STATE OF NEW JERSEY, Plaintiff, vs. JEFFREY T. MORTON, Defendant.	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO.: A-003744-22 ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY MONMOUTH COUNTY LAW DIVISION-CRIMINAL PART MUNICIPAL APPEAL NO. 22-017 Sat below: Hon. Michael A. Guadagno, J.A.D. (ret. and t/a)

BRIEF AND APPENDIX (Da1-48) IN SUPPORT OF APPEAL

LOMURRO MUNSON, LLC
Monmouth Executive Center
4 Paragon Way
Freehold, New Jersey 07728
Telephone 732-414-0300
Facsimile 732-431-4043
Attorneys for Defendant-Appellant,
Jeffrey T. Morton

PETER LEDERMAN, ESQ.
NJ ATTORNEY ID: 06881975
plederman@lomurrolaw.com
Of Counsel

Christina Vassiliou Harvey, Esq.
NJ Attorney ID: 023642004
charvey@lomurrolaw.com
Of Counsel and On the Brief

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PRELIMINARY STATEMENT

Defendant Jeffrey T. Morton appeals from the denial of his trial de novo that affirmed his conviction at trial for driving while intoxicated and the denial of his motion to suppress the motor vehicle stop and arrest. The de novo court violated Mr. Morton's constitutional rights under the Confrontation Clauses of the United States and New Jersey Constitutions, because it considered evidence beyond the scope of the municipal court record and did not clearly identify the documents considered. The de novo court's inquiry not only caused a constitutional deprivation, but it was part of a pattern in other matters where the de novo court delved into an inquest beyond the scope of the trial de novo to determine whether there was a basis for excluding Alcotest results that the State did not seek to introduce. The de novo court further erred here because it refused to give an adverse inference when the officer with knowledge and experience of the standardized field sobriety tests was present, but did not testify. As a result, this Court should remand the matter for a trial de novo before an unbiased de novo judge.

COMBINED STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

On May 30, 2021, Defendant Jeffrey T. Morton was charged with driving while intoxicated under N.J.S.A. 39:4-50, failure to maintain lanes under

[1] Due to the intertwined nature, these sections have been combined.

N.J.S.A. 39:4-88, and reckless driving under N.J.S.A. 39:4-96. (Da1-3[2].) Within a week of the arrest, on June 8, 2021, Defendant filed a motion to suppress based upon the stop, the arrest, and the Alcotest. (Da4-5.)

The suppression motion was not heard until July 17, 2022. (1T.) The municipal court took testimony on the motion to suppress from Officer Zachery Pittius beginning on July 17, 2022. (1T5:6.) Officer Pittius had two years of experience with the Freehold Township Police, which meant at the time of Mr. Morton's arrest, Officer Pittius was within his first year with Freehold Township Police. (1T6:4-9; 1T8:17-19.) Officer Pittius only briefly had training in standard field sobriety testing. (1T7:16-21; 1T8:1-6.) As of the day of the motion, Officer Pittius had been involved in about twenty DWI arrests. (1T8:7-9.)

On the early morning hours of May 30, 2021, Officer Pittius' attention was drawn to a pickup truck that "start[ed] to list over to the left over the solid yellow line in the left lane of Route nine." (1T9:18-10:2; 10:11-14.) He testified he decided to pull over the vehicle because, "[a]t one point it actually drifted into the grass median before it regained it's lane in the far left lane." (1T11:7-

[2] The term "1T" refers to the Transcript of Proceedings, dated July 13, 2022; the term "2T" refers to the Transcript of Proceedings, dated August 17, 2022; the term "3T" refers to the transcript of Trial De Novo, dated June 19, 2023; and the term "Da" refers to Defendant Jeffrey T. Morton's Appendix in Support of Appeal.

14.) Yet, during cross-examination, Officer Pittius conceded that he had only written in his report that Mr. Morton "*almost* hit the grass median." (1T33:1-6 (emphasis added).)

Officer Pittius testified during cross-examination that he is trained to prepare an accurate report containing his observations. (1T24:14-25:12.) However, he also testified on cross-examination that his report listed that the vehicle that swerved over the line was a white Chevy Silverado and not a grey Honda, which is what Officer Pittius had reported on the summonses. (1T29:13-30:15; Da1.)

When Officer Pittius pulled over Mr. Morton, he did not notice any containers of alcohol; nor did he recall taking any note of any issues with his eyes. (1T13:24-14:5.) Mr. Morton immediately complied with Officer Pittius' instruction to roll down the window. (1T42:3-9.) Mr. Morton provided Officer Pittius with his documents, which is a test to see if the suspect responds to the officer's directions. (1T44:2-3; 1T45:13-22.) Officer Pittius conceded that Mr. Morton correctly provided the requested documents. (1T46:7-13.) Officer Pittius testified that Mr. Morton was slow in handing over the documents while also conceding the vehicle was oversized, the hour was late, and many people react slower when it is after midnight and the person is tired. (1T46:14-48:2.) Officer Pittius testified it was after midnight, that Mr. Morton was over sixty,

and that it took about thirty seconds for the officer's initial assessment at Mr. Morton's window including the time for Mr. Morton to hand over his documents. (1T48:14-17.)

Officer Pittius noted that Mr. Morton exited his pickup truck that had a higher clearance from the ground than an ordinary sedan, but that he could not recall any issues with Mr. Morton getting out of his vehicle. (1T52:5-25.) Officer Pittius further testified that Mr. Morton had no issues walking from his vehicle to the area where the standard field sobriety tests were conducted—an important observation for conducting a DWI investigation. (1T53:9-20.) Officer Pittius conceded that if a person could walk and stand without difficulties, it would be a sign that the person is not intoxicated. (1T53:21-24.)

Officer Pittius conceded that there are only three standardized field sobriety tests: the horizontal gaze nystagmus "HGN", the walk and turn, and the standing leg raise tests, which do not include the alphabet test. (1T59:13-21.) Officer Pittius testified that Lt. Loos did not tell him anything about the scoring on the HGN test. (1T65:4-7.)

Officer Pittius testified that the field sobriety tests are reliable when administered in a certain manner. (1T60:14-62:16.) Officer Pittius conceded that he was trained to perform the tests on a dry, non-slippery surface so that the

environment does not impact the result of the test. (1T65:13-24.) Officer Pittius conceded the tests were performed in the rain on a wet surface. (1T65:25-66:3.)

Officer Pittius admitted to conducting the walk and turn test with dark lighting in the rain after turning off his vehicle's front lights. (1T14:18-22; 1T15:15-24.) Officer Pittius testified that Mr. Morton performed the walking and turn test without stumbling, "he was just walking a straight line." (1T20:3-4.) Officer Pittius conceded that in demonstrating the walk and turn test, he did so in a manner that changed the test from landing on the even foot to landing on the odd foot, which affects the pivot involved in the test, and thus, the standardization. (2T31:2-32:4.) Officer Pittius also conceded that, in order to fail a standardized test, there must be a failure of more than one scoring factor for the one-leg raise test. (2T34:13-19.)

Although Officer Pittius stated that the walk and turn test has scoring factors, he did not know the number of scoring factors, and that the only factors he knew were the "[t]ouch heel to toe, swaying, walking off line." (1T63:4-12.) Officer Pittius testified that his scoring of the walk and turn test was subjective. (1T64:12-22.)

During the motion to suppress, the State and Defendant stipulated that Freehold Township does not have any standard operating procedures for roadside DWI investigations but that the Attorney General guidelines for

prosecution of DWI as well as the five-day training for standardized field sobriety test, four-day training on Alcotest, and an Alcotest conversion training course would apply. (2T5:1-13.)

Despite this stipulation, Officer Pittius testified that he had not taken either the five-day training course, the four-day course, or the conversion training course. (2T5:21-6:13.) He also testified he was not scheduled to take the training course. (2T6:2-4.) Officer Pittius testified he never received the actual New Jersey State Police Alcohol Drug Test Unit training. (2T9:14-17.) Officer Pittius admitted that "there's a certain number of scoring factors that have to be observed [during the administration of the field sobriety test] before a particular test will result in a determination of probable cause of intoxication." (2T10:21-11:2.) He also admitted that he was unaware of the decision points for those scoring factors. (2T11:3-8.) He admitted that the standardized field sobriety tests have to be given in a certain way, and that to be standardized, the administrator would need to know the standardized way of administering the test. (2T11:9-12:1.)

Officer Pittius conceded it was raining that night, and the visibility was affected by rain. (2T14:20-15:22.) Officer Pittius further confirmed that emergency overhead lights should be turned off during the administration of tests because it could affect the subject's ability to perform the tests since they

are extremely bright, and flash or strobe. (2T15:23-16:19.) Although Officer Pittius turned off his overhead lights, he admitted that Lt. Loos' lights remaining on and immediately behind his own patrol car near where defendant performed the tests. (2T16:20-18:15.)

Officer Pittius conceded that age is a factor in performing standard field sobriety tests because older people will have difficulty balancing on one leg or walking heel to toe, and that Mr. Morton was sixty-two years old at the time these tests were performed. (2T19:25-20:11.)

Officer Pittius further testified that time of day when the tests are administered could also affect the test and that Mr. Morton's test was administered at 12:01 AM. (2T20:12-24.) Officer Pittius further admitted remarking to Lt. Loos that Mr. Morton look tired. (1T57:6-23; 2T20:25-21:5.) In fact, Officer Pittius conceded that when he began the standardized field sobriety tests, he was not sure if Mr. Morton was just tired. (2T22:16-21.)

Officer Pittius admitted that the alphabet test is not a standard field sobriety test that can be administered with reliability. (2T33:3-12.)

Two pieces of evidence were moved: S-2, which was Officer Pittius' MVR footage up to the moment of the arrest; and D-1, which was Lt. Loos' MVR footage up to the moment of the arrest. (2T39:5-18.)

Following the testimony, the municipal court heard oral argument on the motion to suppress. (2T36:23-45:9.) Defense counsel argued Mr. Morton showed no signs of slurred speech, had no difficulty communicating with the officers, no issue getting out of his oversized truck, and he had no issues swaying or walking. (2T40:6-41:4.) Defense counsel further argued Officer Pittius had admitted that he believed Mr. Morton was tired. (2T41:22-42:18.) Defense counsel also argued that Officer Pittius did not follow any training to perform the standardized field sobriety tests, and that the flashing overhead lights of Lt. Loos' vehicle affected Mr. Morton's ability to complete the standardized field sobriety tests. (2T37:7-40:3.)

