No. 24-

IN THE

# Supreme Court of the United States

KONSTADIN BITZAS,

*Petitioner,*

*vs.*

STATE OF NEW JERSEY,

*Respondent.*

---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY**

## PETITION FOR A WRIT OF CERTIORARI

ERIC V. KLEINER
*Counsel of Record*
385 Sylvan Avenue
Suite 29, 2nd Floor
Englewood Cliffs, NJ 07632
(201) 394-6229
erickleiner@verizon.net

*Attorney for Petitioner*
*Konstadin Bitzas*

130764

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

## QUESTIONS PRESENTED

1. Under *Franks v. Delaware*, 438 U.S. 154 (1978), do defects in the search warrant application process, including failure to satisfy the oath requirement; providing an ambiguous and misleading criminal history; and omitting key facts about the complaining witnesses' intoxication, render a criminal search warrant invalid?

2. Under *Brigham City v. Stuart*, 547 U.S. 398 (2006) and *United States v. Rahimi*, 144 S. Ct. 1889 (2024), did the warrant-issuing judge and the reviewing courts impermissibly blur-the-line between the emergency caretaker function requirements to enter a dwelling and the more stringent probable cause requirements for issuance of a criminal search warrant?

3. Under *Rock v. Arkansas*, 483 U.S. 44 (1987), when an individual represents himself pro se at a criminal trial, does a trial court's failure to conduct a colloquy to determine whether the defendant understands his right to testify violate the Due Process Clause of the Fourteenth Amendment, the Compulsory Process Clause of the Sixth Amendment, and the Fifth Amendment?

4. Under *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 U.S. 1 (2022) and *United States v. Rahimi*, 602 U.S. ___ (2024), does the Second Amendment permit a state statute criminalizing the possession of firearms by persons not convicted of a violent crime or otherwise determined to pose a safety risk to themselves or others?

## PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover of this Petition.

## STATEMENT OF RELATED PROCEEDINGS

There are no related proceedings.

## TABLE OF CONTENTS

*Table of Contents*

*Table of Contents*

*Page*

## TABLE OF APPENDICES

## TABLE OF CITED AUTHORITIES

*Page*

**CASES:**

*Page*

*Page*

## OPINIONS BELOW

The Order of the Supreme Court of New Jersey, denying Petitioner's Petition for Certification, dated October 1, 2024, appears in the Appendix to this Petition (Appendix A) at 1a and is unpublished.

The opinion of the Superior Court of New Jersey, Appellate Division, the highest state court to review the matter on the merits, denying Petitioner's appeal of the trial court's decision on remand, appears in the Appendix to this Petition (Appendix B) at 2a and is unpublished.

The Decision After Appellate Remand of the Superior Court of New Jersey, Law Division, denying Petitioner's motion to suppress the search warrant, appears in the Appendix to this Petition (Appendix C) at 25a and is unpublished.

The opinion of the Superior Court of New Jersey, Appellate Division, remanding this matter to the trial court, appears in the Appendix to this Petition (Appendix D) at 46a and is unpublished. The Law Division's Decision denying Petitioner's Motion to Suppress appears in Appendix E at 69a. The Superior Court of New Jersey, Appellate Division, reversing the original trial conviction appears in the Appendix to this Petition (Appendix F) at Pet. 71a and is published at *State v. Bitzas*, 451 N.J. Super. 51; 164 A.3d 1091 (App. Div. 2017).

## JURISDICTION

The date on which the Supreme Court for the State of New Jersey decided this matter was October 1, 2024. Petitioner invokes the jurisdiction of the United States Supreme Court under 28 U.S.C. § 28 U. S. C. § 1257(a) having timely filed this Petition for a Writ of Certiorari within ninety days of the final judgment by the New Jersey Supreme Court.

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment II:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a

> presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.J.S.A. 2C:39-7:

Certain Persons Not to Have Weapons or Ammunition.

a. Except as provided in subsection b. of this section, any person, having been convicted in this State or elsewhere of the crime, or an attempt or conspiracy to commit the crime, of [ . . . ] attempt or conspiracy to commit an offense, for the unlawful use, possession or sale of a controlled dangerous substance as defined in N.J.S.2C:35-2, other than a disorderly persons or petty disorderly persons offense, who purchases, owns, possesses or controls any of the specified weapons or any ammunition [ . . . ] is guilty of a crime of the fourth degree.

b. (1) A person having been convicted in this State or elsewhere of the crime, or an attempt or conspiracy to commit the crime, of [ . . . ] a crime, or an attempt or conspiracy to commit a crime, pursuant to the provisions of N.J.S.2C:35-3 through N.J.S. 2C:35-6, inclusive; section 1 of P.L.1987, c.101 (C.2C:35-7); N.J.S.2C:35-11; N.J.S. 2C:39-3; N.J.S. 2C:39-4; or N.J.S. 2C:39-9 who purchases, owns, possesses or controls a firearm is guilty of a crime of the second degree and upon conviction thereof, the person shall be sentenced to a term of imprisonment by the court.

## STATEMENT OF THE CASE

Petitioner Konstadin Bitzas seeks review of the final judgment of the Superior Court of New Jersey, Appellate Division, entered in this action on May 30, 2024, affirming his convictions for firearms offenses entered on April 19, 2018, following a second bifurcated jury trial that resulted in his sentencing to an aggregate prison term of eleven-and-one-half years with six-and-one-half years of parole ineligibility.

As this Court so-aptly stated over one hundred years ago, a "man's house is his castle." *Weeks v. United States*, 232 U.S. 383, 380 (1914). At stake in this matter is the protection of a private dwelling from massive overreach by the State of New Jersey, which executed a criminal search warrant predicated upon a police officer's unsworn and false statements, together with a statement from a highly-unreliable alleged victim who was so extremely intoxicated at the time that police had to escort her to what is colloquially known as the "drunk tank" to dry-out.

The police power of the State extends only to immediate threats of public safety, health, and welfare. *See Michigan Commission v. Duke*, 266 U.S. 570 (1925). Moreover, exercises of the police power must respect the individual rights guaranteed in the Constitution and the State is prohibited from violating substantive rights. *See Owens v. City*, 445 U.S. 662 (1980). If not for the extreme intoxication and inconsistent statements of the complaining witness, perhaps the emergency aid or caretaker doctrine could justify a temporary entry and seizure based upon a showing that someone "poses a clear

threat of physical violence to another[1]" but the Fourth Amendment, applicable here by virtue of the Fourteenth Amendment, requires more to justify governmental intrusion into a private dwelling to seize weapons kept in the home for self-defense for the purpose of later mounting a criminal prosecution. See Point I, infra. The appropriate constitutional remedy here is to suppress any evidence derived from the search warrant. Moreover, Petitioner's convictions under New Jersey's "certain persons not to have weapons" statute, N.J.S.A. 2C:39-7, must be overturned to uphold the constitutionality of the statute under *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 U.S. 1 (2022). *See* Point III, *infra*.

By way of background, Petitioner is alleged to have assaulted P.K.[2] on August 31, 2013, but the police officers who arrived on the scene that evening apparently did not believe Mr. Bitzas had committed any crime. The alleged victim, P.K., however, is described in the police investigation report as "extremely emotional, uncooperative, and intoxicated." *State v. Bitzas*, No. A-5918-17, *12 (App. Div. Jul. 27, 2021). The record shows that P.K., while throwing and breaking dishes in the street, initially told the police there was no assault. At first, P.K. did not wish to obtain a temporary restraining order ("TRO"), or even furnish a statement to police. *Id.* She initially told police she was not injured. *Id.* P.K. then made inconsistent statements as to whether she was assaulted and regarding the presence of weapons in the apartment. Moreover, P.K. made exculpatory remarks on

1. *United States v. Rahimi*, 602 U.S. ___ (2024); 144 S. Ct. 1889, 1901 (2024).

2. Initials are used to protect P.K.'s privacy.

the scene that contradict with what she later told the police the next day. In addition, the officers had to "physically grab" P.K. to prevent her from leaving the scene. *Id.* P.K. reportedly "became belligerent and ranted about wanting [the police] to search [Petitioner's] apartment." *Id.* She was being so disruptive outside Petitioner's residence that it led to physical contact between her and the police, who repeatedly grabbed P.K. to get her under control and transport her to an ATRA[3] sobering facility.

The next day, fresh from her overnight stint in what is informally known as the "drunk tank," P.K. reported to Detective Morgenstern-Byrnes that Petitioner had assaulted her and threatened her with a gun night before, and that she had seen firearms inside Petitioner's home. P.K.'s combativeness with the police, which had prompted a physical altercation with the police that night before, among other potential causes, like falling while heavily intoxicated, could explain the bruises on P.K.'s body the next day, but in an abundance of caution Det. Morgenstern-Byrnes issued a TRO for Mr. Bitzas. Mr. Bitzas was subsequently arrested during a traffic stop. The duty judge in Fort Lee, New Jersey authorized police to seize Petitioner's weapons under New Jersey's Prevention of Domestic Violence Act. See N.J.S.A. 2C:25-17 ("PDVA").

Additionally, a criminal search warrant was issued for Petitioner's home. Execution of this search warrant yielded four handguns, a rifle, and some ammunition. Mr. Bitzas was indicted and charged with second-degree

3. *See* N.J.S.A. 26:2B-17 (ATRA Alcohol Treatment and Rehabilitation Act).

possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39–4a; third-degree terroristic threats, N.J.S.A. 2C:12–3b; fourth-degree aggravated assault by pointing a firearm at or in the direction of another, N.J.S.A. 2C:12–1b(4); second degree possession of an assault firearm, N.J.S.A. 2C:39–5f; fourth degree possession of a large capacity magazine, N.J.S.A. 2C:39–3j; and, pursuant to New Jersey's "Certain Persons Not to Have Weapons" statute, fourth degree possession of a handgun following a conviction for possessing a controlled dangerous substance, N.J.S.A. 2C:39–7a.

This case was first tried before Liliana S. DeAvila-Silebi, a former state court judge who has now been defrocked and disbarred. *See State v. Bitzas*, 451 N.J. Super. 51 (App. Div. 2017). The New Jersey Appellate Division unanimously overturned Petitioner's convictions and ordered a new trial, in large part because the judge removed P.K. from the stand after she failed or refused to adhere to the court's instructions and the trial judge *sua sponte* dismissed with prejudice all of the charges involving alleged violence against P.K. *Id.* at 51. As stated by the appellate court: "P.K. impulsively inserted herself into the colloquy between the judge and defense counsel and personally refuted defense counsel's objection by addressing him directly. These two elements of P.K.'s temperament became the hallmark of her obstreperous demeanor, which escalated out of control during defense counsel's cross-examination." *Id.* at 81. Indeed, as noted in the Appellate Division's first published opinion: "***The judge's decision to dismiss the indictment's first three counts was ineffective in counteracting the prejudice caused by the witness's misconduct***." *Id.* at 60 (emphasis added). And yet, the same court of appeals later approved

the probable cause finding for issuance of the search warrant depending exclusively on P.K.'s credibility, which is nonexistent. Forcing Mr. Bitzas to face a second trial after the alleged victim poisoned the first trial was fundamentally unfair.

Mr. Bitzas represented himself pro se during the first phase of a bifurcated retrial conducted before a different judge. Based on the foregoing Before the retrial, the State focused on the firearms-related charges only, including five counts of possession of a handgun under the "certain persons " statute. *See State v. Bitzas*, No. A-5918-17, at 46a. Thus, while this entire case rests on P.K.'s credibility, she never testified at the retrial. *Id.* at 47a. The retrial judge conducted the proceedings too rapidly causing multiple errors of a constitutional dimension which adversely impacted Petitioner's right to compulsory process and, most importantly, his right to testify. *See* Point II, *infra*. The retrial judge failed to conduct a sufficient colloquy to determine whether Petitioner understood his right to testify, and also failed to instruct petitioner regarding the dangers of self-representation. The judge even admonished Mr. Bitzas for employing "trial strategy," implying she did not believe he deserved the presumption of innocence or the right to present a defense. The judge asked Mr. Bitzas to stipulate to his 1992 drug possession conviction but did not explain the significance of this decision to him. [11T-49:7-53:12]. Petitioner refused and requested permission to argue to the jury that his conviction was too old for consideration but the court denied his request. The judge then barred and/or severely limited Petitioner from introducing any evidence concerning the existence of P.K.; any reference to the dismissed counts of the Indictment involving P.K.;

or any suggestion that P.K. herself may have owned some of the firearms discovered in the apartment and/or could have planted evidence to entrap Mr. Bitzas before she called the police.

After the first phase of trial, on April 18, 2018, Bitzas was convicted of possession of the rifle without a license and possession of two large capacity magazines. Immediately after the verdict, Mr. Bitzas absented himself from the courtroom for the rest of the proceedings, choosing to remain in jail instead. After Petitioner requested standby counsel, a member of the New Jersey Office of the Public Defender was appointed to represent him and the judge transitioned to an even faster pace. The public defender was given little or no time to prepare; was denied permission to file briefs and locate a witness; and was given virtually no time to communicate with her client. The clock and the calendar are terrible masters, and the lower court's heavy-footed approach resulted in creating a recipe for disaster. The second phase of the bifurcated retrial began on April 19, 2018, and later on that same day the same jury convicted Mr. Bitzas on four counts of possession of a handgun under the "certain persons not to have weapons" statute.

On direct appeal, the New Jersey Appellate Division, relying on *Franks v. Delaware*, 438 U.S. 154 (1978), remanded back to the lower court for reconsideration of Petitioner's argument that the State violated his right to be free from unreasonable searches and seizures when police acted solely on the basis of facts supplied by a complaining witness who was heavily intoxicated at the time of the alleged occurrence. The appellate court noted that the retiral court, in orally denying Petitioner's

motion to suppress, had reviewed the TRO issued to P.K.; the police report regarding the domestic violence incident; P.K.'s videorecorded statement; photographs of P.K.'s alleged injuries; and the search warrant and supporting affidavit. *See State v. Bitzas*, No. A-5918-17 at 57a. Among other findings, the first trial court had stated that Mr. Bitzas "had a prior history of firearms possession and he had firearms in his possession in the past." *Id.* The Appellate Division noted that P.K.'s videorecorded statement "apparently was not furnished to the warrant-issuing judge," and hence the retiral court's review of the video erroneously exceeded the four corners of the search warrant affidavit. *Id.* at 62a. Nevertheless, the appellate court deemed this to be harmless error and remained this matter for further consideration by the same retrial judge. The Appellate Division was concerned, however, about "***the affiant's apparently erroneous description of defendant's criminal record and the State's late disclosure of that issue***." *Id.* at 63a (emphasis added). Accordingly, the appellate court instructed the trial court to conduct the following specific inquiry:

> On remand, the parties shall provide the trial court with their submissions on appeal. The court may, in its discretion, order additional briefing. The court shall thereafter determine whether a *Franks* hearing is warranted in view of the governing law as applied to the represented facts. In view of the State's belated disclosure, the court shall make its own findings of fact and conclusions of law, distinct and separate from those of the initial trial judge, who did not "fully" consider the issues now illuminated. [ . . . ] The court shall also consider

> anew defendant's argument concerning the reliability of P.K.'s statements supporting the warrant . . .

*Id.* at 64a (internal citations omitted).

Despite these clear instructions to determine whether a Franks hearing was warranted and make independent findings of fact and conclusions of law distinct and separate from those of the initial trial judge, as soon as the remand proceedings commenced the retrial judge stated as follows:

> THE COURT: Okay. Well, all right, so, what we need to do, this is an Appellate remand and I am going to schedule a *Franks* Hearing. So, how long do you think it will take? Do I need a full day or a half day, or can we get away with a half day?
>
> PROSECUTOR: Your Honor, I don't—my interpretation of the Appellate remand is that Your Honor needs to determine whether a Franks Hearing should be –
>
> THE COURT: Exactly. And I just did.
>
> PROSECUTOR: Okay. All right. Okay.
>
> THE COURT: Okay? That was my interpretation, too. If you read closely, the Appellate Division wants me to do a *Franks* Hearing, counsel, okay?

> PROSECUTOR: Yes.
>
> THE COURT: Because if I don't, we are just going to be here—
>
> PROSECUTOR: Again.
>
> THE COURT:—a month from now scheduling a *Franks* Hearing. So, I took the pragmatic step and determined that we're going to do this, okay.

[1T:4:10-5:5].

Thus, as demonstrated by the above excerpt, the remand process was compromised at this initial stage because the judge was required to first determine whether or not false statements and/or material omissions required a *Franks* hearing. Instead, the retrial judge, having already made up her mind, went through the hollow motions of conducting an illusory *Franks* hearing merely to appease the appellate court.

At the so-called *Franks* hearing, Detective Cabler testified about applying for the criminal search warrant and Detective Morgenstern-Byrnes testified about applying for the TRO, although the TRO should not have been the court's focus as it was not the instrument relied upon to seize the firearms. Shockingly, Cabler openly admitted during the *Franks* hearing that he had discussed the facts of the case with the search warrant-issuing judge prior to being sworn in as the affiant. The only documents Cabler actually remembered providing to the warrant-issuing judge were his affidavit in support of the search

warrant and the search warrant itself. [3T:48:20-49:15; 52:12-16]. Morganstern testified that police "always, . . . had to give [the judge issuing a complaint] the criminal history along with the charges." Both witnesses testified that the search warrant packet had since been destroyed. The remand court found Morganstern "did not tell [the warrant judge] anything about the police response the night before, [P.K.'s] differing accounts of what happened, or [P.K.'s] significant level of intoxication." *Id.* Cabler also admitted that he never told the search warrant judge any facts about P.K. making exculpatory statements on the night of the incident and he never told the search warrant judge that P.K. was heavily intoxicated and, indeed, had to be forcibly taken to the drunk tank to sober up.

In October of 2020, late in the second appeal following a second criminal jury trial in this matter, the State supplied––for the first time, a copy of Cabler's affidavit in support of the search warrant, in which Cabler certifies, in pertinent part: "During my investigation, I was informed by Det. Morgenstern that [Petitioner] has a criminal history for possession of firearms . . . " [Application for Search Warrant at p. 4]. At the time, however, Mr. Bitzas had no convictions involving firearms or weapons possession, or, for that matter, any convictions for violent offenses or derivative lesser-included offenses related to firearms or violence. Moreover, the State's earlier submissions to the Appellate Division in October of 2020 included a 2014 presentence report showing no weapons convictions, charges, or arrests whatsoever. On remand, however, the State produced a criminal case history ("CCH") printout indicating a 1997 arrest for weapons possession, with no disposition listed. The CCH contains a conviction noted for the separate, unrelated, low-level

offense of receiving stolen property and no conviction for the weapons charge because it was dismissed. 13a. Nevertheless, the remand judge made a factual finding, without supporting testimony or proofs, that the CCH listing the 1997 weapons arrest had been presented to the municipal court that issued the search warrant.

The retrial court determined on remand that: "Cabler's representation that . . . defendant had a history, rather than a conviction, for weapons possession is ambiguous." 13a. And yet, the court found, "it is not false, nor in reckless disregard for the truth, nor exculpatory in some way . . . because [the warrant-issuing judge] already knew [Petitioner's] criminal history contained within the CCH." *Id.* But the CCH did not indicate any disposition as to the weapons charge and nether detective testified to ever having informed the warrant-issuing judge, either orally or in writing, whether under oath or not, that the weapons charge had, in fact, been dismissed. This amounts to a material omission made in reckless disregard for the truth, as demonstrated by the officers' testimony on remand. Cabler in damning fashion confessed on the stand that he could care less if the gun charge had been dismissed, stating that the arrest for the weapon even if dismissed would go to the search warrant judge. [3T:25:12-49:15; 52:12-16]. This of course would lead a judge to think there was a gun conviction. Despite the officers' flouting of the oath requirement and admitting they did not find the disposition of an arrest to be relevant to the probable cause analysis, the trial court denied Petitioner's motion to suppress evidence.

In its third and final review of Petitioner's case, the New Jersey Appellate Division essentially abdicated its

gatekeeping function, abandoned its earlier concerns, and blindly accepted the retrial judge's efforts to burnish her previous decision approving of the search warrant based on P.K.'s allegations alone. *See State v. Bitzas*, No. A-3213-21 (App. Div. May 30, 2024) at 3a.

The Appellate Division duly recognized that the State had violated the oath requirement, and also acknowledged the constitutional dimension of the error, but somehow found it to be harmless and declined to issue a remedy. The appellate court readily acknowledged that Cabler openly admitting to speaking to the warrant-issuing judge about the case before being placed under oath. *Id.* at 22a. The appellate court also noted that "[t]he trial court's written opinion makes no finding and does not discuss whether Cabler presented information to the warrant judge before being sworn in." *Id.* at 13a. As stated in the appellate court's final opinion:

> ***We find troubling the practice of conversing with a judge about a case before being sworn in. The Fourth Amendment and Article 1, paragraph 7 of the New Jersey Constitution expressly state that no warrant shall be issued without probable cause" supported by oath or affirmation***." Although defendant generally bears the burden of proof when challenging a search authorized by a warrant [ . . . ] we deem it to be the State's burden to produce evidence showing that all information used to support probable cause was tendered to the judge under oath or affirmation. The State failed to meet that burden with respect to P.K.'s intoxication. We therefore presume

> for purposes of our analysis that police did not present that information within the four corners of the warrant application, thus constituting an omission.

*Id.* at 22a (internal citations omitted) (emphasis added).

