SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2824-23-T4
MUNICIPAL APPEAL NO. MA24-002

STATE OF NEW JERSEY
PLAINTIFF – RESPONDENT

V.

TONY T. YUSUFOV
DEFENDANT – APPELLANT – PRO SE

ON APPEAL FROM
SUPERIOR COURT, LAW DIVISION
MONMOUTH COUNTY
HONORABLE MICHAEL A. GUADAGNO, J.A.D
SAT BELOW

FORMAL BRIEF AND APPENDIX

PREPARED BY

TONY T. YUSUFOV (PRO SE)

Date Submitted 7/25/24

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New Jersey Statute 39:4-92.2 - Procedure for motorist approaching certain stationary vehicle.

1. a. The operator of a motor vehicle approaching a stationary authorized emergency vehicle as defined in R.S.39:1-1 that is displaying a flashing, blinking or alternating red or blue light or, any configuration of lights containing one of these colors, shall approach the authorized emergency vehicle with due caution and shall, absent any other direction by a law enforcement officer, proceed as follows:

(1) Make a lane change into a lane not adjacent to the authorized emergency vehicle if possible in the existing safety and traffic conditions; or

(2) If a lane change pursuant to paragraph (1) of subsection a. of this section would be impossible, prohibited by law or unsafe, reduce the speed of the motor vehicle to a reasonable and proper speed for the existing road and traffic conditions, which speed shall be less than the posted speed limit, and be prepared to stop.

New Jersey Statute 39:4-88 - Traffic on marked lanes.

When a roadway has been divided into clearly marked lanes for traffic, drivers of vehicles shall obey the following regulations:

a. A vehicle shall normally be driven in the lane nearest the right-hand edge or curb of the roadway when that lane is available for travel, except when overtaking another vehicle or in preparation for a left turn.

b. A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from that lane until the driver has first ascertained that the movement can be made with safety

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39:4-50.4a Refusal to submit to test; penalties.

> The municipal court shall determine by proof beyond a reasonable doubt whether the arresting officer had probable cause to believe that the person had been driving or was in actual physical control of a motor vehicle on the public highways or quasi-public areas of this State while the person was under the influence of intoxicating liquor or a narcotic, hallucinogenic, or habit-producing drug, or marijuana or cannabis item as defined in section 3 of P.L.2021, c.16 (C.24:6I-33); whether the person was placed under arrest, if appropriate, and whether he refused to submit to the test upon request of the officer; and if these elements of the violation are not established, no conviction shall issue.

39:4-50.2 Consent to taking of samples of breath; record of test; independent test; prohibition of use of force; informing accused.

(a) Any person who operates a motor vehicle on any public road, street or highway or quasi-public area in this State shall be deemed to have given his consent to the taking of samples of his breath for the purpose of making chemical tests to determine the content of alcohol in his blood; provided, however, that the taking of samples is made in accordance with the provisions of this act

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Preliminary Statement

The State failed to prove beyond a reasonable doubt that the officer had reasonable suspicion to stop me and whether the officer had probable cause to arrest me for driving while intoxicated as required by State v. Cummings and many other authorities. The legal standard for determining probable cause is the "totality of the circumstances" test. Simply put, the officer must have more than a mere hunch that a person is intoxicated. Essentially, in determining guilt or innocence, the judge must consider the totality of the circumstances to determine if the state proved beyond a reasonable doubt that the officer reasonably had more than a mere hunch that my mental faculties and physical capabilities were substantially diminished and deteriorated. A summary of the "totality of the circumstances" in my case is that:

1) The officer admitted to improperly administering the standardized field sobriety test. The officer admitted to making one pass during the maximum deviation nystagmus test instead of the minimum of 2 as required by the standardized field sobriety test manual.
2) The municipal judge acknowledged that the officer didn't administer the SFST properly.

3) The municipal judge has stated my performance on the SFST wasn't bad.
4) The municipal prosecutor has stated that my performance on the SFST wasn't bad.
5) I did NOT commit any traffic violations as determined by the superior court judge.
6) The officer admitted I didn't cross the road lines in violation of N.J.S.A 39:4-88 "failure to maintain lane".
7) The officer lied in court and on the police report about me not maintaining my position during the walk and turn part of the SFST and lied about telling me to get back into position. Unfortunately, the judge erred when she interrupted and didn't allow the officer to admit it stating, "I'll look at the video and determine it".
8) The municipal judge didn't seem to care about whether the officer lied or not, despite me trying to prove it via bodycam.

A necessary element of the refusal offense — *proof beyond a reasonable doubt whether the arresting officer had probable cause to believe that the person had been driving or was in actual physical control of a motor vehicle on the public highways or quasi-public areas of this State while under the influence of intoxicating liquor* — was not established beyond a reasonable doubt as required. Without proof beyond a reasonable doubt that there was probable cause, the first two out of three

elements of the refusal statute under N.J.S.A. 39:4-50.4a were not met.

I ask and beg the Honorable appellant judges to please review the dash cam and body cam footages, that I provided to the case manager, of the arresting officer "Borriello", and the bodycam of officer "Coladonatos", which is a better view of the SFST and my allegations on the officer lying in the police report and in court. Please take a second opinion of my performance during the SFST to determine if there was probable cause to arrest; On whether my demeanor and physical signs show a man who is intoxicated; On my driving to determine reasonable suspicion. I am fortunate enough that everything from start to finish is on video. Please just take a look. It is much simpler that reading this brief and all the transcripts.

For the above summarized reasons and detailed arguments below, I ask from the Honorable appellant judges, that the judgment of conviction for refusal should therefore be reversed and dismissed since there was no probable cause ultimately making the arrest unlawful in violation of my fourth amendment rights. Also, for the above summarized reasons and detailed arguments below, the fruits of my arrest and refusal evidence derived from an unlawful arrest should have been suppressed and should be suppressed in accordance with the "fruits of the poisonous tree doctrine."

Procedural History

After admission by the officer that he administered the standardized field sobriety test wrong 2T:25-(22-25), 2T:26-(1-3)and comments by the judge and the prosecutor that my performance wasn't bad 4T:34-(14-20),[5T:8-(19-25), 5T:9-(1-4)], 5T:9-(8-15), 5T:11-(16-21), 5T:6-(14-16), the judge still found there was probable cause to arrest and uphold the refusal charge based on me admitting I had 1 beer, motor vehicle violation of failure to maintain lane, and the officer subjective statements of a strong order of alcohol and glassy eyes.(4T, 5T, [4T:37-(12-25)- 4T:38-(1-11)])

After arguments in the trial court, the superior judge found me not guilty of failure to maintain lane but stated that there was reasonable suspension to stop based on the articulation by the officer that I failed to move over for stopped police vehicles in violation of New Jersey Statute 39:4-92.2. The judge also found me guilty of refusal based solely on me verbally refusing the breathalyzer.(Da 1a) He gave full deference to the municipal judge's credibility findings in determining probable cause. He did not reference or consider the facts of why I was found not guilty for DWI or consider the testimony in the record that the officer admitted to administering the SFST wrong or consider the municipal judges

and prosecutor's comments that I did not perform the test poorly. Neither the superior court judge or municipal judge referenced or considered the proper refusal statute 39:4-50.4a, which is clear from his written opinion because there was nothing written about the 3 elements of the refusal statute. Instead, he cited 39:4-50.2. (Da 1a, Da 2a)

("Footnote" of Transcripts as required)

1T - 7/12/23 Municipal Transcript

2T - 8/9/23 Municipal Transcript

3T - 8/23/23 Municipal Transcript

4T - 12/6/23 Municipal Transcript

5T - 1/9/24 Municipal Transcript

6T - 4/17/19 Superior Transcript

Statement Of Facts

Before the officer put on his sirens, I did not commit any traffic violations and was not driving erratically (Da 1a,Da 2a, 1T:28-(12-16); When the sirens went on, I put on my hazards and pulled over immediately; When asked to show my identification, insurance and registration, I did without issue; When asked to step out of the car, I stepped out immediately; when asked if I would perform SFST, I responded with "sure" despite not knowing what it was. I performed the test relatively well according to the prosecutor and judge. (4T:34-(14-20),[5T:8-(19-25), 5T:9-(1-4)], 5T:9-(8-15), 5T:11-(16-21), 5T:6-(14-16) When told to put my hands behind my back, I did; When asked if I had anything in my pockets that was dangerous, I immediately directed the cops to my work knife.

These are all facts that need to be considered as totality of the circumstances which are all provable via body cam and dash cam (Da 6a). The officer's subjective statements of an odor of alcohol, red eyes and alcohol are not provable and are not "proof". They are merely his own subjective statements to justify an invalid and unlawful arrest. In fact, what is also provable, via bodycam, is that when I asked the officer why he thought I had too much to drink, he didn't know how to respond stating "based on my experience in administering the SFST" and

"odor of alcohol". Well after I cross examined him in court, we now know how credible his "experience" is in administering the SFST after he admitted he administered it wrong 2T:25-(22-25). What is also provable is that in the police reports, he didn't even note that my speech was slurred or any other indicators as to his reasoning for probable cause to arrest; He simply wrote "because he said he had one beer" (Da 3a). The officer also failed to cite me for a refusal until 2 weeks later when the prosecutor called the officer on his cell phone and asked him to immediately issue a refusal citation. (Da 4a)

The officer, prosecutor and judge's justifications for probable cause is invalid. Chewing gum, red eyes, odor of alcohol, admitting to coming from a restaurant, admitting to consuming one beer without specifying when it was consumed, committing no traffic violation, lying on the police report and in court (1T:23-(5-17), [1T:28(22-25) - 1T:29-(1-10)], [4T:14-(16-25) - 4T:15-(1-14)], (Da 3a)) and an improperly administered SFST are **NOT** proof beyond a reasonable doubt that amount to probable cause to believe that I am intoxicated. At most, those are subjective statements and subjective opinions. Those are also multiple mistakes and lies by the officer. In no way can those subjective statements, lies and mistakes show that

my mental faculties and physical capabilities was substantial diminished and deteriorated.