The municipal court found the stop was justified. (2T45:16-21.) The municipal court found that all the factors identified by defense counsel – Mr. Morton's age, that he was not wearing his glasses, that it was wet out, and that Lt. Loos' lights were on – did not negate the municipal court's finding that Mr. Morton could not perform the psychophysical tests. (2T46:21-47:7.) The municipal court then denied the suppression motion finding there was enough evidence to support the arrest. (2T47:19-25.)

The municipal court then proceeded with the trial. (2T48:11.) Officer Pittius testified that he smelled alcohol while transporting Mr. Morton back to the station, but he could not identify the type of alcohol, and he conceded alcohol

itself is odorless. (2T50:22-53:8.) The State limited the evidence to Officer Pittius' observations. (2T53:23-54:4.)

Defense counsel argued to the municipal court that the State had not met its burden because Officer Pittius did not have the training or experience to testify as to whether Mr. Morton failed any of the standardized field sobriety tests. (2T54:23-58:15.) Counsel argued, "It's got to be through the trained eye of somebody who has been taught to see things the way they're the supposed to be seen." (2T56:17-19.) Because Officer Pittius did not know the scoring factors for the standardized field sobriety tests, he could not offer an opinion on whether Mr. Morton was intoxicated. (2T56:17-58:15.)

Further, defense counsel argued that Lt. Loos, who had experience, was not called to testify. (2T59:5-20.) Defense counsel argued that the State could not meet its burden of proof beyond a reasonable doubt of Mr. Morton's guilt when Officer Pittius conceded that he was not sure whether Mr. Morton was just tired. (2T59:21-60:8.)

In finding that Mr. Morton was guilty of DWI, the municipal court noted that the MVR did not depict swerving, but did show "the defendant drifting into the grass median." (2T63:4-15.) Although the municipal court found that Officer Pittius' directions to perform the walk and turn and one-leg stand raise test were "poor," the municipal court found Mr. Morton did not pass the tests. (2T66:3-

15.) The municipal court was further persuaded that Mr. Morton was intoxicated because he failed the alphabet test. (2T66:16-67:14.) The municipal court further declined to make an adverse inference as to the State's failure to call Lt. Loos' as witness. (2T67:15-21.)

The municipal court imposed the minimum penalty. (2T68:12-17.) The record noted that Mr. Morton had proactively attended alcohol counseling. (2T69:17-21.) Although the municipal court stayed the sentence pending appeal, she indicated following an appeal, the fine would be $507, $33 court costs, $225 in DWI surcharge, $75 Safe Neighborhood, $50 VCCO, and two-year loss of license with an ignition interlock device. (2T70:7-25.) The municipal court further found Mr. Morton guilty of failing to maintain lane and reckless driving but merged the sentence. (2T71:10-16.)

At the trial de novo, defense counsel argued that the appeal was from both the denial of the suppression motion and the finding of guilt following the suppression motion. (3T4:6-10.) He summarized for the suppression motion, "we have the analysis of whether there's been justification to stop the motor vehicle, have the defendant step from the vehicle to perform field sobriety tests. State v. Bernokeits investigative detention. And then ultimately arrest." (3T4:11-15.)

The de novo court inquired into Mr. Morton's blood alcohol content level, even though that was not an issue before the municipal court. (3T7:3-11.) The de novo court noted that it routinely asks about the reasons why Alcotest results are not admitted even if it is not presented in the issues on appeal before the trial court. (3T6:13-7:1; 3T7:12-20.) Defense counsel responded that although Lt. Loos was in the building, who was the officer who could have testified to those results, the "State chose to proceed on observations and on observations only." (3T5:8-6:2.) Defense counsel also stated that the breath test results exceed the scope of the court's review, but that they were inadmissible which was why they were not introduced. (3T8:9-21.) The prosecutor noted that the Alcotest results were not admitted because Lt. Loos used his cell phone in the room, and thus the results were barred by State v. Chun, 194 N.J. 54, cert. den., 555 U.S. 825 (2008). (3T18:8-19:5.)

Defense counsel requested an adverse inference because Lt. Loos was in the building, but the State did not call him to testify. (3T9:3-23.) Counsel argued Lt. Loos was the officer with the proper training in DWI investigations, he conducted the field sobriety tests, including the horizontal gaze nystagmus test, and he made observations that Mr. Morton appeared tired. (3T9:3-10:20, 3T11:12-19.) Defense counsel summarized all of Officer Pittius' credibility issues prior to even conducting the field sobriety tests: identifying a different

make and model of the vehicle that crossed the grass median, not recording that the vehicle crossed over the median in his report, and the initial impression that Mr. Morton was tired, not intoxicated. (3T11:24-12:4.)

Defense counsel further argued that the law requires a driver to maintain the lane as nearly as practicable, and due to the rain, time of night, road conditions, and size of Mr. Morton's large Chevrolet Silverado, he maintained his lane as best he could, which is consistent with Officer Pittius failing to activate his overhead lights or the MVR. (3T13:16-14:4.)

Defense counsel also noted that Officer Pittius testified that the most important part is whether a defendant follows instructions and that Mr. Morton complied: he pulled over without an issue parking "the car perfectly," he handed over the right documents, and he was able to walk out of the vehicle without an issue. (3T14:5-15:8.) He also noted there was no slurred speech. (3T14:24-15:8.)

Defense counsel highlighted that despite all these things, Officer Pittius proceeded to administer the standardized field sobriety tests, even though he did not have the right training to do so. (3T15:9-21.) On the walk and turn test, out of eight possible scoring factors, Mr. Morton did only one thing wrong—he failed to touch heel to toe. (3T15:22-16:2.) On the one leg stand test, there's four possible scoring factors, but Officer Pittius only identified one problem—that Mr. Morton put his foot down. (3T16:3-9.) On this basis, there were only

two of ten possible factors that Mr. Morton got wrong, which does not provide either probable cause to arrest, or guilt beyond a reasonable doubt. (3T15:22-16:15.)

On the alphabet test, Mr. Morton did not make mistakes-he just did not finish the test. (3T16:10-15.) There was no testimony on the horizontal gaze nystagmus test. (Id.)

Although the de novo court noted that he could not consider the police report, which was inconsistent with the officer's testimony, there was an attempt to obtain the report. (3T12:22-24; Da43-44.)

The de novo court noted that Freehold had stipulated that it had no standard operating procedures for conducting a DWI investigation. (3T11:10-11.)

In denying the trial de novo, the de novo court reviewed the record created in the municipal court. (Da15.) Although there was no testimony as to the result, the trial court found "Lt. Loos administered the Horizontal Gaze Nystagmus (HGN) test." (Da16.) The de novo court found Mr. Morton "failed 'on multiple occasions' to follow instructions and walked without touching heel to toe." (Da16.) The de novo court further found as to the "one-leg-stand test, defendant 'put his foot down multiple times, he switched legs [and] was not able to complete the test.'" (Da16.) The de novo court found Mr. Morton could not

finish the alphabet, and although he started correctly at C as instructed, he restarted at A. (Da16.)

The de novo court further mentioned that the Alcotest was administered, noting "[i]n spite of this indication that defendant was being processed for an Alcotest, there was no mention of same during the trial and after the conclusion of the cross-examination of Pittius, defense counsel informed the judge that it was his understanding that 'the State is only going to rely on observations for this case.'" (Da17.) The de novo court further questioned the State's decision to rest solely upon Pittius' testimony given "defendant's attorney had vigorously challenged Officer Pittius' observations of defendant and his conduct of field sobriety tests." (Da17.)

The de novo court declined to give an adverse inference to the State's failure to call Lt. Loos finding State v. Clawans, 38 N.J. 162 (1962) had fallen into disfavor, there was no suggestion as to the facts that Lt. Loos had that Officer Pittius did not, and the matter had not been raised to the municipal court.[3] (Da18.) As will be discussed in the Legal Argument, Mr. Morton challenges each basis.

[3] The municipal court rejected Mr. Morton's request for an adverse inference at 2T67:15-21.

In deciding the trial de novo, the de novo court noted that the scope of its review was de novo upon the record made in the municipal court. (Da18-19.) The de novo court found the MVR footage supported Officer Pittius' testimony that there was a lane deviation justifying the stop. (Da20-21.) Despite Officer Pittius' testimony about Mr. Morton being tired, the trial court found "[b]ased on the erratic driving, slow movements and the odor of alcohol, Officer Pittius concluded that defendant was under the influence of alcohol and asked defendant to step out of his vehicle to complete field sobriety tests." (Da22.)

The de novo court found that defendant failed the walk-and-turn test by walking without touching heel-to-toe, failed the one leg stand test by putting his foot down several times, and failed the alphabet test by not following instructions, noting Defendant said "C, D, T, F, G, A, B, C, D, E, F, D," even though nowhere in the record is there evidence that Defendant said these letters. (Da22, Da48 at D-1 at Loos Camera 0 at 15:23-15:36.[4])

The de novo court summarized that the motion to suppress was correctly denied based on the totality of failure to maintain lane, odor of alcohol, and

[4] The video taken from Lt. Loos' motor vehicle recorder at Da48 marked as D-1 at Camera 0 at 15:23 to 15:36 demonstrates that Mr. Morton stated "C, D, E, F, G, A, B, C, D, E, F, G," and then the officer instructed Mr. Morton to return to his vehicle. It bears noting that Mr. Morton kept asking Officer Pittius to repeat the instructions because he could not hear due to the rain and traffic on Route 9. See Da48 at D-1 Camera 0 at 10:07, 10:22, and 14:07.

failure of the standardized field sobriety tests. (Da23.) The de novo court relied on the same evidence to find defendant guilty beyond a reasonable doubt of N.J.S.A. 39:4-50, and reimposed the municipal court's sentence. (Da23.)

Defendant timely appealed to this Court (Da27), and this brief now follows in support of the appeal.

STANDARD OF REVIEW

This Court reviews an appeal from a trial de novo for "sufficient credible evidence in the record to have led to the judge's findings." State v. Avena, 281 N.J. Super. 327, 333 (App. Div. 1995) (citing State v. Johnson, 42 N.J. 146, 162 (1964).) When this Court finds that the trial court's decision was clearly "mistaken and so plainly unwarranted ... the interests of justice demand intervention and correction ... then, and only then, it should appraise the record as if it were deciding the matter at inception and make its own findings and conclusions." Id.

This Court also reviews legal questions de novo. State v. Hemenway, 239 N.J. 111, 125 (2019)(explaining no deference owed to the lower court's decision on an issue of law). In this matter, the de novo court violated Mr. Morton's constitutional rights by exceeding the scope of review under the Court Rule for a trial de novo. R. 3:23-8(a)(2). By considering issues beyond the scope while also not informing Mr. Morton that they would be considered, the de novo court

erred and prejudiced the result. The proper remedy is to remand for a fair trial de novo under the appropriate scope before an impartial judge.