Yet, in spite of the omission and the affiant's admitted failure to fully satisfy the oath requirement, the appellate court dropped its prior concerns about the misleading description of Petitioner's criminal history and decided to accept the retrial court's *ex post facto* reasoning that "probable cause to support issuance of the search warrant would still exist had the affidavit revealed that P.K. was heavily intoxicated when the crime occurred." *Id.* at 24a (internal citations and quotation marks omitted). This finding cannot withstand closer legal scrutiny for the reasons set forth below.

## REASONS FOR GRANTING THE WRIT

### I. FUNDAMENTAL CONSTITUTIONAL ERRORS DURING THE WARRANT APPLICATION PROCESS RENDERED A TOTALLY DEFECTIVE CRIMINAL SEARCH WARRANT.

#### A. THE OFFICER WHO APPLIED FOR THE SEARCH WARRANT VIOLATED THE OATH REQUIREMENT.

The Fourth Amendment requires that warrants issue "upon probable cause, ***supported by Oath or affirmation***." Const. Amend. IV (emphasis added). The significance of the oath requirement is "that someone must take the

responsibility for the facts alleged, giving rise to the probable cause for the issuance of a warrant." *United States ex rel. Pugh v. Pate*, 401 F.2d 6 (7th Cir. 1968); *see also Frazier v. Roberts*, 441 F.2d 1224 (8th Cir. 1971). The need for an oath under the Fourth Amendment does not "require a face-to-face confrontation between the magistrate and the affiant." *People v. Chavaz*, 27 Cal. App.3d 883 (1972); *see also People v. Aguirre*, 26 Cal. App.3d 7 (1972) (finding that oral statements need not be taken in the physical presence of the magistrate). It is permissible for an officer in the field to relay his information by radio or telephone to another officer who has more ready access to a magistrate and who will thus act as the affiant, *see Lopez v. United States*, 370 F.2d 8 (5th Cir. 1966), but that procedure is disfavored because it deprives the magistrate of the opportunity to examine the officer at the scene, who is in a much better position to answer questions relating to probable cause and the requisite scope of the search. *Id.* At an absolute constitutional minimum, however, the Fourth Amendment's oath requirement must be satisfied.

Here, during the *Franks* hearing on remand, the police officer who sought and obtained the warrant to search Petitioner's home openly flouted the oath requirement and freely admitted that he spoke to the warrant-issuing judge off-the-record, prior to being sworn-in as the affiant on the warrant. Without any question, this violated the oath requirement. The failure of both Cabler and the municipal court to follow the necessary procedure that explicitly mandated by the both the U.S. Constitution and New Jersey's Constitution clearly affected the judge's decision to issue the warrant. It is impossible to put the cat back in the bag, so to speak. Thus, Cabler's entire affidavit

should have been struck, and the reviewing courts should have suppressed the evidence derived from the defective search warrant. Under both New Jersey and federal law, evidence seized pursuant to a defectively authorized search warrant' is inadmissible in a subsequent criminal prosecution. *See State v. Dispoto*, 189 N.J. 108, 121 (2007); *Mapp v. Ohio*, 367 U.S. 643 (1961).

### B. THE POLICE NEVER ADVISED THE WARRANT-ISSUING JUDGE ABOUT THE EXTREME INTOXICATION OF THE COMPLAINING WITNESS.

This case concerns a search of a private dwelling, a man's castle, via a search warrant based on an affidavit replete with material omissions regarding the drunkenness and unreliability of the sole complaining witness. Both police officers involved in this case admitted during the *Franks* hearing that they never told the municipal judge who issued the search warrant about P.K.'s intoxication; or about P.K.'s combative behavior on the night of the alleged domestic incident; or about P.K.'s statements that night, which conflicted with her later account of the incident; or about P.K.'s overnight stay in the drunk tank; or about the physical contact between P.K. and the police that could have caused her bruises. The police purposefully omitted these key facts, all of which impeach the credibility of P.K., thereby depriving the judge of necessary information about the reliability of the only complaining witness in the case. Issuance of a warrant to intrude upon the sanctity of the home should depend upon more than the word of a lone alleged witness who was heavily-intoxicated and highly unstable at the time of the alleged occurrence.

Although the warrant-issuing judge signed both a TRO and a search warrant, the Appellate Division did not remand this matter for a hearing about the TRO. *See* 64a. The instruction from the Appellate Division as to P.K. was: "The court shall also consider anew defendant's argument concerning the reliability of P.K.'s statements supporting the warrant." *Id.* This was not an invitation to delve into the TRO process. Cabler testified that he executed a criminal case probable cause search warrant only to search and seize weapons at Petitioner's home. The lower court went beyond the four corners of the evidence received by the search warrant judge and erroneously relied on the TRO, as reflected by Her Honor stating: "Applying a totality of the circumstances analysis, there was sufficient information contained in *the TRO*. . . ." ) (emphasis added). The retrial judge repeated and compounded this prior error on remand by considering extraneous material from the TRO far beyond the four corners of the search warrant. P.K.'s allegations, standing alone, do not have sufficient indicia of reliability to establish probable cause, and the lower courts ignored overwhelming evidence that P.K. was untruthful and unreliable. The police knew that P.K. could not hold up as being credible in front of the search warrant judge if her heavy intoxication on the night in question was disclosed, or her spontaneous exculpatory statements were revealed. The police concealed all of these impeaching factors from the judge because they destroy P.K.'s credibility and eviscerate the probable cause finding. For this reason, the fruits of the search warrant must be suppressed.

### C. THE SEARCH WARRANT APPLICANT PROVIDED AN "AMBIGUOUS" CRIMINAL HISTORY AND THE DISMISSAL OF PETITIONER'S PRIOR WEAPONS CHARGE WAS NOT SUFFICIENTLY COMMUNICATED TO THE WARRANT-ISSUING JUDGE.

After the *Franks* hearing on remand, the trial court determined that "Cabler's representation that the defendant had a history, rather than a conviction, for weapons possession is ambiguous, but it is not false, nor in reckless disregard of the truth, nor exculpatory in some way, [because the warrant-issuing judge] already knew Bitzas' criminal history contained within the CCH." 13a. To the contrary, though, as the Appellate Division noted in its second written opinion, the search warrant-issuing judge made a note on the TRO forms indicating that he believed the target of the search had one or more firearms-related convictions. If not for this false impression, it is highly likely that the search warrant would never have issued. Regardless, notwithstanding the lower courts' assumptions there is no evidence that the municipal court judge ever actually received or reviewed the criminal history report ("CCH") indicating that Petitioner had been arrested, but not convicted, for an alleged weapons offense in 1997. What is indisputable, however, is that both police officers who worked on this case testified at the *Franks* hearing that they never told or otherwise communicated to the municipal court judge who issued the warrant that Petitioner's weapons possession charge had been dismissed with prejudice. In view of the testimony elicited at the Franks hearing, all that is known for certain is that Cabler prepared the warrant application packet and relied upon Morgenstern's representation that Mr. Bitzas had an

extensive criminal history involving firearms. On these facts, bald assertions about what the judge reviewed are insufficient to establish that the warrant-issuing judge correctly understood that Petitioner's alleged "extensive criminal history" involving firearms did not include a single gun-related conviction.

Given the affiant's "ambiguous" description of Petitioner's criminal history, the failure of the police to communicate the disposition of the weapons charge to the judge amounted to a material omission and/or misrepresentation. There is no meaningful distinction between "ambiguous" and "false" here because the affiant demonstrated a reckless disregard for the truth. It makes no difference whether Cabler's statement is considered a deliberate falsehood or merely ambiguous because the failure to communicate this necessary information amounted to a material omission. Indeed, Cabler testified straightforwardly that he did not care whether the gun charge resulted in a conviction or not because he did not consider this to be relevant information he needed to share with the judge. [3T:25:12-49:15, 52:12-16]. Morgenstern disappointingly echoed these sentiments. [2T:30:22-32:11]. At best, both officers showed reckless disregard. At worst, the "ambiguous" statement in the search warrant affidavit was deliberately misleading. Use of the words "criminal case history" gave the warrant-issuing judge the false belief that Mr. Bitzas had a prior firearms-related conviction.

Notably, a prior arrest is the least reliable type of reputation evidence relative to probable cause because a prior arrest indicates nothing more than suspicion that a crime has been committed. *See State v. Jones*, 179

N.J. 377 (2002). Under New Jersey law, arrest records disclosed in supporting affidavits must include language qualifying that the charge is only an arrest because arrests have limited probative value. *Id.* at 404. Although *Jones* involved a no-knock entry, the officers' conduct here clearly violates the spirit if not the letter of *Jones*. When assessing probable cause to search a private dwelling, an old, stale arrest that resulted in a dismissal should not be considered at all. Police and prosecutors rarely attempt to use prior arrests for purposes of establishing probable cause, and when they do, they are firmly instructed to include final dispositions of any charges mentioned. As noted above, however, the officers in this case testified that they did not consider a full and accurate disclosure of target's criminal history to be necessary. [2T:30:22-32:11; 3T:25:12-49:15, 52:12-16]. This honorable Court should clarify to law enforcement that when applying for a probable cause search warrant, a suspect's criminal history must include the final dispositions of any arrests and/or charges. Providing arrest/charge information without including the final dispositions is not only "ambiguous," but also misleading and highly prejudicial.

As stated in the Appellate Division's second opinion in this case: "[T]he basis of the State's assumption that the issuing judge did not rely on the affiant's description of defendant's criminal history—as it relates to possessing firearms—is unclear." *State v. Bitzas*, No. A-5918-17 (App. Div. 2021) at 63a. Contrary to the instructions on remand, the State and reviewing court utterly failed to show that the warrant-issuing judge did not rely on the affiant's "ambiguous" description of the defendant's criminal history as it relates to possessing firearms. For purposes of determining probable cause, New Jersey courts "must

consider the nature and quality of the evidence." *State v. Gathers*, 234 N.J. 208 (2018). The test is "qualitative and not quantitative." *State v. Keyes*, 184 N.J. 541 (2005). To constitute probable cause, the information known to the police must be both factually and legally sufficient. *Id.* Here, absent any showing that the judge who issued the warrant ever actually received and considered the final disposition of the extensive criminal history for firearms referenced in the search warrant affidavit, the evidence seized pursuant to the warrant is tainted and should be suppressed, especially in light of the extreme unreliability of P.K. as a witness.

### D. THE PROSECUTOR BELATEDLY DISCLOSED THE SEARCH WARRANT AFFIDAVIT TO PETITIONER'S APPELLATE COUNSEL AND THE OPINIONS OF THE NEW JERSEY APPELLATE DIVISION ISSUED BEFORE AND AFTER REMAND ARE INCONSISTENT WITH ONE ANOTHER REGARDING WHETHER PETITIONER PREVIOUSLY HAD POSSESSION OF THE AFFIDAVIT.

In the second opinion in this case issued by the New Jersey Appellate Division, *State v. Bitzas*, No. A-5918-17 (App. Div. 2021) the court recognizes the State's initial failure to produce Cabler's search warrant affidavit. *See* 63a. But in the third appellate opinion, *State v. Bitzas*, No. A-3213-21 (App. Div. May 30, 2024), the court pivots and accepts the State's excuse that Mr. Bitzas allegedly had possession of the affidavit at an earlier date when he represented himself pro se. *Cf.* 17a. Thus, the appellate

court's opinions issued before and after remand are inconsistent with each other.

The Appellate Division dropped its earlier concerns about the State's belated disclosure of the search warrant affidavit to defense counsel and adopted a version of the procedural history that is flatly inconsistent with its prior opinion on the matter. Both reviewing courts eventually accepted a vague unsworn self-serving statement of the prosecutor, who during the remaind produced a 2018 hearing transcript indicating that Mr. Bitzas himself, but, notably, not his defense attorney, had access to the search warrant affidavit at some undefined time in the past, presumably when Mr. Bitzas represented himself pro se. *See State v. Bitzas*, No. A-3213-21 at 17a. There is no discovery inventory sheet to prove that he ever received the search warrant affidavit. Moreover, it was admitted in the appeal by the State's appellate attorney that Bitzas nor his appellate counsel or stand by trial counsel ever had the search warrant affidavit.

Instead, the lower court's ultimate resolution of this serious constitutional due process issue rests almost entirely upon an unsworn statement in oral argument which is wholly contradicted by the aforementioned facts and evidence in the case. Regardless, the search warrant affidavit did not surface as an issue in this case until the State made what it conceded to be a belated disclosure of the pertinent document midway through the appellate process. *See State v. Bitzas*, No. A-5918-17 at 63a. Petitioner's undersigned appellate counsel had repeatedly requested discovery of the search warrant affidavit beginning soon after the appeal was docketed,

but he did not receive a copy until well after filing the opening appellant's brief on the merits.

Over the course of two criminal trials, defense counsel for Mr. Bitzas, including his designated trial attorney for the first trial, and his standby counsel during the second trial, made several requests to suppress the evidence, and yet never raised one of the most obvious flaws in Cabler's affidavit submitted in support of the search warrant, namely, that Cabler's affidavit falsely implied that Mr. Bitzas had prior convictions or "substantial criminal history" involving firearms. Had Petitioner and/or his defense attorneys actually had access to Cabler's affidavit in support of the search warrant, they surely would have raised this issue at the retrial but it never occurred because they did not have the affidavit.

"[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene v. McElroy*, 360 U.S. 474, 496 (1959); *See also Goldberg v. Kelly*, 397 U.S. 260 (1970). It follows that due process protections must include the right to full and complete discovery on appeal, particularly where a criminal defendant previously represented himself pro se at trial. This Court should grant certiorari to address the conflicting opinions below and sanction the prosecution's failure to produce the search warrant affidavit to Petitioner's counsel in a timely fashion, to the tremendous detriment of Petitioner on appeal. Moreover, the State's post verdict late disclosure of Cabler's affidavit to Petitioner's undersigned appellate counsel after the first appellate briefs were submitted

strongly suggests that the prosecution realized how damaging the affidavit is to the State's case.

## II. THE TRIAL COURT FAILED TO CONDUCT A COLLOQUY TO DETERMINE WHETHER PETITIONER UNDERSTOOD HIS RIGHT TO TESTIFY.

In *Rock v. Arkansas*, 483 U.S. 44 (1987), this Court held that the Due Process Clause of the Fourteenth Amendment, the Compulsory Process Clause of the Sixth Amendment, and the Fifth Amendment protect the right of the individual to testify on one's own behalf at a criminal trial. At the state level, the New Jersey Supreme Court has held that "a criminal defendant is entitled to testify on his or her own behalf under Article I, paragraphs 1 and 10 of our State Constitution." *State v. Savage*, 120 N.J. 594 (1990).

Indeed, "the right to testify is essential to our state-based concept of due process of law, which guarantees a fair and impartial trial in which there is a legitimate and decorous recognition of the substantive rights of the defendant. The right is also implicit in our state constitutional guarantee for a criminal defendant to have compulsory process for calling witnesses in his favor." *Id.* at 628. Our state's highest state court has even opined in another weapons possession case that "few principles are more fundamental than a criminal defendant's right to testify in his own defense." *State v. Lopez*, 417 N.J. Super. 34, 36 (App. Div. 2010).

Accordingly, "[i]n order to waive the right to testify, a criminal defendant must be aware of the right and must

make a knowing decision to give it up. [ . . . ] It is the better practice for the court to determine on the record whether a defendant wishes to testify or to waive the right. *Id.* When a defendant is represented by counsel, the court need not engage in a voir dire on the record to establish the defendant's waiver. *Id.* Nevertheless, "the better practice [is] for a trial court to inquire of counsel whether he or she has advised a defendant . . . of his or her right to testify. Or, alternatively, to advise defendant directly." *Id.* at 36 (citing *State v. Ball*, 381 N.J. Super. 545, 556 (App. Div. 2005)).

Here, although an election not to testify form was provided to the judge, the court never engaged in a colloquy as to Petitioner's right to testify. Standby counsel was not questioned about whether Bitzas understood this right to testify. The judge mentioned the form in an off-hand manner, and only with regard to whether Petitioner requested a jury instruction as to his election not to testify. Given that Petitioner represented himself pro se and was not represented by counsel during the first phase of the bifurcated retrial, it follows that, as a matter of law, and without exception, the lower court was required to engage in a colloquy with the pro se party to ensure he understood his right to testify, or not. *See Lopez*, 417 N.J. Super. at 36; *see also State v. Dwyer*, 229 N.J. Super. 531 (App. Div. 1989); *State v. Bogus*, 223 N.J. Super. 409, 423 (App. Div. 1988).

Consider the sound reasoning in *United States v. Teague*, 908 F.2d 752 (11th Cir. 1990); aff. en banc, 953 F.2d 1525 (11th Cir. 1992). In *Teague*, the 11th Circuit astutely observed that a trial court must take affirmative direct steps to confirm a defendant fully understands that

once the trial concludes and the jury deliberates he or she cannot change their mind and choose to testify. The *Teague* court recognized that a pro se defendant is not schooled in the intricacies of the criminal justice system, so trial judges must be required to re-question a pro se defendant about his right to testify at key intervals, including just before resting. *Id.*; *see also United States v. Desalvo*, 726 F. Supp. 596 (E.D. Pa. 1989).

The fundamental rights arising under the 5th, 6th, and 14th Amendments, including a meaningful right to testify and to confront one's accusers, are essential to our pursuit of justice. *See Rock*, 483 U.S. at 49-53 (stating: the right to testify "is one of the rights that 'are essential to due process of law in a fair adversary process," and is "[e]ven more fundamental to a personal defense than the right of self-representation") (quoting *Faretta v. California*, 422 U.S. 806, 819 n. 15 (1975))

Notably, the standard of review for determining whether constitutional error warrants reversal differs from the usual standard in that the State must prove beyond a reasonable doubt that the error complained of did not contribute to the conviction. *See State v. Camacho*, 218 N.J. 533, 548 (2014). The errors made by the lower court surrounding the election to testify issue cannot be considered harmless. *See Dwyer*, 229 N.J. Super. at 540.

In our case, the record reveals that after the State rested Mr. Bitzas also immediately rested. There was no colloquy between the judge and Bitzas before, during, or after either phase of retrial. When the prosecution and then Bitzas rested in quick succession, the lower court moved directly into charge conference mode and never

once broached the right to testify subject, except to inquire whether Petitioner wanted a jury instruction regarding his right to remain silent. This was the extent of the retrial court's inquiry on the subject.

After the verdict in the first phase of trial, standby counsel took over as counsel and Bitzas went back to his cell, absenting himself from the courtroom. The record from the second phase reveals the lower court judge had no communication with Bitzas about whether he would come back to testify or whether he (or the court) even knew about his right to testify during the second stage of the bifurcated retrial. Indeed, the judge took no curative steps and may have labored under a false misconception that Petitioner could not testify in the second phase after declining to testify in the first phase of the retrial. This was the same scenario visited in the *Lopez* case, which led to a reversal. *See also Canaan v. McBride*, 395 F.3d 376 (7th Cir. 2005) (holding that a failure to advise a defendant in a death penalty case that he may testify during the penalty phase, even if he did not testify in the guilt-innocence phase, constitutes ineffective assistance of counsel.).

Similarly, in *United States v. Hung Thien Ly*, 646 F.3d 1307 (11th Cir. 2011), the defendant represented himself at trial and when the judge asked him if he wanted to testify. The defendant expressed concern that he would not have a lawyer to ask him questions, and he would have to submit to cross-examination without having the opportunity to present his testimony. The judge kept asking him, "Do you want to testify, or not?" without explaining that he would, in fact, have the opportunity to present his own sworn testimony. The Eleventh Circuit Court of Appeals

found this to be reversible error, but at least the district court in *Hung Thien Ly* bothered to broach the subject.

Given the fundamental constitutional nature of the right to testify, Mr. Bitzas did not intelligently waive his right, and the trial court's failure to conduct any inquiry whatsoever violated due process. Bearing in mind the usual protections typically afforded to pro se defendants, including key safeguards surrounding the decision of whether or not to testify in one's own defense, all of Petitioner's convictions rendered at both phases of the bifurcated retrial must be overturned.

## III. NEW JERSEY'S "SPECIAL PERSONS NOT TO HAVE WEAPONS" LAW VIOLATES THE SECOND AMENDMENT AS APPLIED TO PETITIONER BECAUSE HE HAS NEVER BEEN CONVICTED OF A VIOLENT CRIME OR OTHERWISE SHOWN TO BE DANGEROUS.

Petitioner challenges the constitutionality of New Jersey's "Certain Persons Not to Have Weapons or Ammunition" statute, N.J.S.A. 2C:39–7. As applied to Petitioner, the "certain persons" statute cannot pass the text, history, and tradition analysis test this Court adopted in the landmark case of *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 U.S. 1 (2022).

The challenged statute deprives nonviolent persons convicted of drug offenses of their right to bear arms under the Second Amendment to the U.S. Constitution, which is incorporated as against the states and their political subdivisions pursuant to the Due Process Clause of the Fourteenth Amendment. *See* U.S. Const., Amends.

II and XIIII. New Jersey's certain persons statute targets certain ex-felons who are caught with a firearm or ammunition in their possession or in their home, including non-violent drug offenders like Petitioner who have been convicted for the unlawful use, possession, or sale of a controlled dangerous substance, other than a disorderly persons or petty disorderly persons offense. *See* N.J.S.A. 2C:39–7.

