons outlined in the previous Point, the court should have entered a judgment of acquittal on this count. Alternatively, failing to inform the jury that possessing hollow-nose bullets in one's own home is not a violation of N.J.S.A. 2C:39-3(f) was "clearly capable of producing an unjust result." R. 2:10-2. Mr. Davis's conviction under N.J.S.A. 2C:39-3(f) (count 25) must be vacated.

POINT III

THE PROSECUTOR'S REPEATED INFLAMMATORY CLAIMS THAT MR. DAVIS POSSESSED A GUN IN ORDER TO USE IT AGAINST LAW ENFORCEMENT OFFICERS DENIED MR. DAVIS A FAIR TRIAL. (Not Raised Below)

The State repeatedly told the jury that Mr. Davis possessed a gun in order to use it against law enforcement officers who would interfere with his drug enterprise. This commentary was irrelevant to the charges against Mr. Davis, not supported by the record, and served only to inflame the jury. Exacerbating the prejudice to Mr. Davis, the State supported its baseless claim with improper expert testimony. Because these remarks may have led members of the jury to convict Mr. Davis not based on his actual conduct, but because they were told he planned to use a deadly weapon against police officers, Mr. Davis was denied his right to a fair trial. U.S. Const. amends. VI & XIV; N.J. Const. art. I, ¶¶ 1, 9, & 10. Mr. Davis's convictions must be reversed.

The State introduced its unproven theory that Mr. Davis had a handgun "to protect his fentanyl packaging operation from law enforcement and from any rivals" in its opening statement. (4T 70-22 to 25) The assistant prosecutor then advanced this theory by eliciting improper testimony from Detective Chad Meyers, who was qualified as an expert "in the field of narcotics use, packaging and distribution." (6T 14-19 to 22) Detective Meyers testified on direct:

> Q: . . . How are weapons, including firearms, used by drug dealers or packagers?
>
> A: This is a very dangerous game that these individuals are involved in. They not only have to be mindful of law enforcement, but they also have to be mindful of rival distributors who wish to take their product or take their area of operation, so they'll – many times we will see people distributing narcotics to be in possession of firearms as well.
>
> [6T 26-1 to 10.]

The State later returned to this claim in summation, asserting that Mr. Davis's gun "is a tool of the trade for protection against law enforcement." (7T 36-19 to 21) By improperly informing the jury that Mr. Davis intended to use a gun against police officers, and by eliciting impermissible expert testimony to support its claim, the State deprived Mr. Davis of his right to a fair trial.

Although prosecutors are given "considerable leeway" in their presentations to jurors, that discretion is not unlimited. State v. Frost, 158 N.J. 76, 82 (1999). In closing arguments, for instance, "prosecutors should confine their summations to a review of, and an argument on, the evidence, and not indulge in . . . collateral improprieties of any type, lest they imperil otherwise sound convictions." Id. at 88 (quoting State v. Thornton, 38 N.J. 380, 400 (1962)).

A prosecutor's remarks may constitute misconduct when they "stray[] beyond the evidence without any 'basis in the record.'" State v. Williams, 244 N.J. 592, 610 (2021) (quoting State v. Feaster, 156 N.J. 1, 62 (1998)). A defendant's

right to a fair trial may be compromised by "references to matters extraneous to the evidence." State v. Jackson, 211 N.J. 394, 408 (2012); see also Williams, 244 N.J. at 612 ("Despite concluding in Jackson that no reversible error occurred, we nonetheless reemphasized that prosecutorial misconduct warranting reversal of a defendant's conviction can be based upon references to matters extraneous to the evidence."). A prosecutor's failure to limit his or her commentary to the evidence is especially dangerous because it "may imply that facts or circumstances exist beyond what has been presented to the jury." Id. at 613.

Prosecutors must also "refrain from unfairly inflaming the jury." State v. Atwater, 400 N.J. Super. 319, 335 (App. Div. 2008). In Atwater, a vehicular homicide case, this Court was "particularly offended by the prosecutor's comment: 'he's closing in on the kill,'" given that "[t]here was no evidence whatsoever that defendant acted intentionally or that he was in any way focused on hitting the victims, as this remark suggests." Id. at 337. Similarly, the prosecution in Williams committed reversible error when it displayed "an inflammatory photograph" and referred to a "violent and frightening movie scene" even though there was no evidence that the defendant committed "an act of physical violence" during a bank robbery. 244 N.J. at 615.

As in Atwater and Williams, the assistant prosecutor attributed far worse conduct to Mr. Davis than there was evidence to support, raising the specter of

him as a violent, desperate drug dealer with motive and intent to harm police officers. Though not prior bad-act evidence, the prejudicial nature of the prosecutor's accusation mirrors the danger N.J.R.E. 404(b) guards against: "that a jury . . . may convict a defendant not on the evidence of the specific crime at issue but because of the perception that the defendant is a 'bad' person in general." State v. Gibbons, 105 N.J. 67, 77 (1987). The commentary was therefore "clearly capable of having an unfair impact on the jury's deliberations, intruded upon defendant's right to a fair trial, and constituted reversible error." Williams, 244 N.J. at 616 (internal quotation marks omitted).

That prejudice was compounded when the State attempted to ground its inflammatory, unsubstantiated theory in the improper expert testimony it elicited from Detective Meyers. "Trial courts are expected to perform a gatekeeper role in determining whether there exists a reasonable need for an expert's testimony, and what the parameters of that testimony may be." State v. Nesbitt, 185 N.J. 504, 514 (2006). Under N.J.R.E. 702, expert testimony is permitted "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." An expert's opinion must concern a matter that is "beyond the ken of an average juror." State v. Reeds, 197 N.J. 280, 290 (2009).

None of the charges against Mr. Davis required the State to prove that he

possessed a gun for a particular purpose. In count 23, Mr. Davis was charged under subsection (a) of the statute criminalizing the possession of a weapon while in the course of committing a drug offense, N.J.S.A. 2C:39-4.1. That statute "embraces two discrete classifications." State v. Harris, 384 N.J. Super. 29, 52 (App. Div. 2006). Subsection (a) criminalizes the possession of firearms while committing a CDS crime, whereas subsection (b) concerns the possession of weapons other than firearms during the commission of a drug crime. See N.J.S.A. 2C:39-4.1(a), (b). Under subsection (b), "a defendant must have a purpose to use the weapon, unlawfully, against a person or property of another during the commission of the underlying drug offense." Harris, 384 N.J. Super. at 53.

But under subsection (a), the State was not required to prove Mr. Davis used or intended to use a gun for any particular purpose. Harris, 384 N.J. Super. at 52-53. Rather, to support a conviction under subsection (a), "the mere presence of guns at the scene where the drug offense is committed" is sufficient. State v. Harrison, 358 N.J. Super. 578, 584 (App. Div. 2003), aff'd sub nom., State v. Spivey, 179 N.J. 229 (2004).

Further, Mr. Davis was not charged with possession of a weapon for an unlawful purpose. N.J.S.A. 2C:39-4. Accordingly, Detective Meyers's expert opinion that drug dealers carry weapons because they are "mindful" of police

interference was not designed to "assist the trier of fact to . . . determine a fact in issue." N.J.R.E. 702. It was designed instead to inflame the jury.

Moreover, because it did not relate to any element of a crime, any marginal probative value this expert testimony may have had was easily overwhelmed by the unfair prejudice to Mr. Davis. Under N.J.R.E. 403, testimony is excludable "if its probative value is substantially outweighed by the risk of . . . [u]ndue prejudice, confusion of issues, or misleading the jury." See also State v. Cain, 224 N.J. 410, 421 (2016) (noting that expert testimony in drug distribution cases may be excluded under N.J.R.E. 403). Failing to exclude this part of Detective Meyers's testimony was clearly capable of producing an unjust result, namely, that jurors convicted Mr. Davis because he was a "bad guy" who planned to do violence to police. R. 2:10-2.

The prosecution's claim that Mr. Davis owned a gun to harm police officers, compounded by its reliance on improper expert testimony by Detective Meyers, denied Mr. Davis a fair trial. The inflammatory impact of these remarks requires reversal of his convictions.

POINT IV

THE 48-YEAR SENTENCE FOR CONSTRUCTIVE POSSESSION OF A GUN INSIDE A HOME IS MANIFESTLY EXCESSIVE AND WAS OTHERWISE IMPROPERLY IMPOSED. (8T 77-11 to 81-6)

In imposing a 48-year custodial sentence with 24 years of parole ineligibility, the court found aggravating factors three (the risk of reoffending), six (the extent and seriousness of the defendant's criminal record), and nine (the need for general and specific deterrence), and no mitigating factors. N.J.S.A. 2C:44-1(a)(3), (6), (9). This extraordinary sentence was based primarily on a mischaracterization of Mr. Davis's criminal history: an incorrect belief that he had a history of CDS offenses, and the improper consideration of pending, unproven charges. The error was compounded by the court's use of Mr. Davis's criminal history in multiple areas of his sentence – to justify all three aggravating factors, to impose an extended term based on a qualifying prior conviction under N.J.S.A. 2C:44-3(d), to support his conviction under N.J.S.A. 2C:39-5(j), which requires that a defendant have a prior NERA conviction, and to support his certain-persons conviction under N.J.S.A. 2C:39-7(b)(1), which requires that a defendant have a specified prior offense. The court further erred by engaging in the long-abandoned practice of presumptive term sentencing to arrive at the 48-year sentence.

A 48-year term of imprisonment cannot be justified by a principled weighing and application of the aggravating factors to the present convictions, which are largely possessory and all nonviolent. That term of imprisonment should shock the judicial conscience and warrants resentencing.

If the Court is not inclined to grant other relief requested herein, two corrections to Mr. Davis's judgment of conviction are nonetheless required.

A. The court significantly misstated Mr. Davis's criminal history and then relied almost exclusively on his record as support for all three aggravating factors.