In addition, the de novo court erred as a matter of law by misinterpreting the Supreme Court's precedent as to when an adverse inference should be granted to benefit a criminal defendant. Because the de novo court took the opposite of the precedent to deny the use of the adverse inference, the matter should be reversed.

Finally, Mr. Morton's matter should be reversed because the de novo court's finding was not supported by sufficient credible evidence when Officer Pittius admitted he did not rely on standardized scoring factors to make the determination of Mr. Morton's intoxication. (1T63:4-64:22.) Based on this error, the matter should be remanded for a new trial de novo.

LEGAL ARGUMENT

POINT ONE

This Court Should Reverse Because Defendant's Rights Under the Confrontation Clause Were Violated. (Da17; Da43-44.)

In this matter, defense counsel was contacted by the court clerk after the filing of the de novo appeal requesting documents that were not part of the record in the municipal court be provided. (Da43-44.) Because Defendant does not know what documents were considered beyond those that were part of the record in the municipal court, his rights under the federal and state Constitutions were violated.

State v. Branch, 182 N.J. 338, 348 (2005) (citing U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10); State v. Bankston, 63 N.J. 263, 268–69 (1973)(holding the accused as a right under the Sixth Amendment "to be confronted by witnesses against him)(citations omitted); see N.J. Const. art. I, ¶ 10. The remedy here is a new trial de novo with a clear record of the evidence being considered by the court.

As noted by the de novo court, on a trial de novo, the "standard requires the reviewing court to make original findings of fact and rulings on the evidence, while limited to the evidentiary record created in the municipal court." (Da19 (citing State v. Thomas, 372 N.J. Super. 29, 31 (App. Div. 2004)). But here, the de novo court sought evidence of the police report that was not a part of the evidentiary record in the municipal court. (Da43-44.)

The de novo court then discussed information about the administration of Alcotest in the trial de novo even though it exceeded the scope of the hearing in the municipal court under R. 3:23-8(a)(2). (Da17.) The de novo court noted,

> During the trial de novo, this court inquired why the Alcotest was not introduced and an assistant prosecutor responded that she had questioned the municipal prosecutor on this, and he indicated to her that Lt. Loos was seen on video using his cell phone while performing the Alcotest which violated the protocols established in State v. Chun, 194 N.J. 54, cert. denied, 555 U.S. 825 (2008).

(Da17.) The de novo court further faulted "the municipal judge [for] fail[ure] to make any inquiry as to why the evidence was not being admitted." (Da17.) Because

neither the Alcotest results nor the additional exhibits requested by the de novo court clerk were part of the record before the municipal court, the de novo court violated Mr. Morton's constitutional rights under the Sixth Amendment and New Jersey Constitution, article I, paragraph 10.

A person charged with a criminal offense has the right to confront his accusers. State v. Weaver, 219 N.J. 131, 151 (2014) (citing U.S. Const. amend. VI). The reason for the Confrontation Clause is the principle that "subjecting testimony to cross-examination enhances the truth-discerning process and the reliability of the information." Id. at 151 (citing California v. Green, 399 U.S. 149, 159 (1970); State ex rel. J.A., 195 N.J. 324, 342 (2008))).

"The right of confrontation is an essential attribute of the right to a fair trial, requiring that a defendant have a 'fair opportunity to defend against the State's accusations.'" Branch, 182 N.J. at 348 (quoting State v. Garron, 177 N.J. 147, 169 (2003) (quoting Chambers v. Mississippi, 410 U.S. 284, 294 (1973)), cert. denied, 540 U.S. 1160 (2004)). Importantly, "[a] defendant exercises his right of confrontation through cross-examination, which has been described as the "'greatest legal engine ever invented for the discovery of truth.'" Id. at 348-49 (quoting California v. Green, 399 U.S. at 158 (quoting 5 Wigmore *349 § 1367); see also Pointer v. Texas, 380 U.S. 400, 404 (1965)).

Further, under the Sixth Amendment, a criminal defendant is entitled to know the evidence against him. State v. Gibson, 219 N.J. 227, 249 (2014)(explaining when evidence from suppression motion is then used on a municipal trial, there must be a clear record of the testimony and exhibits being incorporated into the trial); State v. Bankston, 63 N.J. 263, 268–69 (1973) (holding that detective's recounting of information received from informant to explain reason for entry to tavern and arrest of defendant contravened defendant's Sixth Amendment right to confront witnesses against him). A matter should be reversed when inadmissible evidence is used to implicate a defendant's guilt. Weaver, 219 N.J. at 152 (quoting State v. Branch, 182 N.J. 338, 351 (2005)).

Here, the de novo court violated Mr. Morton's rights by making inquiry into the Alcotest results that were not relevant to the trial de novo. (3T6:13-7:10.) The de novo court noted that it routinely makes inquiry into the exclusion of Alcotest results, which demonstrates prejudice. (Id.) Because Mr. Morton does not know what items were actually considered, and the de novo court made inquiry both on the record and in emails before the trial de novo to expand the record, the proper remedy is for a remand for a new trial de novo.

POINT TWO

The De Novo Court Demonstrated Bias By Inquiring Into Matters that Exceeded the Scope of the Hearing. (Da17, Da43-44.)

As mentioned above, the de novo court faulted the municipal judge for failing to make any inquiry as to why the Alcotest evidence was not being admitted. (Da17.) There is no requirement for Alcotest evidence to be admitted. See State v. Gibson, 219 N.J. 227, 246 (2014)(noting that a defendant may be convicted of DWI based on observation alone). In addition, the de novo court's inquiry into matters that exceeded the scope of the review demonstrated an intent to find additional reasons to convict Defendant, such as reviewing the police report. (Da43-44.)

This Court should take judicial notice under N.J.R.E. 201 of other matters where the same judge has conducted the same inquiry that demonstrates a pattern of exceeding the scope of review for a trial de novo. See e.g., State v. Chopp, A-002798-22. Moreover, the de novo judge here even admitted to his routine to inquire whenever the Alcotest results are excluded – even though that inquiry is not relevant to this defendant's trial de novo. (3T6:13-8:4.)

The New Jersey Supreme Court has explained "judges must avoid acting in a biased way or in a manner that may be perceived as partial." DeNike v. Cupo, 196 N.J. 502, 514 (2008). The Court held "[t]o demand any less would invite questions about the impartiality of the justice system and thereby "threaten[ ] the integrity of our judicial process." Id. at 514-15 (quoting State v. Tucker, 264 N.J. Super. 549,

554 (App. Div. 1993), certif. denied, 135 N.J. 468 (1994)). In finding the trial court should have recused himself from post-bench trial issues when he began post-employment discussions with one of the lawyers, the Supreme Court explained it did not matter that there did not appear to be bias and unfairness because it was enough for the other attorney to have "an 'objectively reasonable' belief that the proceedings were unfair." Id. at 517.

Similarly, in State v. McCabe, 201 N.J. 34, 35 (2010), the Supreme Court analyzed the issue when the municipal court judge did not recuse himself in a DWI being handled by a defense attorney who was adverse to the municipal judge in a different matter. The Court explained that "it is not necessary to prove actual prejudice on the part of the court[;] ... the mere appearance of bias may require disqualification.... [T]he belief that the proceedings were unfair must be objectively reasonable." Id. at 43 (quoting State v. Marshall, 148 N.J. 89, 279 (citing R. 1:12–1(f)), cert. den., 522 U.S. 850 (1997). The Court found it was a mistake to focus on the actual prejudice suffered by the litigant. Id. at 45. The Supreme Court explained it did not matter that "there is no evidence of bias or unfairness in the record." McCabe, 201 N.J. at 45. The Court used McCabe to set bright-line rule that disqualification is necessary whenever the municipal judge and a lawyer for a party are adversaries in a pending matter. Id. at 46.

Similarly, in P.M. v. N.P., 441 N.J. Super. 127, 142 (App. Div. 2015), the Appellate Division remanded to the trial court to create a record as to potential bias in entry of an Order because one of the attorneys later hired the judge's law clerk. In remanding, the Appellate Division stated:

> If the judge concludes the law clerk "substantially participated" in any of the decisions he reached in this case after defense counsel revealed to him her interest in hiring his law clerk or after defense counsel revealed to the law clerk her interest in hiring her, the judge is required to vacate any orders entered during this time period and recuse himself from further involvement in this case.

P.M., 441 N.J. Super at 142 (citing In re Reddin, 221 N.J. 221, 223 (2015) and R. 1:12–1(g)).

In Reddin, 221 N.J. at 236, the Court held the public confidence in the judiciary's independence is undermined when two judges regularly dine with a person under indictment. In Goldfarb v. Solimine, 460 N.J. Super. 22, 31 (App. Div. 2019), the Appellate Division held a trial judge had a duty to recuse herself when she exchanged *ex parte* text messages regarding her presiding over a trial.

Under the Code of Judicial Conduct, "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Canon 2.1. The Comments to the Code note, "an appearance of impropriety is created when a reasonable person, fully informed person observing the judge's

conduct would have doubts about the judge's impartiality." Code of Judicial Conduct, cmt. 3 on Rule 2.1.

The Rules also provide that a judge must "disqualify themselves in proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned" due to "personal bias, prejudice, or knowledge." Code of Judicial Conduct, Canon 3.17. To determine whether there is a violation of the Rules of Judicial Conduct, the court looks to whether a "reasonable, fully informed person have doubts about the judge's impartiality." DeNike v. Cupo, 196 N.J. 502, 517 (2008).

Here, the de novo court did not appear impartial when it repeated asked about circumstances that exceeded the scope of the trial de novo, in particular, the result of the Alcotest that was not relied on and the reasoning why the Alcotest result was not introduced. (3T6:13-8:21; 3T18:2-21:5.) This pattern of inquiry that the trial court admitted it conducts as a matter of routine, demonstrates bias that the individual is intoxicated because there is an Alcotest result, even when the State did not rely on or introduce the test result. (3T6:13-8:21.) This Court should end this improper inquiry at de novo trials, and grant this Defendant a new trial de novo with an impartial judge.

POINT THREE

The De Novo Court Erred in Denying Defendant's Request for an Adverse Inference. (Da18).