In *Range v. Attorney General United States*, No. 21-2835 (3d Cir. 2022), the U.S. Court of Appeals for the Third Circuit held that a nonviolent offender may not be stripped of their Second Amendment rights. The federal court of appeals struck down the federal law commonly referred to as the felon-in-possession ban, which prohibited individuals convicted of certain crimes from possessing firearms. *See* 18 U.S.C. § 922(g)(1). The government had prevailed at the district court, successfully arguing that Range was not entitled to protection under the Second Amendment because, as an "unvirtuous citizen," he was not one of "the people" to whom the amendment protected. Id. at *6-7. The majority disagreed, concluding that "the people" refers to all Americans rather than a particular subset, consistent with other constitutional provisions that refer to "the people." *Id.* Applying *Bruen*, the Third Circuit then allocated the burden of proof to the government to establish under strict scrutiny analysis the ban was consistent with historical tradition. *Id.* at *7-9. The majority held that the government failed to show the felon-in-possession ban, at least as applied to the plaintiff, was analogous to historical restrictions on firearm possession. *Id.* The court observed that, although the statute at issue dated to the 1960s, it was too recent to satisfy Bruen, and distant precursors of the statute

applied only to ***violent criminals***. *Id.* at *17 (emphasis in original). The court considered founding-era restrictions on felons, including the fact that "felons were exposed to far more severe consequences than disarmament," but ultimately determined that there was no founding-era analogue to the punishment of lifetime disarmament. *Id.* at *16-*19. Finding no historical comparator, the federal court of appeals held that the felon-in-possession ban violated the Second Amendment under *Bruen*. *Id.* at *16. The court decided the case en banc and reversed the district court's decision. In total, eleven judges found a Second Amendment violation; three judges found no Second Amendment violation; and one judge would have dismissed the case for lack of standing without deciding the merits. Judge Ambro's concurring Opinion noted that Range could not constitutionally be disarmed as he was not a menace to society and nor would anyone fit that criteria unless they were convicted of serious felonies, particularly violent offenses. *Id.* (Concurring Op. at *7). Judge David Porter, writing a separate concurring Opinion, believed the lack of founding-era analogues to the felon-in-possession ban was attributable to a historical understanding that Congress or any state or local body lacked the power to enact such regulations. *Id.* (Concurring Op. at *6-7).

On July 2, 2024, this Court vacated the Third Circuit's opinion in *Range* and remanded for further proceedings in light of *United States v. Rahimi*, 144 S. Ct. 1889 (2024). In *Rahimi*, this Court upheld a post-*Bruen* Second Amendment challenge to 18 U.S.C. § 922(g)(8), which criminalizes possession of a firearm while one is subject to a domestic violence restraining order. *Id.* at *7 (holding that when an individual has been found by a court to pose a credible threat to the physical safety of another, that

individual may be temporarily disarmed consistent with the Second Amendment).

Given that *Bruen* and *Rahimi* require the government to point to a relevantly similar historical analogue to uphold any firearm restriction, the natural (and still open question) is whether a relevantly analogue exists for the nonviolent controlled substance offenses requiring dispossession under N.J.S.A. 2C:39–7a. A close reading of *Bruen* and *Rahimi* would seem to suggest that no historical analogue exists, at least for non-violent offenses, but exactly where this line may be drawn has yet to be decided.

*Rahimi* stands for the legal principle that the police could have relied upon the TRO to temporally seize Petitioner's weapons while the domestic violence restraining order was in effect. *See Rahimi*, 144 S. Ct. at 1901. But *Rahimi* differs from Petitioner's case in that N.J.S.A. 2C:39–7a permanently disarms those to whom it applies, while U.S.C. § 922(g)(8) is only a temporary restriction, applying only so long as a person "is" subject to a restraining order. *Rahimi*, 144 S. Ct. at 1902. Second, unlike § 922(g)(8), New Jersey's certain persons statute does not require an individualized "[finding] by a court" that a person "pose[s] a credible threat to the physical safety of another." *Id.* at 1901.

*Rahimi* also confirms that, with *Bruen*, this Court issued sweeping legal reforms regarding its interpretation of citizens' second amendment rights, rendering unconstitutional many of the existing restrictions placed on gun rights, particularly in New Jersey, which has some of the most restrictive gun laws in our Nation. As

recognized by the federal court of appeals in Petitioner's circuit, "the *Bruen* majority [saw] that the circuit courts were generally treating the Second Amendment with dismissive hostility, as if it were a second-class provision of the Bill of Rights." *Lara v. Commissioner Pennsylvania State Police*, ___F.___ (3d. Cir. 2024).

As set forth in *Bruen*: "To justify its [firearm] regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." 597 U.S. at 1. As clarified in Rahimi, the proper test is: "A court must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the founding generation to modern circumstances.'" *Id.*

Notably, one current Justice of this Court, the Honorable Amy Coney Barret, while sitting as a judge on the U.S. Court of Appeals for the Seventh Circuit, in her dissent in *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019), has already questioned the constitutionality of the "wildly overinclusive" federal felon-in-possession ban, which is the federal analog to New Jersey's certain persons statute. *Id.* at 466. In Her Honor's dissent, which the Third Circuit cited approvingly in *Range*, Justice Barrett concluded that a mail fraud conviction could not justify lifelong disarmament. *Id.* at 451. Her Honor recognized that our Nation's history "demonstrates that legislatures have the power to prohibit dangerous people from possessing guns," she wrote. "But that power extends only to people who are dangerous." *Id.* (emphasis added).

As predicted by the Ninth Circuit Court of Appeals in *United States v. Duarte*, No. 22-50048 (9th Cir. May 9, 2024), which, like the Third Circuit in *Range*, also recently reversed a defendant's conviction for violating the federal analog to N.J.S.A. 2C:39–7. "One day—likely sooner, rather than later—the Supreme Court will address the constitutionality of [the felon-in-possession ban] or otherwise provide clearer guidance on whether felons are protected by the Second Amendment." *Id.* at *73.

Mr. Bitzas is an American citizen, and thus one of "the people" whom the Second Amendment protects. The Second Amendment's plain text and historically understood meaning therefore presumptively guarantee his individual right to possess a firearm for self-defense. The State has never rebutted this presumption by demonstrating that permanently depriving Petitioner of this fundamental right is otherwise consistent with our nation's history. Thus, N.J.S.A. 2C:39–7 violates Petitioner's Second Amendment rights and is unconstitutional as applied to him.

## CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

ERIC V. KLEINER
*Counsel of Record*
385 Sylvan Avenue
Suite 29, 2nd Floor
Englewood Cliffs, NJ 07632
(201) 394-6229
erickleiner@verizon.net

*Attorney for Petitioner*
*Konstadin Bitzas*

Dated: December 19, 2024

# APPENDIX

## TABLE OF APPENDICES

**APPENDIX A — ORDER OF THE SUPREME COURT OF NEW JERSEY, FILED OCTOBER 3, 2024**

SUPREME COURT OF NEW JERSEY

C-82 September Term 2024
089553

STATE OF NEW JERSEY,

*Plaintiff-Respondent,*

v.

KONSTADIN BITZAS, a/k/a CONSTANTINE BITZAS, CHRISTOS BITZAS, DEAN BITZAS, CHRISTOS DEAN BITZAS, CONSTANTI BITZAS, DINO BITZAS, BEAN BITZAS, AND CONSTANI BITZAS,

*Defendant-Petitioner.*

Filed October 3, 2024

**ORDER**

A petition for certification of the judgment in A-003213-21 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

*Appendix A*

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 1st day of October, 2024.

/s/ Heather J. Becker
CLERK OF THE SUPREME COURT

**APPENDIX B — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, FILED MAY 30, 2024**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-3213-21

STATE OF NEW JERSEY,

*Plaintiff-Respondent,*

v.

KONSTADIN BITZAS, a/k/a CONSTANTINE BITZAS, CHRISTOS BITZAS, DEAN BITZAS, CHRISTOS DEAN BITZAS, CONSTANTI BITZAS, DINO BITZAS, BEAN BITZAS, and CONSTANI BITZAS,

*Defendant-Appellant.*

Decided May 30, 2024—Argued April 17, 2024

Before Judges Currier and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 14-02-0228.

*Appendix B*

PER CURIAM

This case returns to us for a third time. Defendant Konstadin Bitzas appeals his jury trial convictions for multiple firearms offenses, challenging the municipal court warrant that authorized the search of his home during which the weapons were seized. Defendant contends the State belatedly provided the search warrant affidavit defendant claims to be defective; the search warrant application contained material misrepresentations; the application omitted a critical fact relating to the victim's credibility, and the police affiant improperly discussed the facts of the case with the municipal court judge before he was placed under oath.

In our second opinion, we instructed the trial court to determine whether a *Franks*[1] hearing is warranted. We also directed the trial court to "consider anew defendant's argument concerning the reliability of [the victim's] statements supporting the warrant." *See State v. Bitzas*, No. A-5918-17 (App. Div. July 27, 2021) (slip op. at 6). On remand, the trial court convened a testimonial hearing, after which it made findings, including credibility assessments of the State's witnesses. The trial court concluded that the search warrant was lawfully issued. After carefully reviewing the record in light of the governing legal principles and the arguments of the parties, we affirm.

1. *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

*Appendix B*

**I.**

We discern the following pertinent facts and procedural history from the record. On August 31, 2013, around 11:30 p.m., Fort Lee police officers responded to defendant's home because of a reported fight. When police arrived, defendant and the victim, P.K.,[2] were outside. Defendant told police that earlier in the evening, he was eating dinner at a restaurant and P.K. arrived on her own. Defendant and P.K. were drinking and defendant left the restaurant. Subsequently, P.K. showed up at defendant's house intoxicated. They argued about defendant's former girlfriend, went outside, and then P.K. called the police claiming defendant assaulted her. Defendant denied assaulting P.K and stated he was not interested in filing charges against her.

The investigation report described P.K. as "extremely emotional, uncooperative, and intoxicated." Police had to "physically grab" her to prevent her from leaving the scene. According to the report, P.K. "became belligerent and ranted about wanting [the police] to search [defendant's] apartment." She told the police that defendant had attacked her before they arrived and that she was afraid of defendant. She also said defendant's ex-girlfriend beat her up earlier that day. P.K. did not wish to obtain a temporary restraining order (TRO) or complete an affidavit that evening.

---

2. Consistent with our prior opinions, we use initials to protect P.K.'s privacy.

Because P.K. was heavily intoxicated, officers called an ambulance, and she was transported to the hospital. P.K. and defendant were told to go to police headquarters if either party changed their mind about filing a complaint.

The next day, September 1, 2013, P.K. went to police headquarters. She apologized for her behavior the night before and admitted she was intoxicated. P.K. spoke with Detective Michele Morganstern[3]—who was not one of the responding officers the night before—claiming defendant assaulted her, pointed a gun at her, and threatened to kill her if she called police. P.K. also informed Morganstern she saw a long gun and a handgun in defendant's home. Morganstern ran a criminal case history (CCH) database query of defendant, which revealed several charges including a January 1997 possession of a handgun charge that had been dismissed.

Morganstern drew up a TRO on behalf of P.K. She presented the TRO application to a municipal court judge along with a criminal complaint. The municipal court judge, who we refer to as the warrant judge, issued a probable cause search warrant for weapons and a domestic violence TRO. During the search of defendant's home, police seized an assault rifle, three handguns, a 12-gauge shotgun, and two large-capacity ammunition magazines.

---

3. During the course of this litigation, Detective Morganstern was promoted to sergeant and changed her last name after getting married. For purposes of this opinion, we refer to her by the surname she had in 2013. We mean no disrespect in doing so.

*Appendix B*

In February 2014, defendant was charged by indictment with second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count one); third-degree terroristic threats, N.J.S.A. 2C:12-3(b) (count two); fourth-degree aggravated assault by pointing a firearm at another, N.J.S.A. 2C:12-1(b)(4) (count three); five counts of fourth-degree possession of a handgun following a conviction for possessing a controlled dangerous substance, N.J.S.A. 2C:39-7(a) (counts four, five, six, seven and eight); second-degree possession of an assault firearm, N.J.S.A. 2C:39-5(f) (count nine); and two counts of fourth-degree possession of a large-capacity magazine, N.J.S.A. 2C:39-3(j) (counts ten and eleven).

A jury trial was convened in 2014 after which defendant was convicted of all counts other than those that were dismissed by the trial judge.[4] Defendant was sentenced to an aggregate prison term of thirteen years with eight years parole ineligibility. On appeal, we vacated defendant's convictions and remanded for a new trial, ruling the trial judge abused her discretion by failing to declare a mistrial due to P.K.'s misconduct as a witness. *Bitzas*, 451 N.J. Super. at 80.

A second jury trial was convened in 2018 and was presided over by a different judge, who we refer to as the trial court. Defendant was convicted on all counts. In July 2018, the trial court sentenced defendant to an aggregate

4. Before jury deliberations, the judge dismissed counts one, two, and three "with prejudice" because of P.K.'s misconduct in the courtroom. *See State v. Bitzas*, 451 N.J. Super. 51, 58, 164 A.3d 1091 (App. Div. 2017).

prison term of eleven-and-one-half years with six-and-one-half years of parole ineligibility.

On appeal, we affirmed in part, but remanded for the trial court to determine whether a *Franks* hearing was warranted to address defendant's contention the search warrant affidavit included material misrepresentations and omissions. We further stated:

> In view of the State's belated disclosure, the [trial] court shall make its own findings of fact and conclusions of law, distinct and separate from those of the initial trial judge, who did not "fully" consider the issues now illuminated . . . . The [trial] court shall also consider anew defendant's argument concerning the reliability of P.K.'s statements supporting the warrant.

[*Bitzas*, slip op. at 7.]

We added, "[s]hould the trial court ultimately determine the warrant is invalid, the evidence seized from defendant's residence shall be suppressed and a new trial granted. If, however, the warrant's validity is established, we affirm defendant's convictions." *Ibid.*

On remand, the trial court convened a testimonial *Franks* hearing. Two police witnesses testified for the State. Morganstern testified she worked on the TRO, drew up the criminal complaint, and provided Fort Lee Detective Douglas Cabler information used in the search warrant application.

Morganstern testified that P.K.'s behavior on August 31, 2013 did not give her reason to doubt P.K.'s truthfulness on September 1 at police headquarters. She explained:

> [P.K.] came in in the afternoon and she wanted to explain why she was so uncooperative [the night before], and explained that she was scared. I could see that she was visibly shaken [from] what had happened the night before. That she was afraid of [defendant]. She was afraid of retaliation from [defendant], and she told us what actually occurred at his house . . . .

Morganstern believed P.K.'s version and noticed a bruise on her arm.[5]

Morganstern testified she could not recall what she told Cabler verbatim but "would have relayed [defendant's] criminal history jacket, if he hadn't seen it already, that there [were] multiple charges and one of them was for possession of a handgun." Morganstern believed the weapons charge gave weight to P.K.'s statement that she had seen a firearm in defendant's home and that he had pointed a firearm at her. Morganstern also testified that police "always, . . . had to give [the judge issuing a complaint] the criminal history along with the charges." The trial court found Morganstern "did not tell [the warrant judge] anything about the police response the

5. The trial court noted in his findings of fact that the bruise on P.K.'s arm "could have been caused by [defendant] or by the officers who had to keep [P.K.] from leaving the scene."

night before, [P.K.'s] differing accounts of what happened, or [P.K.'s] significant level of intoxication."

Cabler testified that he responded to defendant's home on August 31, 2013. He noted the responding officers "didn't resolve anything between the defendant and the victim that night."

On September 1, 2013, Cabler was tasked with preparing the search warrant application and explained "[t]he probable cause was based on a statement given by [P.K.] to [] Morganstern." Cabler did not have an independent recollection of putting the CCH in the packet for the warrant judge. However, he testified that the judge "always wanted a CCH, the computerized criminal history, with a search warrant. So, I am going to say that was also included in . . . the packet." Cabler explained standard procedure would be to put the CCH in the packet.

On the question of whether he had been sworn in by the municipal court judge, Cabler testified as follows:

> [DEFENSE COUNSEL]: Do you think you provided [the warrant judge] with sworn testimony that was substantive, verbal, that day? Do you understand my question? In other words, not just hi, how are you. But swears you in and actually may have asked you questions about the event?

> [CABLER]: Before being sworn in, I am giving [the warrant judge] details about the event the day before and the day of.
>
> [DEFENSE COUNSEL]: So, let me just hold you there.
>
> [CABLER]: So, before—
>
> [DEFENSE COUNSEL]: Let me just hold you there.
>
> [CABLER]: Go ahead.
>
> [DEFENSE COUNSEL]: Before you got sworn in by [the warrant judge], you are telling us that you had a back and forth with him about what happened on the 31st and the 1st related to this case; is that what you were telling me?
>
> [CABLER]: That's what I am telling you.
>
> [DEFENSE COUNSEL]: Before you were sworn in?
>
> [CABLER]: That's—exactly.

The following colloquy occurred during Cabler's cross-examination:

> [DEFENSE COUNSEL]: Please tell me in your affidavit where it tells us that [P.K.] was heavily intoxicated the night before?

> [CABLER]: [It is not in] the affidavit . . . but I am sure that I had told the judge [about] the incident of the night before verbally.
>
> [DEFENSE COUNSEL]: Of a conversation that might have actually happened before you were even sworn in, right?
>
> [CABLER]: That's correct.

On May 23, 2022, trial court entered an order denying defendant's motion to suppress evidence and to dismiss the charges. In its written opinion, the trial court found that "[b]oth witnesses were credible. Their lack of recall was understandable, given the passage of time."[6] The trial court also found:

> Based on [P.K.'s] allegations, Morganstern processed the TRO and filed criminal charges against [defendant]. Morganstern provided [defendant's] CCH to [the warrant judge]. Review of the CCH reveals multiple arrests, dismissals, a third-degree conviction for [c]ocaine possession, and a third-degree conviction for receiving stolen property. The conviction for receiving stolen property included an arrest for possession of a handgun and possession of a weapon, which were dismissed. [Defendant] also violated probation in 2008 and was sentenced

6. The *Franks* hearing was conducted nine years after the warrant was issued.

> to a State Prison term. [The warrant judge] reviewed the allegations made in support of the TRO and read the CCH. It was he who concluded that [defendant] had an "extensive criminal history."

The trial court concluded with respect to the criminal history issue:

> [D]efendant argued that the affiant presented false information in support of the search warrant. The court disagrees. [] Cabler's representation that . . . defendant had a history, rather than a conviction, for weapons possession is ambiguous, but it is not false, nor in reckless disregard of the truth, nor exculpatory in some way, as ... defendant argues, especially because [the warrant judge] already knew [defendant's] criminal history contained within the CCH. [Morganstern] and Cabler gave no indication to this court that they purposely withheld information or intended to mislead or deceive [the warrant judge].

With respect to the issue of whether Cabler had been sworn in, the trial court found "Cabler drafted the affidavit, appeared before [the warrant judge], and was placed under oath." The trial court's written opinion makes no finding and does not discuss whether Cabler presented information to the warrant judge before being sworn in.

With respect to the relevance of P.K.'s intoxication the night before she went to police headquarters, the trial court found:

> When the police responded to [defendant's] home on August 31, both parties had been drinking. [P.K.] was highly intoxicated, but not incoherent. [P.K.] changed her story several times, but she did tell police that [defendant] had assaulted her and did ask police officers to search [defendant's] home. Both parties were encouraged to return to headquarters if they decided to press charges or ask for a TRO.
>
> [P.K.] did just that. The next day, she returned to headquarters and met with Morganstern, who found [P.K.] lucid. [P.K.] apologized for her conduct the night before. While [P.K.'s] intoxication would be relevant to her reliability on the night of August 31, she was sober when she returned to headquarters on September 1. [P.K.] reported having been assaulted by [defendant] and threatened with a firearm. Her allegation of an assault was consistent with her allegation the prior evening.

This appeal follows. Defendant raises the following contentions for our consideration:

*Appendix B*

POINT I

THE LOWER COURT ERRED IN FINDING THAT THE WARRANT APPLICATION DID NOT INCLUDE A MATERIAL MISREPRESENTATION OR OMISSION MADE IN RECKLESS DISREGARD FOR THE TRUTH.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT THE SEARCH WARRANT APPLICATION CONTAINED SUFFICIENT FACTS TO ESTABLISH PROBABLE CAUSE WHEN CUMULATIVE ERRORS RESULTED IN A TOTALLY DEFECTIVE WARRANT.

POINT III

NAPUE VIOLATIONS REQUIRE DISMISSAL OF THE ENTIRE MATTER WITH PREJUDICE.

POINT IV

FOURTH AMENDMENT VIOLATIONS REQUIRE SUPPRESSION OF ALL EVIDENCE S[E]IZED AS A RESULT OF THE ILLEGAL SEARCH OF DEFENDANT'S HOME.

*Appendix B*

Defendant raises the following additional contentions in his reply brief:

> POINT I
>
> THE DISMISSAL OF THE WEAPONS CHARGE WAS NOT SUFFICIENTLY COMMUNICATED TO THE WARRANT ISSUING JUDGE.
>
> POINT II
>
> GIVEN THE AFFIANT'S "AMBIGUOUS" DESCRIPTION OF DEFENDANT'S CRIMINAL HISTORY, THE OFFICERS' FAILURE TO COMMUNICATE THE DISPOSITION OF THE WEAPONS CHARGE AMOUNTED TO A MATERIAL OMISSION AND/OR MISREPRESENTATION.
>
> POINT III
>
> THE MUNICIPAL COURT JUDGE'S FINDING OF PROBABLE CAUSE DEPENDED UPON THE "AMBIGUOUS" DESCRIPTION OF DEFENDANT'S CRIMINAL HISTORY.