The court recited Mr. Davis's criminal history as follows: "The defendant has a significant criminal history involving aggravated assault, weapons charges, CDS charges, conspiracy, burglary, tampering, and attempted murder." (8T 69-23 to 70-1) In reality, Mr. Davis had never been convicted of any CDS offenses prior to the instant matter, and charges of conspiracy, burglary, and tampering with physical evidence were pending at the time of his sentencing. (PSR) Those charges were subsequently dismissed pursuant to plea agreements. (Da 109-116)

The court was also aware of a pending attempted murder charge which had been severed: "[T]he house was a subject of the search warrant based upon events that took place in September, I believe September 13th, involving what could potentially be a murder trial. Or attempted murder trial," (8T 62-24 to 63-

3), and a pending robbery charge: "In addition to the present indictment, the defendant has a pending matter in Atlantic County for robbery." (8T 64-11 to 13)

Just as a court may not consider acquitted conduct to increase a defendant's sentence, a court should not consider pending, unproven charges in aggravation. State v. Cambrelen, 473 N.J. Super. 70, 85 (App. Div. 2022). To do so "defies the principles of due process and fundamental fairness." State v. Melvin, 248 N.J. 321, 349 (2021); see also State v. Farrell, 61 N.J. 99, 107 (1972) ("It must be remembered that unproven allegations of criminal conduct should not be considered by a sentencing judge.").

The court's mischaracterization of Mr. Davis's history, and the inclusion of unproven conduct in its consideration, was used to support all three aggravating factors:

(1) Aggravating Factor Three

The court rested its finding of aggravating factor three on Mr. Davis's adult and juvenile history which it incorrectly believed included prior CDS charges, and convictions for conspiracy, burglary, and tampering. (8T 69-2 to 19) In addition, although the court assured defense counsel that it "ha[d] not weighed any . . . unconvicted counts against him" (8T 35-1 to 5), the court twice asserted that "[h]is criminality is escalating." (8T 69-10; 69-13 to 14) But Mr.

Davis was convicted of attempted murder and aggravated assault with a deadly weapon in 2004. His prior convictions were thus far more serious than the gun and drug crimes before the court in the present case. The court's belief in his "escalating" criminality and his "propensity to engage in violent behavior" was therefore either baseless, or improperly based on a consideration of his pending, unproven charges, which included attempted murder and robbery. (8T 69-14 to 15)

(2) Aggravating Factor Six

The court recited the incorrect criminal history in its discussion of aggravating factor six: "The defendant has a significant criminal history involving aggravated assault, weapons charges, CDS charges, conspiracy, burglary, tampering, and attempted murder." (8T 69-23 to 70-1) The court referred again to Mr. Davis's "continued criminal escalation" and gave it "great weight." (8T 70-7 to 8) As explained above, the accusation that his criminal conduct was escalating was either baseless or wrongly based upon unproven conduct.

(3) Aggravating Factor Nine

The explanation for the court's finding of aggravating factor nine was essentially the same as the explanations offered for factors three and six. The court stated that Mr. Davis "and others need to be deterred from CDS crimes in our

community, and clearly this defendant is undeterred, as depicted in his criminal history." (8T 70-18 to 20) Mr. Davis had no history of CDS offenses.

A sentence cannot stand if the aggravating factors are not based on credible evidence in the record. See State v. Case, 220 N.J. 49, 54 (2014). Here, every aggravating factor was grounded in Mr. Davis's criminal history, yet the court's recitation of his prior convictions was incorrect in both quantity and quality.[5] This calls into question the finding of those factors and the weight attributed to them and entitles Mr. Davis to a remand for resentencing.

B. The court further erred by reusing Mr. Davis's prior convictions to (1) upgrade the unlawful possession of a handgun offense to a first-degree offense, (2) impose an extended term sentence on that charge, (3) convict him of violating the certain-persons statute, and (4) support every aggravating factor.

Compounding the above-mentioned errors in the court's analysis of Mr. Davis's criminal history, the court failed to identify which of Mr. Davis's prior convictions qualified him for an upgrade to first-degree unlawful possession of a firearm under N.J.S.A. 2C:39-5(j) (count 29), which offense qualified him for an extended term as a second offender with a firearm, and which offense provided the predicate for the certain-persons charge (count 28). Once those

[5] Not only was the court incorrect about the kinds of crimes Mr. Davis had been previously convicted of, the court's listing of the offenses suggests it believed he was convicted of at least 7 indictable offenses – more than 7 if one notes the court's use of the plural "CDS offenses" – when in actuality he had 4 prior convictions as an adult. (PSR)

determinations had been made, the court was required to set those convictions aside in its consideration of the aggravating factors.

Convictions used to qualify an individual for an extended term may not be considered in determining the aggravating factors or the length of the extended-range sentence. See State v. Dunbar, 108 N.J. 80, 91 (1987). When a court does so, it is a prohibited form of double – or in this case, triple or quadruple -- counting. Id. at 90-91; State v. Vasquez, 374 N.J. Super. 252, 267 (App. Div. 2005).

Here, Mr. Davis's prior convictions had already been used (1) as an element for upgrading his second-degree gun possession charge to a first-degree offense, (2) to subject him to an extended term under N.J.S.A. 2C:44-3(d), and (3) as an element of the conviction for certain-persons under N.J.S.A. 2C:39-7(b)(1). The court failed to consider that those past convictions thus "would not have the same qualitative weight in grading the range of the extended sentence." Dunbar, 108 N.J. at 91-92. As discussed above, the court's assessment of the aggravating factors relied almost entirely upon his prior convictions. A remand for resentencing is required.

C. The court's unsubstantiated declaration that the midpoint of a 20-to-life sentencing range is 50 years was actually a form of impermissible presumptive term sentencing.

The court additionally justified its extreme sentence by declaring the "midpoint" of a 20-to-life range to be 50 years.

> The reason the Court came up with 48 years. It used to be 20 to life, the midpoint was 50. 50 was the midpoint. And when you sentence somebody, you start at the midpoint and you add the aggravating factors, subtract the mitigating factors. In this particular case, I am not bound by that. That has gone by. Case law does not require the courts to start at the midpoint anymore. But I'm just using that as a . . . form of metric to show my rationale.
> . . .
> So . . . he's really be[ing] sentenced on two counts with . . . less than a midpoint, notwithstanding the aggravating factors for sentencing.
>
> [8T 80-9 to 18; 81-11 to 13.]

Mr. Davis has not found support for the notion that 50 years is the mid-point of a 20-to-life sentencing range in the Criminal Code or in caselaw.[6] It is clear, however, that the statutory presumptive term for first-degree extended term sentences was 50 years. N.J.S.A. 2C:44-1(f) ("[S]entences imposed

[6] A life sentence is deemed to be 75 years "[s]olely for the purpose of calculating the minimum term of parole ineligibility pursuant to [NERA]." N.J.S.A. 2C:43-7.2(b). If the same calculation were used here, although Mr. Davis was not being sentenced for any NERA offenses, the midpoint of a 20-to-75-year sentence would be 47.5 years.

pursuant to [N.J.S.A. 2C:43-7(a)(2)[7]] shall have a presumptive term of 50 years' imprisonment.").

But the practice of presumptive sentencing was eliminated decades ago by the Court's decision in State v. Natale, 184 N.J. 458, 487 (2005). By referring to 50 years as the "midpoint," a claim without mathematical or legal support, and anchoring its extreme 48-year sentence to that metric, the trial court effectively engaged in the abandoned practice of presumptive sentencing. This too demands a remand for resentencing.

In sum, a 48-year sentence with 24 years of parole ineligibility is virtually a life sentence for Mr. Davis, aged 37 when he was sentenced. He will be 59 years old on his first parole eligibility date in 2044. A sentence so severe is normally reserved for the most serious, violent offenses contemplated by the Criminal Code. Here, it was imposed on a nonviolent possessory offense. Even if it were not the result of serious analytical errors committed by the sentencing court, the sentence is "clearly unreasonable so as to shock the judicial conscience." State v. Roth, 95 N.J. 334, 364-65 (1984). This matter must be remanded for resentencing.

[7] N.J.S.A. 2C:43-7(a)(2) provides that an extended term "in the case of a crime of the first degree . . . shall be between 20 years and life imprisonment."

D. At minimum, two corrections to the judgment of conviction are required.

If this Court is not inclined to grant other relief in this matter, two corrections to Mr. Davis's judgment of conviction are nonetheless required.

First, the judgment of conviction incorrectly reflects an 18-month prison term for count 10, resisting arrest. In fact, the court imposed no jail term on that count:

> [C]ount 10, resisting arrest, eluding, under 2C:29-2(a), a fourth-degree crime, I'm going to impose – it's up to 18 months and I'm going to impose zero jail term. And it will be fines and penalties only and it will be – doesn't really need to be concurrent, but it will be concurrent to the other charges.
>
> [8T 72-2 to 8.]

Later in the proceeding, the court repeated, "zero jail, concurrent, fines only" for count 10. (8T 77-11 to 15)

When there is a conflict between the oral sentence and the written record of that sentence, the court's oral pronouncement "is the true source of the sentence." State v. Pohlabel, 40 N.J. Super. 416, 423 (App. Div. 1956); see also State v. Abril, 444 N.J. Super. 553, 564 (App. Div. 2016) ("In the event of a discrepancy between the court's oral pronouncement of sentence and the sentence described in the judgment of conviction, the sentencing transcript controls and a corrective judgment is to be entered."). This part of the judgment of conviction must be remanded for correction.

Second, because N.J.S.A. 2C:39-5(j) is not a substantive offense according to Cromedy, 478 N.J. Super. 157, Mr. Davis could not be convicted or sentenced for a non-existent crime. See Cooper, 256 N.J. at 610. Even if this Court does not agree with the arguments in favor of vacating the conviction for unlawful possession of a handgun, see Point I, Mr. Davis's judgment of conviction must be amended to reflect that there cannot be a separate conviction and sentence under N.J.S.A. 2C:39-5(j). Instead, Mr. Davis could only be convicted of violating N.J.S.A. 2C:39-5(b), and that conviction could be upgraded to a first-degree offense upon a finding that he has a prior conviction for a NERA offense. See N.J.S.A. 2C:39-5(j); N.J.S.A. 2C:43-7.2. This part of the judgment of conviction therefore also requires amendment.