Despite subjectively stating I had a "strong odor of alcohol" and stating that "alcohol comes in all different fragrances, the officer couldn’t identify what alcoholic beverage my breath smelt like. A person trained in detecting intoxication should be able to distinguish whether the strong odor is beer or wine or vodka or tequila ex. 1T:31-(4-25)

The officer stated that unintoxicated people can also have red eyes. Which is true. Red eyes can be caused by a range of things including fatigue, irritation, itching, contacts. 1T-40-(18-20)

The officer testified that on his bodycam; while passing the cops on the side of the road, his speed was 45 mph in a 50-mph zone and that he was behind me. Which means that I did not violate New Jersey Statute 39:4-92.2. 45mph in a 50mph zone is 10% slower than the speed limit. This further reduces his credibility and completely removes all reasonable suspicion to stop me in violation of the fourth amendment. But the judge didn’t think it is relevant as to reasonable suspicion to stop. 4T:26-(10-22), [4T:20-(19-25) -4T:21(1-25) -4T:22-(1-6)], 4T:34-(1-13), 4T:37-(14-17)

Legal Argument – Point 1 - Admission by the officer that he improperly administering the "Standardized field sobriety test"

2T:25-(22-25), 2T:26-(1-3)

Any admission of improperly administering a SFST should be considered automatic grounds for dismissal otherwise it would lead to absurd results. 2T:25-(22-25), 2T:26-(1-3). It cannot be allowed that an officer improperly administer SFST and arrest people. This would lead to absurd results such as people paying thousands in lawyer fees and if found guilty, also pay thousands in court fees and surcharges. Whereas if the charges are challenged on the improperly administered SFST, the officer can simply respond with "oops". This is ridiculous. A SFST must be administered properly every time for an officer to be considered to have probable cause to arrest. That is what the SFST was designed for.

> *State v. Harris, DOCKET NO. A-5499-18T1, 12 (App. Div. Oct. 26, 2020) ("failure to successfully perform the field sobriety tests, established sufficient grounds for an objectively reasonable police officer to believe that defendant had operated her car in violation of the DUI statute.")*

If State v. Harris has any merit, then it stands to reason that failure to administer the SFST properly and an admission by the officer that it was done improperly would establish

sufficient grounds for an objectively reasonable judge to conclude that there was, in fact, no proof beyond a reasonable doubt that the officer had probable cause to arrest me, which would ultimately conclude that the first and second elements of the refusal statue would not be met, which would mean that the refusal citation should be dismissed with prejudice or at the very least, that the arrest would be considered invalid and unlawful in violation of my fourth amendment rights, therefore suppressing the fruits of the arrest, in accordance to the fruits of the poisonous tree doctrine, which in this case is my refusal to submit to the breath test.

> *State v. Harris, DOCKET NO. A-5499-18T1, 6-7 (App. Div. Oct. 26, 2020) ("Judge Johnson made detailed findings of fact and conclusions of law. The judge found that Officer Fearnhead observed that defendant's eyes were glassy, she was slurring her speech and smelled of alcohol, and the* ***officer properly conducted field sobriety tests.*** *The judge further found that once defendant failed to successfully complete those tests, the officer had probable cause to arrest defendant and require her to submit to a breath test.")* ***[Emphasis on "properly"]***

In State v. Harris, the judge at the very least concluded that the officer properly conducted the field sobriety test before deciding that there was probable cause to arrest. In my case the municipal court judge agreed with me that the SFST was

done improperly. 4T:34-(14-20), [5T:8-(19-25), 5T:9-(1-4)]The superior court judge didn't even consider the fact that the municipal court judge agreed there was an error on the SFST. He didn't look at the totality of the circumstances when deciding if there was probable cause. (Da 1a)

Why is it that when an innocent person makes a simple mistake during a field sobriety test, that probably occurred in the middle of the night, on the side of the road, while full of anxiety and worry, while probably tired from a long day, while first time hearing all the instructions, that there is still probable cause to arrest them from a small mistake? But when that same innocent person reads through the entire DWI field manual, reads dozens of case laws, reads the original surveys that created the SFST, and after all that was able to prove that the officer improperly administered the SFST, even though the officer rehearsed it dozens of times and was just starting his shift and was of clear and fresh mind, why is that not enough reason to throw out the charges against them? Why does someone have to go throw multiple courts to get something done? One innocent mistake during the test and you're getting handcuffed, your car impounded, and you're fingerprinted and thrown in a cell. But a proven mistake by the officer and a judge agreeing there is a mistake, is not good enough to be free from all this

mess? Apparently, officers lying and proof they are lying is also not good enough to throw out the charges. 4T:37-(14-17).

People should not be forced to go to such extreme lengths as I have, to prove my innocence. I am doing this on my own because I consider myself of relatively good intelligence and lawyers quoted me several thousand dollars for these appeals. Random people would not be able to do this considering how much time, effort and knowledge this takes.

On a side note, I have spoken to a retired police sergeant of 20 years, the guy who owns the mechanic shop who installed my interlock device, "jersey trucks and cars" on 309 Georgia RD, freehold, and he was shocked when I told him I was able to prove a mistake on the officer's part and still got a refusal. He told me that in all his years, once the officer admits to making a mistake in the SFST or it was proven he made a mistake, then the DWI and refusal would be automatically thrown out.

Legal Argument – Point 2 - No probable Cause and proof beyond a reasonable doubt 4T:34-(14-20),[5T:8-(19-25), 5T:9-(1-4), 5T:9-(8-15), 5T:11-(16-21), 5T:6-(14-16)

> *State v. Cummings, 184 N.J. 84, 93 (N.J. 2005) ("The municipal court shall determine by a ~~preponderance of the evidence~~* ****Proof beyond a reasonable doubt* [Edited to reflect the new statute determined by the supreme judges in this case to be effective with "pipeline retroactivity]*** *whether the arresting officer had* ***probable cause*** *to believe that the person had been driving or was in actual physical control of a motor vehicle on the public highways or quasi-public areas of this State while* ***the person was under the influence of intoxicating liquor*** *or a narcotic, hallucinogenic, or habit-producing drug or marijuana;* ***whether the person was placed under arrest,*** *if appropriate, and whether he refused to submit to the test upon request of the officer;* ***and if these elements of the violation are not established, no conviction shall issue.")***

So, what exactly did the judge find as proof beyond a reasonable doubt that the officer had probable cause to believe I drank liquor to the point that my mental faculties and physical capabilities was substantially diminished and deteriorated?

> *State v. Basil, 202 N.J. 570, 585 (N.J. 2010) ("Probable cause cannot be defined with scientific precision, ...because it is a "`practical, nontechnical conception'" addressing "`the factual and practical considerations of*

> *everyday life on which reasonable and prudent men, not legal technicians, act.'" ..."[P]robable cause is a fluid concept — turning on the assessment of probabilities in particular factual contexts — not readily, or even usefully, reduced to a neat set of legal rules." ...Although probable cause is more than a mere suspicion of guilt, it is less than the evidence necessary to convict a defendant of a crime in a court of law.* ***[Internal citations omitted by me]***

A subjective opinion that I had a strong odor of alcohol is not proof beyond a reasonable doubt. Emphasis on "proof".

A subjective opinion that my eyes were red at 2am without knowing my eyes in general is not proof beyond a reasonable doubt. Emphasis on "proof".

The fact that I was chewing gum is not "proof" beyond a reasonable doubt. This is comical to state.

The fact that I admitted to consumming one beer without context of the size of the beer and when I consumed it is not probable cause. There is nothing illegal or unreasonable about a grown adult going out and drinking one alcoholic beverage. So many people go out to dinner and have a glass of wine or a beer or a mixed drink.

> *State v. Basil, 202 N.J. 570, 585 (N.J. 2010) ("In determining whether there was probable cause*

> *to make an arrest, a court must look to the totality of the circumstances, ...and view those circumstances "from the standpoint of an objectively reasonable police officer,"* ***[Internal citations omitted by me]***

The fact that the officer admitted to improperly administering the field sobriety test 2T:25-(22-25), 2T:26-(1-3)and the prosecutors and judge's statements in court that I didn't perform the tests poorly, 4T:34-(14-20),[5T:8-(19-25), 5T:9-(1-4)], 5T:6-(14-16) 5T:9-(8-15), 5T:11-(16-21) definitely shows proof beyond a reasonable doubt of **my innocence** and that there was **NO** probable cause.