The de novo court erred as a matter of law in rejecting Mr. Morton's request for an adverse inference because Lt. Loos was within the State's control, he had knowledge superior to Officer Pittius regarding the administration and scoring of the standardized field sobriety tests, he was available within the court house, and there information went to crucial issues in the suppression motion and trial. See 3T9:3-23; 2T12:10-13:11; 2T60:20-25. The de novo court erred in its reliance on a case for the opposite principle than applied to the case at bar. See Da18. In addition, the de novo court erred when it found Mr. Morton had not raised the issue previously when the absence of Lt. Loos was argued to the municipal court and rejected by it. (2T59:1-60:13; 2T67:15-21.)

"[D]ue process requires the State to prove each element of a charged crime beyond a reasonable doubt." State v. Hill, 199 N.J. 545, 558–59 (2009)(citing In re Winship, 397 U.S. 358, 364 (1970) (applying Due Process Clause of Federal Constitution); State v. Anderson, 127 N.J. 191, 200–01 (1992) (requiring same under State Constitution). Because a defendant has a presumption of innocence, "[a] defendant need not call any witnesses." Id. (citing Winship, 397 U.S. at 363 (stating that "[t]he [reasonable-doubt] standard

provides concrete substance for the presumption of innocence") (quoting Coffin v. United States, 156 U.S. 432, 453 (1895))).

"This presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created." Coffin, 156 U.S. at 459. Under Clawans, "a defendant may be entitled to such a charge if the State fails to present a witness who is within its control, unavailable to the defense, and likely to give favorable testimony to the defendant." State v. Dabas, 215 N.J. 114, 140 (2013) (citing Clawans, 38 N.J. at 170-75).

Within this context of the presumption of innocence, the trial court erred in failing to grant an adverse inference because the State did not call its experienced officer with proper training to standardized field sobriety tests who could have testified to the scoring factors. (2T12:16-13:11.) Here, because the scoring factors were not evaluated, the harm was compounded because Officer Pittius had no basis for concluding that Mr. Morton failed the standardized field sobriety tests given Pittius did not use the scoring factors, and Lt. Loos was not called, who could have testified as to the scoring factors. (2T11:3-12:1; 1T63:4-64:22; 2T59:5-20.) In finding Defendant guilty of DWI, the de novo court noted that Lt. Loos administered the HGN test. (Da16.) The de novo court should have granted an adverse inference given the failure to call Lt. Loos to testify.

The de novo court here rejected the request for an adverse inference for failing to call Lt. Loos based on State v. Hill, 199 N.J. 545, 550, 974 A.2d 403, 406 (2009). But in Hill, the adverse inference would have benefited the State that had the burden of proof while here, the adverse inference would protect the accused, who has the constitutional right to remain silent. See U.S. Const. amend. V. In Hill, 199 N.J. at 550, a defendant was convicted for serving as an accomplice to an armed robbery. Defendant had testified that he had driven his nephew and two companions but that he did not know about a robbery until he saw the gentlemen running towards the car brandishing a gun while being chased by angry men. Id. at 550. Defendant's nephew had pled guilty, and a plea colloquy implicated the defendant. Id. at 551. The State sought an adverse inference because the nephew did not testify. Id. at 557.

In explaining why the adverse inference should not be used against a criminal defendant, the Court reviewed the circumstances of State v. Clawans, 38 N.J. 162 (1962). Id. at 565-66. In that case, the adverse inference was used against the State – the party with the burden of proof – in a criminal matter. Clawans, 38 N.J. at 170. The Court in Clawans held, "For an inference to be drawn from the nonproduction of a witness it must appear that the person was within the power of the party to produce and that his testimony would have been superior to that already utilized in respect to the fact to be proved." Id. at 171.

The Court in Hill noted that four factors generally apply before an adverse inference is granted:

> (1) that the uncalled witness is peculiarly within the control or power of only the one party, or that there is a special relationship between the party and the witness or the party has superior knowledge of the identity of the witness or of the testimony the witness might be expected to give; (2) that the witness is available to that party both practically and physically; (3) that the testimony of the uncalled witness will elucidate relevant and critical facts in issue [;] and (4) that such testimony appears to be superior to that already utilized in respect to the fact to be proven.

Hill, 199 N.J. at 561 (quoting State v. Hickman, 204 N.J. Super. 409, 414, (App.Div.1985), certif. denied, 103 N.J. 495 (1986). The four factors favor the use of the charge for this case: 1) Lt. Loos was within the State's control; 2) he was available as it was stated throughout the transcript that he was in the building at the time of the trial; (2T60:20-25); 3) Lt. Loos administered standardized field sobriety tests to Mr. Morton; (2T12:10-13:11); and 4) his testimony would have been superior because he was trained and knew the scoring factors for field sobriety tests that Officer Pittius was unaware. Id.

The de novo court noted that under Hill use of the charge has been disfavored, but it is disfavored only when it is used against a criminal defendant who has the presumption of innocence. Id. at 562-63, 566. The de novo court improperly faulted Mr. Morton for not calling Lt. Loos himself when the answer

lies in the very case on which the trial court relied; in Hill, the Court explained, "Defendant did not need to prove anything; he could merely rely on the presumption of innocence and require that the State satisfy its burden." Hill, 199 N.J. at 568. Here, by denying the adverse inference, the de novo court overlooked that Lt. Loos' knowledge of the field sobriety tests were far greater and that had he been called, there would be more robust cross-examination as to the scoring factors to show reasonable doubt into Mr. Morton's intoxication. (2T12:5-13:11.)

When "potentially useful evidence" that can assist a defendant to cross-examine the State is destroyed, "[t]he adverse-inference charge is a remedy to balance the scales of justice ...." State v. Richardson, 452 N.J. Super. 124, 135 (App. Div. 2017) (quoting Dabas, 215 N.J. at 140). A criminal defendant may be entitled to an adverse inference charge when the State does not preserve evidence that the defendant requested during discovery. State v. Richardson, 452 N.J. Super. 124, 128 (App. Div. 2017).

To qualify as "relevant material," the evidence must have "'a tendency in reason to prove or disprove [a] fact of consequence to the determination of the action.'" State v. Richardson, 452 N.J. Super. 124, 132 (App. Div. 2017)(quoting State v. Gilchrist, 381 N.J. Super. 138, 146 (App. Div. 2005) (quoting N.J.R.E. 401)). "A court must 'focus upon 'the logical connection

between the ... evidence and a fact in issue.'" Id. (quoting Gilchrist, 381 N.J. Super. at 146((quoting State v. Darby, 174 N.J. 509, 519 (2002)).

The New Jersey Supreme Court has established that the police have a duty to preserve a police officer's contemporaneously written notes. State v. W.B., 205 N.J. 588 (2011). The Court held, "if notes of a law enforcement officer are lost or destroyed before trial, a defendant, upon request, may be entitled to an adverse inference charge molded, after conference with counsel, to the facts of the case." 205 N.J. at 608–09. The reason for that requirement is so the defendant has a basis to cross-examine the police officer at trial. The issue is both one of discovery and due process right to confront the witnesses:

> Yet the possibility of a misrecording is precisely why the notes must be maintained—a defendant, protected by the Confrontation Clause and our rules of discovery, is entitled to test whether the contemporaneous recording is accurate or the final report is inaccurate because of some inconsistency with a contemporaneous recordation. It is for the jury to decide the credibility of the contemporaneous or other recordation made while an investigation is on-going prior to preparation of a formal report.

Id. at 607–08.

The Court held that it was an abuse of discretion and reversible error to deny an adverse inference charge where an officer threw out "his lengthy pre-interview notes involving a murder investigation" one year after indictment. State v. Dabas, 215 N.J. 114, 123–24 (2013). "The pre-interview was followed

by a brief recorded inculpatory interview consisting of short answers to leading questions." Id. The Court explained:

> The potential for unconscious, innocent self-editing in transferring words, sentence fragments, or full sentences into a final report is a real possibility. So is the potential for human error in the transposition of words from notes into a report. The meaning and context of [the defendant's] words as recorded in the notes may have been subject to differing interpretations where [the investigator] saw only one. Language nuances may have been lost as [the investigator] translated them into the final report. The slightest variation of a word or a phrase can either illuminate or obscure the meaning of a communication.
>
> [Id. at 138–39.]

As the Court held in W.B. and Dabas, neither proof of bad faith, nor a showing that evidence is exculpatory, is essential to demonstrate a discovery violation or to justify an adverse inference charge.

Applying the Supreme Court's precedent, this Court relied on it to conclude that "the State may not destroy law enforcement's videorecording of an offense, particularly when a defendant has made a timely request to preserve it." Richardson, 452 N.J. Super. at 134. Because the State had destroyed the videorecording, the Appellate Division held the defendant was entitled to an adverse inference charge, and that the denial of the adverse inference charge constituted reversible error. Id. at 134. This Court explained that the booking room video was particularly relevant because the sole basis for the conviction

was the testimony of the arresting officer. "The recording may have conclusively established defendant's guilt if the officer was truthful, but it may have conclusively exonerated defendant if the officer was not." State v. Richardson, 452 N.J. Super. 124, 142 (App. Div. 2017).

Mr. Morton was entitled to the adverse inference because Lt. Loos was the experienced officer, who administered the HGN test, knew the scoring factors for all the standardized tests, was present for the administration of all the tests, and was present in the court house at the time of the suppression hearing and trial. (Da16; 2T12:5-13:11; 2T60:16-61:1.) The trial court here erred as a matter of law by relying on Hill where the Court's concern was the exact opposite of the facts at bar – in this case, a criminal defendant sought the benefit of the inference because the State, who has the burden of proof, did not call the witness with the superior knowledge. Mr. Morton was prejudiced because the only witness who testified provided a lay opinion without foundation given Officer Pittius conceded he knew there were scoring factors for standardized field sobriety tests but he did not know what those factors were and thus, did not use them. (2T11:3-12:1; 1T63:24-65:3.) This testimony was prejudicial on its face but even more so because the party with superior knowledge was not called.

POINT FOUR

The De Novo Court Erred in Affirming the Arrest and Conviction Given Officer Pittius Did Not Comply with the Scoring Protocols for Administering the Standardized Field Sobriety Tests. (Da21-22).

In this case, the trial court overlooked Mr. Morton's argument that Officer Pittius did not use the proper scoring factors. (2T56:20-57:1; 3T15:14-16:15.) The evidence in this matter was extremely limited. Because Officer Pittius' testimony as to the scoring factors was given great weight, this Court should reverse because Officer Pittius admitted that he did not comply with the standardized scoring protocols for administering these sobriety tests. (1T64:6-66:3.)