CONCLUSION

For the reasons stated in Points I, II, and III, Mr. Davis's convictions require reversal. Alternatively, for the reasons stated in Point IV, Mr. Davis's sentence is excessive, was improperly imposed, and requires a remand for resentencing.

Respectfully submitted,

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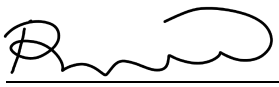
Attorney for Defendant-Appellant

BY: 
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Dated: June 17, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003373-22T4

STATE OF NEW JERSEY,	:	**CRIMINAL ACTION**
Plaintiff-Respondent,	:	**On Appeal from a Judgment of Conviction Superior Court of New Jersey, Law Division, Atlantic**
v.	:	**County.** **Indictment No. 22-06-0989**
KEVIN N. DAVIS	:	
Defendant-Appellant.		**Sat Below:**
	:	**Hon. W. Todd Miller, J.S.C., and a jury**

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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October 1, 2024

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1 This Point responds to the related claims contained in Points I and II of defendant's brief. (Db10-20).

2 This Point responds to Point III of defendant's brief. (Db21-26).

3 This Point responds to the sentencing claims contained in Point IV of defendant's brief. (Db27-36).

TABLE OF APPENDIX

[4] The State submits that defendant's trial brief falls within an exception to the general prohibition against including trial court briefs in the appendix, R. 2:6-1(a)(2), because it is germane to whether an issue was raised in the trial court.

TABLE OF AUTHORITIES

CASES

RULES

STATUTES

MISCELLANEOUS

PRELIMINARY STATEMENT

Since a premises exemption would not have exonerated defendant of all of the charges, or even of the most serious ones, it is clear why this is being raised for the first time on appeal: Defendant is seeking a second bite at the apple after the first bite proved fruitless.

It is well-settled that a trial judge must not tread in active opposition to defendant's trial strategy, even if a defense not sought is clearly indicated. Here, although a premises exemption under N.J.S.A. 2C:39-6(e) theoretically may have avoided the gun possession charge, it would have failed to exonerate defendant of the first-degree maintaining a C.D.S. production facility charge, (or the possession of a firearm while committing a C.D.S. crime), which would have yielded the very same extended life exposure under persistent offender sentencing. In fact, since the exemption asks the jury to find that the home was defendant's, it would have all but guaranteed a conviction, equating to an admission to those charges. That is the exact position that defendant actively opposed at trial, for good reason, as that was the only strategy that would have allowed him to avoid all of the charges.

Finally, a premises exemption would nevertheless not have applied here, where defendant's relationship to the room in his cousin's house was nothing more than a "crash pad," under a statute that, by its plain language and legislative intent, does not permit multiple or temporary residences. Defendant received a fair trial.

COUNTERSTATEMENT OF PROCEDURAL HISTORY[1]

On or about March 10, 2021, the Atlantic County Grand Jury charged defendant, Kevin N. Davis, under 29-count Indictment No. 22-06-0989, which, in relevant part, included: two counts of fourth-degree resisting arrest by flight, contrary to N.J.S.A. 2C:29-2(a)(2) (Counts 10 and 11); three counts of third-degree possession of C.D.S. (a combination of Heroin, Fentanyl, 4-ANPP, and Cocaine), contrary to N.J.S.A. 2C:35-10(a)(1) (Counts 12, 15, and 17); three counts of third-degree possession of C.D.S. (a combination of Heroin, Fentanyl, 4-ANPP, and Cocaine) with intent to distribute, contrary to N.J.S.A. 2C:35-5(a)(1)/2C:35-5(b)(3) (Counts 13, 16, and 18); third-degree possession of property derived from criminal activity, contrary to N.J.S.A. 2C:21-25(a) (Count 14); first-degree maintaining a CDS production facility, contrary to N.J.S.A. 2C:35-4 (Count 19); second-degree unlawful possession of a handgun, contrary to N.J.S.A. 2C:39-5(b)(1) (Count 20);

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[1] "Db" refers to defendant's brief.
"Da" refers to the appendix to defendant's brief.
"Pa" refers to the appendix to the State's brief.
"PSR" refers to the pre-sentence report.
"1T" refers to the motion transcript, dated March 15, 2021.
"2T" refers to the motion transcript, dated February 9, 2023.
"3T" refers to the trial transcript, dated March 3, 2023.
"4T" refers to the trial transcript, dated March 8, 2023.
"5T" refers to the trial transcript, dated March 9, 2023.
"6T" refers to trial transcript, dated March 10, 2023.
"7T" refers to trial transcript, dated March 13, 2023.
"8T" refers to motion and sentencing transcript, dated May 3, 2023.

second-degree possession of C.D.S. within 500 feet of public property, contrary to N.J.S.A. 2C:35-7.1(a) (Count 21); third-degree possession of C.D.S. within 1,000 feet of school property, contrary to N.J.S.A. 2C:35-7 (Count 22); second-degree possession of a firearm while committing a C.D.S. crime, contrary to N.J.S.A. 2C:39-4.1(a) (Count 23); fourth-degree possession of a large capacity ammunition magazine, contrary to N.J.S.A. 2C:39-3(j) (Count 24); fourth-degree possession of hollow-nose bullets, contrary to N.J.S.A. 2C:39-3(f)(1) (Count 25); second-degree certain persons not to have a weapon, contrary to N.J.S.A. 2C:39-7(b)(1) (Count 28); and, first-degree unlawful possession of a handgun with a prior NERA conviction, contrary to N.J.S.A. 2C:39-5(j) (Count 29). (Da1-32; Da102).[2]

On May 2, 2023, defendant was tried before the Honorable W. Todd Miller, J.S.C., and a jury, which acquitted defendant on Count 14 (possession of property derived from criminal activity), and convicted defendant on all other counts. (7T1, et seq.; Da85-101). Following the jury's verdict, Judge Miller conducted a bench trial on the second-degree certain-persons charge (Count 28) and first-degree unlawful possession of a handgun with a prior NERA conviction (Count 29), and found defendant guilty on both counts. (7T163-10 to 18; 7T166-9 to 24).

[2] On February 13, 2023, the court severed counts 1 through 9, 26, and 27 without objection, and they are not before this Court on appeal. (2T7-4 to 9; Da102; Pa1).

On May 3, 2023, Judge Miller denied defendant's motion for a judgment of acquittal on Counts 11, 19, 20, and 23, granted the State's motion for a mandatory Graves Act extended term (and, for a discretionary extended term), and sentenced defendant to an aggregate term of 48 years, subject to 24 years of parole ineligibility. (8T29-1 to 32-14; 8T77-11 to 80-8; Pa2). Specifically, on **Count 10** (resisting arrest), after merging Count 11 (resisting arrest) into Count 10, the judge ordered no jail time;[3] on **Count 16** (possession of C.D.S.), after merging Count 15 (possession of C.D.S.) into Count 16, the judge ordered a concurrent flat sentence of 3 years; on **Count 18** (possession with intent to distribute C.D.S.), the judge ordered a concurrent 3-year flat term; on **Count 19**, charging first-degree maintaining a C.D.S. production facility, the judge imposed a concurrent 10-year term with 5 years to be served without parole eligibility; on **Count 20**, charging second-degree unlawful possession of a handgun, the judge imposed a concurrent 10-year term with 5 years to be served without parole eligibility; on **Count 21** (public property distribution), after merging Count 12 (possession of C.D.S.), Count 13 (possession with intent to distribute C.D.S.), and Count 22 (school zone distribution) into Count 21, the judge imposed a concurrent flat 5-year term; on **Count 23** (second-degree possession of a firearm while committing a C.D.S. crime), after merging Count 24 (fourth-degree

[3] The State agrees with defendant that the Judgment of Conviction needs to be amended to reflect that no jail time was imposed on Count 10. (Db35).

possession of a large capacity ammunition magazine) and Count 25 (fourth-degree possession of hollow-nose bullets), the judge imposed a Graves Act 10-year term with 5 years to be served without parole eligibility mandatorily **consecutive** to Count 19 (first-degree maintaining a CDS production facility);[4] and, on **Count 29** (first-degree unlawful possession of a handgun with a prior NERA conviction), after merging Count 28 (second-degree certain persons not to have a weapon), the judge imposed a concurrent term of 48 years, subject to 24 years of parole ineligibility. (8T71-7 to 89-9; Da102-08). Defendant received 984 days of jail credit. (8T71-8; Da104).[5]

On or about July 10, 2023, defendant filed a notice of appeal with this Court. (Da117-19).

This appeal follows.

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[4] Because Count 19 was ordered to run concurrent to the 48-year sentence on Count 29, the court's order for Count 23 to run consecutively to Count 19 did not increase defendant's aggregate sentence. (8T88-13 to 89-9).

[5] Following sentencing, defendant resolved the severed counts of the instant indictment by guilty plea, negotiating for concurrent time consisting of 15 years subject to NERA for first-degree attempted murder and second-degree unlawful possession of a firearm, as well as negotiating a guilty plea for a concurrent 15-year NERA term for armed robbery under I-21-03-0221. (Da109-16).

COUNTERSTATEMENT OF FACTS

Defendant, Kevin N. Davis, was tried before a jury on drugs and weapons charges recovered during the execution of a search warrant on a room in his cousin's house associated with him. Defendant did not pursue a home exemption defense below, under N.J.S.A. 2C:39-6(e), arguing instead that defendant did not live there, only using his cousin's residence to get high and when he was fighting with his girlfriend. (5T180-1 to 183-13).

On October 3, 2019, Atlantic City police department detectives were conducting surveillance before executing a search warrant at the two-story single-family dwelling at 111 North New Jersey Avenue in Atlantic City, New Jersey. (5T13-11 to 14-24; 5T109-1 to 3). However before they could begin, defendant, later identified as Kevin N. Davis, was seen exiting from the home, appearing to lock the front door, and speeding off on a bicycle. (5T109-3 to 10; 5T113-9).

Officers unsuccessfully tried to stop defendant, resulting in a foot and vehicle pursuit. (5T109-10 to 18). Defendant was captured about seven blocks away, and taken into custody. (5T114-6 to 20). A search of defendant's person revealed a cell phone, cash, and suspected drugs packaged in approximately 100 individual wax folds stamped in purple ink with, "You're Invited." (5T115-5 to 118-3; 5T126-21 to 128-10). At the point defendant was taken into custody, he was within 1,000 feet

of the Pennsylvania Avenue School, and within 500 feet of Boys & Girls Club. (5T133-23 to 139-16).