> *State v. Kazanowski, DOCKET NO. A-2813-18T1, 9 (App. Div. Dec. 9, 2020) ("In our review of a Law Division decision on a municipal appeal, we consider "whether the findings made could reasonably have been reached on sufficient credible evidence present in the record."*
> ***[Internal citations omitted by me]***

Legal Argument – Point 3 - Articulation of Odor of alcohol, red eyes, admission to consuming 1 beer, and chewing gum do not amount to probable cause under the "totality of the circumstances" analysis approach. (4T, 5T), (Da 1a)

State v. Cummings, 184 N.J. 84, 89 (N.J. 2005) ("We hold that, because a breathalyzer refusal case is properly a quasi-criminal matter, ***the constitutionally required burden of proof is the one applicable to criminal cases: proof beyond a reasonable doubt. We further hold this ruling shall have "pipeline retroactivity" effect.")***

An admission to consuming 1 beer, which is so in my case, cannot be amplified by the police, prosecutors and the courts as an admission to being intoxicated. That is absurd. As adults, we are allowed to consume alcoholic beverages responsibly. There is nothing wrong with going to a restaurant establishment and having a beer, glass of wine or a mixed drink while enjoying your dinner or spending time with people.

Someone admitting they had an alcoholic beverage cannot be used as probable cause to arrest someone. No average size adult man without any medical condition and in clearly good physical condition would ever get intoxicated from consuming 1 beer. To suggest otherwise is complete nonsense.

The seasoned officer and seasoned prosecutor had every opportunity to establish what I meant when I said I had one beer. Did I admit to drinking one 16 oz cup? Did I admit to drinking an 8 oz cup? Did I admit to drinking a nonalcoholic beer? Did I drink that beer 3 hours ago or right before leaving? There simply was no investigation on the cop's side and no additional investigation on the prosecutor's side when I decided to testify.

In addition, my admission of having one beer cannot be automatically assumed as a lie and give cause as to probable cause to arrest. That is ridiculous no matter which way you look at it. In contrast, an officer cannot be automatically assumed to be a "beacon of honesty" and to always speak veraciously simply because they completed 6 months of police academy. NJ Courts knows this very well from the State v. Eileen Cassidy case which effected upwards of 20,000 people and dramatically altered their lives. Cops cannot be given absolute credibility solely because they are cops. A simple search on the internet on how cops act and how many of them lie despite being on camera is eye opening. In fact, if the municipal judge allowed the cop to answer my question on whether he lied during the field sobriety test, she would have removed all credibility from the officer. If she would have investigated my accusations of the officer

lying during the walk and turn portion of the SFST, she would have clearly seen and heard on the officer's body cam video that I am the credible one and that the officer is not.

> *State v. Kuropchak, 221 N.J. 368, 388 (N.J. 2015) ("However, we have also recognized that police officers who draft reports have an interest in prosecuting defendants.")*

This is a court of law, with a requirement of "proof beyond a reasonable doubt." (Emphasis on proof".) This is not a court of assumption with a requirement of "assumptions beyond a reasonable doubt. A statement that there is an odor of alcohol is not probable cause to arrest. It is merely a subjective statement/opinion which could neither be proven or disproven. It could also be a flat out lie. Every adult who has drank alcohol knows consuming a small amount of alcohol will be detectable by breath. If a subjective unprovable statement that there was a strong odor of alcohol can be used to justify probable cause, this would lead to utterly absurd results in the court system. Cops will simply arrest anyone that came out of a restaurant establishment and state there was a strong odor of alcohol. It would not matter if it was coming from their breath because they drank it or if it is coming off their clothes because they leaned on a puddle of alcohol on the bar or if there is even any odor at all because how are you going to prove or disprove that someone smelt a particular odor?

At that point, the BAC allowance might as well be 0.00 instead of 0.08. Meaning drinking or smelling like any amount of alcohol and driving would be considered illegal. This way people would not drink at all and probably stay away from any restaurant establishment that serves alcoholic beverages.

But it is not illegal to drink and then drive. It is illegal to get intoxicated and then drive. Meaning it is illegal to drink and drive when your mental faculties and physical capabilities are substantial diminished and deteriorated.

Probable cause to arrest for odor of alcohol and probable cause to arrest for odor of marijuana or anything else is not the same because driving while high on marijuana is illegal, any odor of marijuana can be used as probable cause to arrest. But again, alcohol and odor of alcohol is not illegal and cannot be allowed to be used as probable cause. The only things that can be used as probable cause to arrest is the "totality of circumstances" analysis and the SFST. The SFST was designed to give officer probable cause to arrest. In my case, the officer admitted under oath at court that he administered it wrong.

> *State v. Marquez, 202 N.J. 485, 514 (N.J. 2010) ("Once again, the State is required to prove the four elements of refusal beyond a reasonable doubt.")*

Chewing gum is not probable cause. If that was the case, then we should all join together and arrest every single kid in elementary school, middle school, and high school. Because the "paraphernalia" chewing gum, runs rampant throughout these schools. Also, to suggest I was chewing gum because I was intoxicated and to mask the smell of alcohol is absurd and has no merit or grounds. I personally chew a pack of gum every week. And when I go out in public, it is not unusual for me to be chewing multiple pieces of gum at one time. How is it ok for a cop to arrest you for chewing gum and how is it normal for a judge to think chewing gum can be used as probable cause?

> *State v. Curran, DOCKET NO. A-3848-12T2, 7-8 (App. Div. Jul. 17, 2014) ("Probable cause for driving under the influence will be found where an officer "had reasonable grounds to believe that the driver was operating a motor vehicle in violation" of the DWI statute...In assessing probable cause, a judge considers the totality of the circumstances...They are viewed "from the standpoint of an objectively reasonable police officer."* ***[Internal citations omitted by me]***

I do not agree with the officer that I had red eyes. The video evidence shows that my eyes were white. Even if they were red, there is nothing abnormal for a person having slightly red eyes at 2am at a time most people are sleeping including me. Red eyes can simply mean a person is tired or they recently rubbed

their eyes, or they have irritation from contacts or several other random reasons besides being intoxicated. I did have contacts and I did notify the cop.

> *State v. Cummings, 184 N.J. 84, 96 (N.J. 2005) ("Hence, we hold that, for prosecutions under N.J.S.A. 39:4-50.4a, the State **must prove the statutory elements** of a defendant's refusal to submit to a breathalyzer test beyond a reasonable doubt.")*

Legal Argument – Point 4 - New Jersey Statute 39:4-92.2 - Procedure for motorist approaching certain stationary vehicle, 39:4-88 - Traffic on marked lanes - no reasonable suspicion to pull me over 1T:28-(12-16), (Da 1a, Da 2a)

> *State v. Smith, 251 N.J. 244, 260 (N.J. 2022) ("Under the statute's plain language, the tint on defendant's rear windshield could not constitute a violation of N.J.S.A. 39:3-74. It did not give rise to the reasonable and articulable suspicion necessary to justify this motor vehicle stop.")*
>
> *State v. Smith, 251 N.J. 244, 263 (N.J. 2022) ("We thus hold that the initial stop of defendant's vehicle was unconstitutional because no statutory or regulatory provision forms the basis for a reasonable and articulable suspicion")*

According to *State v. Smith*, the supreme court judge found that it is irrelevant what the cop's opinions were whether what

they observed was a motor vehicle violation to justify reasonable and articulable suspicion to pull someone over. The judge argued that it only matters if the person actually committed a motor vehicle violation based on the exact words written in the statute.

> *State v. Smith, 251 N.J. 244, 258 (N.J. 2022) ("To determine whether reasonable and articulable suspicion exists, a court must evaluate the totality of the circumstances and "assess whether 'the facts available to the officer at the moment of the seizure ... warrant[ed] a [person] of reasonable caution in the belief that the action taken was appropriate.' ...A motor vehicle stop that is not based on a "reasonable and articulable suspicion is an 'unlawful seizure,' and evidence discovered during the course of an unconstitutional detention is subject to the exclusionary rule."*
> ***[Internal citations omitted by me]***

The supreme judge also stated, "the goal of statutory interpretation is to give effect to the Legislature's intent, and "the best indicator of that intent" is the statute's plain language." He further argues that because the person in that case did not violate a motor vehicle statue based on the plain language of the statute, the motor vehicle stop was unconstitutional because no statutory or regulatory provision forms the basis for a reasonable and articulable suspicion").

> *State v. Smith, 251 N.J. 244, 258-59 (N.J. 2022) ("As always, the goal of statutory interpretation is to give effect to the Legislature's intent, and "the best indicator of that intent" is the statute's plain language...If the plain language is clear and unambiguous, "then our interpretative process is over." ...If the statutory language is ambiguous, or if a plain reading of the statute would lead to an absurd result, we may consider extrinsic aids, including legislative history.* ***[Internal citations omitted by me]***

He further argues that the words and phrases of statutes should be given their generally accepted meanings. This sets the stage for my argument that my stop is invalid, unlawful and unconstitutional.

> *State v. Smith, 251 N.J. 244, 265 (N.J. 2022) (""It is not the function of this Court to 'rewrite a plainly written enactment of the Legislature [ ]or presume that the Legislature intended something other than that expressed by way of the plain language.'* ***[Internal citations omitted by me]***

The superior court judge in my case already found that I didn't violate the failure to maintain lane statute which I was ticketed for. (Da 1a, Da 2a). So, there was no reasonable and articulable suspicion to pull me over for that.