"[A] conviction for driving while under the influence of alcohol will be sustained on proofs of the fact of intoxication – [as shown by] 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. Olenowski, 255 N.J. 529, 549 (2023)(quoting State v. Bealor, 187 N.J. 574, 588 (2006)). The State bears the burden to prove both intoxication and the cause of intoxication. Id. at 550.

"The three SFSTs were deemed the most accurate tests for determining alcohol-caused impairment. The two psychophysical tests in this step that are

part of the three-test SFST battery are the walk-and-turn and one-leg-stand tests. The third SFST is the HGN test, which is an eye exam covered previously in Step 4." Olenowski, 255 N.J. at 555, n. 8. The "horizontal gaze nystagmus (HGN) exam, which checks for the lack of the smooth eye pursuit, sustained eye jerking at maximum deviation (where the eye is turned as far to the side as possible), and the angle of onset at which the eyes first begin to jerk, all while tracking the eyes in a horizontal path following a stimulus." Id. at 554.

The Supreme Court of Ohio has recognized that the results of standardized field sobriety tests performed without strict compliance with the standard procedure does not provide probable cause for arrest for DWI. State v. Homan, 732 N.E.2d 952, 955 (2000), mod. as stated in State v. Boczar, 863 N.E.2d 155, 160 (Ohio 2007). Although the Supreme Court of Ohio subsequently modified the holding to change the standard from strict compliance to substantial compliance, the Supreme Court of Ohio recognized the need for standardization of field sobriety tests in order for the tests to have meaning. Boczar, 863 N.E.2d at 159-60. The importance of the standard administration of standardized field sobriety tests is because "[w]hen field sobriety testing is conducted in a manner that departs from established methods and procedures, the results are inherently unreliable." Homan, 732 N.E.2d at 955. For non-scientific standardized field sobriety tests to be admissible, Ohio requires an officer to substantially comply

with the standard manner of administration and testing standards. State v. Boczar, 863 N.E.2d 155, 160 (Ohio 2007).

> The NHTSA concluded that field sobriety tests are an effective means of detecting legal intoxication "only when: the tests are administered in the prescribed, standardized manner[,] the standardized clues are used to assess the suspect's performance[, and] the standardized criteria are employed to interpret that performance." National Highway Traffic Safety Adm., U.S. Dept. of Transp., HS 178 R2/00, DWI Detection and Standardized Field Sobriety Testing, Student Manual (2000), at VIII–3. According to the NHTSA, "[i]f any one of the standardized field sobriety test elements is changed, the validity is compromised." Id. Experts in the areas of drunk driving apprehension, prosecution, and defense all appear to agree that the reliability of field sobriety test results does indeed turn upon the degree to which police comply with standardized testing procedures. See, e.g., 1 Erwin, Defense of Drunk Driving Cases (3 Ed.1997), Section 10.06 [4]; Cohen & Green, Apprehending and Prosecuting the Drunk Driver: A Manual for Police and Prosecution (1997), Section 4.01.

State v. Homan, 732 N.E.2d 952, 955–56. In Homan, the Supreme Court of Ohio explained "Even the seemingly straightforward one-leg-stand test requires precise administration." Id. at 956. In addition, the Court explained the care necessary in administration of all the standard field sobriety tests for the test to be admissible because deviation causes the results to be unreliable: "it is well established that in field sobriety testing even minor deviations from the standardized procedures can severely bias the results." Id. at 957.

This Court will reverse a finding of guilt beyond a reasonable doubt from a trial de novo in the Law Division when it finds "obvious and exceptional error." State v. Zingis, 471 N.J. Super. 590, 602 (App. Div.), certif. gr., cause remanded on other grounds, 251 N.J. 502 (2022). While "a trial court may rely on the 'observations and opinion of experienced officers' about a defendant's condition and behavior to determine guilt," here the evidence was severely lacking given Officer Pittius did not substantially comply with the standardized field sobriety tests by scoring the results before coming to the conclusion that Mr. Morton was intoxicated. See id. at 602 (quoting Johnson, 42 N.J. at 166).

"Any factor alone may be insufficient to carry the State's burden, but, in combination, can 'more than ampl[y] ... support the conclusion that [a] defendant was driving under the influence of alcohol ....'" Id. at 602 (quoting State v. Kent, 391 N.J. Super. 352, 384 (App. Div. 2007). Here, due to the errors with not granting an adverse inference regarding Lt. Loos' lack of testimony, Officer Pittius' concession that he did not properly score the factors as required for reliable results, and Officer Pittius' administration of the tests in wet conditions and noisy conditions where Mr. Morton could not hear the instructions demonstrates that Mr. Morton should be entitled to a new trial de novo before an impartial judge. See Da48 at D-1 Camera 0 at 10:07, 10:22, and 14:07; 1T64:6-66:3; 2T60:20-61:1.

CONCLUSION

Mr. Morton's constitutional confrontation rights were violated by the trial court considering evidence that exceeded the scope of review. By considering that information, the trial court demonstrated bias that undermines the fairness in the trial de novo that Mr. Morton received. This Court should reverse and remand for a new trial de novo with a different trial judge.

In addition, the trial court erred in its analysis of the law on the adverse inference when it denied an adverse inference to Mr. Morton, who did not have the burden of proof in this matter. Because the concerns raised in the case cited by the trial court did not apply to a criminal defendant attempting to rely upon the adverse inference, the trial court's decision was legal error. Considering the totality of the circumstances, failing to give the adverse inference could have affected the result, and thus, a remand is proper in this case.

Finally, given the lower courts applied substantial weight to Officer Pittius' administration of the standardized field sobriety tests even though the officer conceded he did not apply the objective scoring factors, the evidence was insufficient to support a finding beyond a reasonable doubt of guilt for driving while intoxicated. This Court should remand for consideration by an impartial judge.

Respectfully submitted,

LOMURRO MUNSON, LLC
Attorneys for Defendant-Appellant,
Jeffrey Morton

CHRISTINA VASSILIOU HARVEY, ESQ.

Dated: March 18, 2024

OFFICE OF THE COUNTY PROSECUTOR
COUNTY OF MONMOUTH

132 JERSEYVILLE AVENUE
FREEHOLD, NJ 07728-2374

(732) 431-7160

RAYMOND S. SANTIAGO
MONMOUTH COUNTY PROSECUTOR

June 14, 2023

Melinda A. Harrigan, 062102014
Assistant Prosecutor
Of Counsel and
On the Letter Brief
email: mharrigan@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. Jeffrey T. Morton (Defendant-Appellant)
Appellate Division Docket No. A-3744-22T2
Municipal Appeal No. MA22-017; Misc. Case No. ML-22-08-00132
Criminal Action: On Appeal from an Order Denying Defendant's Municipal Appeal in the Superior Court of New Jersey, Law Division (Criminal), Monmouth County

Sat Below: Honorable 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 May 30, 2021, defendant Jeffrey T. Morton was arrested in Freehold Township and charged with Driving While Intoxicated ("DWI"), in violation of N.J.S.A. 39:4-50; Failure to Maintain Lane, in violation of N.J.S.A. 39:4-88; and Reckless Driving, in violation of N.J.S.A. 39:4-96.

On July 13, 2022, defendant appeared for trial in Freehold Township Municipal Court before the Honorable Nicole Sonnenblick J.M.C. See generally (1T).[1] The first matter was defendant's motion to suppress. Freehold Township Police Officer Zackery Pittius was the sole witness. Ibid. However, when testimony did not conclude, the matter was calendared for an additional day – August 17, 2022. See generally (2T).

On that date, Police Officer Pittius took the stand again and completed his testimony. (2T:48-17 to 53-20). Thereafter, the trial court denied defendant's motion to suppress, finding there was justification for the traffic stop and resulting arrest. (2T: 36-25 to 42-23; 45-10 to 47-24). More specifically, the trial court found that defendant's failure to maintain his vehicle inside the proper lane, along with not being able to complete any field sobriety tests and the smell of alcohol emanating from his breath was sufficient evidence to place defendant under arrest. (2T:45-16 to 47-24)(emphasis added).

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1 1T – Transcript of Trial, July 13, 2022;
2T – Transcript of Trial, August 17, 2022;
3T – Transcript of Hearing, June 19, 2023;
4T – Sentencing, August 1, 2023.

The case then moved to trial and Officer Pittius again took the witness stand as the sole witness for the State. Following his testimony, the trial court found the defendant guilty of DWI based on the observations of Officer Pittius and the MVR recording of the stop (entered into evidence as S-2). (2T:68-12 to 68-13;39-8 to 15; 63-4 to 64-2; 65-15 to 21). Defendant was also found guilty of Failure to Maintain Lane and Reckless Driving, which were merged into the DWI conviction. (2T:71-10 to 16). In finding defendant guilty, the trial court specifically found Officer Pittius' testimony to be "extremely credible." The court found the officer to be "clear, concise" and specifically noted that he "obviously recall[ed] the incident...listened to defense counsel's questions [and] answered them well." In fact, the trial court concluded that Officer Pittius was "more than credible, excellent." (2T: 64-9 to 19). The court also noted that "as the trier of fact, I watched the results of those tests..." ultimately finding that "[t]here's no other explanation, other than impairment, that could possibly, in conjunction with being – smelling the alcohol, not being able to maintain the car in its lane, not being able to do the physical psychophysical test, but now cannot even do the ABC tests." (2T:66-20 to 25).

Based on his driver's abstract, defendant was sentenced as a second offender to a $507.00 fine, $33.00 court cost, $225.00 in DWI surcharge, a VCCO penalty of $50.00, and a Safe Neighborhood fine of $75.00. (2T:70-13 to 70-16). He was also sentenced to a one-year driver's license suspension, the installation of an ignition interlock device for two years, and a 30-day suspended jail sentence conditioned upon competition of at least 48 hours in

IDRC. (2T:70-23 to 71-9). The sentenced was stayed pending appeal. (2T: 70-7 to 8; 71-19 to 22).

On August 25, 2022, defendant filed a notice of appeal to the Law Division. On June 19, 2023, oral arguments were heard before the Honorable Michael A. Guadagno, J.A.D. (ret. & t/a). (See generally 3T). After hearing from the parties, Judge Guadagno reserved decision. (3T:24-12).

On June 26, 2023, Judge Guadagno filed his written opinion. (Da 15-23). He denied defendant's motion to suppress, finding that the State had proven the stop was justified based on the observation by the officer of the operation of defendant's vehicle, the investigative detention was justified based on the reasonable and articulable suspicion that defendant was operating his vehicle under the influence, in violation of N.J.S.A. 39:4-50, and there was probable cause to arrest defendant for a violation of N.J.S.A. 39:4-50. (Da 23). He also found that "the same evidence supports the conclusion that the State has proven defendant's guilt of N.J.S.A. 39:4-50 beyond a reasonable doubt." (Da 23). Judge Guadagno then vacated the stay of defendant's sentence and remanded the case back to the municipal court to impose sentence. (Da 14); See generally 4T).