Upon then executing the search warrant at 111 North New Jersey Avenue, officers discovered a purple marker and stamper of "You're Invited" in the front upstairs bedroom, matching the stamp found on the drug bags seized from defendant's person. (5T130-11 to 25). In that same upstairs front bedroom, officers located drugs, packaging paraphernalia, and a handgun loaded with an inserted magazine and the chamber slide positioned forward. (5T16-17 to 17-10; 5T18-20 to 23; 5T29-1 to 21). Specifically, on the bed, officers found a brown Polo Ralph Lauren paper bag containing approximately 50 white wax folds that were not stamped, believed to be narcotics. (5T17-23 to 3). On the floor next to the bed, was a clear plastic Ziploc bag of suspected C.D.S. on a dinner plate, with a stamper, little black rubber bands, and razorblade. (5T18-3 to 12; 5T32-12 to 17; 5T132-15 to 20). The bag tested positive for 5.71 grams of heroin, fentanyl, and 4-ANPP. (5T234-19 to 235-14). Next to that was the handgun on top of a plastic tote container, a couple of feet from the bed. (5T18-17 to 19-4).

The handgun was determined to be a loaded 9mm Taurus, and operable. (5T42-14 to 17; 5T72-1 to 6; 5T75-15 to 16;S 5T204-17 to 23; 5T206-13 to 17). The handgun's magazine was capable of being loaded with seventeen 9mm caliber

cartridges, exceeding New Jersey's limit of ten. (5T207-25 to 208-5). The handgun had both ballpoint and hollow-point ammunition. (5T210-25 to 211-5).

That second-story front room contained men's clothing on the floor and accessories, including a jacket, shirt, baseball caps, shoes and Timberland boots, along with some Black & Mild cigars, and men's deodorant, men's body spray, and other toiletries in an open bottom drawer. (5T17-9 to 19; 5T20-21 to 21-5; 5T30-9 to 31-3). In addition, two phones were recovered from the front room: an Apple iPhone 7 was plugged in and charging (5T34-6 to 9; S-5 in Evidence), and a black Samsung Galaxy J7 Star phone (5T34-10 to 13; S-6 in Evidence). A third phone was retrieved from a search of defendant's person (S-4 in Evidence); an extraction of that rose gold iPhone 7 revealed to have an Apple ID associated with defendant. (5T144-5 to 6).

Photographs and text messages extracted from defendant's phones further tied him to the bedroom only two weeks before the search warrant was executed. A photograph extracted from one of defendant's iPhones showed defendant on September 15, 2019 with his head on the pillow in that room, which matched the "unique design" of the bedding. (5T120-6 to 11; 5T150-2 to 14; 5T151-21 to 25). Multiple photographs were extracted showing defendant wearing the clothes found in the room outside of the home, and photographs taken of defendant in the room with the clothes, hats, and shoes in the room. (5T158-11 to 162-14; 7T20-6 to 23-

3; 8T14-8 to 19). Similarly, a text message extracted from the phone revealed that, when asked to provide his address to someone on September 16, 2019, defendant texted the 111 North New Jersey Avenue address. (5T156-8 to 157-14).

The house belonged to defendant's cousin, Rasheeda Davis, but defendant allegedly would go there "to get high" and when he was having a disagreement with his girlfriend. (5T177-14 to 179-19; 5T182-21 to 183-13). No mail or bills with defendant's name was found in the house. (5T57-10 to 14). Defendant instead pointed to his driver's license and the indictment as reflecting that defendant's address was 1930 North Missouri Avenue in Atlantic City, with defense counsel claiming in summation that his cousin's house was his "crash pad." (5T180-1 to 183-12; 7T8-22 to 9-1). No mail or other identifying documents of defendant's cousin were found in that bedroom. (5T119-3 to 25).

Before the jury returned a verdict, defendant indicated that he wanted a bench trial on the certain persons and 2C:39-5(j) charges, regardless of the jury's verdict. (7T141-10 to 23). After the jury convicted defendant on all but one count, the trial judge determined that defendant was guilty of the two remaining offenses. (7T160-1 to 166-24).

LEGAL ARGUMENT

POINT I

THERE WAS NO PLAIN ERROR IN NOT SUA SPONTE RECOGNIZING THE UNREQUESTED, AND NEVERTHELESS INAPPLICABLE, PREMISES EXEMPTION UNDER N.J.S.A. 2C:39-6(e), WHERE DEFENDANT AFFIRMATIVELY TRIED TO DISTANCE HIMSELF FROM HIS COUSIN'S HOME; FINDING PLAIN ERROR HERE WOULD BE SANCTIONING TWO BITES AT THE APPLE. [Not Raised Below.[6]][7]

Despite defendant's trial strategy of arguing that he had no connection to the home, neither in terms of ownership nor possession, for the first time on appeal, defendant asserts that the trial court committed plain error by failing to acquit him of the unlawful possession of a handgun and possession of hollow-nose bullets under the N.J.S.A. 2C:39-6(e) premises exemption he actively opposed below, and/or failing sua sponte to charge the jury on the unrequested and nevertheless inapplicable premises exemption. (Db10-19).

The State maintains that the trial court was not required to force an unrequested defense that was patently incompatible with defendant's trial strategy.

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[6] Contrary to defendant's position on appeal, not only did defendant nowhere raise this issue below much less meet his burden to assert this defense, but also, defendant's motion for a judgment of acquittal after the jury convicted doubled-down on defendant's strategy of arguing that the home was ***not*** his residence. (8T6-13 to 7-15; Pa3-7).

[7] This Point responds to the related claims contained in Points I and II of defendant's brief. (Db10-20).

Indeed, it would not have been rational for defense counsel to pursue the premises exemption since it would not have exonerated defendant of all of the charges, and instead, would essentially have equated to admitting to the first-degree maintaining a C.D.S. production facility charge. Finally, the premises exemption was nevertheless not clearly indicated as the statute does not even support an application to multiple residences, given that defendant admitted that the most he did was stay occasionally at his cousin's house as a "crash pad." Defendant received a fair trial.

At the outset, this Court should decline to consider arguments which defendant failed to first raise before the trial court. See State v. Robinson, 200 N.J. 1, 19 (2009); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (holding that appellate courts will decline to consider issues not properly presented to the trial court when an opportunity for such a representation is available "unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest") (internal quotation marks and citations omitted); see also Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011) ("An issue not briefed on appeal is deemed waived.").

When reviewing an issue not raised to the trial court, the plain error standard applies. See R. 2:10-2. That standard looks to whether, "in light of the overall strength of the State's case," State v. Sanchez-Medina, 231 N.J. 452, 468 (2018) (quoting State v. Galicia, 210 N.J. 364, 388 (2012)), such an "unchallenged

error…was 'clearly capable of producing an unjust result,'" State v. Clark, 251 N.J. 266, 287 (2022) (quoting R. 2:10-2); see also State v. Singh, 245 N.J. 1, 13 (2021). "The possibility of an unjust result must be 'sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.'" Clark, 251 N.J. at 287 (quoting State v. Melvin, 65 N.J. 1, 18-19 (1974)).

In the absence of a party's request or objection, the evidence in the record must "clearly indicate" the need to provide the unrequested charge. State v. Alexander, 233 N.J. 132, 143 (2018). The New Jersey Supreme Court has recognized that a trial court's duty to charge the jury on its own motion "is one that is not self-executing," arising only when the record evidence "clearly indicates" the need. State v. Rivera, 205 N.J. 472, 489-90 (2011). "'The trial court does not have the obligation on its own meticulously to sift through the entire record in every trial to see if some combination of facts and inferences might rationally sustain a[n unrequested] charge.'" State v. Thomas, 187 N.J. 119, 134 (2006) (quoting State v. Choice, 98 N.J. 295, 299 (1985)). See also State v. Walker, 203 N.J. 73, 87 (2011) (applying the same standard to evaluate court's obligation to charge statutory defense to felony murder without request). Analysis of the record includes evidence adduced either in the State's or the defendant's case, without regard to credibility, but "the need for the charge must [be] 'jump[ing] off' the proverbial page." Id. at

89; State v. R.T., 205 N.J. 493, 509-10 (2011) (citations omitted); State v. Denofa, 187 N.J. 24, 42 (2006).

However, the New Jersey Supreme Court has recognized that the "clearly indicated" standard is tempered by the need to avoid stepping on trial strategy. "Trial courts must carefully refrain from preempting defense counsel's strategic and tactical decisions and possibly prejudicing defendant's chance of acquittal. The public interest, while important, may not overwhelm defendant's interest in pursuing a legitimate defense in the complex setting of a criminal trial." State v. Perry, 124 N.J. 128, 162–63 (1991) (citing Choice, 98 N.J. at 300-01). As the Court explained, "forcing counsel to incorporate defenses that pre-suppose the existence of the very fact his main method of defense contests destroys the credibility and coherence of the defense entirely." Perry, 124 N.J. at 163. See also State v. Daniels, 224 N.J. 168, 182 (2016) (recognizing "[a] different and more complicated calculus pertains when reviewing a trial record for factual support for an affirmative defense that defendant did not request and may have actively opposed."); R.T., 205 N.J. at 511 (2011) (Long, J., concurring) ("It goes without saying that a defendant who denies having committed a crime should not be required to acknowledge, either explicitly or inferentially, complicity in the event by way of a compelled affirmative defense.").

When engaging in statutory construction, examination of the statute's plain language is the starting point, see State v. Butler, 89 N.J. 220, 226 (1982), and sometimes the ending point as well, see Matter of R.H., 258 N.J. 1, 12 (2024) ("When 'the plain language of a statute is clear, our task is complete.'") (quoting Savage v. Township of Neptune, 257 N.J. 204, 215 (2024)). The plain language is typically the best indicator of legislative intent. R.H., 258 N.J. at 12 (citations omitted). Words are given their ordinary meaning, and read in context of related provisions to give sense to the legislation as a whole. Ibid. (citations omitted).