**II.**

We first address defendant's contention "the false statements in the search warrant and the affidavit were

neither provided to [him] nor disclosed to this [c]ourt until October 27, 2020, after a retrial, late in the process of the second appeal before the remand." In its written opinion, trial court rejected that contention, finding "[defense] counsel's contention that he was never provided with the affidavit in support of the search warrant until October 2020 is mistaken. It was [defendant] who moved to dismiss the indictment during the trial based on his assertion of the insufficiency of the search warrant and he acknowledged having received the affidavit during the hearing."

The trial court's finding with respect to the disclosure of the search warrant affidavit is supported by the record. At an April 12, 2018 hearing before the trial court, the following exchange took place:

> THE COURT: All right, where is the affidavit?
>
> [PROSECUTOR]: The affidavit I believe is in my file.
>
> THE COURT: And the transcript of the suppression hearing is in your file.
>
> [PROSECUTOR]: Yes, which the defendant has as well. But I'll get it.
>
> THE COURT: Do you have the transcript—[defendant] do you have the affidavit in support of the warrant?
>
> [DEFENDANT]: Somewhere Judge.

This exchange indicates defendant was provided with the affidavit prior to October 2020.

**III.**

We turn next to defendant's contention that the search warrant affidavit contained false statements that were either made deliberately or in reckless disregard of the truth. The pertinent portion of the search warrant affidavit prepared by Cabler reads:

> On September 1, 2013, the victim, [P.K.], reported that [defendant] physically assaulted her on August 31, 2013 at approximately 2330 hours at his residence []. She reported that he grabbed her by the arms and dragged her across the floor. While he was dragging her across the floor, she struck her head on the floor and on a counter. He told her he was going to kill her if she called the police. She also reported he pointed a gun at her during this altercation.
>
> During my investigation, I was informed by [] Morganstern that [defendant] has a criminal history for possession of firearms and has had firearms in his residence on a previous occasion.
>
> This request is made as my investigation reveals that [defendant] physically assaulted [P.K.] and pointed an unknown weapon at her while making threats to kill her at [defendant's residence]. Therefore, I am requesting authority to search the residence of [defendant] . . . .

Defendant contends the language in the affidavit concerning defendant's "criminal history" is misleading because he was not convicted of the unlawful possession of a firearm charge.

We begin our analysis by acknowledging the foundational legal principles governing our review of the warrant. A search based on a warrant is presumed valid and the defendant has the burden of proving its invalidity. *State v. Sullivan*, 169 N.J. 204, 211, 777 A.2d 60 (2001). To be valid, a search warrant "must be based on sufficient specific information to enable a prudent, neutral judicial officer to make an independent determination that there is probable cause to believe that a search would yield evidence of past or present criminal activity." *State v. Keyes*, 184 N.J. 541, 553, 878 A.2d 772 (2005).

The scope of our review of a search warrant is limited. *State v. Chippero*, 201 N.J. 14, 32, 987 A.2d 555 (2009). As our Supreme Court stressed in *State v. Andrews*, "reviewing courts 'should pay substantial deference' to judicial findings of probable cause in search warrant applications." 243 N.J. 447, 464, 234 A.3d 1254 (2020) (quoting *State v. Kasabucki*, 52 N.J. 110, 117, 244 A.2d 101 (1968)); *see also State v. Marshall*, 123 N.J. 1, 72, 586 A.2d 85 (1991) ("We accord substantial deference to the discretionary determination resulting in the issuance of the warrant.").

When a defendant challenges the veracity of a search warrant affidavit, a hearing is required "where the defendant makes a substantial preliminary showing that

a false statement knowingly and intentionally, or with reckless disregard for the truth, was included . . . in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause." *Franks*, 438 U.S. at 155-56. The defendant "must allege 'deliberate falsehood or reckless disregard for the truth,' pointing out with specificity the portions of the warrant that are claimed to be untrue." *State v. Howery*, 80 N.J. 563, 567, 404 A.2d 632 (1979) (quoting *Franks*, 438 U.S. at 171). Furthermore, only where a defendant also establishes "the allegedly false statement [was] necessary to the [issuing judge's] finding of probable cause, [does] the Fourth Amendment require[] that a hearing be held at the defendant's request." *State v. Desir*, 245 N.J. 179, 196, 244 A.3d 737 (2021) (quoting *Franks*, 438 U.S. at 155-56).

Here, the trial court convened an evidentiary hearing and made credibility assessments of the State's witnesses, including the search warrant affiant, to which we owe deference. *See State v. Elders*, 192 N.J. 224, 243, 927 A.2d 1250 (2007) ("[A]n appellate court reviewing a motion to suppress must uphold the factual findings underlying the trial court's decision so long as those findings are 'supported by sufficient credible evidence in the record.") (citations omitted).

The State offered evidence that Fort Lee police "always, . . . had to give [the warrant judge] the criminal history along with the charges." *See* N.J.R.E. 406 ("Evidence, whether corroborated or not, of habit or routine practice is admissible to prove that on a specific occasion a person or organization acted in conformity

with the habit or routine practice.") The trial court found that the warrant judge was aware of the information in the CCH and thus would have known that defendant had only been charged with, not convicted of, a prior firearm offense. That finding is supported by credible evidence in the record.

The trial court added that even "if [the warrant judge] was not provided with any information regarding [defendant's] criminal history, there still was ample, credible information provided by Cabler within the four corners of the affidavit to support a search warrant." *See Desir*, 245 N.J. at 196 (noting the allegedly false statement must be necessary to the finding of probable cause). We agree that the affidavit's reference to defendant's criminal history regarding a prior weapons offense provides no basis upon which to invalidate the search warrant or render the ensuing search unlawful.

**IV.**

We turn next to defendant's related contention "the affiant omitted key facts impeaching the credibility of the complaining witness P.K., depriving the duty judge assigned to the matter of key facts unsupportive of P.K.'s reliability." A defendant may challenge a warrant affidavit on grounds the affiant made a material *omission* in the application. *State v. Marshall*, 148 N.J. 89, 193, 690 A.2d 1 (1997) ("Material omissions in the affidavit may also invalidate the warrant."). The *Franks* "requirements apply where the allegations are that the affidavit, though facially

accurate, omits material facts." *State v. Stelzner*, 257 N.J. Super. 219, 235, 608 A.2d 386 (App. Div. 1992). Thus, in considering an alleged material omission, "essentially the same factual predicate must be established [as under the *Franks* standard,] in order to entitle the defendant to an evidentiary hearing." *State v. Sheehan*, 217 N.J. Super. 20, 25, 524 A.2d 1265 (App. Div. 1987). Stated another way, "the defendant must make a substantial preliminary showing that the affiant, either deliberately or with reckless disregard for the truth, failed to apprise the issuing judge of material information which, had it been included in the affidavit, would have militated against the issuance of the search warrant." *Ibid.*

As we have noted, the trial court did not make a specific finding whether Cabler advised the warrant judge about P.K.'s intoxication while under oath. Cabler acknowledged he discussed the incident with the warrant judge before being placed under oath but was never specifically asked whether he repeated information about P.K.'s intoxication after being sworn in.

We find troubling the practice of conversing with a judge about a case before being sworn in. The Fourth Amendment and Article I, paragraph 7 of the New Jersey Constitution expressly state that no warrant shall be issued without probable cause "supported by oath or affirmation." Although defendant generally bears the burden of proof when challenging a search authorized by a warrant, *see Sullivan*, 169 N.J. at 211, we deem it to be

the State's burden to produce evidence showing that all information used to support probable cause was tendered to the judge under oath or affirmation. The State failed to meet that burden with respect to P.K.'s intoxication. We therefore presume for purposes of our analysis that police did not present that information within the four corners of the warrant application, thus constituting an omission.

That raises the question whether the omission was material requiring invalidation of the search warrant. We agree with the trial court that P.K.'s intoxication "would be relevant to her reliability on the night of August 31."[7] But we also agree with the trial court's finding that P.K. was sober and lucid when she went to police headquarters and conversed with Morganstern. As we have noted, Morganstern, who the trial court found to be credible, believed P.K. was telling the truth at the police station when she reported defendant assaulted her and pointed a gun at her, notwithstanding her intoxication the night before. We add that P.K.'s veracity is assumed because she was an ordinary citizen, not a confidential informant, who personally observed the crime. *State v. Belliard*, 415 N.J. Super. 51, 79, 999 A.2d 1212 (App. Div. 2010); *see*

7. In *Sheehan*, we held a defendant meets the substantial preliminary showing test to get a hearing if police fail to apprise the issuing judge of material information which, had it been included in the affidavit, "would have militated against issuance of the search warrant." 217 N.J. Super. at 25. Here, defendant was granted an evidential hearing. The failure to include all information militating against a finding of probable cause does not automatically invalidate a warrant.

*also State v. Basil*, 202 N.J. 570, 586, 998 A.2d 472 (2010) ("[A]n objectively reasonable police officer may assume that an ordinary citizen reporting a crime, which the citizen purports to have observed, is providing reliable information.").

We are satisfied that P.K.'s statement to Morganstern was sufficient "to make an independent determination that there [was] . . . probable cause to believe that a search would yield evidence of past or present criminal activity." *Keyes*, 184 N.J. at 553. Stated another way, probable cause to support issuance of the search warrant would still exist had the affidavit revealed that P.K. was heavily intoxicated when the crime occurred. *See Sheehan*, 217 N.J. Super. at 25. We therefore conclude defendant has failed to establish the warrant was improperly issued and that the fruits of the ensuing search must be suppressed.

Affirmed.

## APPENDIX C — DECISION AND ORDER OF THE SUPERIOR COURT OF NEW JERSEY, BERGEN COUNTY, FILED MAY 23, 2022

SUPERIOR COURT OF NEW JERSEY,
BERGEN COUNTY, CHANCERY DIVISION

CRIMINAL PART INDICTMENT:
14-02-228-I

STATE OF NEW JERSEY,

*Plaintiff,*

v.

KONSTANTIN BITZAS,

*Defendant.*

May 23, 2022

### DECISION AFTER APPELLATE REMAND

Frances A. McGrogan, J.S.C.

**Procedural History:**

This matter was originally tried before Bergen County Superior Court Judge Liliana De Avila Selebi. An appellate panel vacated the defendant's convictions, finding the judge abused her discretion by failing to grant the State's motion for a mistrial.

*Appendix C*

This court presided over the second jury trial in April 2018. The defendant was charged with the following offenses:

Count 1: POSS OF WEAPON FOR UNLAWFUL PURPOSES—FIREARMS, 2C:39-4A, 2nd DEGREE

Count 2: TERRORISTIC THREATS—THREATEN IMMINENT DEATH—PURP FEAR, 2C:12-3B, 3rd DEGREE

Count 3: AGG ASSAULT W/ FIREARM, 2C:12-1B(4), 4th DEGREE

Count 4: CERTAIN PERSONS NOT TO HAVE WEAP—CONVICTED CRIME, 2C:39-7A, 4th DEGREE

Count 5: CERTAIN PERSONS NOT TO HAVE WEAP—CONVICTED CRIME, 2C:39-7A, 4th DEGREE

Count 6: CERTAIN PERSONS NOT TO HAVE WEAP—CONVICTED CRIME, 2C:39-7A, 4th DEGREE

Count 7: CERTAIN PERSONS NOT TO HAVE WEAP—CONVICTED CRIME, 2C:39-7A, 4th DEGREE

*Appendix C*

Count 8: CERTAIN PERSONS NOT TO HAVE WEAP—CONVICTED CRIME, 2C:39-7A, 4th DEGREE

Count 9: UNLAWFUL POSSESSION OF WEAPONS—ASSAULT FIREARM, 2C:39-5F, 2nd DEGREE

Count 10: PROHIBITED WEAPONS AND DEVICES—LARGE CAPACITY AMMO, 2C:39-3J, 4th DEGREE

Count 11: PROHIBITED WEAPONS AND DEVICES—LARGE CAPACITY AMMO, 2C:39-3J, 4th DEGREE

DP01: POSS CDS—< 50G MARIJUANA, 5G HASHISH, 2C:35-10A(4)

DP02: USE/POSS W/INTENT TO USE DRUG PARAPHERNALIA, 2C:36-2

DP03: CRIMINAL MISCHIEF—DAMAGE PROPERTY, 2C:17-3A(1)

The defendant represented himself during the first phase of the trial, with standby counsel, Milagros Camacho present. On April 9, 2018, the defendant moved by way of an oral application to dismiss the indictment based on Judge Silebi's *sua sponte* dismissal of domestic violence charges contained in the first indictment. This court denied the motion.

*Appendix C*

On April 12, 2018, the defendant moved by way of an oral motion for reconsideration of the court's ruling. He argued that officers who responded to a domestic violence call to his home on August 31, 2013, determined that he was telling the truth and that the alleged victim was lying. Therefore, Officer Morgenstern acted in bad faith. When questioned, Mr. Bitzas acknowledged that he had the affidavit in support of the warrant. The court requested and reviewed the following documents: the affidavit in support of a search warrant; the search warrant; the statement made by the alleged domestic violence victim, Peggy Kalfain; and the transcript of the suppression hearing conducted by Judge Selebi. This court found the search warrant to be valid and Judge Silebi's dismissal of domestic violence charges irrelevant to the remaining charges and denied the defendant's motion.

On April 19, 2018, the defendant was found guilty of second-degree possession of an assault firearm in violation of 2C:39-5(f) (Count 9) and two counts of 4th degree possession of a large-capacity magazine in violation of 2C:39-3(j) (Counts 10 and 11). After the first jury verdict, the defendant asked the court to proceed in his absence. After conferring with his standby counsel, the defendant voluntarily absented himself from the second phase and the defendant's standby counsel stepped in for the bifurcated phase of the trial.

Thereafter, the same jury found the defendant guilty of five counts of a violation of 2C:39-7(a), certain persons prohibited from possessing weapons in the fourth degree (Counts 4, 5, 6, 7, and 8).

*Appendix C*

On July 20, 2018, this court sentenced the defendant to an aggregate term of eleven and one-half years with a parole disqualifier of six and one-half years pursuant to the Graves Act. At the time of sentencing, the defendant had accrued four hundred fifty-nine jail credits.

The defendant appealed. On July 27, 2021, an appellate panel rejected the defendant's arguments that:

1. The trial court committed reversable error in disregarding his constitutional due process rights surrounding the decision as to whether to testify; and

2. The trial court committed reversable error in failing to instruct the defendant regarding the dangers of self-representation and by interfering with his right to the free and unfettered assistance of standby counsel; and

3. The defendant's certain persons convictions required reversal because the trial court failed to adequately question the jury, wrongfully denied a motion for severance, and failed to empanel a new jury or declare a mistrial; and

4. The trial court committed reversable error in effectively denying the defendant's right to present evidence of third-party guilt; and

5. The trial court committed cumulative errors in violating the defendant's 4th, 5th, 6th, and 14th amendment rights and by allowing inadmissible hearsay into the trial.

The defendant also argued that the trial court erred by incorrectly relying on the factual and legal findings of "the now defrocked and removed" initial trial judge, Liliana De Avila Selebi. The appellate panel affirmed the defendant's conviction and remanded on the issue of whether the search warrant was based solely on the statement made by Peggy Kalfain to law enforcement.

The appellate panel found that this court committed error when it reviewed a videorecorded statement of the victim that apparently was not furnished to the municipal judge who issued the warrant. The appellate panel directed this court not to consider the recorded statement in determining whether probable cause existed for issuance of the search warrant, but instructed the court that it could consider any testimony given by Peggy Kalfain in her application for a Temporary Restraining Order (TRO).

The appellate panel expressed concern over the affiant's apparently erroneous description of the defendant's criminal record and the State's late disclosure of that issue. In support of a search warrant, the affiant, Fort Lee Police Officer Douglas Cabler, told Fort Lee Municipal Court Judge DeSheplo that his colleague, Detective Sargent Michele Morgenstern, told him that the defendant had a criminal history for possession of firearms and had firearms at his residence on a previous occasion.

*Appendix C*

When the appellate panel reviewed the defendant's presentence report included within the State's appendix and read the State's footnote that the defendant had no disposition that directly noted firearms possession, the panel criticized the State for alleging a criminal history when there was none. The State argued that the issuing judge did not rely on the defendant's criminal history of a past allegation of firearms possession when issuing the search warrant, but did consider the defendant's extensive criminal history in issuing the TRO. That explanation did not satisfy the appellate panel.

On remand, the panel directed the parties to provide this court with their appellate submissions. The panel directed this court to make findings of fact and conclusions of law distinct and separate from the initial trial judge who did not fully consider the issues before the appellate division.

Lastly, the panel directed this court to consider anew the reliability of Peggy Kalfain's statements in support of the warrant.

Considering the number of factual issues raised by the parties, this court concluded that a testimonial hearing was necessary to make the findings that the appellate panel required pursuant to *Franks v. Delaware,* 438 U.S. 154 (1978).

The evidentiary hearing commenced on February 25, 2022. The hearing ended early when the defendant indicated that he was diabetic and not feeling well. The court rescheduled the matter for March 2, 2022.

*Appendix C*

On March 2, 2022, the assistant prosecutor arrived prepared to present the testimony of the second witness. The defendant failed to appear, citing work responsibilities and the inability to arrive in Hackensack from Long Island on time. Given the defendant's prior voluntary absence from the trial and his subsequent appeal of issues that took place during his absence, the court adjourned the matter until March 10, 2022, and instructed defense counsel to inform the defendant that the court would not proceed without him.

The hearing continued March 10, 2022. Thereafter, both parties provided written submissions to the court. The parties presented oral argument on May 9, 2022.

The Court listened closely to the witnesses to assess their credibility and the reasonableness of their testimony. *State v. Locurto,* 157 N.J. 463 (1999).

Fort Lee Police Sergeant Michele Byrnes testified for the State. Byrnes is referred to by her maiden name, Morgenstern, in 2013 police reports. Byrnes testified in a straightforward manner, consistent on direct and cross-examination. She freely admitted lack of recall at times. Notwithstanding, Byrnes had fairly good recall of her interaction with Peggy Kalfain on September 1, 2013.

Byrnes could not recall whether she told Judge DeSheplo that the police responded to Kalfain's domestic call on the night of August 31, 2013 and found Kalfain uncooperative and so inebriated that they transported her to a hospital for observation. Byrnes testified that Kalfain's

intoxication the night before she arrived at headquarters was irrelevant to Byrne's belief that Kalfain's allegations of domestic violence were credible.

Retired Fort Lee Police Officer Douglas Cabler testified for the State. Cabler recalled his interaction with the defendant and Kalfain on August 31, 2013. Although he could not recall specific details of the procedure he used to obtain a search warrant in this case, Cabler credibly testified that he always followed the same procedure when requesting a search warrant.

Both witnesses were credible. Their lack of recall was understandable, given the passage of time. Neither officer appeared to be purposely evasive or attempting to mislead the court.

The following exhibits were entered into evidence without objection:

S-1: Temporary Restraining Order dated 9/1/13

S-2: Defendant's Criminal Case History dated 12/26/879/1/13

S-3: Application for Search warrant dated 9/1/13

D-1: Police report authored by Officer Dennis Pathos dated 9/1/13

*Appendix C*

D-4: Defendant's Judgment of Conviction dated 5/22/9

**Findings of Fact:**

On August 31, 2013, Fort Lee police officers were summoned to Konstantin Bitzas' home on a report of a fight in progress. When officers arrived, they found Kalfain and Bitzas outside talking quietly. Officers separated the parties.

Bitzas told officers that he and Kalfain had been drinking earlier in the evening at a restaurant. Bitzas left alone and Kalfain later arrived at his home heavily intoxicated, accusing Bitzas of infidelity. Kalfain began throwing and breaking dishes. Bitzas told her to leave. The argument spilled onto the street and Kalfain called the police. Bitzas denied assaulting Kalfain, and officers saw no evidence of a physical struggle when they checked Bitzas. Bitzas did not want to file charges.

Kalfain was emotional, intoxicated, and uncooperative. Officers had to grab her arm several times to keep her from leaving. Kalfain told officers that she was afraid of Bitzas and that his former girlfriend had beaten her up earlier that day. She refused to answer questions and became belligerent. She then told officers that she wanted them to search Bitzas' apartment, without providing any further explanation. Kalfain then reported that Bitzas attacked her before the officers arrived, but they saw no visible signs of injury. Kalfain then denied any altercation with Bitzas. She refused to apply for a TRO and refused to complete an affidavit to support her allegations.

Due to Kalfain's level of intoxication, officers called an ambulance to transport her to the hospital for observation. Both parties were advised to respond to headquarters if they changed their minds about filing complaints.

The following afternoon, Kalfain arrived at Fort Lee Police Headquarters and spoke with Detective Morgenstern who was not involved in the incident the prior night. Kalfain appeared "jittery and scared," but not intoxicated. Kalfain apologized for her behavior at Bitzas' home and admitted having been intoxicated and telling the police officers different stories.

Kalfain reported that Bitzas assaulted her the night before and when she threatened to call police, he pointed a handgun at her head and threatened to kill her. She told Morgenstern that she did report having been assaulted, but because she was afraid of Bitzas, who was present, she refused to provide any details. Kalfain told Morgenstern that she had seen a short gun and a long gun at Bitzas' home. Morgenstern observed a bruise on Kalfain's left arm, which could have been caused by Bitzas or by the officers who had to keep Kalfain from leaving the scene.