> *State v. Smith, 251 N.J. 244, 265 (N.J. 2022) ("See N.J.S.A. 1:1-1 ("In the construction of the laws and statutes of this state, both civil and criminal, words and phrases ... shall, unless*

> *inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language.").”)*

Now comes the articulation of failure to move over for police vehicles in violation of 39:4-92.2, which I was not ticketed for, 4T:19-(9-17) but of which the municipal judge and superior judge found to be reasonable and articulable suspicion to stop me and therefore render my suppression motion to be denied. (Da 1a)

> The statute 39:4-92.2 reads, *(1) Make a lane change into a lane not adjacent to the authorized emergency vehicle if possible in the existing safety and traffic conditions;* ***or*** *(2) If a lane change pursuant to paragraph (1) of subsection a. of this section would be impossible, prohibited by law or unsafe, reduce the speed of the motor vehicle to a reasonable and proper speed for the existing road and traffic conditions, which speed shall be less than the posted speed limit, and be prepared to stop.* **[Emphasis on “or”. Meaning If you move over OR slow down, that means you didn’t violate the statute.]**

Using the supreme judge’s interpretations, I did not violate this statute based on the officer’s own testimony. 1T:14-(6-9) Here the officer states the person needs to either slow down or move over. 4T:22-(11-20) Here the officer states

that I am in the center lane. 4T:26-(10-22) Here the officer testifies that his own body cam shows he is going 45 mph in a 50mph zone and that he was immediately behind me. 4T:20-(3-4) This stands to reason that I was also going 45 or under. That is more than 10% less than the posted speed limit. Which means I slowed down below the posted speed limit as required as the statute clearly states. The municipal court judge didn't see the logic in this, that if a car is driving closely behind you, that the car in front is probably going the same speed or less.[4T:30-(13-25)-4T:31-(1-16)]

> *State v. Marquez, 202 N.J. 485, 506 n.8 (N.J. 2010) ("It is not for the courts to rewrite those statutes and substitute a different approach.")*

Therefore, I neither violated the failure to maintain lane statute nor the failure to move over statute. So, my motion to suppress should have been allowed because the stop was unlawful in violation of my fourth amendment rights and the fruits of that unlawful arrest should have been suppressed.

> *State v. Woodruff, 403 N.J. Super. 620, 627-28 (Law Div. 2008) ("Considering the plain language of the statute, and the persuasive authority of other courts, this court finds that a driver must maintain a lane to the extent that a person may reasonably maintain the lane, given surrounding circumstances, such as road conditions, weather,*

> *vehicle condition, and vehicle size and lane width, and* ***taking into account the skill that a reasonable driver, as opposed to a perfect driver, should have.")***

In State v. Woodruff, the superior judges reasonably and positively concluded and wrote that courts should consider the skill of a reasonable driver as opposed to a perfect driver when determining if a violation took place. This is a great outlook that the judges took because no one can drive perfectly all the time, and neither should they be expected too. We are everyday drivers. We are not Nascar drivers. People cannot be harassed and get temporarily seized for minor unnoticeable movements in this day and age where there are thousands of stimuli all over the place attracting our attention.

> *State v. Woodruff, 403 N.J. Super. 620, 624 (Law Div. 2008) ("The "articulable reasons" or "particularized suspicion" of criminal activity must be based upon the law enforcement officer's assessment of the totality of circumstances with which he is faced. Such observations are those that, in view of [the] officer's experience and knowledge, taken together with rational inferences drawn from those facts, reasonabl[y] warrant the limited intrusion upon the individual's freedom.*

Legal Argument – Point 5 - Judges errors 1T:23-(5-17),[4T:14-(4-25)- 4T:15-(1-14)], 4T:37-(12-17), 4T:38-(7-15), [5T:8(19-25), 5T:9-(1-4)], 5T:11-(7-15), (4T, 5T), (Da 1a)

> *State v. Singh, DOCKET NO. A-0876-16T2, 7 (App. Div. Nov. 1, 2018) ("The Court has cautioned that "care should be taken to list . . . N.J.S.A. 39:4-50.4a, the exact statutory provision applicable to breathalyzer refusal cases" in documents charging a defendant with refusal to provide a breath sample.*

The officer, prosecutor and judge erred in charging me with 39:4-50.2 instead of 39:4-50.4a. This prejudiced my ability to provide a defense to the state's allegation that I refused to provide a breath sample for testing under 39:4-50.4a, which is the proper violation. If I was aware of the proper violation, I would have made more arguments as to why the state did not meet the 3 elements listed in 39:4-50.4a. Instead, 39:4-50.2a, simply states that everyone must submit to a breathalyzer regardless of the circumstances and nowhere in the statute is there a statement to the public that 39:4-50.2 and 39:4-50.4a are interconnected and that we should also look at 39:4-50.4a.

> *State v. Singh, DOCKET NO. A-0876-16T2, 3 (App. Div. Nov. 1, 2018) (" Although the refusal offense is set forth in N.J.S.A. 39:4-50.4a, the summons given to defendant listed only N.J.S.A. 39:4-50.2,")*

It is only after reading multiple case laws that I understood that they are interconnected. Solely Interpreting the statute 39:4-50.2, me and everyone else who gets this violation automatically assumes we are guilty. But that is clearly untrue. The courts have stated that statutes are written so the everyday citizen would be able to interpret the laws.

> *State v. Kazanowski, DOCKET NO. A-2813-18T1, 12 (App. Div. Dec. 9, 2020) ("Although the officer here should have taken more care to cite to N.J.S.A. 39:4-50.4a in the charging summons*

The everyday citizen would not know to dig through dozens of case laws to figure out what they are really being charged with and that 39:4-50.2 and 39:4-50.4a are interrelated. If the police officer, prosecutor or municipal judge corrected this summons, I would have prepared extra arguments as to the 3 elements in 39:4-50.4a that the prosecutor needed to prove beyond a reasonable doubt.

> *State v. Singh, DOCKET NO. A-0876-16T2, 7 (App. Div. Nov. 1, 2018) ("As our Supreme Court has held "[t]o identify all of the elements of a refusal offense, we must look at the plain language of both statutes because although they appear in different sections, they are plainly interrelated."")*

Therefore, because of the police officer, prosecutor and judges' errors, I was prejudiced from making proper arguments in

relation to the 3 elements required in 39:4-50.4a. The judge and prosecutor had ample time to notify me of the proper charge considering I appeared in court approximately 7 times for this case. Therefore, this error deprived me of due process by having been charged with violating N.J.S.A. 39:4-50.2 but convicted of violating N.J.S.A. 39:4-50.4a.

> *State v. Gately, 204 N.J. Super. 332, 336 (App. Div. 1985) ("Legislation imposing penal sanctions, such as N.J.S.A. 39:4-50.2, must be strictly construed against the State. The public is entitled to plain and unambiguous statutory language defining proscribed conduct; a vague and indefinite penal statute infringes that right.*

Also, the municipal judge doesn't seem to think an officer lying on the police report and in court about whether I "failed to maintain the position" or whether the officer "put me back in starting position" during the walk and turn part of the SFST is important information. Unfortunately, the judge erred when she interrupted and didn't allow the officer to admit the lie, stating, "I'll look at the video and determine it". But it is clear that she doesn't even want to look at those provable allegations. She states, "maybe the officer didn't ask him to restart at the starting position. None of that even comes close to my findings that there's not probable cause for defendant to

be arrested." 4T:37-(12-17). So, lying to arrest someone is completely acceptable to the judge. Lies cannot add to a person's credibility. (Da 3a, 1T:23-(5-17), [1T:28(22-25) - 1T:29-(1-10)], [4T:14-(4-25)- 4T:15-(1-14)], The very beginning of Officer Coladonato bodycam)

> *State v. Kuropchak, 221 N.J. 368, 386 (N.J. 2015) ("A person charged with a criminal offense has the right to confront his accusers. U.S. Const. amend. VI.")*

The municipal judge also erred when she found probable cause to arrest before reviewing the video and my accusation on what the officer did wrong. (4T:38-(7-15) Even if she did ultimately go back and review the video, which I'm not convinced she did, this clearly shows that the judge had prejudice. How can you make a legal determination, that has the potential to ruin someone's life, without properly and thoroughly reviewing all evidence and accusation? This prejudice shows that the judge thought that the officer's word is absolute and untaintable. 4T:38-(7-15)

The municipal judge also confusingly stated, "that the officer did everything correctly and I have no reason to believe that he didn't, that he did note the defendant did not maintain in his lane properly" 5T:12-(5-8), even though she acknowledged that he did not do everything perfectly 5T:8(19-25), 5T:9-(1-4).

Also, the superior court found that I did not commit the motor vehicle violation of 39:4-88 failure to maintain my lane. (Da 1a)

The municipal judge also mistakenly believes that State v Tischio, "allows the court to use a refusal as prima facie evidence towards someone's guilt for DWI because there is an understanding that if they're refusing, then that automatically means they're trying to avoid detection." 5T:11-(7-15). That is not what State v Tischio says. In fact, State v Tischio doesn't talk about refusing other than some citations because the person in that case did not refuse. The person in that case blew a .10.

What State v Tischio said was,

> State v. Tischio, 107 N.J. 504, 526 (N.J. 1987) ("I should think we could accommodate the words the legislature used and what the Court sees as the legislative intent by making a more-than-.10% reading prima facie evidence, rather than conclusive proof, of a violation while driving, provided that the reading is obtained, as in this case, within a reasonable time after the arrest.")

I also vehemently reject the comments by the judge that I was belligerent and not cooperative with the police before the arrest. Body cam very clearly shows on the contrary. Its shows I was very cooperative.