When a statute's language is ambiguous, the court may consider extrinsic evidence, including legislative history. Ibid. The clear legislative intent of New Jersey's gun control legislation is to restrict the use of guns. State v. Rovito, 99 N.J. 581, 586 (1985) (recognizing "the overriding philosophy of the Legislature and of the judiciary[] to limit the use of guns"); see also State v. Hatch, 64 N.J. 179, 184-86 (1973); State v. Wright, 155 N.J. Super. 549, 553 (App. Div. 1978)). Moreover, "exemptions from gun statutes should be strictly construed to better effectuate the policy of gun control." Rovito, 99 N.J. at 587.

Under N.J.S.A. 2C:39-5(b), it is unlawful for a person to possess a handgun without first obtaining a permit to carry it. Section e of N.J.S.A. 2C:39-6 provides an exemption from the restrictions placed on the possession of weapons for carrying

or possessing a weapon in a "residence, premises or other land owned or possessed by him...." N.J.S.A. 2C:39-6(e). This statutory exemption reads, in full:

> Nothing in subsections b., c. and d. of N.J.S.A. 2C:39-5 shall be construed to prevent a person keeping or carrying about the person's place of business, residence, premises or other land owned or possessed by the person, any firearm, or from carrying the same, in the manner specified in subsection g. of this section, from any place of purchase to the person's residence or place of business, between the person's dwelling and place of business, between one place of business or residence and another when moving, or between the person's dwelling or place of business and place where the firearms are repaired, for the purpose of repair. For the purposes of this section, a place of business shall be deemed to be a fixed location.
>
> [N.J.S.A. 2C:39-6(e).]

The premises exemption is treated as an ordinary defense in a prosecution for unlawful possession of a weapon. See State v. Moultrie, 357 N.J. Super. 547, 555 (App. Div. 2003). However, a defendant requesting a defense must show that there is a rational basis in the facts before the defense will be included in the jury charge. Id. at 556.

Here, there was no plain error in either failing to acquit defendant on the gun possession charge under the home premises exemption that was not sought and was patently incompatible with defendant's trial strategy, or in failing sua sponte to charge the jury on the inapplicable home premises exemption. First, this is the quintessential case where forcing an unrequested defense would have prejudicially tread on defendant's trial strategy. Defendant's entire trial strategy was to distance

himself as much as possible from his cousin's home in order to avoid liability on all the charges, rather than on just the gun charge. Assuming arguendo that the exemption was an option, it was eminently rational for defense counsel to forgo it as it could not have led to a complete exoneration. In fact, if defendant had attempted to establish that the room at his cousin's house was his residence, then he would essentially have admitted to the first-degree maintaining a C.D.S. production facility charge exposing himself similarly to first-degree extended term sentencing.

Instead, defense counsel attempted to obtain complete vindication for defendant by referencing official documents reflecting a different address in the same town, and by referencing text messages and photographs to describe the room as merely a "crash pad" in which to get high, for which he had to obtain keys. (5T180-1 to 3; 5T181-25 to 183-15; 7T10-11 to 23). In his motion for judgment of acquittal, defense counsel argued that there was no evidence of ownership or possession, faulting the State for offering "nothing more than a '[mere] presence' theory…." (Pa3-7; Pa7). This active opposition to a finding that he lived there certainly did not amount to meeting his burden that the premises exemption defense was "clearly indicated." Finding plain error on this record would not only sanction undermining defendant's trial strategy, but also, afford two bites at the apple.

Contrary to defendant's claim on appeal, the fact that the State argued that defendant constructively possessed the items in the room has no bearing on this

analysis. (Db12 to14). The State's burden of establishing constructive possession under the drug and gun statutes is wholly unrelated to the plain language and legal concept embodied in the real property context of N.J.S.A. 2C:39-6(e). Rather, the issue in this plain error context on appeal is recognizing that the "clearly indicated" standard must defer to defendant's trial strategy that actively opposed any finding that he lived in, or "possessed" that room and its contents, as that theory would eviscerate any chance of a full exoneration.

And, finally, while it is perhaps not necessary to reach this issue to deny defendant's claim, the home premises exemption did not apply in this case, as the plain language of the statute does not recognize either merely temporary or multiple residences. Defendant did not establish a rational basis to believe he "possessed" the room in his cousin's house within the meaning of the exemption statute. At the outset, as noted above, the possession envisioned in the "constructive possession" theory successfully espoused by the State at trial is not the same as the word contained in section 6(e)'s unrelated phrase requiring a "residence…[that is] owned or possessed." Statutory terms must be read within their specific context. See, e.g., State v. Lopez-Carrera, 245 N.J. 596, 613 (2021) ("A statute's words and phrases should also 'be read and construed with their context.'….We do not read them in isolation…") (quoting N.J.S.A. 1:1-1).

Of course, the New Jersey Supreme Court has recognized that "[t]here is an element of ambiguity inherent in that portion of the exemption's sentence structure" regarding premises that are owned or possessed by the actor. Morillo v. Torres, 222 N.J. 104, 121 (2015). In Morillo, the Court did not reach the issue of whether a defendant "staying/living" at his mother's house qualified under the exemption in light of the posture of that case. Id. at 125. And while renting, rather than owning, a room tangentially has been acknowledged to be within the exemption's protection, see, e.g., State v. Gomez, 246 N.J. Super. 209, 216 (App. Div. 1991), this Court has rejected non-primary transient/merely accessible properties, such as hotel rooms or properties to which the defendant merely has a key, as satisfying the "clearly indicated" standard. See, e.g., State v. Pratts, No. A-2262-22 (App. Div. July 7, 2023) (slip op. at *4-5) (Pa3-8); State v. Lopez, No. A-3196-11 (App. Div. May 23, 2013) (slip op. at *4-8) (Pa9-18) (rejecting that the exemption applied where defendant had the key and sometimes stayed overnight at his girlfriend's apartment, once or twice a week, while living somewhere else).[8] In rejecting defendant's attempt to extend the statutory exemption to include "multiple residences," this

[8] While Rule 1:36-3 generally restricts courts from citing an unpublished opinion as precedential authority, a court may cite an unpublished opinion as a "secondary authority." Pressler, Current N.J. Court Rules, comment 2 on R. 1:36-3 (2005). See Marjarum v. Twp. of Hamilton, 336 N.J. Super. 85, 98 (App. Div. 2000) (treating an unpublished opinion of another panel as persuasive authority for their decision). A copy of these opinions is included for the convenience of the Court.

Court looked to the plain language of the statute: "Simply by its plain reading, the statutory provision at issue employs the term 'residence,' not 'residences,' and expressly states that an individual may move firearms *between residences only* when moving….Such a delimiting construction comports with the clear legislative intent of our gun control legislation to restrict the use of guns." Lopez, at *8 (Pa14).

Here, the exemption statute similarly does not encompass multiple residences or merely temporary stays, and there was no evidence that defendant's cousin's house was his primary, non-temporary residence. Defendant indisputably held no proprietary interest in his cousin's premises. Moreover, there was no evidence that defendant paid rent, had any of the home's bills in his name, or had an independent or enforceable right of entry; rather, defendant was dependent upon the consent of his cousin, which presumably could be withdrawn at any time. As his text messages described, he had to get his keys back to his cousin's "crib." (5T177-22 to 178-5). And while he maintained some scant possessions in the room, by his own admission, this was merely a "crash pad" he occasionally used to get high in, or to temporarily escape a domestic argument. Defendant affirmatively refuted the notion that this was his primary or even non-temporary residence.[9] Accordingly, the statutory exemption was not applicable in this case.

[9] Indeed, in defendant's sentencing allocution, he stated that house was not the house he was paroled to, he was not staying there, he was not receiving mail there, he was just "beefing" with his girlfriend. (8T47-24 to 48-8).

Defendant received a fair trial; forcing the imposition of the exemption defense in direct opposition to defendant's trial strategy would actually have deprived defendant of a fair trial.

POINT II

THERE WAS NO PLAIN ERROR, AS EVIDENCED BY THE LACK OF OBJECTION BELOW, IN THE FAIR AND OBVIOUS INFERENCE DRAWN REGARDING THE PURPOSE OF A DRUG DEALER IN HAVING A GUN; ANY ERROR WAS NEVERTHELESS HARMLESS AS CAPITALIZED UPON BY DEFENSE COUNSEL IN THE FACE OF OVERWHELMING EVIDENCE OF GUILT. [Not Raised Below.][10]

Again raising a claim for the first time on appeal, defendant now argues that the prosecutor's fleeting references to the fair and obvious inference, adduced from the evidence and expert opinion, of the purpose for a drug dealer to have a gun to protect his drug operation against rivals and law enforcement, deprived defendant of a fair trial. (Db21-26). As the lack of objection below indicates, this statement was unremarkable, particularly as it was a fair inference from the evidence and actually was used to defendant's benefit to further his theory that he was not a drug dealer at that property, or the gun would have been on him. Finally, given the overwhelming evidence of guilt, as well as the jury's acquittal on one of the charges along with appropriate jury instructions, any belatedly perceived error is harmless.

Because no objection was made below to the admission of the belatedly challenged testimony and argument, review is subject to plain error clearly capable of causing an unjust result. R. 2:10-2; State v. Macon, 57 N.J. 325, 337-38 (1971). This means the error must be "sufficient to raise a reasonable doubt as to whether

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10 This Point responds to Point III of defendant's brief. (Db21-26).

[it] led the jury to a result it otherwise might not have reached[.]" State v. Taffaro, 195 N.J. 442, 454 (2008). It is also well-accepted that the absence of objection below by trial counsel generally indicates that counsel did not believe the remark to be prejudicial within the atmosphere of the trial. See, e.g., State v. Irving, 114 N.J. 427, 444 (1989). Likewise, as the Supreme Court has recognized, the failure to seek a curative or limiting instruction suggests that defense counsel believed that he had worked it to his advantage or that any possible error "'was actually of no moment.'" State v. Yough, 208 N.J. 385, 400-01 (2011) (quoting Macon, 57 N.J. at 333).