Morgenstern obtained Bitzas' Criminal Case History (CCH) and saw that he was charged with possession of a handgun on January 30, 1997. That charge was later dismissed. The fact that Bitzas was not convicted of the 1997 weapon's offense was not dispositive to Morgenstern's assessment of whether a TRO should be processed and whether the defendant should be charged. Morgenstern believed that the defendant's prior arrests, and not only

convictions, were important considerations. Morgenstern believed that the history of a weapons charge gave weight to Kalfain's report that she had seen a firearm in Bitzas' home and that he pointed it at her.

Morgenstern appeared before Municipal Court Judge DeSheplo. She provided the judge with Bitzas' CCH and recounted the allegations made by Kalfain, but did not tell Judge DeSheplo anything about the police response the night before, Kalfain's differing accounts of what happened, or Kalfain's significant level of intoxication.

Judge DeSheplo issued a TRO. On the TRO, Judge DeSheplo noted, "Search warrant issued. Def. has an extensive criminal history." Judge DeSheplo also checked off the box on the TRO ordering a search warrant pursuant to the Prevention of Domestic Violence Act.

While Morgenstern was working on the TRO and criminal charges, she provided information to Detective Cabler who prepared an affidavit in support of a warrant for Bitzas' home. Cabler drafted the affidavit, appeared before Judge DeSheplo, and was placed under oath. Cabler also gave the judge the same CCH that Morgenstern had provided in support of the TRO.

To establish probable cause for the search warrant, Cabler certified that, on September 1, 2013, Peggy Kalfain reported that Bitzas physically assaulted her at his residence, grabbed her by the arms, and dragged her across the floor. She struck her head on the floor and on a counter. She reported that Bitzas told her he

would kill her if she called police and he pointed a gun at her during the altercation. Cabler added that Officer Morgenstern informed him that Bitzas had a criminal history for possession of firearms and had had firearms in his residence on a previous occasion.

Cabler went on to certify that, during his investigation, Morgenstern told him that Bitzas had a criminal history for possession of firearms and had firearms in his residence in the past. Cabler believed there was certain property within the residence of the defendant, to wit: an unknown type of handgun, a long gun, and a short gun used to point at victim during the domestic incident that involved a terroristic threat, simple assault, and possession of a weapon for an unlawful purpose.

Based on the affidavit, Judge DeSheplo granted the warrant.

**DEFENSE ARGUMENT:**

All evidence must be suppressed and the charges against the defendant dismissed based on law enforcement and prosecutorial misconduct in not disclosing to any judge or court that there was a false statement in the warrant affidavit.

The affidavit had never been disclosed to the defense throughout the criminal and appeal processes until October 27, 2020, when the prosecutor handling the appeal finally provided the search warrant affidavit to the defense.

*Cahill* and *Napue* violations independently merited a dismissal.

**STATE RESPONSE:**

The information contained within the four corners of the search warrant affidavit and TRO provided ample probable cause to search the defendant's home.

There is no evidence that the affiant deliberately falsified the affidavit.

The defendant's CCH did contain an arrest for firearms possession and the appellate panel was not aware of that record when the panel remanded the matter.

Including the events of August 31 would not have defeated the probable cause determination. Kalfain's intoxication on August 31 did not nullify her veracity on September 1, 2013.

**CONCLUSIONS OF LAW:**

A search executed pursuant to a valid warrant is presumed to be valid and a defendant challenging its validity has the burden to prove that there was no probable cause supporting the issuance of the warrant or that the search was otherwise unreasonable. *State v. Jones,* 179 N.J. 377, 388 (2004), citing, *State v. Valencia,* 93 N.J. 126, 133 (1983). A reviewing court must give substantial deference to the determination of the issuing judge. *State v. Sullivan,* 169 N.J. 204, 211 (2001).

*Appendix C*

Probable cause is a common-sense, practical standard for determining the validity of a search warrant. Id. at 211. The issuing authority must be satisfied that there is probable cause to believe that a crime has been, or is being, committed at a specific location or that evidence of a crime is at the place sought to be searched. Id. at 210. When determining whether probable cause exists, courts must consider the totality of the circumstances, and they must deal with probabilities. *Schneider v. Simonini,* 163 N.J. 336, 361 (2000).

The issuing judge must make a practical, common-sense decision, whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that evidence of a crime will be found in a particular place. *State v. Smith,* 155 N.J. 83, 93 (1998).

When examining the totality of the circumstances to determine whether probable cause existed in this case, especially considering the concern for Peggy Kalfain, the court is persuaded that there was sufficient probable cause to sustain the validity of the warrant.

The State may not knowingly use false evidence to obtain a tainted conviction. *Napue v. Illinois,* 360 U.S. 264, 269 (1959); *State v. Taylor,* 49 N.J. 440, 453 (1967). Whether nondisclosure was a result of negligence or design, it is the prosecutor's responsibility to disclose the incorrectness of the witness' statement. *State v. Cahill,* 125 N.J. Super. 492, 498 (1973). To be entitled to relief on

the ground that false or perjured testimony was used in obtaining a conviction, a defendant must establish that the testimony was false or perjured; it was material to the conviction; and the prosecutor participated or had knowledge of the falsity. Id. at 495, citing, *Jackson v. United States,* 338 F. Supp. 7 (D.N.J. 1971).

The appellate panel expressed concern that the affiant provided an erroneous description of the defendant's criminal history in support of the search warrant. The State clarified by providing the court with the defendant's Criminal Case History (CCH) which included a January 30, 1997, arrest for theft-related charges, possession of marijuana, possession of drug paraphernalia, possession of a handgun and possession of a weapon. The defendant was found guilty of receiving stolen property and the remaining charges, including the weapons charges, were dismissed.

Mistakenly, the defendant's 2014 pre-sentence report, which is not evidentiary, was provided to the appellate panel, and it erroneously omitted the 1997 weapon charges. The State did not provide the defendant's criminal case history (CCH), upon which Cabler relied in support of the search warrant to the appellate court.

The defendant argued that Kalfain's intoxication the night prior to her request for a TRO made Kalfain an unreliable witness, and her conduct that night was relevant information that should have been provided in the affidavit in support of the search warrant. The court disagrees.

*Appendix C*

When the police responded to Bitzas' home on August 31, both parties had been drinking. Kalfain was highly intoxicated, but not incoherent. Kalfain changed her story several times, but she did tell police that Bitzas had assaulted her and did ask police officers to search Bitzas' home. Both parties were encouraged to return to headquarters if they decided to press charges or ask for a TRO.

Kalfain did just that. The next day, she returned to headquarters and met with Morgenstern, who found Kalfain lucid. Kalfain apologized for her conduct the night before. While Kalfain's intoxication would be relevant to her reliability on the night of August 31, she was sober when she returned to headquarters on September 1. Kalfain reported having been assaulted by Bitzas and threatened with a firearm. Her allegation of an assault was consistent with her allegation the prior evening.

Based on Kalfain's allegations, Morgenstern processed the TRO and filed criminal charges against Bitzas. Morgenstern provided Bitzas' CCH to Judge DeSheplo. Review of the CCH reveals multiple arrests, dismissals, a third-degree conviction for Cocaine possession, and a third-degree conviction for receiving stolen property. The conviction for receiving stolen property included an arrest for possession of a handgun and possession of a weapon, which were dismissed. Bitzas also violated probation in 2008 and was sentenced to a State Prison term. Judge DeSheplo reviewed the allegations made in support of the TRO and read the CCH. It was he who concluded that Bitzas had an "extensive criminal history."

*Appendix C*

Bitzas' counsel's contention that he was never provided with the affidavit in support of the search warrant until October 2020 is mistaken. It was Bitzas who moved to dismiss the indictment during the trial based on his assertion of the insufficiency of the search warrant and he acknowledged having received the affidavit during the hearing.

The defendant argued that the affiant presented false information in support of the search warrant. The court disagrees. Detective Cabler's representation that the defendant had a history, rather than a conviction, for weapons possession is ambiguous, but it is not false, nor in reckless disregard of the truth, nor exculpatory in some way, as the defendant argues, especially because Judge DeSheplo already knew Bitzas' criminal history contained within the CCH. Byrne and Cabler gave no indication to this court that they purposely withheld information or intended to mislead or deceive Judge DeSheplo.

A suspect's criminal record may be considered when determining probable cause to arrest. *State v. Jones,* 179 N.J. 377 (2002), citing, *State v. Valentine,* 134 N.J. 536, 636 (1994). A suspect's criminal history is also germane to a search analysis. Id. citing, *State v. Novembrino,* 105 N.J. 95, 127 (1987). In *Jones,* the defendant challenged the facts to support a departure from the knock-and-announce requirement. In support of a no-knock warrant, the affiant provided Jones' and his brother's arrest record. Jones' brother had a prior arrest for assault on a police officer, but pleaded to unlawful possession of a weapon. The Appellate Division discounted the brother's criminal history and

found it "significant" that the brother was never convicted of the assault charge. The Supreme Court disagreed and found that the fact that an offender eventually pleaded to a lesser-included offense does not undermine the probative value to officer safety. Jones at 402.

Applying a totality of the circumstances analysis, there was sufficient information contained in the TRO for Judge DeSheplo to have ordered a search of Bitzas' home. Furthermore, if Judge DeSheplo was not provided with any information regarding Bitzas' criminal history, there still was ample, credible information provided by Detective Cabler within the four corners of the affidavit to support a search warrant.

*Appendix C*

SUPERIOR COURT OF NEW JERSEY,
BERGEN COUNTY, LAW DIVISION

CRIMINAL PART INDICTMENT NO.:
~~20-10-712-I~~ [14-02-228-I]

STATE OF NEW JERSEY,

*Plaintiff,*

v.

KONSTANTIN BITZAS,

*Defendant.*

May 23, 2022

**ORDER**

This matter having been remanded by the Appellate Division for further findings of fact and conclusions of law; Mark Musella, Bergen County Prosecutor, Assistant Prosecutors Vered Adoni and Craig Becker appearing on behalf of the State; and Eric Kleiner, Esquire appearing on behalf of Konstantin Bitzas, who also appeared; and the Court having held a testimonial hearing; and for the reasons set forth in the Court's decision of this date; and for good cause shown:

**It is on this 23rd day of May 2022:**

**ORDERED:**

The defendant's motion to suppress evidence and dismiss the charges against the defendant is hereby denied in its entirety.

/s/_____
FRANCES A. McGROGAN, J.S.C.

## APPENDIX D — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, FILED JULY 27, 2021

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-5918-17

STATE OF NEW JERSEY,

*Plaintiff-Respondent,*

v.

KONSTADIN BITZAS, a/k/a CONSTANTINE BITZAS, CHRISTOS BITZAS, DEAN BITZAS, CHRISTOS DEAN BITZAS, CONSTANTI BITZAS, DINO BITZAS, BEAN BITZAS, and CONSTANI BITZAS,

*Defendant-Appellant.*

Decided July 27, 2021—Argued May 12, 2021

Before Judges Fuentes, Rose, and Firko.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 14-02-0228.

*Appendix D*

PER CURIAM

This matter returns to us following a remand ordered in our previous opinion. *State v. Bitzas*, 451 N.J. Super. 51, 164 A.3d 1091 (App. Div. 2017). In that case, we vacated defendant Konstadin Bitzas's convictions on the remaining counts of an eleven-count Bergen County indictment after the judge (initial trial judge) sua sponte dismissed with prejudice three domestic violence-related charges as a sanction for the complaining witness's recalcitrant behavior on the witness stand. *Id.* at 58. This court also held the initial trial judge abused her discretion by failing to grant the State's motion for a mistrial. *Id.* at 60.

On remand, a different judge (trial court) conducted a bifurcated trial before a jury. Prior to trial, the court granted the State's motion to dismiss the first three counts of the indictment: second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count one); third-degree terroristic threats, N.J.S.A. 2C:12-3(b) (count two); and fourth-degree aggravated assault, N.J.S.A. 2C:12-1(b)(4) (count three). Accordingly, the complaining witness, P.K.,[1] did not testify at the retrial. The remaining charges pertained to the seizure of several firearms pursuant to a search warrant executed at defendant's home on September 1, 2013.

The jury found defendant guilty of second-degree possession of an assault firearm, N.J.S.A. 2C:39-5(f) (count

1. Consistent with our prior opinion, we use initials to protect P.K.'s privacy.

nine); and fourth-degree possession of a large-capacity ammunition magazine, N.J.S.A. 2C:39-3(j) (counts ten and eleven). Thereafter, the same jury convicted defendant of fourth-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(a) (counts four through eight). Unlike the initial trial, defendant represented himself at the first phase of the trial under review and voluntarily absented himself from the second phase. At defendant's request, standby counsel represented him during the second phase of trial and remained his attorney through sentencing.

The trial court sentenced defendant to an aggregate eleven-and-one-half-year prison term with a parole disqualifier of six-and-one-half years pursuant to the Graves Act, N.J.S.A. 2C:43-6(c). This appeal followed.

On appeal, defendant raises the following points for our consideration:

> POINT I
>
> THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DISREGARDING [DEFENDANT]'S CONSTITUTIONAL DUE PROCESS RIGHTS SURROUNDING THE DECISION WHETHER OR NOT TO TESTIFY.
>
> (Not raised below)

*Appendix D*

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO INSTRUCT [DEFENDANT] REGARDING THE DANGERS OF SELF-REPRESENTATION AND INTERFERING WITH [DEFENDANT]'S RIGHT TO THE FREE AND UNFETTERED ASSISTANCE OF STANDBY COUNSEL.

(Not raised below)

POINT III

[DEFENDANT]'S [CERTAIN] PERSONS CONVICTIONS REQUIRE REVERSAL BECAUSE THE TRIAL COURT FAILED TO ADEQUATELY QUESTION THE JURY, WRONGFULLY DENIED A MOTION FOR A SEVERANCE, AND FAILED TO EMPANEL A NEW JURY OR DECLARE A MISTRIAL.

POINT IV

THE STATE VIOLATED [DEFENDANT]'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES WHEN POLICE ACTED SOLELY ON THE BASIS OF FACTS SUPPLIED BY A SOURCE WHO WAS HEAVILY INTOXICATED AT THE TIME OF THE ALLEGED OCCURRENCE.

POINT V

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN EFFECTIVELY DENYING [DEFENDANT]'S RIGHT TO PRESENT EVIDENCE OF THIRD-PARTY GUILT.

POINT VI

THE TRIAL COURT COMMITTED CUMULATIVE ERROR IN VIOLATING [DEFENDANT]'S [FOURTH], [FIFTH], [SIXTH,] AND [FOURTEENTH] AMENDMENT RIGHTS AND ALLOWING INADMISSIBLE HEARSAY INTO THE TRIAL. (Partially raised below)

We reject these contentions and affirm, subject to a remand on defendant's constitutional argument raised in point IV. In doing so, we find insufficient merit in the arguments raised in points III, V, and VI to warrant discussion in a written opinion. *R.* 2:11-3(e)(2). We focus instead — as did defendant during oral argument before us — on points I and IV. Finally, we address defendant's point II and conclude it lacks merit.

**I.**

Defendant did not testify at either phase of his retrial. He now contends the trial court failed to fully apprise him of his right to testify "before, during, or after either

phase of retrial," requiring reversal of his convictions. Defendant's contentions are unavailing.

We have recognized "[t]he right of a criminal defendant to testify on his or her own behalf is essential to our state-based concept of due process," and may only be waived knowingly and voluntarily. *State v. Ball*, 381 N.J. Super. 545, 556, 887 A.2d 174 (App. Div. 2005) (internal quotation marks omitted). "In order to waive the right to testify, a criminal defendant must be aware of the right and must make a knowing decision to give it up." *State v. Lopez*, 417 N.J. Super. 34, 39, 8 A.3d 256 (App. Div. 2010). Accordingly, "it is the better practice for the court to determine on the record whether a defendant wishes to testify or to waive that right[.]" *Ibid.*

To establish a waiver of counsel "when a defendant is represented by counsel, the court need not engage in a voir dire on the record." *Ball*, 381 N.J. Super. at 556. Rather, it is the responsibility of defense counsel, not the trial court, to advise the defendant on whether to testify. *State v. Savage*, 120 N.J. 594, 630, 577 A.2d 455 (1990).

In the first phase of trial, after the State concluded its case and the jurors were on a short break, defendant rested without testifying or presenting any witnesses. The following colloquy ensued:

> THE COURT: Okay. Sir, it is your constitutional right to remain silent. I'm going to give you a form that indicates that you are electing not to testify. And it has . . . with it a charge that you

can elect to be given . . . that we can give to the jury or not, so I would like you to read this form.

Do you understand that you have the right to remain silent?

DEFENDANT: Yes, Judge.

THE COURT: Do you understand if you exercise the right to remain silent that the jury cannot hold that against you?

DEFENDANT: Yes.

THE COURT: I can give the jury the following charge and this is up to you:

"It is the constitutional right of a defendant not to . . . to remain silent . . . it is the constitutional right of a defendant to remain silent. [sic] The defendant in this case *chose not to be a witness*, and therefore elected to exercise that right. I charge that you are not to consider for any purpose or in any manner in arriving at your verdict the fact that the defendant did not testify, nor should that fact enter into your deliberations or discussions in any manner at any time.

The defendant is entitled to have the jury consider all of the evidence and he is entitled to the presumption of innocence, whether or not he

> testifies as a witness. Therefore, the jury may not draw any inference of guilt from the fact that the defendant did not testify."

[(Emphasis added).]

The judge then furnished defendant with a form entitled, "Defendant's Election Not to Testify." After reviewing the form with standby counsel and signing it, defendant requested that the trial court read the charge to the jury.

Based upon the foregoing exchange, we discern no error in the court's failure to expressly advise defendant of his right to testify on his own behalf. The court apprised defendant it would inform the jury that he "chose not to be a witness" if he so agreed, thereby implicitly advising defendant of his right to testify. *See State v. Bogus*, 223 N.J. Super. 409, 424, 538 A.2d 1278 (App. Div. 1988) (quoting *Commonwealth v. Waters*, 399 Mass. 708, 506 N.E.2d 859, 865 (Mass. 1987) (recognizing "[u]nlike most other rights, the right to testify is counterpoised by the right not to testify")).

Moreover, when conducting the October 23, 2017 *Faretta*[2] hearing to ascertain that defendant understood the implications of waiving his constitutional right to counsel, another judge (*Faretta* judge) inquired: "Do you understand that if the matter goes to trial and you

---

2. *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

*choose not to testify* on your own behalf, the jury will be instructed that your silence cannot be considered against you?" (Emphasis added). According to the plain meaning of the term, "choose" defendant was informed that he had the option to testify or remain silent. Indeed, as noted in the State's responding brief, defendant testified at both phases of his first trial, thereby evincing his knowledge of his right to testify. Under the totality of these circumstances, we discern no error here.

Similarly unpersuasive is defendant's argument that the trial court failed to inquire whether defendant intended to return to testify on his own behalf at the second phase of trial. After the jury verdict in the first phase of trial and before testimony commenced, defendant informed the court, in the jury's absence: "I am obviously not an attorney and I represented myself so far to my own detriment. And at this point, I am requesting that the court proceed without me." After affording defendant the opportunity to confer with standby counsel, defendant advised the court that standby counsel would "take over the case at this point."

Having clearly indicated his intention to "waiv[e] the right to be present at trial," *R.* 3:16(b), defendant effectively relinquished his right to testify. In any event, because standby counsel represented defendant in his absence during the second phase of trial, the trial court was under no obligation to inform defendant of his right to testify. *Bogus*, 223 N.J. Super. at 424; *see also Savage*, 120 N.J at 630.

*Appendix D*

**II.**

We turn next to the contentions raised in point IV. In his merits brief, defendant argues the search warrant was issued without probable cause because the supporting affidavit was based solely on P.K.'s statement to law enforcement. In essence, defendant contends the trial court erred by: (1) incorrectly relying on the factual and legal findings of "the now defrocked and removed" initial trial judge[3]; (2) conducting a review beyond the four corners of the search warrant affidavit; (3) failing to take testimony or creating a record to explain the reasons for its denial of the motion to suppress; and (4) relying on the statements of P.K., who was "highly-unreliable, highly-unstable, and . . . heavily-intoxicated at the time of the alleged incident." In his reply brief, defendant further asserts the affidavit contains "a false material fact" regarding defendant's criminal history, disclosed for the first time in the State's responding brief. Defendant seeks reversal of his convictions based upon the trial court's errors and prosecutorial misconduct.

During the April 9, 2018, pretrial conference, defendant advised the trial court that he had not changed his mind about proceeding pro se; he appeared with standby counsel. Because phase one of the retrial was limited to the charges pertaining to the weapons and ammunition seized pursuant to the search warrant, the State indicated it would refrain from introducing any

3. The initial trial judge was removed from judicial office on September 26, 2018. *Matter of DeAvila-Silebi*, 235 N.J. 218, 194 A.3d 497 (2018).

evidence regarding defendant's arrest, which was based on P.K.'s domestic violence allegations. However, defendant refused to stipulate to the validity of the search warrant, claiming he "proved at trial the first time that the charges were false" and he "was falsely arrested." Arguing "the remaining counts [we]re fruit of the poisonous tree," defendant moved to dismiss all charges.

Following the State's representation that the initial trial judge held a hearing on the validity of the warrant—and that issue was not raised on appeal from the first jury verdict—the trial court denied defendant's oral application. In doing so, the court determined the initial judge's decision was the "law of the case." The court also noted the search warrant was "not the reason why the Appellate Division sent this [trial] back."