On August 7, 2023, defendant filed the instant notice of appeal. (Da 27-38). The State submits this response in opposition.

COUNTERSTATEMENT OF FACTS

On May 30, 2021, Freehold Township Police Officer Zachery Pittius, along with Lieutenant Loos, was on duty patrolling Route 9 in Freehold Township. As he was driving northbound on Route 9, he observed a silver Chevrolet Silverado, later determined to be driven by defendant, Jeffrey T. Morton, swerve across the highway. (1T: 8-22 to 24; 9-25 to 10-2). Officer Pittius pulled directly behind defendant and observed him drive his vehicle over the solid yellow line of the left lane. (1T:11-8 to 14). Officer Pittius then observed defendant cross the solid yellow line three more times over the next 20 seconds. (1T:35-16 to 22). During the final swerve, defendant drove his vehicle onto a grass median before he reentered the far-left lane. (1T:11-7 to 11).

Based on defendant's erratic driving, Officer Pittius activated his lights and conducted a motor vehicle stop. (1T:11-12 to 13). Officer Pittius followed defendant from the left lane to the shoulder on the right-hand side of the highway. (1T:11-15 to 16). As Officer Pittius followed defendant, he observed defendant's vehicle cross the white dotted line on the left side of the right shoulder before the vehicle stopped. (1T:11-16 to 18).

After defendant's vehicle stopped, Officer Pittius approached the passenger side of the vehicle and Lt. Loos approached the driver's side. (1T:11-20 to 22). Officer Pittius identified himself and asked defendant for his license, registration and insurance. In doing so, Officer Pittus observed that defendant movements were "a little slow" (1T:13-20 to 21). He also smelled an odor of alcohol emanating from the vehicle. (1T:13-21 to 23). Based on his observations of defendant's driving, demeanor, and the odor of alcohol,

Officer Pittius asked defendant to step out of the car to administer standard field sobriety tests because he believed defendant was driving under the influence. (1T:14-18 to 22; 40-14 to -16; 15-1 to 3). Meanwhile, in continuing to interact with defendant, Officer Pittius continued to detect the smell of alcohol from defendant's breath. (2T:45-4 to 45-5).

Lt. Loos first administered the Horizontal Gaze Nystagmus (HGN) test. Next, Officer Pittius administered the walk and turn test. (1T: 16-9 to 11). He asked defendant to walk nine heel to toe paces in a straight line while counting out loud from one until nine before turning around and returning in the same manner. (1T:16-20 to 22). However, defendant did not walk heel to toe as instructed. Instead, he just walked forward without touching heel to toe. (1T:19-8 to 15).

The next test administered was the one leg stand. (1T:20-8). Defendant was instructed to stand with his arms at his side and with the foot of his choosing raised approximately six inches off the ground. Defendant was further instructed to count out loud until he was told to stop. (1T:20-9 to 15). Defendant again did not follow instructions. Instead, defendant raised his knee and his leg went backwards. (1T:20-19 to 21). Defendant put his foot down multiple times and switched legs. As a result, he was unable to complete the test. (1T:20-21 to 22). Defendant was then told to recite alphabet from the letter C all the way to the letter W without singing. (1T:21-3 to 6). However, defendant got confused and said "C, D, E, F, G, A, B, C, D, E, F, D." (2T:44-22 to 23).

Based on defendant's performance, Officer Pittius determined that defendant was under the influence, placed him under arrest for DWI, and

seated him in the rear seat of the police vehicle. (1T:22-7 to 9). Defendant was then transported to the police station. (2T:48-22 to 49-3). En route, Officer Pittius smelled a strong odor of alcohol coming from the rear passenger seat where defendant was sitting. (2T:49-11 to 14). Once at the police station and while defendant was being processed, Officer Pittius continued to smell the odor of alcohol on defendant. (2T:49-16 to 25).

Although an Alcotest was administered, the reading was not admitted into evidence because Lt. Loos, as seen on a video from inside the Alcotest room, was using his cellular telephone in violation of State v. Chun, 194 N.J. 54, 80 (2008). (2T:49-16 to 49-25). As a result, the State opted to prove its case by the observational testimony of Officer Pittius and the admission of the officer's MVR recording. (2T:53-23 to 54-3; see also 3T:18-8 to 20-7; S-2).

LEGAL ARGUMENT

POINT I

DEFENDANT'S RIGHTS UNDER THE CONFRONTATION CLAUSE WERE NOT VIOLATED

Under his first point, defendant claims his rights under the Confrontation clause were violated because he "was contacted by the court clerk after the filing of the de novo appeal requesting documents that were not part of the record in the municipal court." (Db 17). However, defendant's argument is misplaced, thus substantively without merit.

An Appellate Court's review of a trial court's judgment is restricted to the test of "whether there is sufficient credible evidence . . . in the record to support the trial court's findings." State v. Robertson, 228 N.J. 138, 148

(2017); (quoting State v. Johnson, 42 N.J. 146, 162 (1964) (internal quotations omitted); State v. Locurto, 157 N.J. 463, 472 (1999). Specifically, a reviewing court should defer to trial court's "credibility 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." State v. Ebert, 377 N.J. Super 1, 8 (App. Div. 2005) (quoting Locurto, 157 N.J. at 474) (internal quotations omitted).

Overturning a trial courts' assessment of credibility is an extraordinary step, since, "[t]rial court findings [concerning issues of fact] are ordinarily not disturbed unless 'they are so wholly unsupportable as to result in a denial of justice,' and are upheld whenever they are 'supported by adequate, substantial and credible evidence.'" Meshinsky v. Nicholas Yacht Sales, Inc., 110 N.J. 464, 475 (1988) (quoting Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 483-84 (1974)). See also Cesare v. Cesare, 154 N.J. 394, 411-12 (1998).

"Moreover, the rule of deference is more compelling where . . . two lower courts have entered concurrent judgments on purely factual issues." Locurto, 157 N.J. at 474. Pursuant to the "two-court rule," "absent a very obvious and exceptional showing of error," the "appellate court[] ordinarily should not undertake to alter concurrent findings of facts and credibility determinations made by two lower courts." Ibid. However, the legal rulings of a trial court are considered de novo. Robertson, 228 N.J. at 148.

With those legal tenants in mind, defendant essentially asserts that a court clerk's *inquiry* into matters that were not part of the municipal record violated his right to confrontation because "defendant does not know what documents were considered beyond those that were part of the record in the

municipal court...." (Db 17, 20). However, as this record clearly reflects, defendant's confrontation rights were not impacted.

Both the Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution provide that the accused in a criminal prosecution has the right "to be confronted with the witnesses against him." State v. Branch, 182 N.J. 338, 348 (2005) (citing the U.S. Const. amend. VI and N.J. Const. art. I, ¶ 10. The right of confrontation is an essential attribute of the right to a fair trial, requiring that a defendant have a "'fair opportunity to defend against the States accusations.'" State v. Garron, 177 N.J. 147, 169 (2003) (quoting Chambers v. Mississippi, 410 U.S. 284, 294 (1973)), cert. denied, 540 U.S. 1160 (2004).

Here, defendant's argument that "the de novo court sought evidence of the police report that was not part of the evidentiary record in municipal court" (Db 18) is negated by the record. Indeed, the record is clear that the specific report defendant takes issue with was never asked for by Judge Guadagno, nor did defendant submit any support for his argument that it was provided to Judge Guadagno (see Da 43). As the email indicates, it was the court clerk, and not Judge Guadagno, who asked, "I was reviewing transcripts and saw there was a S-1 Police Report and a S-1 link of Officer Pitius Video and D-1 link of Lt. Loos video. Do you happen to have those to share? (Da 43-44). When the clerk further stated that the municipal court said they did not have to provide the information, defense counsel's response was to cite the court rule for the transfer of information from the municipal court to the law division – Rule 3:28-4(a). Defense counsel also informed her that "as far as exhibits, no report was admitted into evidence, although it may have been marked for

identification...I'll have to check the transcript...if you have any further questions, feel free to contact me...Peter." (Da 43). Since defendant takes particular issue with this request, it can be assumed that the defense never sent the report. The State can submit, without hesitation, that it never sent the report to the court.

Judge Guadagno also specifically told defendant, during oral argument when defense counsel actually tried to argue what was in the police report that since it was not introduced into evidence, the court could not consider any information therein. In fact, in response to defense counsel's attempt to argue that the report was used by the officer during trial to refresh his recollection, Judge Guadagno stated:

> Here's the problem. I am a sponge and I am happy to see anything that the Municipal Court Judge saw...However, it's not introduced in evidence. It's not part of the record. Now here this supports your position. Okay, I don't know why it was not introduced into evidence. It's not, and I can't consider it." (3T:12-5 to 20).

As the record is clear that Judge Guadagno did not ask for the report and Judge Guadagno's own words during oral argument stating that he would not consider the report, defendant's assertion that the court violated his Confrontation rights is without any merit.

More importantly, there is no mention or reference to said report in Judge Guadagno's written opinion and no no evidence that anything outside of the record was considered. (Da 15-23). To be sure, Judge Guadagno found defendant guilty based his erratic driving, confirmed by the MVR, which also corroborated the officer's testimony. The officer's testimony was specifically found to be credible by the municipal court and those credibility findings were given deference and adopted by Judge Guadagno to independently find the

officer credible. (Da 21-22). In that vein, and along with defendant's erratic driving, Judge Guadagno detailed the specific observations the officer testified to that demonstrated impairment: slow movements, smell of alcohol, his poor performance on all of the standard field test, all of which are amply and specifically found in the record. (Ibid.) Judge Guadagno did not go beyond the record or scope of review.

Defendant also takes issue with Judge Guadagno's questioning of the Alcotest reading, which was not admitted into evidence at the municipal trial. More specifically, defendant asserts that the judge making inquiry into the Alcotest result somehow violated his rights because he "does not know what items were actually considered." Yet the record in this case fully answers that question. First, the Alcotest result was never divulged on the record. (See 3T:5-8 to 9-2). Second, Judge Guadagno's written opinion in this case proves that not only was the existence of an Alcotest reading was never considered by the court, it was – in no way – relied upon in Judge Guadagno's independent finding of guilt. (Da 15-23).

In sum, the record below and written opinion reflect that the Judge Guadagno did not improperly expand the record, but rather found defendant's guilty of DWI based on the facts presented to him. Accordingly, there is no error requiring a remand for a new trial de novo.