Indeed, prosecutorial misconduct is not grounds for reversal of a criminal conviction unless the conduct is so egregious as to deprive defendant of a fair trial. State v. Timmendequas, 161 N.J. 515, 575 (1999); State v. Chew, 150 N.J. 30, 84 (1997) (Chew I); State v. Ribalta, 277 N.J. Super. 277, 294 (App. Div. 1994), certif. denied, 139 N.J. 442 (1995); State v. Ramseur, 106 N.J. 123, 322 (1987). To justify reversal, the prosecutor's conduct must have been "clearly and unmistakably improper," and must have substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense. Timmendequas, 161 N.J. at 575. This standard is observed out of a recognition that "public security should not suffer because of a prosecutor's blunder." State v. Watson, 224 N.J. Super. 354, 362 (App. Div.), certif. denied, 111 N.J. 620, cert. denied, 488 U.S. 983 (1988).

As the New Jersey Supreme Court has repeatedly recognized, "It is but a truism that prosecutors, as lawyers, are engaged in an oratorical profession. As such, and in consonance with our adversarial method of ascertaining the truth, we properly afford counsel on both sides latitude for forceful and graphic advocacy." State v. Reddish, 181 N.J. 553, 640-41 (2004) (employing heightened scrutiny in capital case), citing State v. Smith, 167 N.J. 158, 177 (2001); State v. Harris, 141 N.J. 525, 559 (1995); see also State v. Frost, 158 N.J. 76, 82 (1999); State v. Williams, 113 N.J. 393, 447 (1988). In fact, it is well-accepted that prosecutors are afforded considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented, and the legitimate inferences therefrom. Frost, 158 N.J. at 76 (citing Harris, 141 N.J. at 525); Williams, 113 N.J. at 447.

Finally, particular remarks during the prosecutor's summation must be evaluated in the setting of the entire trial, as well as against the remarks by defense counsel. State v. Ortisi, 308 N.J. Super. 573, 595 (App. Div. 1998); State v. Engel, 249 N.J. Super. 336, 379 (App. Div.), certif. denied, 130 N.J. 393 (1991). The "overwhelming evidence" against a defendant is a factor to be considered when determining whether an error is harmless. State v. Derry, 250 N.J. 611, 634 (2022); State v. Trinidad, 241 N.J. 425, 452 (2020). Indeed, a jury's verdict of finding a defendant not guilty on a count may serve to demonstrate that the jury retained its

impartiality in its duty to evaluate only the merits of the evidence presented. See, e.g., State v. Marquez, 277 N.J. Super. 162, 173 (App. Div. 1994), certif. denied, 141 N.J. 99 (1995) (declining to reverse despite being "deeply troubled" by prosecutor's improper remarks, concluding that defendant's right to a fair trial was not substantially prejudiced because the jury's verdict also included an acquittal).

Here, defendant fails to show how the isolated inference, fairly and obviously supported by the evidence, "was clearly capable of an unjust result," R. 2:10-2, and "led the jury to a result it otherwise might not have reached[,]" Taffaro, 195 N.J. at 454, in the full context of this trial. In a case where the loaded gun was found within feet of bulk drugs being packaged for sale, it was a fair and obvious inference for the prosecutor to suggest in his opening and closing statements that having a gun be so accessible to the operation was "to protect his fentanyl packaging operati[on] from law enforcement and from any rivals," (4T70-22 to 25), and that it was "a tool of the trade for protection against law enforcement," (7T36-19 to 21). It was likewise relevant for the narcotics distribution expert to address the link between guns and drugs, when defendant was specifically charged with possession of a gun while committing a C.D.S. crime, under Count 23. (6T26-4 to 15; Da25; Da78-80; Da98).

Importantly, defense counsel not only did not object to this inference, but rather, counsel further elicited and elaborated upon it, because it actually supported

his theory at trial. During cross-examination, defense counsel repeatedly had the expert remind the jury that drug distributors have a gun with the purpose to protect their drugs and well-being:

> DEFENSE COUNSEL: Well, you told the jury that you've come across guns oftentimes because you have to – it's dangerous. You have rival drug dealers, you got law enforcement; right?
>
> A: That's correct. I said that.
>
> * * *
>
> DEFENSE COUNSEL: But you told the jury that the whole point of a drug distributor having a gun is to protect his drugs and well-being. Right?
>
> A: That's what I've seen, sir, yes.
>
> DEFENSE COUNSEL: You can't protect your drugs and well-being if your gun is in the house and you're on the street; right?
>
> * * *
>
> DEFENSE COUNSEL: Okay. You ever see a buyer with a gun?
> A: I can't say that I have.
>
> [6T31-4 to 32-7.]

Then in summation, defense counsel made use of this expert testimony and inference to argue that, based on the detective's own testimony, defendant could not have been a drug dealer: "[W]hat else did Detective Meyers tell you? He has never stopped a buyer with a gun. That a gun, a cell phone…are…all tools of the trade…..And [defendant]'s leaving his crash pad without his gun….And again, what did Detective

Meyers tell you? That's how they do business….The gun is for protection. Left with none of it." (7T12-15 to 13-5).

Defense counsel did not object because it was a fair inference from the relevant evidence presented, and also, because counsel made the strategic decision to capitalize on it. This fully supported his theory of the case that defendant was merely a buyer, not a dealer, because a dealer would have taken that gun with him to protect himself and his drugs. It fully supported counsel's theory that the detective never saw a buyer without a gun. In the entire case, the prosecutor referenced or elicited the inference only three times, and defense counsel did so two times. This was neither objectionable nor prejudicial to defendant.

Understandably for that reason, no request for a curative or other instruction was made. Most significant, the jury's verdict of finding defendant not guilty on one count demonstrates that the jury retained its impartiality in its duty to evaluate only the merits of the evidence presented. See, e.g., Marquez, 277 N.J. Super. at 173 (declining to reverse despite being "deeply troubled" by prosecutor's improper remarks, concluding that defendant's right to a fair trial was not substantially prejudiced because the jury's verdict also included an acquittal).

Finally, the overwhelming evidence of defendant's guilt weighs against any finding of plain error. Defendant received a fair trial.

POINT III

THERE IS NO BASIS TO DISTURB THE TRIAL COURT'S REASONABLE EXERCISE OF DISCRETION IN IMPOSING A SENTENCE SUPPORTED BY THE RECORD, AND CONSISTENT WITH ALL SENTENCING GUIDELINES (8T71-7 to 89-9; Da102-08). [Not Raised Below.][11]

Lastly, despite the fact that the sentencing judge took great pains to impose concurrent, mid-range terms to offset the mandatory sentencing features, defendant maintains that his sentence was manifestly excessive. (Db27-36). Specifically, defendant claims that the sentencing court erred by allegedly misstating defendant's criminal history, erred by re-using defendant's prior convictions to support the mandatory extended Graves Act terms, and erred by allegedly invoking defunct presumptive sentencing by referring to a "midpoint." (Db27-34). Finally, defendant asserts, at a minimum, that the Judgment of Conviction must be corrected to reflect that: 1) the sentence for Count 10 was zero jail time rather than eighteen months, to which that alone the State agrees; and that, 2) given that State v. Cromedy, 478 N.J. Super. 157 (App. Div. 2024), certif. pending, determined that N.J.S.A. 2C:39-5(j) was merely a grading statute, the Judgment of Conviction should be amended to reflect an upgraded first-degree N.J.S.A. 2C:39-5(b) offense, rather than a separate

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11 This Point responds to the sentencing claims contained in Point IV of defendant's brief. (Db27-36).

N.J.S.A. 2C:39-5(j) offense for unlawfully possessing a handgun with a prior NERA conviction. (Db36).

The State maintains that defendant's claims lack merit, as most are factually baseless as a result of misreading the sentencing record, or unsound as a result of misreading the applicable law. As the New Jersey Supreme Court continues to reaffirm, 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) (citing State v. Lawless, 214 N.J. 594, 606 (2013)). See also State v. Grate, 220 N.J. 317, 337 (2015); State v. Fuentes, 217 N.J. 57, 70 (2014); State v. Miller, 205 N.J. 109, 127 (2011); State v. Cassady, 198 N.J. 165, 180 (2009). Indeed, if there is such adherence to the Code's sentencing scheme by a trial court, "its discretion should be immune from second-guessing." State v. Bieniek, 200 N.J. 601, 612 (2010). See also State v. Jabbour, 118 N.J. 1, 5 (1990) (holding that, if a trial court follows the sentencing guidelines, an appellate court ought not second-guess the sentencing court's decision); State v. Roth, 95 N.J. 334 (1984).

In clarifying the limitations of appellate review, the Cassady Court maintained, "If a sentencing court observes the procedural protections imposed as part of the sentencing process, its exercise of sentencing discretion must be sustained unless the sentence imposed 'shocks the judicial conscience.'" Cassady, 198 N.J. at

183-84. Thus, the standard of review is one of deference; the test on appeal is not whether a reviewing court would have reached a different conclusion on what an appropriate sentence should be; it is rather whether, on the basis of the evidence, no reasonable sentencing court could have imposed the sentence under review. State v. Ghertler, 114 N.J. 383, 388 (1989); see also State v. Ball, 268 N.J. Super. 72, 145 (App. Div. 1993), aff'd, 141 N.J. 142 (1995), cert. denied, 516 U.S. 1075 (1996).

Sitting both as the trial judge and the sentencing judge, the judge adhered to all Code and sentencing guidelines when imposing the aggregate sentence of 48 years, subject to 24 years of parole ineligibility. (8T29-1 to 32-14; 8T77-11 to 80-8; Pa2). In setting the term of imprisonment, the judge identified three relevant aggravating factors which he accorded "great weight," including a(3) (the risk that defendant will commit another offense), a(6) (prior criminal record), and a(9) (deterrence of defendant and others), and no mitigating factors to be relevant. (8T69-1 to 71-6; Da102-08). The sentencing court's finding of applicable aggravating and mitigating factors was eminently reasonable.