On April 10, 2018, defendant again orally moved to dismiss the charges on the same basis. The court denied the motion, again citing law of the case.

Undeterred, on April 12, 2018, defendant orally moved for reconsideration of the trial court's decision, claiming he omitted "some important information" from his previous arguments. Defendant maintained the search warrant issued on September 1, 2013 was invalid. He argued that the day before the search warrant was issued, members of the Fort Lee Police Department (FLPD), who responded to defendant's home on P.K.'s report of domestic violence, "determined she was lying and [he] was telling the truth." The officers did not arrest defendant at that time. Instead, they brought P.K. to the hospital because

she was "intoxicated, high on drugs, and out of control." Defendant claimed that when P.K. was released from the hospital, she reported to the FLPD and made the same allegations to Detective Michele Morgenstern, who did not respond to defendant's home the previous night. Defendant contended that had Morgenstern properly investigated the allegations, she would have known "these allegations were false."

Following argument, the trial court reserved decision, to conduct a review of the temporary restraining order (TRO) issued to P.K.; the police report regarding the domestic violence incident; P.K.'s videorecorded statement to Morgenstern; photographs of P.K.'s injuries; the search warrant and supporting affidavit; and the transcript of the suppression hearing before the initial judge. On April 16, 2018, the court issued an oral decision denying the motion. Among other findings, the court noted the search warrant affidavit summarized P.K.'s videorecorded statement about the assault and that defendant "had a prior history of firearms possession and he had firearms in his possession in the past."

Referencing the initial trial judge's findings, the court found defendant had "made the same allegations regarding the victim's intoxication[,]" including that the police transported P.K. to the hospital based on "her extreme intoxication."[4] The trial court also noted the

4. According to the transcript of the initial judge's decision, defense counsel orally moved to suppress the evidence seized pursuant to the search warrant on the first day of trial. The initial judge requested and reviewed the affidavit in court and denied

initial judge's legal conclusion "that the police do not have to prove that the victim was assaulted or threatened" to sustain a probable cause finding for issuance of the search warrant.

Citing our Supreme Court's decision in *State v. Chippero*, 201 N.J. 14, 987 A.2d 555 (2009), the trial court concluded defendant failed to demonstrate the warrant was issued without probable cause or was otherwise unreasonable. Ultimately, the court reiterated its earlier determination that the validity of the warrant was the law of the case.

"The law-of-the-case doctrine 'is a non-binding rule intended to "prevent relitigation of a previously resolved issue"' in the same case." *State v. K.P.S.*, 221 N.J. 266, 276, 112 A.3d 579 (2015) (quoting *Lombardi v. Masso*, 207 N.J. 517, 538, 25 A.3d 1080 (2011)). "[O]nce an issue has been fully and fairly litigated, it ordinarily is not subject to relitigation between the same parties either in the same or in subsequent litigation." *Id.* at 277 (internal quotation marks omitted). The doctrine "is subject to the exercise of sound discretion." *Ibid.*

A search executed pursuant to a warrant enjoys the presumption of validity. *State v. Marshall*, 199 N.J. 602, 612, 974 A.2d 1038 (2009). "Doubt as to the validity of the warrant 'should ordinarily be resolved by sustaining the

---

defendant's request for a hearing. On an unrelated matter later in the hearing, defendant told the court he was "never" found "guilty of a weapons offense."

search.'" *State v. Keyes*, 184 N.J. 541, 554, 878 A.2d 772 (2005) (quoting *State v. Jones*, 179 N.J. 377, 389, 846 A.2d 569 (2004)). The defendant bears the burden of challenging the search, and must "prove 'that there was no probable cause supporting the issuance of the warrant or that the search was otherwise unreasonable.'" *Jones*, 179 N.J. at 388 (quoting *State v. Valencia*, 93 N.J. 126, 133 (1983)). Probable cause exists where there is "a reasonable ground for belief of guilt" based on facts of which the officers had knowledge and reasonably trustworthy sources. *Marshall*, 199 N.J. at 610 (quoting *State v. O'Neal*, 190 N.J. 601, 612, 921 A.2d 1079 (2007)).

Further, "[w]hen reviewing the issuance of a search warrant by another judge, the [motion judge] is required to pay substantial deference to the [issuing] judge's determination." *State v. Dispoto*, 383 N.J. Super. 205, 216, 891 A.2d 633 (App. Div. 2006) (citing *State v. Kasabucki*, 52 N.J. 110, 117, 244 A.2d 101 (1968)), *modified on other grounds*, 189 N.J. 108, 913 A.2d 791 (2007). Nonetheless, "under certain circumstances, a search warrant's validity may be questioned, in which case an evidential hearing may be afforded." *Ibid.* (citing *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)).

Where, as here, a defendant challenges the veracity of a search warrant affidavit, a *Franks* hearing is required only "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding

of probable cause . . . ." 438 U.S. at 155-56. The defendant "must allege 'deliberate falsehood or reckless disregard for the truth,' pointing out with specificity the portions of the warrant that are claimed to be untrue." *State v. Howery*, 80 N.J. 563, 567, 404 A.2d 632 (1979) (quoting *Franks*, 438 U.S. at 171).

To obtain a *Franks* hearing, a defendant's allegations should be supported by affidavits or other reliable statements; "[a]llegations of negligence or innocent mistake are insufficient." *State v. Broom-Smith*, 406 N.J. Super. 228, 241, 967 A.2d 359 (App. Div. 2009) (quoting *Franks*, 438 U.S. at 171). The allegations "must be proved by a preponderance of the evidence." *Howery*, 80 N.J. at 568. A defendant must also demonstrate that absent the alleged false statements, the search warrant lacks sufficient facts to establish probable cause. *Ibid.* If a search warrant affidavit contains sufficient facts establishing probable cause even after the alleged false statements are excised, a *Franks* hearing is not required. *Franks*, 438 U.S. at 171-72.

A misstatement is considered material if, when excised, the warrant affidavit "no longer contains facts sufficient to establish probable cause" in its absence. *Howery*, 80 N.J. at 568 (citing *Franks*, 438 U.S. at 171). "If at such inquiry the defendant proves [a] falsity by a preponderance of the evidence, the warrant is invalid and the evidence seized thereby must be suppressed." *Id.* at 566.

Defendant further contends the affidavit omitted facts concerning the FLPD's investigation. Similarly, the

*Franks* "requirements apply where the allegations are that the affidavit, though facially accurate, omits material facts." *State v. Stelzner*, 257 N.J. Super. 219, 235, 608 A.2d 386 (App. Div. 1992). An omission is deemed material if the issuing judge likely would not have approved the warrant if the judge had been apprised of the omitted information. *State v. Sheehan*, 217 N.J. Super. 20, 25, 524 A.2d 1265 (App. Div. 1987). However, "[t]he test for materiality is whether inclusion of the omitted information would defeat a finding of probable cause; it is not . . . whether a reviewing magistrate would want to know the information." *State v. Smith*, 212 N.J. 365, 399, 54 A.3d 772 (2012).

If probable cause exists despite the errant information, the search warrant remains valid and an evidentiary hearing is unnecessary. *See Sheehan*, 217 N.J. Super. at 25. If the defendant meets the requisite threshold burden, however, the court must conduct a hearing. *Ibid.* In turn, "[i]f at such inquiry the defendant proves by a preponderance of the evidence that the affiant, deliberately or with reckless disregard for the truth, excluded material information from the affidavit which, had it been provided, would have caused the judge to refuse to issue the warrant, the evidence must be suppressed." *Id.* at 26.

Because a search warrant is presumed valid, an "appellate court's role is not to determine anew whether there was probable cause for issuance of the warrant, but rather, whether there is evidence to support the finding made by the warrant-issuing judge." *Chippero*, 201 N.J. at 20-21. The issuing judge's probable cause determination "must be made based on the information contained

within the four corners of the supporting affidavit, as supplemented by sworn testimony before the issuing judge that is recorded contemporaneously." *Schneider v. Simonini*, 163 N.J. 336, 363, 749 A.2d 336 (2000) (citing *State v. Novembrino*, 105 N.J. 95, 128, 519 A.2d 820 (1987)).

Against this legal backdrop, we turn to defendant's challenges, recognizing the trial court liberally considered his orally deficient motion because was he self-represented. *See R.* 3:5-7(b) (requiring a defendant to file the initial brief when "the search was made with a warrant"). Further, the court essentially converted defendant's motion to dismiss the remaining charges of the indictment to a motion to suppress the evidence seized pursuant to a valid warrant.

However, because the court's review included P.K.'s videorecorded statement, which apparently was not furnished to the warrant-issuing judge, it exceeded the four corners of the search warrant affidavit. Nonetheless, that belated claim of error was not "clearly capable of producing an unjust result," *R.* 2:10-2, here in that the record before us reveals the same municipal court judge granted P.K.'s September 1, 2013 application for a TRO and seizure of the same weapons under the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35, based on the same allegations of domestic violence. On remand, however, the court shall not consider P.K.'s videorecorded statement in determining whether probable cause existed for issuance of the search warrant, but can consider any testimony given by P.K. in support of her application for the TRO.

Our concern, however, pertains to the affiant's apparently erroneous description of defendant's criminal record and the State's late disclosure of that issue. In his sworn affidavit, an FLPD detective certified: "During my investigation, I was informed by . . . Morgenstern that [defendant] has a criminal history for possession of firearms and has had firearms in his residence on a previous occasion."

Referencing defendant's presentence report included in the State's appendix, the State embedded a footnote in its responding brief, addressing that statement, as follows: "While defendant's criminal history is extensive, the State notes that none of the dispositions directly note firearms possession." Referencing the search warrant and TRO, the State claims the issuing judge "did not rely on defendant's criminal history of this past allegation of firearms in issuing the search warrant. . . . But he did consider defendant's 'extensive criminal history' in issuing the TRO."

We are troubled by the State's late disclosure for several reasons. Initially, the basis of the State's assumption that the issuing judge did not rely on the affiant's description of defendant's criminal history—as it relates to possessing firearms—is unclear. The issuing judge's notation on the TRO that defendant had an "extensive criminal history" may well belie such assertion.

Secondly, the State's disclosure neither was presented to the trial court nor issuing judge—although as noted above defendant attempted to advise the initial judge that

he was never convicted of weapons offenses. We recognize defendant neither raised this precise issue pro se before the trial court nor when represented by counsel before the initial judge. We also note that defendant did not question the validity of the search in the appeal challenging his conviction in the first trial. Nonetheless, we are satisfied the appropriate remedy here is to remand the matter pursuant to *Franks* and its progeny.

On remand, the parties shall provide the trial court with their submissions on appeal. The court may, in its discretion, order additional briefing. The court shall thereafter determine whether a *Franks* hearing is warranted in view of the governing law as applied to the represented facts. In view of the State's belated disclosure, the court shall make its own findings of fact and conclusions of law, distinct and separate from those of the initial trial judge, who did not "fully" consider the issues now illuminated. *See K.P.S.*, 221 N.J. at 277. The court shall also consider anew defendant's argument concerning the reliability of P.K.'s statements supporting the warrant.

In view of our decision, we need not reach defendant's argument that the court improperly relied upon the initial judge's findings here, where that judge was subsequently removed from office. However, we agree it is prudent based on the newly-disclosed information—and the history of this case—for the trial court to issue independent findings of fact and conclusions of law.

Should the trial court ultimately determine the warrant is invalid, the evidence seized from defendant's

residence shall be suppressed and a new trial granted. If, however, the warrant's validity is established, we affirm defendant's convictions.

**III.**

We turn briefly to the contentions raised in defendant's point II. Defendant argues the *Faretta* judge and the trial court failed to engage in the required colloquy to determine whether he knowingly and voluntarily waived his right to counsel and that these errors require a new trial. Defendant further contends the trial judge erroneously limited standby counsel's role during the second phase of the bifurcated trial. We disagree.

A trial court's determination as to whether a defendant "knowingly and intelligently waived his right to counsel" is reviewed for abuse of discretion. *State v. DuBois*, 189 N.J. 454, 475, 916 A.2d 450 (2007). That is because a trial court is "in the best position to evaluate defendant's understanding of what it meant to represent himself and whether defendant's decision to proceed pro se was knowing and intelligent." *Ibid.*

"[A] defendant has a constitutionally protected right to represent himself in a criminal trial." *Faretta v. California*, 422 U.S. 806, 816, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Nonetheless, because a waiver of the right to counsel constitutes a relinquishment of "many of the traditional benefits associated with" that right, it must be made "knowingly and intelligently." *Id.* at 835. When a criminal defendant requests to proceed pro se, the

judge must "engage in a searching inquiry" to determine whether the defendant understands the implications of the waiver. *State v. Crisafi*, 128 N.J. 499, 510, 608 A.2d 317 (1992).

Our Supreme Court in *Crisafi*, and later in *State v. Reddish*, 181 N.J. 553, 859 A.2d 1173 (2004), provided trial courts with a framework to determine if a defendant has knowingly and voluntarily waived his right to counsel in favor of proceeding pro se. "Taken together," *Crisafi* and *Reddish* require

> the trial court to inform a defendant asserting a right to self-representation of (1) the nature of the charges, statutory defenses, and possible range of punishment; (2) the technical problems associated with self-representation and the risks if the defense is unsuccessful; (3) the necessity that defendant comply with the rules of criminal procedure and the rules of evidence; (4) the fact that the lack of knowledge of the law may impair defendant's ability to defend himself or herself; (5) the impact that the dual role of counsel and defendant may have; (6) the reality that it would be unwise not to accept the assistance of counsel; (7) the need for an open-ended discussion so that the defendant may express an understanding in his or her own words; (8) the fact that, if defendant proceeds pro se, he or she will be unable to assert an ineffective assistance of counsel claim; and (9) the ramifications that self-representation

> will have on the right to remain silent and the privilege against self-incrimination.
>
> [*DuBois*, 189 N.J. at 468-69.]

This approach was recently reaffirmed by the Court in *State v. Outland*, 245 N.J. 494, 506, 246 A.3d 1245 (2021).

In his merits brief, without the benefit of the *Faretta* hearing transcript, defendant contends the *Faretta* judge's inquiries set forth in his preliminary hearings were inadequate. In his reply brief, after receiving the transcript of the comprehensive *Faretta* hearing, defendant limits his contentions to the *Faretta* judge's failure to: (1) advise defendant "that testifying on [his] own behalf w[ould] be difficult if acting pro se"; and (2) sufficiently probe defendant "to ensure that he . . . [w]as capable of understanding the legal complexities involved in this [bifurcated trial]." Without citation to any authority, defendant further contends the trial court failed to reexamine defendant as to his self - representation decision. The record belies defendant's claims.

During the third status conference before the *Faretta* judge, the judge thoroughly examined defendant pursuant to the *Crisafi/Reddish* requirements. In sum, the judge probed defendant about the voluntariness of his decision and the perils of self-representation; thoroughly reviewed each charge of the indictment and defendant's sentencing exposure; and reviewed the trial process and the difficulties a non-lawyer encounters in following the court rules and legal concepts.

*Appendix D*

At the conclusion of the *Faretta* hearing on October 23, 2017, the judge issued a cogent oral decision stating his factual and leg al findings. Given our discretionary standard of review, *DuBois*, 189 N.J. at 475, we discern no basis to disturb his decision. We simply add that the judge was not required under the *Crisafi/Reddish* factors to expressly inform defendant about the difficulties of "testifying" pro se. Instead, the judge complied with factor nine by explaining the "risk of self-incrimination by the very nature of questions that [he would] pose to witnesses."

Affirmed in part; remanded in part. We do not retain jurisdiction.

## APPENDIX E — ORDER OF THE SUPERIOR COURT OF NEW JERSEY, BERGEN COUNTY, FILED APRIL 19, 2018

SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY
LAW DIVISION: CRIMINAL PART

Case No. A-005918-17
Indictment No. 14-02-00228-I

STATE OF NEW JERSEY,

*Plaintiff,*

v.

KONSTADIN BITZAS,

*Defendant.*

Filed April 19, 2018

### ORDER

**THIS MATTER** having been opened to the Court by way of notice of motion to suppress by the Defendant, Konstadin Bitzas, and the Court having conducted a hearing on April 19th, 2018 and Milagros Camacho, Esquire, appearing on behalf of the Defendant, and Assistant Prosecutor, Vered Adoni, appearing, and the Court, having heard the arguments of counsel, and for the reasons set forth on the record; and for good cause shown;

*Appendix E*

**IT IS** on this **19th** day of **April, 2018**,

**ORDERED** that the Defendant's motion to suppress is hereby DENIED.

/s/ Frances A. McGrogan
HONORABLE FRANCES A. MCGROGAN J.S.C.

## APPENDIX F — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, FILED JULY 10, 2017

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-1653-14T1

STATE OF NEW JERSEY,

*Plaintiff-Respondent,*

v.

KONSTADIN BITZAS, a/k/a CONSTANTINE BITZAS, CHRISTOS BITZAS, AND DEAN BITZAS,

*Defendant-Appellant.*

Decided July 10, 2017—Argued September 28, 2016

Before Judges Fuentes, Simonelli and Gooden Brown

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 14-02-0228

The opinion of the court was delivered by

FUENTES, P.J.A.D.

A Bergen County grand jury returned an indictment against defendant Konstadin Bitzas, a/k/a Dean Bitzas,

charging him with second degree possession of a firearm for an unlawful purpose, *N.J.S.A.* 2C:39-4(a) (count one); third degree terroristic threats, *N.J.S.A.* 2C:12-3(b) (count two); fourth degree aggravated assault by pointing a firearm at or in the direction of another, *N.J.S.A.* 2C:12-1(b)(4) (count three); fourth degree possession of a handgun following a conviction for possessing a controlled dangerous substance, *N.J.S.A.* 2C:39-7(a) (counts four through eight); second degree possession of an assault firearm, *N.J.S.A.* 2C:39-5(f) (count nine); and fourth degree possession of a large capacity magazine, *N.J.S.A.* 2C:39-3(j) (counts ten and eleven).

Before the trial began, the judge severed counts four through eight to allow the jury to decide the remaining counts without being influenced by defendant's prior drug-related convictions.[1] The State's first witness, P.K.,[2] was a woman who previously had a dating relationship with defendant. She testified about the incident that gave rise to the first three counts of the indictment. P.K. continuously responded to defense counsel's questions in a disruptive manner. She disregarded the prosecutor's instructions, deliberately mentioned extraneous information that was prejudicial to defendant, and walked out of the courtroom during her cross-examination on the first day of trial.

---

1. A bifurcated trial is required to avoid the prejudice that would ensue if the jurors were previously aware that defendant had been convicted of one or more of the predicate offenses listed in *N.J.S.A.* 2C:39-7(a); *see State v. Ragland*, 105 N.J. 189, 193, 519 A.2d 1361 (1986).

2. Although the indictment identifies the complaining witness by her complete name, we use only her initials to protect her privacy.

Although the trial judge issued curative instructions to the jury, P.K.'s obstreperous behavior eventually overwhelmed the proceedings. It soon became clear that the curative instructions could neither counteract the prejudice caused by the witness's misbehavior nor deter her from continuing to disrupt the trial. As a sanction for P.K.'s refusal to adhere to the prosecutor and the court's repeated instructions, the trial judge sua sponte dismissed the first three counts of the indictment[3] "with prejudice." The judge did not consult with the attorneys before taking such an extraordinary action. More importantly, the judge did not identify any legal authority that permits a judge in a criminal trial to unilaterally dismiss a criminal charge "with prejudice" as a sanction for the misconduct of the State's fact witness, or to enter the functional equivalent of a judgment of acquittal before the State has completed presenting its case in chief.

The judge overruled the State's objection challenging her authority to take this action and denied the State's motion to declare a mistrial. Defense counsel acquiesced to the trial judge's decisions without comment. The State's case then continued with the indictment's remaining counts, which were part of the first phase of a bifurcated trial. The State called a law enforcement witness who testified about the execution of a search warrant on defendant's residence, the seizure of defendant's firearms, and the operability of defendant's weapons.

---

3. The three counts the judge dismissed charged defendant with second degree possession of a firearm for an unlawful purpose, *N.J.S.A.* 2C:39-4(a); third degree terroristic threats, *N.J.S.A.* 2C:12-3(b); and fourth degree aggravated assault, *N.J.S.A.* 2C:12-1(b)(4).

*Appendix F*

The jury found defendant guilty on the three counts of the indictment that charged him with second degree possession of an assault firearm, *N.J.S.A.* 2C:39-5(f); and fourth degree possession of a large capacity magazine, *N.J.S.A.* 2C:39-3(j). The same jury later reconvened in the second phase of the bifurcated trial and convicted defendant on five counts of fourth degree possession of a handgun following a conviction for possessing a controlled dangerous substance, *N.J.S.A.* 2C:39-7(a). The trial court sentenced defendant to an aggregate term of thirteen years, with eight years of parole ineligibility.

In this appeal, both sides have framed their arguments in a manner that repudiates the positions they advanced before the trial court. Defendant now argues the trial judge abused her discretion in allowing the jury to render a verdict on the remaining counts in the indictment after she dismissed with prejudice the first three counts that involved P.K. as the complaining witness. Defendant claims the judge should have interviewed each juror individually to determine whether any of them had a negative impression of defendant based on P.K.'s extensive testimony portraying him as a "bad person in general." Defendant also argues the judge's curative instructions were insufficient to counteract the prejudice caused by P.K.'s testimony.