Legal Argument – Point 6 - Warrantless search of my mom's vehicle including opening the truck in violation of my 4th amendment rights (Issue was not raised) and pulling me over in the middle of the night for no reasonable reason in violation of my 4th amendment rights. (Issue was partly argued in point 4 above.)

> *State v. Badessa, 185 N.J. 303, 311 (N.J. 2005) ("the State is barred from introducing into evidence the "fruits" of an unlawful search or seizure by the police...Those "fruits" include not only "tangible materials" seized, but also "testimony as to matters observed" in the course of a Fourth Amendment violation. Ibid.; see also Murray v. United States, (1988) (stating that "exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search" and "testimony concerning knowledge acquired during an unlawful search"); State v. Puzio, 379 N.J.Super. 378, 878 A.2d 857 (App.Div. 2005) (excluding observations made by police officer after unlawful stop of defendant's vehicle that led to defendant's arrest for DWI). Even evidence indirectly acquired by the police through a constitutional violation is subject to suppression.* ***[Internal citations omitted by me]***

Pulling me over in the middle of the night for no reason is a violation of my 4th amendment rights and all evidence including the refusal should have been suppressed. Although the officer articulated the reason he pulled me over, the articulation was not reasonable. The superior court judge agreed with me that I

didn't violate the statute 39:4-88 in which I was ticketed for. (Da 1a). The superior court judge unfortunately gave credit to the officer for reasonable suspicion because he articulated that I failed to slow down for the cops on the side of the road in violation of 39:4-92.2, even though the cop admitted that we were going 45 mph in a 50-mph zone. 4T:20-(3-4)

> *State v. Smith, 251 N.J. 244, 257-58 (N.J. 2022) ("The Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution guarantee "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." A motor vehicle stop by a police officer, no matter how brief or limited, is a " 'seizure' of 'persons' " under both the Federal and State Constitutions...To justify such a seizure, "a police officer must have a reasonable and articulable suspicion that the driver of a vehicle, or its occupants, is committing a motor-vehicle violation or a criminal or disorderly persons offense." ..."The suspicion necessary to justify a stop must not only be reasonable, but also particularized." ...An investigative stop "may not be based on arbitrary police practices, the officer's subjective good faith, or a mere hunch."* ***[Internal citations omitted by me]***

I am not going to put a lot of weight on the argument revolving around the warrantless search of my mom's car because it did not result in any findings. On the other hand, I am going

to mentions it here as it is another error from the officers which again violated my fourth amendment rights because they did not have "sufficient exigent circumstances" to conduct a warrantless search of the vehicle, including opening the locked trunk, considering the vehicle was impounded. This is also an error on the judge's part who should have noted this 4th amendment violation after reviewing the body cam footages. Also, the judge should have reduced the credibility of the officer after witnessing this warrantless search violation.

> *State v. Witt, 223 N.J. 409, 416 (N.J. 2015) ("With Pena-Flores as its guide, the trial court made the following findings: the officer had a right to stop defendant's car based on an "unexpected" occurrence and had probable cause to search for an open container of alcohol, but did not have "sufficient exigent circumstances" to conduct a warrantless search. Accordingly, the court suppressed the handgun.")*

> *State v. Witt, 223 N.J. 409, 417 (N.J. 2015) ("in applying Pena-Flores, the panel determined that the evidence at the suppression hearing did not "suggest[ ] anything close to an exigency that would permit a motor vehicle search without a warrant." Id. at 613, 90 A.3d 664. It emphasized that the stop occurred in the early morning when defendant was driving alone; during the search, defendant was "handcuffed" and "seated in the back of a police vehicle"; and the police had no reason to believe that the object of the search—*

"open containers of alcohol"—would not still be in the car "once a warrant was obtained." Ibid.")

State v. Witt, 223 N.J. 409, 422 (N.J. 2015) ("The automobile exception to the warrant requirement—as defined by the United States Supreme Court in construing the Fourth Amendment—authorizes a police officer to conduct a warrantless search of a motor vehicle if it is "readily mobile" and the officer has "probable cause" to believe that the vehicle contains contraband or evidence of an offense.)

----------Continued on next page---------

Conclusion

> *Ornelas v. United States, 517 U.S. 690, 699 (1996) ("We therefore hold that as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal.")*

The rule of deference is less compelling where, such as here, the municipal and Law Division judges made opposite findings.

> *State v. Singh, DOCKET NO. A-0876-16T2, 10 (App. Div. Nov. 1, 2018) ("The rule of deference is more compelling where, such as here, the municipal and Law Division judges made concurrent findings... "Under the two-court rule, appellate courts ordinarily should not undertake to alter concurrent findings of facts and credibility determinations made by two lower courts absent a very obvious and exceptional showing of error.")*

The 2-court rule has failed in my case because the judges made opposite determinations in the failure to maintain violation. In addition, both judges errored in not changing the refusal violation from 39:4-50.2 to 39:4-50.4a.(Da 1a) (5T) Finally, both judges errored when neither made any remarks regarding the 3 elements of the proper refusal statute 39:4-50.4a.(Da 1a)(5T) This tells me and the courts that the 3 elements of refusal where never considered and that the

determination to find me guilty of refusal was made solely on 39:4-50.2, which simply would be if the person refused or not.

> *State v. Kuropchak, 221 N.J. 368, 389 (N.J. 2015) ("An appellate court should engage in a "searching and critical" review of the record when it is faced with a trial court's admission of police-obtained statements to ensure protection of a defendant's constitutional rights.*

I ask the honorable court judges to not only review this case De Novo, but to have a plenary review of the entire case including: 1) reviewing the 2 officers body cams to make new determinations on whether there was probable cause, considering the totality of the circumstance on whether my demeaner and actions and performance on the SFST raised any indication to intoxication. 2) reviewing officer Boriellos dash cam to make new determinations on whether there was probable cause, considering the totality of the circumstance, on whether my driving raised any indication to intoxication. 3) reviewing officer Boriellos dash cam to make new determinations on whether there was reasonable suspicion to stop me, considering the totality of the circumstance 4) To please acknowledge and respond to my provable accusation that the officer lied in court and on the police report that I failed to maintain my position during the walk and turn test and lying that he told me to get back into position. This is easily seen and heard on the body

cam videos. Officer Coridatos body cam is a better view of my performance of the SFST and my accusation. 1T:23-(5-17), [1T:28(22-25) - 1T:29-(1-10)], [4T:14-(16-25) - 4T:15-(1-14)], (Da 3a)

> *State v. Kazanowski, DOCKET NO. A-2813-18T1, 9 (App. Div. Dec. 9, 2020) (""[N]o such deference is owed to the Law Division or the municipal court with respect to legal determinations or conclusions reached on the basis of the facts." Id. at 49. Our review of a court's "legal determinations is plenary."*

I do not believe the records and video evidence supports my conviction. Each subjective incriminating statements that the officer made and that the judge used as probable cause is also consistent with an innocent explanation. Please review all my accusations and the points I mention in this brief. Thank you!

> *State v. Haskins, 477 N.J. Super. 630, 647 (App. Div. 2024) ("Finally, as the judge made credibility findings and may be committed to her previous view of the evidence, we direct that a new judge preside over the suppression hearing on remand. State v. Jones,... (requiring suppression hearing be assigned to new judge as motion judge weighed evidence and made credibility findings); see also R.L. v. Voytac,...(holding matter should be assigned to a different judge on remand because the court "previously made credibility findings").")* ***[Internal citations omitted by me]***

Proof Of Service

This exact Formal Brief was emailed on, 7/25/24, as allowed by the case manager, to:

Superior Court Appellant Division Case Manager
Heather K Uccio
Court Services Officer 1-Team 4
609-815-2950 x52675
Email - heather.uccio@njcourts.gov

MONMOUTH COUNTY PROSECUTORS OFFICE – Former Prosecutor on Record
ALECIA NATHANNE WOODARD
Email - AWOODARD@MCPONJ.ORG
Email - APPELLATE@MCPONJ.ORG

MONMOUTH COUNTY PROSECUTORS OFFICE – Attorney of record as of
MONICA LUCINDA DO OUTEIRO
Email - appellate@mcponj.org
Email - mdoouteiro@mcponj.org

OFFICE OF THE COUNTY PROSECUTOR
COUNTY OF MONMOUTH

132 JERSEYVILLE AVENUE
FREEHOLD, NJ 07728-2374

(732) 431-7160

RAYMOND S. SANTIAGO
MONMOUTH COUNTY PROSECUTOR

September 30, 2024

Monica do Outeiro, 041202006
Assistant Prosecutor
Director, Appellate Section
Of Counsel and
On the Brief
email: mdooutеiro@mcponj.org

Honorable Judges of the
Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
Post Office Box 006
Trenton, New Jersey 08626

Re State of New Jersey (Plaintiff-Respondent)
v. Tony T. Yusufov (Defendant-Appellant)
Appellate Division Docket No. A-2824-23T4
Municipal Appeal No. MA 24-002; Misc. Case No. ML-24-01-00011
Criminal Action: On Appeal From a Judgement of Conviction in the Superior Court of New Jersey, Law Division (Criminal), Monmouth County
Sat Below: Michael A. Guadagno, J.A.D. (ret &t/a)

Honorable Judges:

Please accept this letter memorandum, pursuant to R. 2:6-2(b), in lieu of a more formal brief submitted on behalf of the State of New Jersey.