Despite finding only weighty aggravating factors, and after appropriate merging, the sentencing judge imposed largely low-end or mid-range flat terms, including zero jail time (Count 10), 3 flat (Counts 16 and 18), and 5 flat (Count 21), with 10/5 on Counts 19, 20, and 23. The sentencing court ordered all sentences to run concurrently, other than the term imposed on the Graves Act offense under

Count 23 (second-degree possession of a firearm while committing a C.D.S. crime) which mandatorily had to run consecutive to Count 19 (first-degree maintaining a CDS production facility), but which the judge noted would be offset by the fact that Count 19 was ordered to run concurrently with the 48-year term, with 24 years of parole ineligibility, under Count 29 (first-degree unlawful possession of a handgun with a prior NERA conviction).

First, defendant claims that the sentencing court improperly based the aggravating factors on the mistaken belief that defendant had prior CDS offenses in his record, and allegedly misstated the number of prior convictions, and improperly referred to defendant's criminal history as "escalating." (Db28-30). On the contrary, the aggravating factors were well-supported by defendant's relentless criminal history spanning nearly twenty years. Defendant's career as a criminal began as a juvenile where defendant incurred six adjudications and six violations of probation, for serious offenses including aggravated assault, robbery, contempt, theft, terroristic threats, and assault. (PSR, pp. 7-8). The violence in defendant's criminal history continued as an adult with two prior indictable offenses, both involving guns, including aggravated assault, attempted murder, and weapons offenses, for which defendant incurred a violation of parole. (PSR, pp. 7-13). Defendant's back-to-back offenses had him in detention, prison, or violating probation and parole, until he maxed out six months before the instant offenses.

Defendant's claim on appeal that it was error to characterize defendant's record as "escalating" because he started with attempted murder and aggravated assault with a deadly weapon is fatuous and unavailing. (Db30). Defendant's record was clearly "escalating" as defendant went from committing aggravated assault against a law enforcement officer and robbery as a juvenile to engaging in attempted murder as an adult, well before the instant possessory offenses. (8T43-22 to 25; PSR). As the sentencing court properly recognized, defendant's juvenile and adult history was "nonstop." (8T69-12). And not only was defendant's criminal history "escalating" in terms of its nature, it also escalated in terms of sanctions, none of which deterred defendant.

While the court once referenced "CDS offenses" amid a laundry list of seven prior crimes (8T69-25), the sentencing judge made it substantively clear that the court was focused on defendant's prior weapons offenses. With respect to aggravating factor a(3), the court accurately stated: "There's a substantial likelihood this defendant will commit another offense, particularly a weapons offense. That really is the focus here, not so much the CDS, at the end of the day, but his inability to remain free of weapons." (8T69-3 to 7). The aggravating factors were well-supported.

Defendant's reliance on State v. Dunbar, 108 N.J. 80, 91 (1987) to argue that the sentencing judge improperly double-counted defendant's prior convictions used

to support the Graves Act mandatory terms simply misconceives the law. (Db31-32). The New Jersey Supreme Court has expressly declined to extend the guidelines for extended term sentencing prescribed in Dunbar to Graves Act mandatory extended term sentencing: "We decline to extend Dunbar broadly to the mandatory extended term sentencing context." State v. Jefimowicz, 119 N.J. 152, 162 (1990).

Lastly, defendant's claim that the sentencing court improperly invoked the "abandoned practice of presumptive sentencing" is patently without merit. (Db33-34). By the court's own words, the judge began by recognizing how the practice "used to be," and, expressly recognizing that, "In this particular case, I am not bound by that. That has gone by. Case law does not require the courts to start at the midpoint anymore." (8T80-9 to 16). Rather, the sentencing judge was revealing his process for reaching a term of forty-eight years, along the continuum of twenty years to life. The judge explicitly explained that he considered defendant's continuous criminal history and lack of deterrence, as well as defendant's prior gun offenses, while being careful to avoid consecutive or all maximum terms on the other counts. (8T80-19 to 81-6).

In terms of correcting the Judgment of Conviction, the State agrees with defendant that Count 10 should be amended to reflect that the sentencing judge imposed "zero" jail time. (Db35; Da102). Likewise, the State points out that while the rule of Cromedy was not available at the time of the instant sentencing, and that

the petition in Cromedy remains pending, N.J.S.A. 2C:39-5(j) is indeed merely a grading statute, not a separate offense, subject to the Graves Act. (Db35).

The sentencing record revealed competent, credible evidence in support of defendant's sentence. While significant, the sentence was neither manifestly excessive nor unduly harsh. This is not one of those rare cases where the sentencing court suffered a clear error of judgment, or that the application of the sentencing guidelines was so unreasonable as to "shock the judicial conscience," particularly considering defendant's unrelenting and serious criminal record, without defendant expressing a hint of remorse. Roth, 95 N.J. at 363-64. As it was properly supported by the record, there is no basis to disturb defendant's sentence on appeal.

CONCLUSION

For the reasons expressed, the State respectfully requests that this Court affirm the defendant's conviction and sentence.

Respectfully submitted,

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REPLY LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3373-22
INDICTMENT NO. 22-06-00989-I

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, Atlantic County.
KEVIN N. DAVIS,	:	Sat Below:
Defendant-Appellant.	:	Hon. W. Todd Miller, J.S.C.,
	:	and a Jury.

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 Kevin N. Davis relies on the procedural history and statement of facts from his initial brief, filed on June 17, 2024. (Db) [1] The State filed its responding brief on October 15, 2024. (Pb)

[1] Pb – State's response brief
Db – Defendant's opening brief
Da – Defendant's appendix to his opening brief

LEGAL ARGUMENT[2]

Mr. Davis relies on the legal argument from his initial brief (Db 10 to 36) and adds the following.

REPLY POINT I

IN CONTRAST TO THE AFFIRMATIVE DEFENSE CASES CITED BY THE STATE, INSTRUCTING THE JURY ON THE HOME-CARRY EXEMPTION, AN ORDINARY DEFENSE, WOULD NOT HAVE UNDERMINED MR. DAVIS'S DEFENSE AT TRIAL.

In Points I and II of his plenary brief, Mr. Davis identifies a straight-forward error: jurors were told repeatedly by the State that Mr. Davis resided in the bedroom at 111 North New Jersey Avenue where a gun and hollow-nose bullets were found, and they were not told that New Jersey law exempts from criminal liability the possession of a gun and hollow-nose bullets within a person's residence. The State responds that giving the home-carry exemption instruction would have forced Mr. Davis to abandon his defense that he did not reside there and that the items in the room were not his. That is not so.

The State cites cases in which our courts correctly decided that affirmative defenses, when unrequested or objected to by defense counsel, risk "preempting defense counsel's strategic and tactical decisions." State v. Perry,

[2] Reply Points I, II, and III reply to Point I of the State's brief. (Pb 10-20) Reply Point IV replies to Point III of the State's brief. (Pb 28-34)

124 N.J. 128, 162-63 (1991) (self-defense); see also State v. Daniels, 224 N.J. 168 (2016) (renunciation); State v. R.T., 205 N.J. 493 (2011) (involuntary intoxication). The State also correctly points out that the home-carry exemption[3] is an ordinary defense to the charge of unlawful possession of a handgun or hollow-nose bullets. (Pb 15 (citing State v. Moultrie, 357 N.J. Super. 547, 556 (App. Div. 2003)).

The State's main objection to the home-carry instruction falls apart in light of the distinction between affirmative defenses and ordinary defenses. Unlike the home-carry exemption, affirmative defenses like self-defense, renunciation, or involuntary intoxication require a defendant to admit to the underlying criminal act and provide an excuse for that conduct. In contrast, as an ordinary defense, informing jurors of the home-carry exemption does not require a defendant to admit to possessing a gun or to residing in a particular place. Jurors need only be told that a home-carry exemption is an ordinary defense to unlawful possession, and that it would apply if they credited the State's evidence that Mr. Davis lived in the bedroom.

On appeal, it is the State, not Mr. Davis, who seeks "two bites at the apple." (Pb 16) Because the State unreservedly embraced a theory of guilt that

[3] As used in this brief, the home-carry exemption refers to the statutory exemptions in N.J.S.A. 2C:39-6(e) (firearms) and N.J.S.A. 2C:39-3(g)(2)(a) (hollow-nose bullets).

would not have resulted in conviction if the jury had been informed of the relevant law, it seeks on appeal to rewrite its trial strategy. It now claims that 111 North New Jersey Avenue was "merely a 'crash pad'" for Mr. Davis. (Pb 19) This is in stark contrast to its refrain at trial that "the defendant was maintaining the residence in question," that "he was living in that residence," and that "the bedroom belonged to the defendant" and "was his and his alone." (4T 73-12 to 14; 7T 16-11 to 15; 8T 8-9 to 11; 8T 8-21 to 9-4) Mr. Davis's brief contains numerous additional examples of the State's trial stance at Db 12-14, and additional support for the State's position came from State witness Detective Procopio, who testified that "the investigation . . . revealed that [Mr. Davis] resided at that residence." (5T 183-4 to 6) An instruction on the home-carry exemption was therefore required.

To avoid the obvious consequence of its own trial theory, the State makes new factual assertions on appeal that contradict its position at trial. (Pb 19) But "[l]ike any other litigant, the State is estopped from taking inconsistent positions that are relied upon by the tribunal." State v. Reid, 456 N.J. Super. 44, 66 (App. Div. 2018). In Reid, the State attempted to avoid a mandatory joinder problem by claiming that guns seized from a residence were unconnected to a robbery, yet also sought to present the guns to jurors as evidence of the robbery. This Court concluded that "[t]he State cannot have it

both ways," noting that the State "should not be permitted to sidestep" a legal consequence "by asserting at pretrial motions and on this appeal" one set of facts, "but suggest later to a jury at a trial" a different set of facts. Ibid. (emphasis added). Here, too, the State cannot sidestep the home-carry exemption by asserting on appeal that the residence was merely Mr. Davis's "crash pad," after having told jurors at trial it was his home.

Mr. Davis, by contrast, does not seek to reconsider his defense in the slightest. To be clear, what Mr. Davis identifies as reversible error is not a failure to tell jurors that he did reside at the home in question, but only that if they determined he did, they must consider the home-carry exemption. The State wishes to force Mr. Davis to choose between disclaiming possession of the items and informing jurors of the relevant law. That is a false choice. Mr. Davis was entitled to a jury that was instructed on the applicable law. Withholding potentially dispositive law from jurors denied Mr. Davis a fair trial.