The State similarly abandons the position it adopted before the trial court. In a letter in lieu of a formal brief submitted pursuant to *Rule* 2:6-2(b), the State now argues the trial judge did not abuse her discretion in denying its motion for a mistrial because defendant was not prejudiced "and the jury was given a sufficient curative instruction."

Despite the sophistry of the parties' positions, our duty as appellate jurists is to determine whether the magnitude of the trial judge's error is clearly capable of producing an unjust result. *R.* 2:10-2. We are satisfied the trial judge's decision cannot stand as a matter of law. The testimony of the State's complaining witness is replete with extraneous, highly prejudicial comments about defendant's propensity for violence and alleged use of illicit drugs. After carefully reviewing the record, we are satisfied the trial judge's initial response to the witness's improper commentary was insufficient to counteract its prejudicial effect.

The trial judge has the ultimate responsibility to manage a trial. When presiding, the judge must impress upon all of the trial's participants that they are expected to behave in a manner that promotes decorum and solemnity. Although a trial is an inherently adversarial proceeding, the attorneys' zeal is circumscribed by the Rules of Professional Conduct and their role as officers of the court. Witnesses, especially those who have been victims of a crime, are understandably emotionally invested in the outcome of the proceedings. It is therefore particularly important for judges to: (1) set clear guidelines on how witnesses should respond to a lawyer's questions; and (2) establish and enforce the boundaries of appropriate behavior. Here, the trial judge erred when she delegated these responsibilities to the prosecutor.

We also hold the trial judge erred when she denied the State's motion to declare a mistrial after it became

apparent that the witness's misconduct had irreparably tainted defendant's right to a fair trial. The judge's decision to dismiss the indictment's first three counts was ineffective in counteracting the prejudice caused by the witness's misconduct. More importantly, a Superior Court judge presiding in a criminal trial has no authority to sua sponte dismiss a count in an indictment as a sanction for a lay witness's misconduct before the State has completed presenting its case in chief.

## I

## THE FIRST DAY OF TRIAL

On the first day of trial, the State called P.K. as its first witness. She testified she had "a dating relationship" with defendant that began in August 2012 and ended in a violent confrontation on August 31, 2013. During this period, P.K. saw defendant "on and off" and slept at his house occasionally. In response to the prosecutor's questions, P.K. claimed defendant bragged to his friends about having firearms in the house. She testified defendant even pulled a machine gun out of his mattress and said, "'Look what I got.'"

According to P.K., the event that gave rise to the first three counts of the indictment occurred on August 31, 2013. She arrived at defendant's house at approximately 10 p.m. P.K. testified the following occurred that night:

> PROSECUTOR: [T]ell us what happened when you got to the defendant's house that night[.]

> WITNESS: When I got to his house[,] he let me in through the back, I believe, and he had something—*he let out a big puff of smoke* and I got into an argument with him. He grabbed my arm. He started hitting me so I tried to call the police. He pulled my phone out. He broke my phone in half, threw it against the dishes, started beating me up, then went into his drawer, the same drawer that he pulled out the gun from last time. I saw him turning to me—
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: What's your objection?
>
> DEFENSE COUNSEL: She's talking about something that happened last time.
>
> WITNESS: *No, I am not, sir.*
>
> DEFENSE COUNSEL: Judge, we went over this numerous times.
>
> THE COURT: The objection is overruled but the way I understood the testimony was about August 31, 2013, correct?
>
> PROSECUTOR: Yes.
>
> [(Emphasis added).]

Although the judge overruled defense counsel's objection, the first language we highlighted exemplifies

the conduct that later permeated P.K.'s testimony during cross-examination. Although seemingly innocuous, her comment that defendant "let out a big puff of smoke" is actually incendiary. As the trial judge later explained, P.K.'s references to "smoke" were accompanied by a "snorting" pantomime on the witness stand. Taken together, the judge concluded that P.K. wanted the jury to view defendant as a user of illicit drugs.

The second highlighted portion reveals P.K.'s disruptive tendencies while on the witness stand. As the record shows, P.K. impulsively inserted herself into the colloquy between the judge and defense counsel and personally refuted defense counsel's objection by addressing him directly. These two elements of P.K.'s temperament became the hallmark of her obstreperous demeanor, which escalated out of control during defense counsel's cross-examination.

When the prosecutor resumed her direct examination, she asked P.K. to continue describing what occurred on the night of August 31, 2013. According to P.K., although defendant had broken her cellphone, she was able to call the police using the home's landline telephone. P.K. testified that when defendant discovered she had called the police, he said: "I will fucking kill you. I swear to God I will fucking kill you. I swear I will kill you for this if you say anything." P.K. testified that when the police arrived, she was "scared" and "didn't say one word." When asked why she was scared, P.K. responded: "I was scared because of the guns, because he beat me[,] and [because] he told me that he's going to kill me."

After the police officers arrived, P.K. was transported to a nearby hospital for a head injury that caused lumps. She had visible bruises and abrasions "all over her body." The prosecutor showed P.K. a series of photographs taken the following day, September 1, 2013, which purportedly depicted the injuries she sustained to various parts of her body. P.K. also identified two photographs that she claimed depicted her cellphone, which defendant allegedly "broke . . . in half." A third photograph depicted the wall-mounted landline telephone she used to call the police. The last photograph depicted what P.K described as the "machine gun under [defendant's] bed."[4] Except for the excerpt highlighted above, P.K. completed her testimony on direct examination without incident.

P.K.'s disruptive behavior reached a critical point during defense counsel's cross-examination. The first incident occurred when defense counsel questioned P.K. about her trip to Greece to visit defendant's parents in 2012. The following exchange illustrates the problem:

> DEFENSE COUNSEL: How long were you in Greece[?]
>
> . . . .
>
> A. Two weeks. Unbearable weeks. Unbearable. Isolation. One hundred ten degrees. No one, no one else there. Wouldn't talk to me. Spent the

4. Although these photographs were admitted into evidence and published to the jury, they are not part of the appellate record.

whole time ignoring me. It was lovely traveling with him.

DEFENSE COUNSEL: Lovely traveling? When you came back you decided the trip was over?

A. Then he got back with his girlfriend he was with for the whole time I was with him. Her name was [N.M.]. *They smoked crack together. That's why he had a problem with our relationship.*

DEFENSE COUNSEL: Judge—

THE COURT: I have to talk to the attorneys.

(Sidebar with reporter)

THE COURT: [Prosecutor], did you not inform your victim she can't talk about any prior bad acts of the defendant?

PROSECUTOR: I did. He's asking the questions.

THE COURT: You're going to have to talk to her. She should know this. This is like I have to give a limiting instruction.

PROSECUTOR: All right. Perhaps . . . we can break and I can reinforce that. It's 12:30 [p.m.] I can reinforce that.

*Appendix F*

THE COURT: I want to continue with the case.

DEFENSE COUNSEL: I have to see my son before he goes away for [thirty] days. I don't mind skipping lunch.

THE COURT: We'll continue. I'll give a limiting instruction.

(Sidebar concluded)

[What occurs next is in the presence of the jury.]

THE COURT: [P.K.], can you step outside for a moment[?]

Prosecutor, if you could step outside with her. I just want to give the limiting instruction, [Prosecutor]. Could you step outside with her[?] . . . I want to give the instructions to the jurors. We'll call her back in when we're ready.

PROSECUTOR: All right.

. . . .

THE COURT: [Addressing the jury]

You heard testimony with regards to some other prior bad activity involving the defendant. I believe the statement . . . was he was using crack

> cocaine with some other individual by the name of [N.M.]. There's absolutely no evidence of that at all. You're to disregard that completely as though you never heard it. . . . [Y]ou are not at any point in time to inject that in any way into your deliberations. It's as though it never happened. You are to completely disregard it because there's absolutely no evidence of that whatsoever.

At this point, the record shows P.K. returned to the courtroom, took the witness stand, and resumed with her testimony on cross-examination. Soon thereafter, P.K. testified that she slept at defendant's house after she returned from Greece "because he wouldn't let me leave and go home." Defense counsel stated: "I've known Mr. Bitzas . . . twenty-eight years." Defense counsel's statement prompted an immediate objection from the prosecutor. After sustaining the objection, the judge made the following comments in the jury's presence, which resulted in the following exchange:

> THE COURT: Absolutely. [Defense counsel], you're either going to be the attorney or you're going to be the witness. Which is it going to be? Tell me right now before we continue with this trial. You know what the court rules are. You cannot testify on behalf of anyone.
>
> DEFENSE COUNSEL: I'm trying to get the truth. I'm getting less than the truth.

*Appendix F*

THE COURT: [Defense counsel], I'll see you at sidebar.

[The following colloquy occurred at sidebar.]

THE COURT: What is the circus that's going on in this courtroom? You know that you are not supposed to talk about your personal feelings about the defendant, about whether or not you like him, whether or not he's your good friend for twenty-eight years. If I hear any more about a personal relationship that you have with the defendant you're going to get sanctioned and I'm going to have to declare a mistrial.

. . . .

DEFENSE COUNSEL: I didn't do it on purpose.

THE COURT: The same thing with the Prosecutor. When you have a domestic violence case[,] the first thing that you have to do is . . . tell the witnesses you can't talk to them about all the bad things that ever happened with regards to crimes. That's another egregious violation.

PROSECUTOR: I have instructed.

THE COURT: This is like a circus in this courtroom.

PROSECUTOR: I have instructed her. She even—when we got to the courtroom she said, "But it happened."

I said to her, "It doesn't matter. You're not allowed to talk about [that]." She said, "Okay, okay." I've instructed her.

THE COURT: *If she does it again the case is over. It's going to be a dismissal with prejudice if she does it again. Now she's been warned.*

PROSECUTOR: I cautioned her.

THE COURT: Like a circus on both sides.

(Sidebar conference concluded.)

[(Emphasis added).]

Defense counsel resumed his cross-examination by asking P.K. to describe the events that preceded the confrontation in defendant's residence on August 31, 2013. According to P.K., she first met defendant that night at a joint restaurant and bar. She told defendant she was hungry and wanted to eat before consuming any alcoholic beverages. P.K. testified that defendant had finished eating by the time she arrived and ignored her many requests to get something to eat. She nevertheless consumed several alcoholic drinks and soon noticed she

was "not sober." Although she asked defendant to drive her home or tow her car,[5] he left the club without helping her.

P.K. eventually drove to defendant's residence. Defense counsel asked P.K. what happened when she arrived. P.K. responded as follows:

> I walked in and he was holding some glass thing in his hand. He lets out a big puff of smoke. His eyes got like this. He started drooling. And I said this is where you went? This is why I got stuck there? This why? [sic] This is all why?
>
> I held the phone up. He went like this. He started grabbing me, hitting me. Cracked my phone. I said stop hitting me. Enough. Enough. Every time. No. I'm not putting up with it anymore.
>
> And this time he knocked me down. I tried—He took my phone out of my hand, cracked it in half, threw it against the dishes. The garbage is right next to the dishes.

We pause to note that defense counsel did not object to P.K.'s clear references to defendant's illicit drug use; nor did the trial judge take any measures to dissuade the witness from continuing to disregard the boundaries of acceptable testimony.

---

5. P.K. testified defendant owned and operated a towing service company.

*Appendix F*

Counsel's use of open-ended questions on cross-examination also allowed P.K. to frame her responses in an erratic fashion, aimlessly wandering without direction. This approach permitted P.K. to continue to respond in a manner that exacerbated the "circus" atmosphere the judge sought to avoid. The following exchange illustrates the point:

> DEFENSE COUNSEL: July 18, 2012. You're still dating Mr. Bitzas?
>
> A. I don't know when that was. Can you give me some context[ ] clues?
>
> DEFENSE COUNSEL: Couple [of] days after you started to date him. A couple [of] days after you started to date him [when] you said he wasn't normal and he had a black eye[;] two days later you're still dating him?
>
> A. Yeah. That seemed like the day that he brought all the people over when he showed the machine gun, yes.
>
> DEFENSE COUNSEL: Judge, this is ridiculous.
>
> A. *Actually you're right.*
>
> DEFENSE COUNSEL: It's improper testimony.

> THE COURT: The objection is overruled. She answered your question. You wanted to know what happened two days later. She says that's the time—
>
> DEFENSE COUNSEL: I asked specifically were you dating two days later.
>
> THE COURT: She answered that question. Move on to your next question.
>
> [(Emphasis added).]

Once again, the record shows P.K. addressing defense counsel directly as counsel interacts with the trial judge on a point of procedure. This combative interaction between defense counsel and P.K. continued unabated. Throughout her cross-examination, P.K. continued to mention defendant's alleged "crack" use with a woman she identified as defendant's girlfriend. At one point, P.K. even attempted to interact with a person seated in the section of the courtroom reserved for the public.

> THE WITNESS: She could have called the police. And he said he's in Pennsylvania. He lied. He was in a hotel room with [N.M.] smoking crack in Fort Lee with my keys. I wanted to know where they were. That's the only time I saw her. I couldn't ask her for a tampon. I asked her for keys to get in my house. She wouldn't give me—

> THE COURT: You have to wait until the next question. What's your next question[?]
>
> DEFENSE COUNSEL: Why does she have a key to your apartment?
>
> THE WITNESS: Who?
>
> DEFENSE COUNSEL: You said you had to wait for her, pointing to someone in the audience.

P.K. did not identify who she pointed to, but that person was seated somewhere in the public section of the courtroom. From this point forward, P.K.'s combative conduct against defense counsel quickly degenerated into outright refusal to answer his questions.

> DEFENSE COUNSEL: Where does your other family live?
>
> A. I'm not telling you anything about my family. I don't want him to know anything about my family. He's a dangerous person. No way. No way.
>
> DEFENSE COUNSEL: [Judge,] [a]sk her to control these outbursts.
>
> A. I'm not revealing any information about my family to this criminal with guns.

DEFENSE COUNSEL: Judge, this is completely improper.

A. That's completely improper your question [sic].

THE COURT: [P.K.], you have to calm down. You have to wait for the question and respond to the question. Any other information [sic] respond to the question.

All right, [defense counsel].

DEFENSE COUNSEL: How far was your family's house?

A. None of your business, sir. I'm not letting you know where my family is so he can kill them with his guns. No, no. Sorry. He's already threatened my life. He's already done things to them. No way. You can ask me that after he threatened to kill me? Are you serious?

DEFENSE COUNSEL: You want to talk at sidebar?

THE COURT: No. Answer the question. How long does it take you to go from one location to your family's house? Don't give an address.

A. My location to my family's house?

THE COURT: Yes. How many minutes?

A. Which family member are you talking about?

THE COURT: The one that you said you went to when you could not get into your house and you didn't want to pay for a locksmith overtime.

A. I don't know. I can't answer that. I don't know where I got the key that night. I don't remember what happened. That's none of anybody's business.

. . . .

DEFENSE COUNSEL: Who is there [at your family's house]?

A. Somebody in my family. None of your business, sir. None of your business, sir. Please don't ask me any question[s] about my family. I don't want him having anything to do with my family. This is my mistake that I went out with this piece of garbage and I don't think that they should suffer or be involved in any way.

Following several failed attempts to get P.K. to respond, the trial judge directed defense counsel to "[a]sk another question on another topic." When counsel asked P.K. if her family lives in Fort Lee, P.K. responded: "None of your business. Let me go. I need to take a break, please." At this point, the transcript merely states: "Witness leaves

courtroom." Although it was not yet near the end of the court-day, the trial judge advised the jurors that the trial would not resume because one of the attorneys "has something I excused him for. They're going to attend to that other case." The trial resumed the following day.

## II

## THE SECOND DAY OF TRIAL

The second day of P.K.'s testimony began with the prosecutor assuming a more aggressive, proactive role in objecting to questions that she thought were designed to revisit areas covered on the previous day. However, the record shows defense counsel's questions sought only to obtain responsive answers to the questions P.K. previously refused to answer. The trial judge was sympathetic to the State's approach. After sustaining the prosecutor's objections, the judge addressed defense counsel directly as follows:

> THE COURT: Move on to another topic. Whatever topic it may be but it has to be a different topic. I think yesterday you explored it at length. She's explained it again today that she got a spare key. She then . . . got into her apartment that night. I think that's been now settled, that whole entire issue.
>
> WITNESS: Thank you, your Honor.

The cross-examination proceeded relatively uneventfully from this point forward. Defense counsel

established that P.K. agreed to travel to Greece with defendant after having known him for approximately one month. Although she had kind words for defendant's parents, who resided in Greece at the time, P.K. described the trip as extremely unpleasant. Defense counsel also questioned P.K. about the nature of her and defendant's activities as a couple. The next point of contention occurred when defense counsel sought to explore P.K.'s testimony concerning her seeing defendant in Florida.

> DEFENSE COUNSEL: You testified you met him in Florida?
>
> A. I was in Florida and he was following me around over there.
>
> DEFENSE COUNSEL: He was following you in Florida?
>
> A. Yes, he was.
>
> DEFENSE COUNSEL: Who were you with in Florida?
>
> A. I don't know. He said he was in a hotel room [or] something. But they tried to separate us. His friend and the friend's sister separated us so that he couldn't come near me because they said he was bad news and he just got out of jail. That's exactly what happened.
>
> DEFENSE COUNSEL: Judge, this is completely improper testimony.

A. That was exactly what happened. That's why.

THE COURT: There's an objection.

Jurors, I'm going to instruct you again this trial is specifically about an incident that happened in August of 2013.

[Defense counsel], you're asking her questions about something when she was eighteen, nineteen years old. You're opening the door. You're stepping right into it.

I'm going to inform the jurors that last bit of testimony you just heard, that she believed that she heard something with regards to him being in jail, that that be completely stricken from the record. You're not to consider that in any way. It's hearsay.

Remember what I explained to you about hearsay. What other people say most of the time is inaccurate. Like playing telephone. By the time it gets to another person it's an out-of-court statement. It's completely not relevant, is not credible testimony in any way. It's as though it never was said in court.

[Defense counsel], I'm going to remind you again you should probably continue with your cross examination as it relates to this case[,] but you're opening the door to all these other things that are not relevant.

*Appendix F*

Immediately following the judge's rebuke of the manner in which he questioned P.K., defense counsel asked P.K.: "Did you hook up with him when you were in Florida?" This prompted an immediate objection from the prosecutor. The judge sustained the objection and again criticized defense counsel in the presence of the jury. The judge admonished that "what somebody did when they were eighteen[,] if it's even true[,]" is not relevant to the case. Defense counsel responded by acknowledging he was not aware the Florida trip occurred when P.K. was eighteen years old.

From this point forward, the matter proceeded in the same disorderly fashion. The judge continued to disparage and criticize defense counsel in the jury's presence; P.K. continued to defy the decorum expected from a witness in a criminal trial by answering defense counsel's questions with nonresponsive, extraneous matters intended to cast defendant as a dangerous and violent man who used illicit drugs on a regular basis. For example, when defense counsel asked P.K. if defendant ever met her parents, she responded: "No way. My family would never want to meet him. Never. They would never let him near me or their house. No way. No way." When defense counsel followed up to clarify, P.K. admitted that defendant had met her mother, but not her "mother and father." When defense counsel remarked "[V]ery clever," P.K. made the following unsolicited statement:

> THE WITNESS: Can you not mention my handicapped mother? I don't want him near her. He entered her house. It's a very sensitive

> area. If he comes near her—she was getting crank calls from him. I don't want to stray off the subject. However, I don't want him involved in her life.

In reacting to this event, the trial judge failed to correct the witness's improper, unsolicited comments, but again reprimanded defense counsel in the jury's presence.

> THE COURT: You asked the question. I keep on telling you. You keep on going on all these other topics and then you don't like the answer.
>
> DEFENSE COUNSEL: Actually the answers are not responsive.
>
> THE COURT: They're responsive. You're asking if he met the mother and father.
>
> DEFENSE COUNSEL: I had no idea the mother had a handicap. This is the first I'm hearing of it.
>
> PROSECUTOR: Your Honor, again we're going to get some testimony from counsel . . . as to what he knew and what he didn't know.
>
> DEFENSE COUNSEL: I didn't know any of this.
>
> THE WITNESS: She had a stroke. She's in a wheelchair. Please leave her alone. She doesn't

need his trauma that we had from him or enough [sic]. I don't want to bring her up. Would you mind please? Out of respect please. And understanding about the experiences that I've been through, please understand. Keep that in mind. That's all I'm asking.

DEFENSE COUNSEL: All I wanted to know is . . . did he ever meet your mother. That was a yes or no question.

A. He followed me to my house one day. He entered her house. I was having a private conversation with her. He said, "I locked your keys in your house [P.K.]." He entered her house, opened it without—

DEFENSE COUNSEL: Yes or no.

A. Yes, he opened it and trespassed without anybody inviting him.

DEFENSE COUNSEL: There's no control here.

THE COURT: Wait until he asks the question and answer the question.

Go ahead. Ask your next question.

THE WITNESS: Next question please.

> DEFENSE COUNSEL: Is it fair to say your mother is a neighbor?
>
> A. Listen, can you please get off my mother please. I'm begging you. I really am in fear for my life and her life because of him. Please. You're asking me where she lives now?
>
> DEFENSE COUNSEL: I ask for an instruction about this.
>
> PROSECUTOR: Objection again for these editorial comments by counsel, your Honor. It's not appropriate for this trial.

This chaotic scene continued in the jury's presence, while the judge and counsel discussed their respective recollections of what P.K. had said about her family during her testimony on the previous day. Finally, the judge again admonished defense counsel to remain focused on the event identified in the indictment.