POINT II

THE DE NOVO COURT DID NOT DEMONSTRATE BIAS

Next, defendant continues to argue that Judge Guadagno's questioning regarding the existence of an Alcotest result exceeded the scope of the hearing, only now, he adds that such questioning "demonstrated an intent to find

additional reasons to convict defendant." (Db 21)[2]. This argument has no merit.

"Our rules. . . are designed to address actual conflicts and bias, as well as the appearance of impropriety." State v. McCabe, 201 N.J. 34, 43 (2010). R. 1:12-1(g) provides that a judge shall be disqualified "when there is any other reason which might preclude a fair and unbiased hearing and judgement, or which might reasonably lead counsel or the parties to believe so." However, "the belief that the proceedings were unfair must be objectively reasonable." State v. Marshall, 148 N.J. 89, 279, cert. denied, 522 U.S. 850 (1997).

To that end, "a judge must ask: would an individual who observes the judge's personal conduct have a reasonable basis to doubt the judge's integrity and impartiality?" P.M. v. N.P., 441 N.J. Super. 127, 141 (App. Div. 2015). When addressing these issues, "such grievances must be weighed against the important interest of preserving order in the courtroom." State v. Medina, 349 N.J. Super. 109, 131 (App. Div. 2002).

"A court's prior statement of opinion concerning a matter before it may indicate that the court has prejudged the matter and must be disqualified."

---

[2] Defendant also asks this Court to "take judicial notice under N.J.R.E. 201 of other matters where the same judge has conducted the same inquiry that demonstrates a pattern of exceeding the scope of review for a trial de novo" and cites a case that is currently pending, but has not been decided by this Court – State v. Chopp, A-002798-22. (Db 21). Indeed, defendant makes the same scope and bias arguments in that case; however, as argued by the State in that case as well as the instant case, defendant's arguments are contrived and misplaced. In addition, since this Court has not decided the issues in State v. Chopp (as of the filing of the State's response in this matter), there is no support for defendant's request that judicial notice should be taken that Judge Guadagno has "demonstrate[ed] a pattern of exceeding the scope of review for a trial de novo." (Db 21).

Marshall 148 N.J. at 278. "[I]nappropriate comments do not, by themselves, necessarily equate to bias." Panitch v. Panitch, 339 N.J. Super. 63, 68 (App. Div. 2001). As such, "isolated instances of judicial annoyance or impatience do not warrant the drastic remedy of vitiating an otherwise valid conviction." Medina, 349 N.J. Super at 132. See also State v. Leverrette, 64 N.J. 569 (1974) (holding that a judge's remarks regarding counsel's behavior did not indicate the court was bias against the defendant.) Ultimately, these types of claims must be considered "within the context of the entire trial proceedings." Medina, 349 N.J. Super. at 132.

Here, defendant argues that Judge Guadagno "was not impartial when [he] repeated[ly] asked about circumstances that exceeded the scope of de novo review, in particular, the result of the Alcotest that was not relied on and the reasoning why the Alcotest was not introduced." (Db 13). However, there was a rational explanation for Judge Guadagno's questions. He was seeking confirmation that the municipal prosecutor was not engaging in improper plea bargaining because at the time of trial in this matter, Guideline 4, which mandated that "No plea agreements whatsoever will be allowed in drunk driving or certain drug offenses" was still in effect. See Guideline 4.[3] Indeed, the Assistant Prosecutor addressed this very issue during the trial de novo and explained to Judge Guadagno that the Alcotest was not admitted into evidence against defendant because Lt. Loos was seen using his cellular telephone, a clear violation of State v. Chun, 194 N.J. 54, 80 (2008). Thus, using the

[3] On February 24, 2023, the New Jersey Supreme Court Withdrew Guideline 4 expressly allowing plea agreements in DWI cases.

Alcotest reading would have been a clear violation of not only precedent, but also his ethical duty as a prosecutor. (3T:18-8 to 22).

The municipal prosecutor's election to prosecute this DWI solely on Officer Pittius' observations, see (2T:60-24 to 61-1; 3T:18-8 to 20-7), was wholly in keeping with New Jersey case precedent and at the time of trial, in keeping with his obligation under Guideline 4. Nonetheless, "N.J.S.A. 39:4-50(a) creates one offense that may be proved by alternate evidential methods." State v. Kashi, 180 N.J. 45, 48 (2004). One acceptable method is that which the prosecutor relied upon here: the officer's "observation[s]" that defendant was "operat[ing] a motor vehicle while under the influence of intoxicating liquor." State v. Zeikel, 423 N.J. Super. 34, 48 (App. Div. 2011)(quoting N.J.S.A. 39:4-50)(listing the other evidential method for proving DWI beyond a reasonable doubt as proof of a BAC or "blood alcohol concentration of 0.08% or more").

As this would be defendant's second DWI (at least for sentencing purposes, see (2T:68-20 to 68-23; 3T:20-2 to 7)), the sentence that would be imposed if he was found guilty after de novo review would be the same regardless of which evidential method the prosecutor used to establish his guilt. See N.J.S.A. 39:4-50(a)(2). As such, the Assistant Prosecutor explained that the prosecutor's election not to rely upon defendant's BAC as proof of intoxication did not run afoul of Guideline 4, which only imposed some limits on prosecutorial discretion on "plea agreements" for first DWIs under N.J.S.A. 39:4-50(a)(1), where the difference in evidential method impacts the sentence to be imposed. The prosecutor's evidentiary election here likewise did not run afoul of the December 2, 2004 memo of Honorable Philip S. Carchman,

J.A.D., which addressed only "dismiss[ed] or amend[ed]" DWI charges. The municipal prosecutor did neither here and instead proceeded to trial and prosecuted this DWI in the lawful manner in which he "s[aw] fit." (2T:60-24 to 61-1; 3T:18-8 to 20-7; 3T:19-19 to 20-7).

As this record demonstrates, Judge Guadagno inquiry into the Alcotest reading was to further his own suppositions about the municipal prosecutor's motives in prosecuting the case by observations where an Alcotest result existed. His inquiry was not, in any way, to garner additional incriminating information to then use against defendant in a finding of guilt, nor could it have been since the results of the Alcotest were never put on the record. (3T:5-8 to 8-23; 3T:5-8 to 9-2; Da 17). Therefore, defendant's arguments that Judge Guadagno "did not appear impartial" and his questions "demonstrated bias that the individual is intoxicated because there is an Alcotest result" is negated by the record and wholly without merit. (Db 24). The record makes clear that Judge Guadagno was displeased with the municipal prosecutor's handling of the case and the lack of clarity as to why it moved forward as an observation case on the record. Judge Guadagno also was displeased with the the lack of inquiry from the municipal judge. Thus, his ire was not aimed at defendant, nor was it for the purpose to find out additional evidence to use against defendant. His motives in asking about the Alcotest were clearly articulated on the record. As a result, a new trial de novo with "an impartial judge" is not required. (Ibid.)

POINT III

THE DE NOVO COURT DID NOT ERR IN DENYING DEFENDANT'S REQUEST FOR AN ADVERSE INFERENCE

For the first time on de novo review, defendant sought an adverse inference based on the State's decision to present only the testimony of Officer Pittius and not call Lt. Loos as a witness, who was also at the scene. (3T:9-11 to 11-19; Da 18). However, as the lower court held, defendant's assertions regarding Lt. Loos supposed superior testimony and his reliance on State v. Clawans, is misplaced.

In order to receive a Clawans charge for an inference to be drawn from the nonproduction of a witness, "it must appear that the person was within the power of the party to produce and that his testimony would have been superior to that already utilized in respect to the fact to be proved." State v. Clawans, 38 N.J. 162 (1962). On this score is where defendant's argument wholly fails because it cannot be disputed that the MVR video of defendant's actual performance on the standard field sobriety tests (SFST) is not only overwhelming evidence of defendant's intoxication, but also is far superior than the supposed testimony of Lt. Loos on the "scoring factors" of said tests. (Db 32; Da 19-22). Indeed, the municipal judge specifically detailed what she saw on the video:

> Not even just the officer who testifies as to the results, but then as the trier of fact, ***I watched the results of those tests*** and I have been told that those tests, if they cannot be completed, and cannot be explained away sufficiently by other factors, are in fact intoxication, and impairment, and inability to drive the vehicle.
>
> . . . .

But you have basic requirements asked of the defendant here. Number one, being able to even just follow directions. He was completely unable to. He didn't do heel to toe at all. He didn't look down as demonstrated, which is very important direction that isn't always adhered to. And it was in fact a direction given to him. And he clearly was unable to do the leg raise test in any sufficient fashion. And then the walk and turn...the walk and turn he wasn't able to do well. The leg raise test he wasn't able to do at all. The directions though on both were poor. And then the ABC test. There was no indication that this isn't even a person who could not say the ABCs. It was terrible. It wasn't even not good. It was terrible. And there's no other explanation, other than impairment, that could possibly, in conjunction with being – smelling alcohol, not being able to do the psychophysical tests, but now can't even do the ABC test. What more could you possibly need other than an admission...but what more could you possibly ask from the State to present this Court to find that the defendant was under the influence of alcohol, other than an admission. I don't see it.

. . . .

So, let's just – and again I'll also say another thing, because it was brought up, that Lt. Loos wasn't here. Lt. Loos is on the video. The State certainly has the right not to call them to feel that their case is sufficient based on who they bring before the Court. There is no negative inference being made by this Court. But we have a new officer for sure, but it's clear from how he presents himself on the video and on the stand that he is very knowledgeable. That he does understand how to demonstrate the tests to the defendant. That he gives him the time and the ability to complete those tests. And gives us the ability to look at the results and be clear, beyond a reasonable doubt that the defendant is in fact intoxicated. So while I do agree that case would, case law should say that a new officer, you need to take that into consideration, their lack of training, their lack of ability, I've taken that into consideration. The officer did everything as a well-seasoned officer would have done, as I've seen thousands and thousands of times. So with that said, I find defendant guilty beyond a reasonable doubt.

[2T:65-15 to 68-13(emphasis added)].

Judge Guadagno, in making his independent finding of guilt, acceded to the credibility findings of the municipal court. (Da 21). He also watched the same video. (Da 21-22). It follows that when the State presents evidence of defendant's actual performance on the SFSTs, the supposed testimony of Lt. Loos and his assessment of "scoring factors" pales in comparison. As the State can present its case in the manner it sees fit, it was not required to call Lt. Loos since his testimony would have only been cumulative, at best. The fact that defendant would have preferred to cross-examine Lt. Loos does not provide the error he asserts. As Judge Guadagno opined in his opinion, if defendant wanted to question Lt. Loos, he was available for the defense to call at trial. (Da 18). Therefore, defendant's claims of prejudice are of no moment.