REPLY POINT II

BECAUSE THE HOME-CARRY EXEMPTION IS AN ORDINARY DEFENSE TO UNLAWFUL POSSESSION OF A FIREARM AND HOLLOW-NOSE BULLETS, MR. DAVIS WAS ENTITLED TO THE INSTRUCTION AND THE STATE FAILED TO CARRY ITS BURDEN TO DISPROVE THAT 111 NORTH NEW JERSEY AVENUE WAS MR. DAVIS'S RESIDENCE.

As discussed in Reply Point I, and as the State correctly points out, the home-carry exemption is an ordinary defense to the charge of unlawful possession of a handgun or hollow-nose bullets. (Pb 15) That is important for the reasons identified in Reply Point I, and two additional reasons. First, even minimal evidence supporting an ordinary defense entitles a defendant to an instruction on that defense. Second, the State bears the burden of disproving an ordinary defense, so it was the State's burden to disprove that 111 North New Jersey Avenue was Mr. Davis's residence. Because the State took the opposite approach, it failed to carry its burden and the jury's verdict is unreliable.

"[A] defendant in a criminal case is entitled to have the jury consider any legally recognized defense theory which has some foundation in the evidence, however tenuous." Moultrie, 357 N.J. Super. at 556 (quoting State v. Powell, 84 N.J. 305, 317 (1980)). Even "[v]ery slight evidence on a theory of defense will justify the giving of an instruction." Ibid. Thus, though Mr. Davis disagrees with the State's position that the home-carry exemption was not

"clearly indicated" by the evidence the State itself presented, there can be no question it met a bare minimum of "some foundation" or "very slight evidence," no matter how "tenuous."

In addition, because it was the State's burden to disprove the home-carry exemption, it effectively functioned as an element of the unlawful possession charges. "Ordinary defenses must be disproved by the State with no requirement that the defendant adduce any evidence whatsoever in their support." Id. at 556 (quoting Cannel, New Jersey Criminal Code Annotated, cmt. 3 on N.J.S.A. 2C:1-13 (2002)). One of the unpublished cases relied on by the State demonstrates how the jury could have been properly charged on the home-carry exemption as the fourth element of unlawful possession. See State v. Lopez, No. A-3196-11 (App. Div. May 23, 2013).[4] In Lopez, this Court approved of the trial judge's instruction that "the State had to prove four elements beyond a reasonable doubt for the unlawful possession charges." Id. (slip op. at 6). Those four elements were "that the weapons were handguns; defendant knowingly possessed them; defendant did not have a permit to possess them; and lastly, which the judge added to the model jury charge, 'defendant's residence is not [the apartment building in question].'" Ibid.

[4] As the State notes in its brief, unpublished cases may not be relied upon as precedential support for a particular legal analysis. R. 1:36-3. (Pb 18 n.8)

(emphasis added).[5]

Even if trial counsel has not requested an instruction, trial courts have "an 'independent duty . . . to ensure that the jurors receive accurate instructions on the law as it pertains to the facts and issues of each case.'" State v. Cooper, 256 N.J. 593, 608 (2024) (quoting State v. Reddish, 181 N.J. 553, 613 (2004)). Nowhere is that duty "more critical [than] in a criminal case when a person's liberty is at stake." State v. McKinney, 223 N.J. 475, 496 (2015) (quoting State v. Green, 86 N.J. 281, 296 (1981)).

Thus, a conviction must be reversed – even on review for plain error – if the jury was not properly instructed on an essential element of the offense. State v. Vick, 117 N.J. 288, 293 (1989) ("[W]e see no way to conclude that a trial can be constitutionally fair when the State is not required to prove . . . the essential elements of the offense charged. The requirement is so basic and so fundamental that it admits of no exception no matter how inconsequential the circumstances."); see also State v. Grate, 220 N.J. 317, 329-34 (2015) (finding plain error because the trial court failed to instruct the jury that "knowingly" modified all material elements of the offense); State v. Afanador, 151 N.J. 41,

[5] This Court furthermore approved of the trial judge's definition of "residence" within the home-carry exemption for jurors as "any building or structure though movable and temporary or a portion thereof which is for the time being the actor's home or place of lodging." Ibid.

55-56 (1997) (finding plain error where the trial court failed to instruct the jury on an essential element of the drug kingpin statute); State v. Federico, 103 N.J. 169, 176 (1986) ("[W]e recognize that the failure to charge the jury on an element of an offense is presumed to be prejudicial error, even in the absence of a request by defense counsel."); State v. Roberson, 246 N.J. Super. 597, 601, 697 (App. Div. 1991) (finding plain error because the jury was not instructed on an essential element, the weight of the cocaine, even though the evidence was "uncontradicted"). The complete omission of this element from the jury instructions is reversible error.

REPLY POINT III

THE NATURE OF MR. DAVIS'S RELATIONSHIP TO THE RESIDENCE IS A QUESTION FOR THE JURY, AND THE HOME-CARRY EXEMPTION DOES NOT REQUIRE A PERSON TO OWN THEIR RESIDENCE.

As explained earlier, the State has changed its position on the residence in order to argue on appeal that the court had no basis to inform jurors of the home-carry exemption. Specifically, the State now makes a series of assertions about Mr. Davis's relationship to the residence, claiming it was not his "primary, non-temporary residence," that he lacked "an independent or enforceable right of entry," and that his use of the home was "dependent upon the consent of his cousin, which presumably could be withdrawn at any time." (Pb 19) But findings of fact regarding Mr. Davis's relationship to the residence must be made by jurors, not the State or an appellate court. Mr. Davis need only demonstrate that "[v]ery slight evidence" warranted giving jurors the home-carry exemption and placing that crucial determination in the hands of the jury. He has done so.

In a final attempt to avoid the home-carry exemption, the State seeks to rewrite the plain language of the exemption itself, urging this Court to find that the qualifier "owned or possessed by the person" extends to "the person's . . . residence." N.J.S.A. 2C:39-6(e); N.J.S.A. 2C:39-3(g)(2)(a). The State contends

that a person is not entitled to the home-carry exemption unless that person "owns or possesses" their residence, and asserts that Mr. Davis did not "possess" the very room which the State claimed throughout the trial "belonged to him." (4T 73-1 to 4; 73-9 to 13) (Pb 17 to 19)

The State misconstrues the Supreme Court's discussion of the home-carry exemption statute in Morillo v. Torres, 222 N.J. 104 (2015). The Court did not identify any ambiguity in the application of the home-carry statute to a person's residence. Indeed, the Court contrasted the phrase "premises or other land owned or possessed by the person," which it characterized as ambiguous, with the unambiguous "residence" or "place of business" language. Id. at 120-21. And the Court apparently concluded that "owned or possessed" applied to premises and other land only:

> The statute's grammatical structure can be read to mean that "premises" and "land"—both more generic descriptions of areas than "residence" or "place of business"—must be owned or possessed by the individual to whom a weapon is registered in order for that person to lawfully carry the weapon in such areas. There is an element of ambiguity inherent in that portion of the exemption's sentence structure.
>
> [Id. at 120-21.]

The Court moreover observed that "the overwhelming majority of New Jersey case law that has touched on the circumstances in which the statutory exemption is applicable supports the view that the statute permits gun owners

to carry firearms, without a carry permit, inside their residences." Id. at 122. And the Court once again interpreted the "owned or possessed" language to modify premises other than the person's residence, writing that "no case law suggests that the statute generally permits a gun owner to carry a firearm outside his or her residence on premises he or she neither owns nor possesses." Id. at 122-23.

An early version of the home-carry exemption statute makes this construction clear. Prior to New Jersey's transition to the 2C in 1978, the unlawful possession statute was found at N.J.S.A. 2A:151-41. The precursor to today's exemption statute read as follows:

> Nothing contained in section 2A:151-41 shall be construed:
> a. to prevent a person from keeping or carrying about his place of business, dwelling house, premises, or on land possessed by him, any firearm . . .
>
> [N.J.S.A. 2A:151-42 (1966).]

The home-carry exemption therefore applies to a person's residence – period – as well as to "other land owned or possessed by the person." N.J.S.A. 2C:39-6(e). There is no suggestion that Mr. Davis carried the firearm in question outside of 111 North New Jersey Avenue. Whether his connection to the residence was sufficient to establish the home-carry exemption was a question for the jury. For all these reasons, as well as the reasons outlined in

Reply Points I and II, and in Mr. Davis's initial brief, the failure to inform the jury of the home-carry exemption deprived him of a fair trial.

REPLY POINT IV

A 48-YEAR TERM OF IMPRISONMENT FOR A GUN FOUND IN A BEDROOM SHOCKS THE CONSCIENCE. THE COURT'S MISAPPREHENSION OF MR. DAVIS'S PRIOR CONVICTIONS WAS NOT HARMLESS.

The State contends that the sentencing court's multiple errors regarding both the length and content of Mr. Davis's prior criminal history were essentially harmless. But sentencing is not a yes-or-no decision. A sentencing court exercises its discretion in setting a term of years within a broad range – in this case, the broadest possible range of 20 years to life imprisonment. Thus, any change in the calculus of the aggravating and mitigating factors is liable to result in a different sentence, even if the difference is small. See State v. Roth, 95 N.J. 334 (1984) (explaining that resentencing is "always require[d]" where the sentencing court's exercise of discretion is not "based upon findings of fact that are grounded in competent, reasonably credible evidence"); State v. Sutton, 132 N.J. 471, 486 (1993) ("[C]onfidence in the ultimate sentencing determination will be enhanced substantially by a sentencing proceeding that incorporates the deliberation and exercise of reasoned discretion . . . ."). Only if Mr. Davis had received a term of years at the very bottom of the sentencing

range could the court's incorrect beliefs about his prior convictions be considered harmless. Mr. Davis was sentenced to an extreme 48-year prison term with 24 years of parole ineligibility based almost entirely on his criminal history. The sentencing court's misunderstanding of that criminal history cannot be harmless.

CONCLUSION

For the reasons in this reply and in Mr. Davis's initial brief, his convictions require reversal. In the alternative, the matter must be remanded for resentencing.

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