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COUNTERSTATEMENT OF PROCEDURAL HISTORY

On February 24, 2023, the defendant, Tony T. Yusufov, was arrested in Freehold Township and charged with failure to maintain lane, N.J.S.A. 39:4-88; reckless driving, N.J.S.A. 39:4-96; driving while intoxicated ("DWI), N.J.S.A. 39:4-50; and, refusal, N.J.S.A. 39:4-50.2.

Prosecution of the motor vehicles summonses took place before the Honorable Nicole Sonneblick, J.M.C., in the Freehold Township Municipal Court. See (1T to 5T).[1] After hearing testimony both on a motion to suppress and trial, Judge Sonneblick denied defendant's motion, see (4T:37-12 to 38-11), and found guilty of refusal and failure to maintain lane and not guilty of DWI and reckless driving, see (5T:7-1 to 13-8). Thereafter, Judge Sonnenblick sentenced the defendant to the statutorily-mandated fines and penalties, along with seven-months ignition interlock and 12 hours IDRC. (5T:16-1 to 17-6).

Defendant thereafter filed an appeal of his conviction with the Superior Court, Law Division. Da6. The Honorable Michael A. Guadagno, J.A.D. (ret. & t/a), heard argument on defendant's de novo appeal on April 17, 2024. (6T). On April 19, 2024, Judge Guadagno issued an opinion finding defendant not guilty of failure to maintain lane, but re-finding defendant guilty of refusal.

[1] The State's transcript citations conform with the transcript key contained in defendant's brief, see Db14.

Da1, 7-14. Judge Guadagno re-imposed the sentence on the refusal charge imposed in the municipal court: "$407 fine, $33 court costs, $125 DDE fund, 12 hours IDRC and suspension of license until interlock device is installed for a seven-month period." Da13.

Defendant filed a request for a stay of sentence pending appeal, which this Court denied. Defendant thereafter perfected his appeal with this Court, to which the State now responds in opposition.

COUNTERSTATEMENT OF FACTS

Consistent with the deferential standard governing this Court's review of the lower courts' credibility and factual findings, see LEGAL ARGUMENT, infra, the State will rely upon the factual findings set forth in Judge Guadagno's written opinion, which the State replicates herein for the convenience of this Court:

> On February 24, 2023, at approximately 1:20 a.m. Sergeant Brandon Borriello of the Freehold Township Police Department was on patrol traveling northbound on Route 9 when he noticed two other patrol vehicles stopped along the right shoulder of the road blocking two lanes of traffic. Borriello then observed a black Audi driven by defendant approaching the vehicles at a high rate of speed. When the Audi failed to slow down or move over, Borriello activated his mobile video recorder (MVR) and stopped defendant's vehicle. When defendant rolled down his window, Borriello detected an odor of alcohol on defendant's breath and noticed his eyes were glassy and bloodshot. Defendant then placed gum in his mouth which further aroused Borriello's suspicion. When Borriello asked defendant where he was coming

from, defendant replied, Tommy's Tavern; when asked how much he had to drink, defendant claimed to have consumed only one beer.

Borriello asked defendant to get out of the car and perform field sobriety tests. Defendant's performance on the Horizontal Gaze Nystagmus (HGN) test indicated impairment. On the walk-and-turn test, defendant failed to maintain the starting position and failed to follow other instructions as to number of steps and manner of turning. On the one-leg stand, defendant again failed to follow instructions and was placed under arrest for DWI.

Although, Sgt. Borriello's arrest report indicates that, after defendant's arrest, he was taken to the police station, read the Attorney General's Standard Statement (Standard Statement) and refused to provide samples of his breath, there was no testimony as to that or anything that occurred after defendant was placed under arrest. Defendant was charged with DWI, failure to provide a breath sample, traffic on marked lanes and reckless driving,

Trial began before the municipal court on July 12, 2023. Defendant appeared pro se and the municipal judge noted that she had tried to convince defendant "multiple times" to speak with an attorney. She explained the seriousness of the charges he faced and confirmed that he wished to represent himself.
Defendant moved to suppress the initial traffic stop and his subsequent arrest. The judge agreed to decide those motions during trial. Sgt. Borriello testified up to the point of defendant's arrest, then defendant began his cross-examination. Trial continued August 9, 2023, but the judge grew frustrated with defendant's failure to follow her instructions and court rules. Over defendant's objection, the judge appointed the public defender as standby counsel to assist defendant.

Trial resumed on August 23, 2023, with the Freehold Township Public Defender, Sophia Shalaby present. Although defendant wished to continue representing himself, he agreed to have Ms. Shalaby "assist" him during the trial. The judge then offered defendant the option of starting the trial over if defendant agreed

to have Shalaby represent him. As an alternative, Ms. Shalaby proposed adjourning the trial so she could obtain a transcript of the prior proceedings. She would then continue the trial from where they left off. The judge decided that once Shalaby read the transcript, the cross-examination of Sgt. Borriello would begin de novo. Defendant then thanked the judge for giving him this "option."

Trial resumed on December 6, 2023, with Sgt. Borriello's cross-examination conducted by defendant with Ms. Shalaby assisting. Bodycam and MVR videos were introduced and played. At the conclusion of Borriello's testimony, Ms. Shalaby argued defendant's motion to suppress the traffic stop. She noted that Borriello testified that one of the reasons he stopped defendant was for failing to maintain his lane, but the dashcam and MVR video established that defendant drove in the center lane and there was no proof that he ever changed lanes. She also argued that the video contradicted Borriello's testimony that defendant failed to slow down once he approached the other patrol cars. She noted that the video showed Borriello's speedometer indicating that he was travelling at 44 m.p.h. Finally, Ms. Shalaby argued that defendant did not have the opportunity to make a safe lane change as he approached the patrol vehicles.

The judge denied defendant's motion to suppress the stop, finding that Sgt. Borriello had reasonable suspicion based on defendant's failure to slow down for the parked patrol vehicles, failure to change lane away from those vehicles, and failure to maintain his current lane. Ms. Shalaby then argued that there was no probable cause to arrest defendant for DWI. In denying this motion, the judge noted defendant's glassy eyes, the odor of alcohol and his admission that he had consumed alcohol earlier that evening.

Instead of proceeding with testimony relating as to the refusal, the municipal prosecutor rested after moving the Standard Statement into evidence. Apparently, the prosecutor was relying on that document and the video to prove defendant's guilt on the refusal charge. Defendant then testified that as he was driving on Route 9, he observed that several officers had pulled a woman over and

> appeared to be administering field sobriety tests. Defendant claimed that Sgt Borriello's patrol car was in the lane to his left preventing him from safely changing lanes.
>
> On cross-examination, defendant acknowledged that he drank one beet at a bar earlier that night and later refused to provide breath samples after the Standard Statement was read to him. Defendant claimed he refused to provide the samples because he had "a lawsuit against multiple police officers" and he does not trust police.
>
> Trial continued January 9, 2024. After summations, the judge found defendant not guilty of DWI and dismissed the reckless driving charge. Based solely on the video, the judge found defendant guilty of the refusal. On the lane change, the judge found that Sgt. Borriello testified credibly that defendant "did not maintain in his lane properly.

Da2-6.

LEGAL ARGUMENT

"Appellate review of a Law Division adjudication of guilt" following a trial de novo is "very narrow" and "deferential." State v. Oliveri, 336 N.J. Super. 244, 252 (App. Div. 2001); State v. Stas, 212 N.J. 37, 48-49 (2012). The appellate court "do[es] not re-weigh the evidence, but rather, determine[s] whether the findings made could reasonably have been reached on sufficient credible evidence present in the record." Oliveri, 336 N.J. Super. at 252 (citing State v. Locurto, 157 N.J. 463, 470 (1999); State v. Johnson, 42 N.J. 146, 161-62 (1964)); Adubato, 420 N.J. Super. at 176. The sole limit to this deferential

standard is review of "purely legal issues," which are owed no deference and are reviewed "plenary." Adubato, 420 N.J. Super. at 176; Stas, 212 N.J. at 49.

With regard to credibility, an "[a]ppellate court should defer to trial courts' ... findings that are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." Locurto, 157 N.J. at 474; Stas, 212 N.J. at 49. This deference "is more compelling where ... two lower courts have entered concurrent judgments on purely factual issues. Under the two-court rule, appellate courts ordinarily should not undertake to alter concurrent findings of facts and credibility determinations made by two lower courts absent a very obvious and exceptional showing of error." Locurto, 157 N.J. at 474; Stas, 212 N.J. at 49 n.2.

POINT I[2]

DEFENDANT'S CONVICTION AND SENTENCE SHOULD BE AFFIRMED

Defendant asks this Court to do that which both lower courts would not: find that the credible testimony of Sergeant Borriello failed to provide a reasonable basis to stop his vehicle, provide probable cause to arrest him on

[2] This POINT is responsive to all arguments contained within the defendant's LEGAL ARGUMENT, see Db18-47.

suspicion of DWI, and/or provide proof beyond a reasonable doubt as to refusal. Because neither of the lower courts erred in so finding, the State respectfully requests this Court affirm defendant's conviction and sentence.