> THE COURT: [Defense counsel], I'm going to direct you to ask questions about the incident. [The] August 31, [2013] incident. I've given you more than enough leeway to explore all different topics on cross-examination[,] but we [have to] concentrate on this indictment.
>
> DEFENSE COUNSEL: Excellent.

> THE COURT: Make sure that you discuss it with your client[,] but every question from now on better be with regards to that indictment.
>
> DEFENSE COUNSEL: Judge, Mr. Bitzas needs to use the bathroom.
>
> THE COURT: He can wait. He's a big boy.[6]
>
> DEFENSE COUNSEL: He has diabetes.
>
> THE COURT: Have a seat. Go ahead.

Defense counsel resumed the contentious cross-examination, trying to remain focused on the incident that occurred on August 31, 2013. P.K. remained combative and undeterred. She claimed defendant consistently lied to her about the nature of their relationship and continued his involvement with N.M. while dating her. When defense counsel characterized her relationship with defendant as akin to "living in a fictitious world," P.K. responded: "Everything I'm finding is like illegal, messages, drugs, everything." Defense counsel did not object.

The matter finally reached a critical point of no return when defense counsel questioned P.K. about what occurred

---

6. We have included this remark by the trial judge because it displays insensitivity and a lack of judicial decorum. Although levity is not always inappropriate in a courtroom, this remark is facially offensive because it gratuitously demeans defendant based on his gender, shows insensitivity to a basic human need, and ignores a potentially serious health issue.

in defendant's house on August 31, 2013. When defense counsel asked P.K. if defendant was "attentive" to her, she responded: "He was attentive to his drugs." This prompted defense counsel to turn to the trial judge and say: "This is ridiculous." At the prosecutor's request, the parties approached the judge at sidebar to discuss the matter. Once outside the jury's presence, the prosecutor stated for the first time that defendant was also facing a disorderly persons charge for possessing drug paraphernalia; this charge was being tried simultaneously by the trial judge as a municipal court. The prosecutor argued the judge could use P.K.'s testimony to support the factual findings the court would need to make with regard to this charge.

The judge rejected the prosecutor's argument as an improper attempt to justify P.K.'s repeated references to defendant's illicit drug use. The judge noted that evidence of drug paraphernalia should be presented through the testimony of police witnesses. The prosecutor ultimately agreed and abandoned this argument. The judge then returned to P.K.'s repeated violations of the strict limits she was required to follow with respect to her testimony. The prosecutor assured the judge that she had instructed P.K. accordingly. The judge excused the jurors to address the problems associated with P.K.'s testimony and to address P.K. directly:

> THE COURT: There's been an objection from the defense about the fact the victim, [P.K.], once again has talked about the defendant using drugs[.]
>
> . . . .

*Appendix F*

I gave [the prosecutor] significant time to go outside. She assured me she had spoken to [P.K.], that she understands now. It was inadvertent. She actually had advised you during the preparation for the trial that you could not discuss the drug activity. And then she reminded you of it again because we had a violation in court. And that is just not allowed pursuant to the rules of evidence. Although it happened, although you may have observed it[,] the rules of evidence do not allow for you to talk about drug activity in a case such as this because he's not charged with possession of cocaine or possession of any drug for that matter.

[The prosecutor] explained to me, assured me that she had spoken to you, [P.K.], and that it would not happen again.

Yesterday we finished the trial early because [P.K.] . . . requested a break and I allowed her to take that break so she could compose herself. She appear[ed] to be very upset. I thought it best rather than continue for another hour until 2:30 [p.m.] we would go for the day.

*Today there has been eight violations of that court order.*

*I have her, I counted them, eight times the victim today has mentioned either smoke, she's*

*been snorting on the witness stand, mimicking what the defendant was doing which in no uncertain terms is snorting cocaine or something with a glass pipe. She did it at least three or four times.*

There [were] an additional three . . . mention[s] of drug activity even before the August 31, 2013 incident and then the last one was the one we just heard where she said oh, he's more concerned about his drugs. That's what he was concerned about.

There's too many violations. I tried to cure the problem with the jurors by giving them an instruction to disregard it[,] but I cannot do it anymore with eight violations.

I'm going to dismiss this half of the trial. *This part of the trial is dismissed with prejudice.*

. . . .

It's only with regards to the counts involving [P.K.].

. . . .

That would be count one, [second degree] possession of [a] weapon for [an] unlawful purpose. It would be count two, which is the . . . [third degree] terroristic threats. And it would

> be count three, which is [fourth degree] pointing of a firearm. The other counts, however, are going to remain because those other counts have nothing to do with [P.K.].
>
> [(Emphasis added).]

At first, the prosecutor objected to the judge's sua sponte decision, arguing the curative instructions were sufficient to counteract any prejudice. The State also took the position that there was "nothing improper" about the witness's comments that she saw defendant blowing "a puff of smoke." The prosecutor maintained the statement was ambiguous and permitted the jury to infer defendant was smoking a cigarette. Finally, the prosecutor again argued this evidence was relevant to the disorderly persons offense, which the judge would need to decide as the trier of fact.

The judge rejected these arguments and clarified that when P.K. testified about seeing defendant blow a puff of smoke, she "used her hands to explain it to the jurors" and "started snorting." The judge specifically found that from the "way [P.K.] presented her hands, it's clear as though someone was using some type of glass thing." The judge ruled P.K.'s testimony in this regard was improper for the same reasons "you can't bring out the previous conviction." The judge also emphasized that these were not isolated mishaps by a nervous witness. "She's clearly let[ting] the jurors know about the fact that the drug activity is not just a one[-]time incident." Based on this record, the judge found that giving the jury further curative instructions

would be futile. In the judge's own words, "It's now too prejudicial."

The judge then addressed P.K. directly as follows:

> I wanted [P.K.] to be here to hear it. I didn't want someone else explaining it to her. I wanted you to hear from me . . . the reasons the case is being dismissed.
>
> Perhaps you're very upset and for that reason you weren't able to follow the instructions of the [c]ourt but I tried. Eight times I let it go. I can't let it go after eight times. I wanted you to hear it from me. You're excused.

The judge advised defense counsel to inquire as to whether defendant was willing to consider reopening plea negotiations based on the court's decision to dismiss the first three counts of the indictment with prejudice. The prosecutor made clear that the State was not willing to modify its previous plea offer based on these events. At this point, the court recessed for lunch. At the start of the afternoon session, but outside the jury's presence, the prosecutor addressed the trial judge as follows:

> PROSECUTOR: Your Honor, I did go and meet with members of my office.
>
> I just would like to state that the State is not sure and not in agreement that the [c]ourt has

the authority to dismiss those counts before the end of the State's case.

. . . .

THE COURT: *It has nothing to do with the end of the State's case. It's a mistrial and dismissal with prejudice for failure to follow the court order.*

PROSECUTOR: I understand.

THE COURT: It has nothing to do with the strengths of the [State's] proofs[,] which is a different standard.

PROSECUTOR: I understand. However, and I'm accepting your Honor's decision, but . . . the reasons for the dismissal with prejudice were because of . . . undue prejudice to this jury.

. . . .

However, proceeding with this jury in light of your Honor's decision is not the proper remedy. And the reason for that, if I may say, if down the line this defendant is convicted after this trial and raises the conviction on appeal, one of his claims would be that this jury, because of your Honor's decision that there was undue prejudice, he will raise that claim that this jury was prejudiced.

> Now, the State will not have a claim at that point because your Honor has made that decision. *We're asking for a mistrial[;] dismiss this jury and let's start anew, get a trial date with the remaining counts, certain persons and the possession of an assault weapon.*
>
> [(Emphasis added).]

The judge denied the State's motion for a mistrial. The judge ruled that she was going to instruct the jury that the three dismissed counts in the indictment "were dismissed pursuant to a legal ruling" and that they had "nothing to do with the State [or] the defense." Defense counsel did not participate in this matter. When the jury returned to the courtroom to start the afternoon session, the judge apprised the jurors as follows:

> With regards to the indictment, if you recall[,] . . . there were six counts. Because of legal reasons, and the State has not been involved in this and neither has the defense, but I as the Judge for a legal reason have dismissed counts one, two[,] and three.
>
> We're going to proceed with the remainder of the case[,] which is the possession of the assault firearm, which is count nine, and the other two counts, five and six, [which] were possession of the large capacity ammunition magazine. So there's three counts. So when you deliberate you are not to consider any of

> the testimony that you've heard up until now. It will be stricken and you're not to consider it in any way in your deliberations. You can only consider the testimony that is going to start from this point forward because the testimony that's going to begin from this point forward has to do with those counts, the ammunition, [the] large capacity magazine[,] and the assault firearm.
>
> Call your next witness.

The State's next and only witness was Fort Lee Detective Matthew Traiger. During his testimony, Traiger described the firearms seized from defendant's residence pursuant to a search warrant on September 1, 2013. Traiger testified that when he began his shift that day, he was ordered to respond to defendant's residence to relieve an officer who was previously assigned to conduct "surveillance on the home in an unmarked vehicle." Traiger's shift began at 4 p.m. He arrived at defendant's residence to relieve the other officer approximately thirty minutes later.

Although the jurors were instructed to disregard everything they had heard over the past two days, Detective Traiger testified that the purpose of conducting surveillance on defendant's home "was a pending arrest and search warrant for a party in the premises." When asked to identify "the party" in question, Traiger responded: "Dean Bitzas." Traiger then pointed to defendant and identified him as the person he arrested

that day after finding a Norinco SKS assault firearm and two large capacity ammunition magazines in his residence. The State rested at the conclusion of Detective Traiger's testimony.

**III**

Against this record, defendant raises the following arguments on appeal:

> POINT I
>
> IT WAS AN ABUSE OF DISCRETION TO CONTINUE WITH THE SAME JURY AFTER THE DISMISSAL OF THE DOMESTIC VIOLENCE COUNTS DUE TO COMPLAINANT/VICTIM'S REPEATED TESTIMONY ABOUT DEFENDANT'S PRIOR BAD ACTS RESULTING IN PREJUDICE TO THE DEFENDANT AND TAINTING OF THE JURY.
>
> POINT II
>
> THE COURT'S INSTRUCTION TO THE JURY FOLLOWING THE OTHER CRIME EVIDENCE WAS NOT SUFFICIENTLY PROPER AND DID NOT CURE THE PREJUDICIAL EFFECT FROM THE MINDS OF THE JURY.

We begin our analysis by reaffirming that "'[a] trial judge has the ultimate responsibility to control [a] trial[.]'"

*State v. Cusumano*, 369 N.J. Super. 305, 311, 848 A.2d 869 (App. Div.) (quoting *Horn v. Vill. Supermarkets, Inc.*, 260 N.J. Super. 165, 175, 615 A.2d 663 (App. Div. 1992), *certif. denied*, 133 N.J. 435, 627 A.2d 1141 (1993)), *certif. denied*, 181 N.J. 546, 859 A.2d 691 (2004). A trial judge is entrusted with the sound discretion to manage the conduct of a trial in a manner that facilitates the orderly presentation of competent evidence, whether in the form of physical exhibits or witness testimony made under oath, subject to the laws of perjury. The exercise of this authority is circumscribed by the judge's responsibility to act reasonably and within constitutional bounds. *Ryslik v. Krass*, 279 N.J. Super. 293, 297-98, 652 A.2d 767 (App. Div. 1995).

As we have long-recognized,

> The trial judge is the symbol of experience, wisdom and impartiality to the jury and, as such, must take great care that an expression of opinion on the evidence should not be given so as to mislead the jury. *He must not throw his judicial weight on one side or the other.*
>
> [*State v. Zwillman*, 112 N.J. Super. 6, 20-21, 270 A.2d 284 (App. Div. 1970) (emphasis added), *certif. denied*, 57 N.J. 603, 274 A.2d 56 (1971).]

Here, the record shows the judge was not mindful of these admonitions. On a number of occasions, the judge attempted to control P.K.'s obstreperous behavior by reprimanding defense counsel in the jury's presence. The

judge criticized defense counsel for asking questions that "opened the door" for P.K. to testify about areas or topics that the judge viewed as not germane to the August 31, 2013 incident. The judge also permitted P.K. to opine when the prosecutor objected to defense counsel's questions. The record shows these failures were not isolated incidents. The judge frequently did not: (1) address P.K. directly; (2) order her to stop talking when an attorney objected; or (3) instruct her to wait for the judge to rule on the objection before responding.

The judge's failure to exercise control first manifested itself during the afternoon session of the first day of P.K.'s testimony. When defense counsel cross-examined P.K. about a trip to Greece she took shortly after meeting defendant, P.K. gratuitously stated that defendant and another woman, identified here as N.M., "smoked crack together." When defense counsel objected, the judge discussed the matter with the attorneys at sidebar. However, instead of formulating an appropriate response with the input of counsel, the judge asked the prosecutor: "[D]id you not inform your victim she can't talk about any prior bad acts of the defendant?" When the prosecutor responded that she had spoken to P.K. about her testimony, the judge again shifted the burden to the prosecutor to remind the witness. The judge believed she was only responsible for giving a curative instruction to the jury.

The judge directed P.K. and the prosecutor to step outside the courtroom. The judge then instructed the jury to "disregard completely" P.K.'s testimony that defendant "was using crack cocaine with some other individual by

the name of [N.M.]." P.K. and the prosecutor returned to the courtroom. Thereafter, P.K. took the witness stand and defense counsel resumed his cross-examination.

This event exemplifies the judge's misguided approach to courtroom management. Her role as the ultimate authority and presiding judge in the trial required that she directly address P.K. outside of the jury's presence. The judge should have sternly and clearly instructed the witness that she should respond to the questions without deliberately adding information prejudicial to defendant. The judge should have made equally clear that the witness was testifying under the court's direction and control. She was thus expected to answer all questions truthfully, respectfully, and completely. If a witness does not understand a question, she should say so before attempting to respond. This will provide an attorney with the opportunity to rephrase the question, if possible.

We recognize that victims of a crime have a right under our Constitution to be "treated with fairness, compassion and respect by the criminal justice system." *N.J. Const.* art. I, ¶ 22. The Legislature also adopted the Crime Victim's Bill of Rights to ensure, *inter alia*, that a crime victim is "free from intimidation, harassment or abuse by any person[,] including the defendant or any other person acting in support of or on behalf of the defendant, due to the involvement of the victim or witness in the criminal justice process[.]" *N.J.S.A.* 52:4B-36(c).

However, when victims testify in a criminal trial, they are subject to the authority of the judge presiding over

the proceedings and must follow the judge's instructions. If a witness is unwilling or unable to adhere to a trial judge's instructions or the witness's courtroom conduct becomes so obstreperous that it interferes with the orderly administration of the trial, the judge has the authority and responsibility to take reasonable measures to restore order, preserve the decorum and solemnity of the proceedings, and protect the defendant's right to a fair trial.

Here, the record shows P.K. repeatedly introduced extraneous and prejudicial information that was calculated to cast defendant as a dangerous individual. The judge characterized what happened in her courtroom as a "circus." The chaotic spectacle that occurred here arose from the witness's disruptive behavior, the defense attorney's inability to conduct an appropriate cross-examination, and the trial judge's misunderstanding of her role and responsibility to manage a contentious criminal trial.

As former trial judges, we are keenly aware of the challenge of maintaining order in a courtroom when confronted with a contentious witness. To assist our trial colleagues who may encounter similar circumstances, we suggest the following options. When faced with a recalcitrant witness, a judge should address the witness directly, but outside of the jury's presence. The judge should next identify the problem with particularity. Problems include: (1) not allowing the attorney to finish the question; (2) continuing to speak after an objection has been raised; (3) unresponsive answers; (4) providing

extraneous, prejudicial information; and (5) arguing with the attorney asking the questions. Having identified the problem, the judge should clearly and concisely explain to the witness that the conduct disrupts the orderly presentation of the evidence to the jury and clashes with the decorum and solemnity of the proceedings.

If the witness does not respond to this approach, but instead continues to disrupt the proceedings, as P.K. did here, the judge should confer with counsel and seek their input outside of the jury's presence. Before acting, the judge must determine whether the misconduct is willful, based on the judge's observations and interactions with the witness. If the judge finds the witness's misconduct is willful, the judge should state the basis for this finding on the record. Thereafter, the judge can consider if enjoining the witness from continuing to testify is a constitutionally viable alternative by balancing defendant's right to cross-examination and the State's right to present its case. We emphasize that these are just suggestions. The decision to grant a mistrial "'to prevent an obvious failure of justice'" always remains within the sound discretion of the trial judge. *State v. Smith*, 224 N.J. 36, 47, 128 A.3d 1077 (2016) (quoting *State v. Harvey*, 151 N.J. 117, 205, 699 A.2d 596 (1997)), *cert. denied*, 528 U.S. 1085, 120 S. Ct. 811, 145 L. Ed. 2d 683 (2000).

However, the trial court must exercise its discretion to declare a mistrial within the following analytical framework:

> To address a motion for a mistrial, trial courts must consider the unique circumstances of the

> case. *State v. Allah*, 170 N.J. 269, 280, 787 A.2d 887 (2002); *State v. Loyal*, 164 N.J. 418, 435-36, 753 A.2d 1073 (2000). If there is "an appropriate alternative course of action," a mistrial is not a proper exercise of discretion. *Allah, supra*, 170 N.J. at 281, 787 A.2d 887. For example, a curative instruction, a short adjournment or continuance, or some other remedy, may provide a viable alternative to a mistrial, depending on the facts of the case. *See State v. Clark*, 347 N.J. Super. 497, 509, 790 A.2d 945 (App. Div. 2002).
>
> [*Smith, supra*, 224 N.J. at 47, 128 A.3d 1077.]

Applying this standard of review, we conclude the trial judge abused her discretion in failing to declare a mistrial. The record shows a pattern of undeterred transgressions by the State's key fact witness. The trial judge counted eight individual instances in which this witness introduced irrelevant and highly prejudicial information about defendant. These were not isolated events. The witness was also highly combative with defense counsel. The judge failed to address the witness directly about her misconduct. Instead, she reprimanded defense counsel in the jury's presence for failing to ask a proper question. The trial judge's conduct severely prejudiced defendant. As Justice Long noted:

> [I]n presiding over a jury trial, the judge, who holds a powerful symbolic position vis-a-vis jurors, must maintain a mien of impartiality and must refrain from any action that would

> suggest that he favors one side over the other, or has a view regarding the credibility of a party or a witness.
>
> [*State v. O'Brien*, 200 N.J. 520, 523, 984 A.2d 879 (2009).]

Although the parties have repudiated the legal positions they advanced before the trial court, we decline to allow this incongruity to determine the outcome here. The integrity of our criminal justice system and defendant's constitutional right to a fair trial drive our analysis. These principles lead us to one conclusion: What occurred in this trial cannot stand.

We make clear that the issue of double-jeopardy is not addressed by this decision. We nevertheless make the following brief comments. It is well-settled that "jeopardy attaches to a defendant when he [or she] is put on trial in a court of competent jurisdiction upon a valid indictment and a jury is impaneled and sworn to determine the issue of his guilt or innocence of the crime charged." *Allah, supra*, 170 N.J. at 280, 787 A.2d 887. But not every mistrial implicates the double jeopardy clauses of the Fifth Amendment of the United States Constitution, as applied to the states by the Fourteenth Amendment, *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 2062, 23 L. Ed. 2d 707, 716 (1969), or Article I, Paragraph 11 of the New Jersey Constitution.[7]

---

7. Although New Jersey's double-jeopardy clause has been described as "textually narrower in scope," *State v. Dunns*, 266

Here, the trial judge sua sponte dismissed with prejudice the first three counts in the indictment as a sanction against P.K.'s disruptive behavior. The judge did not have the authority to take this action. A judge presiding over a criminal jury trial cannot enter a judgment of acquittal before the State has completed presenting its case and without applying the standards the Supreme Court established in *State v. Reyes*, 50 N.J. 454, 458-59, 236 A.2d 385 (1967); *see also R.* 3:18-1. "Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." *State v. Gallegan*, 117 N.J. 345, 358, 567 A.2d 204 (1989) (quoting *Oregon v. Kennedy*, 456 U.S. 667, 676, 102 S. Ct. 2083, 2089, 72 L. Ed. 2d 416, 425 (1982)).

There is no indication in the record that the judge considered the double-jeopardy implications of her decision. The parties have not briefed whether a decision declaring a mistrial would bar the State from trying defendant on the charges as originally reflected in the indictment. The State also did not seek timely appellate review of the judge's decision to dismiss with prejudice the first three counts in the indictment. We thus express no opinion on this issue.

---

N.J. Super. 349, 362, 629 A.2d 922 (App. Div.), *certif. denied*, 134 N.J. 567, 636 A.2d 524 (1993), "the double-jeopardy protections provided in the State and federal constitutions are essentially coextensive in application." *Ibid.*; *see also State v. Koedatich*, 118 N.J. 513, 518, 572 A.2d 622 (1990).

*Appendix F*

## IV

## CONCLUSION

The jury's verdict finding defendant guilty of second degree possession of an assault firearm, *N.J.S.A.* 2C:39-5(f), and fourth degree possession of a large capacity magazine, *N.J.S.A.* 2C:39-3(j), is vacated. The jury's verdict reached in the second phase of the bifurcated trial, finding defendant guilty of five counts of fourth degree possession of a handgun following a conviction for possessing a controlled dangerous substance, *N.J.S.A.* 2C:39-7(a), is also vacated. The matter is remanded for retrial consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.