"To be lawful, an automobile stop 'must be based on reasonable and articulable suspicion that an offense, including a minor traffic offense, has been or is being committed.'" State v. Nelson, 237 N.J. 540, 552 (2019)V(quoting State v. Bacome, 228 N.J. 94, 103(2017). "[R]easonable suspicion necessary to justify an investigatory stop is a lower standard than the probable cause necessary to sustain an arrest." State v. Legette, 227 N.J. 460, 473 (2017); State v. Amelio, 197 N.J. 207, 211, cert. denied, 556 U.S. 1237 (2009). Thus, the State need not prove that the suspected motor vehicle violation occurred. State v. Williamson, 138 N.J. 302, 304 (1994); State v. Locurto, 175 N.J. 463, 470 (1999).

A determination of reasonable suspicion is based on a "totality of the circumstances" and is "highly fact-sensitive." State v. Pineiro, 181 N.J. 13, 22 (2004). "In evaluating the facts giving rise to the officer's suspicion of criminal activity, courts are to give weight to 'the officer's knowledge and experience' as well as 'rational inferences that could be drawn from the facts objectively and reasonably viewed in light of the officer's expertise.'" State v. Citarella, 154 N.J. 272, 279 (1998) (quoting State v. Arthur, 149 N.J. 1, 10-11 (1997)).

Contrary to defendant's argument, and as correctly found by Judge Guadagno, the officer did not stop defendant solely for his failure to maintain lane; the officer also advised that defendant had failed to yield for an emergency vehicle. (1T:13-19 to 14-5; 29-12 to 29-22). As such, the police officer had reasonable and articulable suspicion to stop the defendant's vehicle based on his observations of the defendant failing to slow down for the emergency vehicles, in violation of N.J.S.A. 39:4-92(a). The officer observed defendant's vehicle failed to slow down and move over when it approached the other patrol cars engaged in a traffic stop on Route 9. Since the officer personally observed the defendant's failure to yield to an emergency vehicle, the officer had reasonable suspicion to believe that defendant was also in violation of N.J.S.A. 39:4-92(a). Da11-12.

Likewise without merit is defendant's attack on the existence of probable cause for his arrest and proof beyond a reasonable doubt for his guilt on refusal. As to these findings, Judge Guadagno also did not err. Da7-9, 12-13. As probable cause to arrest for DWI is an element of refusal, the State will discuss the correctness of Judge Guadagno's findings as to both probable cause and proof beyond a reasonable doubt concurrently.

A refusal occurs when a driver provides anything other than an "unequivocal, unambiguous consent" to an officer's request that he submit to a

breath test. State v. Widmaier, 157 N.J. 475, 488 (1999). Each motorist provides implied consent to submit to the test by their use of the road. N.J.S.A. 39:50.3. See State v. Marquez, 202 N.J. 485, 499 (2010). The primary purpose of this regulation is to "curb the senseless havoc and destruction caused by intoxicated drivers." Marquez 202 N.J. at 496 (citing State v. Tischio, 107 N.J. 594, 512 (1987).

Four elements must be met for a defendant to be found guilty of refusal: probable cause to believe the driver was impaired; the defendant was arrested for driving while intoxicated; an officer requested that defendant submit to a test and informed the defendant of the consequences; and the defendant thereafter refused. Id. at 503.

Here, Judge Guadagno did not err in finding that the officer had probable cause to believe defendant was impaired. Probable cause has eluded precise definition. State v. Chippero, 201 N.J. 14, 26 (2009) (quoting State v. Sullivan, 169 N.J. 204, 210 (2001). However, it has been held that, "[t]he substance of all the definitions. . . is a reasonable ground for belief of guilt." State v. Moore, 181 N.J. 40, 46 (2004) (quoting Maryland v. Pringle, 540 U.S. 366, 371 (2003). In other words, the principle component of probable cause is "a well-grounded suspicion that a crime has been or is being committed." Moore 181 N.J. at 45-6 (quoting State v. Nishina, 175 N.J. 502, 515 (2003).

That belief "constitutes less than proof needed to convict and something more than a raw, unsupported suspicion." State v. Moskal, 246 N.J. Super. 12, 21 (App. Div. 1991).

When considering whether there is probable cause, the totality of the circumstances must be considered. State v. Pinson, 461 N.J. Super. 536, 549 (App. Div. 2019). In the context of intoxicated driving, the "yardstick. . . is whether the arresting officer had 'reasonable grounds'" to believe the driver was operating a vehicle while under the influence. Moskal 246 N.J. Super. at 21 (quoting Strelecki v. Coan, 97 N.J. Super. 279, 284 (App. Div. 1967)).

"The phrase 'under the influence' means a substantial deterioration or diminution of the mental faculties or physical capabilities of a person." State v. Cryan, 363 N.J. Super. 442, 455 (App. Div. 2003). "[A] conviction for driving while under the influence of alcohol will be sustained on proofs of the fact of intoxication — a defendant's demeanor and physical appearance—coupled with proofs as to the cause of intoxication — i.e., the smell of alcohol, an admission of the consumption of alcohol, or a lay opinion of alcohol intoxication." State v. Bealor, 187 N.J. 574, 588 (2006); see, e.g., State v. Morris, 262 N.J. Super. 413, 421 (App. Div. 1993) (finding evidence of slurred speech, red and bloodshot eyes and strong odor of alcoholic beverage on defendant's breath was sufficient to show that he was "under the

influence."); State v. Cleverley, 348 N.J. Super. 455 (App. Div. 2002) (finding the officer's observation of defendant's strong odor of alcohol, his swaying while walking, his inability to perform leg-raising test, and his slurred speech, was sufficient to support conviction for DWI).

Judge Guadagno did not err in finding that the evidence presented established the officer had probable cause to believe defendant was intoxicated. The totality of the circumstances, including the odor of alcohol emanating from the vehicle, defendant's bloodshot glassy eyes, placing gum in his mouth, and his admission to drinking earlier that evening, gave the officer a well-grounded suspicion that defendant was driving while intoxicated. Since the officer had probable cause for the aforementioned reasons, he lawfully arrested defendant for DWI.

Furthermore, the record clearly demonstrates that defendant had absolutely no intention of submitting a breath sample after being read the Standard Statement. As noted by Judge Guadagno, defendant can be heard on the "bodycam" "on two occasions acknowledging that he was refusing to submit breath samples because he unsure how the samples would be 'calibrated.'" Da9. Thus, since all four elements of refusal were established beyond a reasonable doubt, defendant's conviction, and resulting sentence, should be affirmed.

CONCLUSION

For the above-mentioned reasons and authorities cited in support thereof, the State respectfully requests this Court deny defendant's appeal and affirm the April 19, 2024 order entered by the lower court.

Respectfully submitted,

RAYMOND S. SANTIAGO
MONMOUTH COUNTY PROSECUTOR

/s/ Monica do Outeiro
By: Monica do Outeiro, 041202006
Assistant Prosecutor
Director, Appellate Section
Of Counsel and
On the Letter Brief
email: mdooueiro@mcponj.org

MD/mc

c Tony Yusufov, pro se

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2824-23-T4
MUNICIPAL APPEAL NO. MA24-002

STATE OF NEW JERSEY
PLAINTIFF – RESPONDENT

V.

TONY T. YUSUFOV
DEFENDANT – APPELLANT – PRO SE

ON APPEAL FROM
SUPERIOR COURT, LAW DIVISION
MONMOUTH COUNTY
HONORABLE MICHAEL A. GUADAGNO, J.A.D
SAT BELOW

FORMAL CROSS REPLY BRIEF

PREPARED BY

TONY T. YUSUFOV (PRO SE)

Timely Submitted 10/14/24

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2. New Jersey Court Rules 2:6-4 - Contents of Respondent's Brief; Statement in Lieu of Brief; Responsibility to File

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Table of Authorities - Statutes

1. New Jersey Statute 39:4-50.2 - Consent to taking of samples of breath; record of test; independent test; prohibition of use of force; informing accused.

2. New Jersey Statute 39:4-50.4a - Refusal to submit to test; penalties.

3. New Jersey Statute 39:4-92.2 - Procedure for motorist approaching certain stationary vehicle.

4. New Jersey Statute 39:4-88 - Traffic on marked lanes.

Preliminary Statement

Dear Honorable Judges, I already made my arguments in my timely filed "Formal Brief" as to why I should be found not guilty. In this timely filed "Formal Cross Reply Brief", I will only counter and argue the prosecutor request to deny my appeal.

----------Continued on next page----------

Legal Argument – Point 1 - The prosecutor's request to deny my appeal has no legal grounds. (Prb12)

> *For the above-mentioned reasons and authorities cited in support thereof, the State respectfully requests this Court deny defendant's appeal and affirm the April 19, 2024 order entered by the lower court. (Prb12)*

I am a little confused on this request by the prosecutor. The prosecutor didn't mention any case laws or court rules that would allow for my appeal to be denied. On the contrary, In fact, I have quite a few grounds for my appeal.

I have legal grounds for an appeal based on probable cause to arrest, since the first element of refusal is "proof beyond a reasonable doubt that the officer had probable cause to arrest". Probable cause is a legal question, so it must be reviewed de novo on appeal. Probable cause is also a constitutional question so it must be reviewed de novo on appeal. The prosecutor knows this as well since she cited statutes in her own brief.

> *Four elements must be met for a defendant to be found guilty of refusal: **probable cause** to believe the driver was impaired; the defendant was arrested for driving while intoxicated; an officer requested that defendant submit to a test and informed the defendant of the consequences;*

> *and the defendant thereafter refused. (Prb9) [Emphasis on "probable cause"]*

> *Fourth amendment – 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. [Emphasis on [Probable cause"] [Not cited by the prosecutor]*

I also have legal grounds for an appeal based on reasonable and articulated suspicion to pull me over for "New Jersey Statute 39:4-88 - Traffic on marked lanes." A motor vehicle violation is a question of law and so is reasonable and articulated suspicion. So, it must be reviewed de novo. The prosecutor knows this as well since she cited case law in her own brief.

> *The sole limit to this deferential standard is review of* ***"purely legal issues," which are owed no deference and are reviewed "plenary."*** *(Prb(5-6))*

I also have legal grounds for an appeal based on reasonable and articulated suspicion to pull me over for "New Jersey Statute 39:4-92.2 - Procedure for motorist approaching certain

stationary vehicle." A motor vehicle violation is a question of law and so is reasonable and articulated suspicion. So, it must be reviewed de novo.

> *NEW JERSEY STANDARDS FOR APPELLATE REVIEW*
>
> *https://www.njcourts.gov/sites/default/files/courts/appellatestandards.pdf*
>
> *(page 24)*
>
> *STANDARDS ON APPEAL IN CIVIL AND CRIMINAL CASES*
>
> *I. DE NOVO REVIEW*
>
> *A. An appellate court's review of rulings of law and issues regarding the applicability, validity (including constitutionality) or interpretation of laws, statutes, or rules is de novo.*

I also have legal grounds for an appeal based on if I violated all the elements of "New Jersey Statute 39:4-50.2 - Consent to taking of samples of breath; record of test; independent test; prohibition of use of force; informing accused" and "New Jersey Statute 39:4-50.4a - Refusal to submit to test; penalties." The prosecutor knows this as well since she cited case law in her own brief. I also mentioned a large number of reasons, case laws and referenced the transcripts to prove that there was not enough credible evidence present in the record.

> *The appellate court "do[es] not re-weigh the evidence, but rather, determine[s] whether the findings made could reasonably have been reached on sufficient credible evidence present in the record." (Prb5)*

NEW JERSEY STANDARDS FOR APPELLATE REVIEW

https://www.njcourts.gov/sites/default/files/courts/appellatestandards.pdf

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On appeal from the Law Division's decision, the appellate court's review "focuses on whether there is 'sufficient credible evidence . . . in the record' to support the trial court's findings." ... However, the trial court's legal rulings are considered de novo. ... [Internal citations omitted by me]

As far as I know, I have at least 4 legal grounds for an appeal on this case. So, I'm not clear on what grounds the prosecution is asking for my appeal to be denied. I am not a lawyer, but "requesting" is not a legal argument to throw out a case. Her colleague tried to request the superior court judge to find me guilty of failure to maintain law without having any legal arguments that I violated that statute. Now, they are requesting to throw out the case without citing any legal grounds for that.

> *Ornelas v. United States, 517 U.S. 690, 699 (1996) ("We therefore hold that as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal.")*

> *State v. Kuropchak, 221 N.J. 368, 389 (N.J. 2015) ("An appellate court should engage in a "searching and critical" review of the record when it is faced with a trial court's admission of police-obtained statements to ensure protection of a defendant's constitutional rights.*

Legal Argument – Point 2 - Prosecution should be disqualified and denied from further participating in all matters of this appeal going forward.

(Prb cover page, Prb12)

The prosecutor's request to deny my appeal is ironic. This is because the prosecutor oddly disqualified herself from this appeal when she wrote in her brief,

> *Please accept this **letter memorandum**, pursuant to R. 2:6-2(b), in lieu of a more formal brief submitted on behalf of the State of New Jersey. (Prb Cover page)[Emphasis on "letter memorandum"]*

Monica do Outeiro, 041202006
Assistant Prosecutor
Director, Appellate Section
Of Counsel and
On the ***Letter Brief***
(Prb12)[Emphasis on "letter brief"]

State v. Smith, 251 N.J. 244, 265 (N.J. 2022) ("See N.J.S.A. 1:1-1 ("In the construction of the laws and statutes of this state, both civil and criminal, words and phrases ... shall, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, ***be given their generally accepted meaning****, according to the approved usage of the language.").")*

The prosecutor mistakenly interpreted court rule 2:6-2(b) to apply to the respondent. Court rule 2:6-2 does not apply to the respondent aka prosecutor. This court rule applies to the appellant, which in this case is me. The court rule is literally called "Contents of Appellants brief". I listed the relevant court rule subsections here.

2:6-2-Contents of Appellant's Brief

2:6-2(a) Formal Brief. Except as otherwise provided by R. 2:6-4(c)(1) (statement in lieu of brief), by R. 2:9-11 (sentencing appeals), and by paragraph (b) of this rule, the brief of the appellant shall contain the following material,

> *under distinctive titles, arranged in the following order:*
>
> *2:6-2(b) Letter Brief. In lieu of filing a formal brief in accordance with paragraph (a) of this rule and except as otherwise provided by R. 2:9-11 (sentencing appeals), the appellant may file a letter brief. Letter briefs shall not exceed 20 pages and shall conform with the requirements of subparagraphs (1), (2), (4), (5) and (6) of paragraph (a). As to any point not presented below a statement to that effect shall be included in parenthesis in the point heading. No cover need be annexed provided that the information required by R. 2:6-6 is included in the heading of the letter.*

The court rule the prosecutor wanted to cite is Court rule 2:6-4. This court rule is literally called "Contents of Respondent's Brief; Statement in Lieu of Brief; Responsibility to File." But here is where the irony comes into play. This court rule does not allow the respondent to file a letter brief or statement in lieu of brief except under 2 circumstances. Which in this case was not met. Those circumstances are:

> *2:6-4(c) Statement in Lieu of Brief. A statement in lieu of brief may be filed if the appeal is from a quasi-judicial decision of a named respondent which represents to the court that the general public interest does not require its adversarial participation in the appeal and that the parties directly affected by its decision*

> *have adequately presented, or may be expected to so present, the issues.*
>
> *2:6-4(d) Filing Responsibility of Public Agencies. In all appeals, where a respondent is the State, a political subdivision thereof, a public or quasi-public body, or a public officer appearing in an official capacity, such respondent shall file a brief or, if paragraph (c) is applicable, a statement in lieu of brief.*

I am a private citizen. This appeal is not from "quesi-judicial decision" as required in 2:6-4(c). Therefore, a letter brief or statement in lieu of brief cannot be filed. Similarly, court rule 2:6-4(d) does not allow for a letter brief or statement in lieu of brief unless court rule 2:6-4(c) is applicable. Which in this case, it is not. Now, since neither exception was met, court rule 2:6-4(b) comes into play. That rule states:

> *2:6-4(b) Consequences of Failure to File. Except as otherwise provided by R. 2:9-11 (sentencing appeals) and paragraphs (c) and (d) of this rule, if a respondent fails to file a brief conforming to the requirements of these rules, the court may consider the appeal unopposed and deny the respondent permission to oppose the appeal orally or may make such other order, including an imposition of sanctions, as may be appropriate.*

Since neither court rule exception allowing the prosecutor to file a letter brief or statement in lieu of brief was met, nor did the prosecutor file any motions to toll the time as required by court rule 2:6-11, I ask the court to consider this appeal unopposed and deny the prosecutor permission to participate in all matters of this appeal going forward pursuant to 2:6-4(b)

----------Continued on next page----------

Conclusion

I appreciate the prosecutor's comment that I perfected my appeal (Prb2).

Despite that, I will counter the prosecution's request of the courts to deny my appeal. (Prb12)

Because the prosecution filed a letter memorandum/ letter brief on 9/30 instead of a Formal respondent brief as required, the prosecution failed to file a timely valid formal respondent brief in accordance with court rules: 2:6-2, 2:6-4, 2:6-11.

There is no reason for the honorable judges to consider the brief as a formal brief or rename the brief as a formal brief, when the prosecutor herself named it a "letter memorandum" (Prb Cover page), and a "letter brief" (Prb12).

Therefore, the prosecution filed a brief that is invalid and inadmissible according to court rules 2:6-2, 2:6-4, 2:6-11.

There are only 2 exceptions in these court rules, that the prosecution drew attention to, that allows the prosecution to file a letter brief or a statement in lieu of brief instead of a formal brief. Those exceptions are court rules 2:6-4(c) and 2:6-4(d). Those exceptions were not met in this appeal.

With that being said, in addition to my arguments and requests in my timely filed and valid formal brief, I now also ask the honorable judges to consider this appeal unopposed and accept the prosecutions forfeiture and disqualification and deny the prosecution from further participating in any/all matters of this appeal, including my timely and valid request for oral arguments in accordance with court rule 2:6-4(b).

Respectfully submitted by,

Tony Yusufov

Timely submitted

10/14/2024

Proof Of Service

This exact Formal Cross Reply Brief was timely emailed on, 10/14/24, as allowed by the case manager, to:

Superior Court Appellant Division Case Manager
Heather K Uccio
Court Services Officer 1-Team 4
609-815-2950 x52675
Email - heather.uccio@njcourts.gov

MONMOUTH COUNTY PROSECUTORS OFFICE – Former Prosecutor on Record
ALECIA NATHANNE WOODARD
Email - AWOODARD@MCPONJ.ORG
Email - APPELLATE@MCPONJ.ORG

MONMOUTH COUNTY PROSECUTORS OFFICE – Attorney of record as of
MONICA LUCINDA DO OUTEIRO
Email - appellate@mcponj.org
Email - mdoouteiro@mcponj.org