In that same vein, Judge Guadagno noted that "the adverse inference charge enunciated in Clawans has fallen onto disfavor with our Supreme Court in more recent years. See State v. Hill, 199 N.J. 545, 566 (2009)." Indeed, the Court in Hill stated that an adverse inference had the "potential to give undeserved significance to the missing witness and unwarranted weight to evidence presented; potential for abuse and gamesmanship...scholars have questioned the continued validity and utility of the inference. Id. at 563-64 (citing State v. Velasquez, 391 N.J. Super. 291, 306, (App.Div.2007)). That's exactly what the defendant hoped to do in this case in seeking an adverse inference for Lt. Loos. Thus, for the factual and legal reasons stated herein, Judge Guadagno did not err in denying defendant's baseless request for an adverse inference. (Db 32).

POINT IV

BASED ON THE EVIDENCE IN THIS RECORD, DEFENDANT'S RELIANCE ON SCORING PROTOCOLS FOR STANDARD FIELD SOBRIETY TESTS IS MISPLACED.

Defendant's final argument again focuses on the absence of "scoring protocols" regarding the standard field sobriety tests (SFST). However as argued above and as this record demonstrates, defendant's argument is wholly misplaced.

Defendant's reliance on "scoring protocols" once again ignores the video in this case. Again, as argued above, the best evidence of defendant's performance on the SFSTs is found in this record by the MVR and the municipal court and Law Divisions recitation of defendant's performance as viewed on the MVR and not on any supposed "scoring protocols" defendant seeks to argue are a prerequisite to a finding of guilt for DWI. (2T:65-15 to 68-13; Da 19-22).

Defendant's argument also ignores settled case law in this state regarding lay testimony of the fact of intoxication. "[L]ay opinion consistently has been admitted to prove that a defendant was 'operat[ing] a motor vehicle while under the influence of intoxicating liquor' in violation of N.J.S.A. 39:4-50 . . . ." State v. Bealor, 187 N.J. 574, 585 (2006). In fact, testimony regarding "scoring protocols" is not required, at all. In State v. Morton, 39 N.J. 512, 514-15 (1963), the Court specifically held,

> When the significance of the results of a field sobriety test depends upon a conclusion of the witness as to whether the motorist's reaction is a departure from the normal or standard such conclusion may not be given unless the examiner is shown to have

> some skill or training which will qualify him to make an evaluation. . . . [However], even if no qualifying experience or training of the officers is shown, it does not follow that their testimony must be excluded. It is entirely proper for them to describe the tests or maneuvers they had the defendant perform and then testify as to what his *physical reaction was* when he undertook to execute them. The reaction should be described in terms of what they *observed* when the tests were undertaken by defendant. . . . In other words, the observed physical reactions to such tests are on the same plane as other common factual indicia that a person is under the influence of intoxicating liquor which always may be testified to by a layman. (emphasis in original).

Here, there is no dispute that Officer Pittius was a trained officer. Being a new officer does not equate to lack of training. In fact, the municipal court found that Officer Pittius conducted himself during this entire stop "as a well-seasoned officer would have done, as I've seen thousands and and thousands of times." (2T:68-9 to 11). And again, Judge Guadagno acceded to the municipal court's credibility findings. (Da 21). What is more, the standard field sobriety tests were just one more piece of the factual mosaic that described defendant's conduct at the time and place of his arrest for DWI. Officer Pittius indicated that defendant did not successfully perform the tests based on his own observations of defendant's performance, and two judges in two separate courts accepted that testimony as credible. As such, there is no basis for this Court to intervene or disregard those findings.

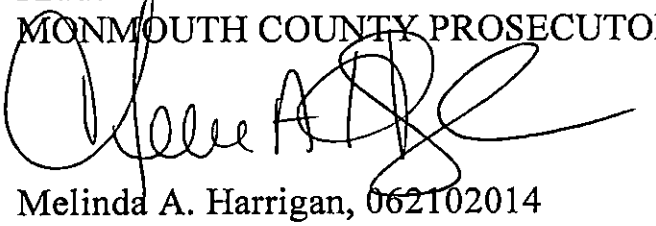
In sum, there was sufficient support for a conclusion beyond a reasonable doubt that he was intoxicated while operating his motor vehicle and Judge Guadagno committed no error in making his independent finding of guilt based on the facts and evidence in this record.

CONCLUSION

For the above mentioned reasons and authorities cited in support thereof, the State respectfully submits defendant's conviction and sentence should be affirmed.

Respectfully submitted,

RAYMOND S. SANTIAGO
MONMOUTH COUNTY PROSECUTOR



By: Melinda A. Harrigan, 062102014
Assistant Prosecutor
Of Counsel and
On the Brief
email: mharrigan@mcponj.org

MAH/mc

c: Peter Lederman, Esq.
Christina Vassiliou Harvey, Esq.
Attorneys for Defendant

STATE OF NEW JERSEY, Plaintiff, vs. JEFFREY T. MORTON, Defendant.	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO.: A-003744-22 ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY MONMOUTH COUNTY LAW DIVISION-CRIMINAL PART MUNICIPAL APPEAL NO. 22-017 Sat below: Hon. Michael A. Guadagno, J.A.D. (ret. and t/a)

REPLY BRIEF

LOMURRO MUNSON, LLC
Monmouth Executive Center
4 Paragon Way
Freehold, New Jersey 07728
Telephone 732-414-0300
Facsimile 732-431-4043
Attorneys for Defendant-Appellant,
Jeffrey T. Morton

PETER LEDERMAN, ESQ.
NJ ATTORNEY ID: 06881975
plederman@lomurrolaw.com
Of Counsel

Christina Vassiliou Harvey, Esq.
NJ Attorney ID: 023642004
charvey@lomurrolaw.com
Of Counsel and On the Brief

Date submitted: July 1, 2024

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POINT ONE

The Court Violated Defendant's Rights Under the Confrontation Clause. (Da17[1], Da43-44.)

Because a violation of Defendant's Sixth Amendment rights had the capability of prejudicing the result, this Court should reverse. See State v. Kuropchak, 221 N.J. 368, 383 (2015)(quoting R. 2:10–2; citing State v. Macon, 57 N.J. 325, 338 (1971); Chapman v. California, 386 U.S. 18, 23, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710 (1967) ("The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." (quoting Fahy v. Connecticut, 375 U.S. 85, 86–87, 84 S.Ct. 229, 230, 11 L.Ed.2d 171, 173 (1963)). In this case, the de novo court considered the Alcotest and the result of the horizontal gaze nystagmus test ("HGN") even though those two issues had not been before municipal court. (Da16-17.)

The State relies upon cases that discuss the limited scope of review of the facts (Sb6-8), but these cases do not provide the standard of review when the issue is whether Defendant's Sixth Amendment rights were violated. See State v. Robertson, 228 N.J. 138, 148 (2017)(noting standard for appellate review

[1] The terms "Da" refers to Defendant-Appellant's Appendix in support of appeal; the term "Sb" refers to the State's brief in opposition to appeal; the term "1T" refers to the Transcript dated July 13, 2022; the term "2T" refers to the Transcript dated August 17, 2022; the term "3T" refers to the Transcript dated June 19, 2023.

from trial de novo for DWI grants de novo review for legal rulings but substantial credible evidence standard for factual determinations) (citing Kuropchak, 221 N.J. at 383); see also State v. Locurto, 157 N.J. 463, 474 (1999)(explaining deference to lower courts on factual issues).

The State argues that because there was sufficient evidence to convict on the record, Defendant's Sixth Amendment argument has no merit. (Sb10.) But the Court has explained that even when there is sufficient evidence, if a Defendant's Sixth Amendment rights to confrontation are violated, error that might lead to a different result justifies reversal. State v. Bankston, 63 N.J. 263, 273 (1973). As argued in Defendant's opening brief, in Bankston, an officer testifying as to information received from an informant constituted a Sixth Amendment violation due to the hearsay nature of the statement. Id. at 268-69. The Court explained that the officer testifying to the details provided by an informant bolstered the State's position improperly. Id. at 272-73.

Similar to Bankston, the de novo judge's consideration of the Alcotest – even just the mere fact that the State had originally sought to rely upon the Alcotest – deprived Defendant of the opportunity to cross-examine Lt. Loos who authored that report. (Da17.) The fact that the State had intended to introduce the Alcotest, even without the details, gave the de novo court sufficient information to bolster the other evidence without offering Defendant the

opportunity for cross-examination. The Court Rule limited the de novo court to "the record below," and thus, consideration that there was an Alcotest necessarily exceeded the scope of review and harmed Defendant's ability to cross-examine Lt. Loos, who administered the Alcotest. R. 3:23-8(a)(2); (1T14:24-15:3.) Such constituted error sufficient to justify reversal and remand to an impartial judge.

The de novo court further considered the HGN test even though only Lt. Loos had first-hand knowledge as to administration of the test and the result. (2T12:22-13:11; 1T65:4-7; 1T14:24-15:5; Da16.) The de novo court noted that Lt. Loos administered the HGN, but then concludes "Defendant has not suggested that Lt. Loos could have provided any evidence that was exculpatory or even helpful to the defense." (Da18.) The right to confront the witness who administered the HGN is necessarily potentially helpful evidence to the defense such that if Lt. Loos had testified, the result may have been different. Because Defendant was denied that cross-examination, the remedy is reversal.

The request from the clerk for the reports that exceeded the scope led to the question as to what documents were actually considered at the de novo hearing. (Da43-44.) The State argues that the clerk in the de novo court's request to documents did not extend to the de novo judge. (Sb8.) But it is unknown whether the request was made for the de novo judge or whether documents were

provided. Given the Sixth Amendment, even if the Court does not reverse on this basis, at a minimum, it should remand to determine the scope of the documents that the de novo court had before it. The email provides an inference that the de novo court had these documents. (Da43-44.) The record further shows that the de novo judge inquired into the Alcotest, even though that report was not the subject of the issues on de novo appeal. (Da17.) Thus, there is a question as to what was used to justify Defendant's conviction.

While the State argues that the de novo court stated that its review was limited, the State's analysis takes Defendant's argument out of context. (Sb9.) The issue came as a result of Defendant's argument as to the request for an adverse inference pursuant to State v. Clawans, 38 N.J. 162 (1962) because Lt. Loos did not testify. (3T11:12-19.) The point was that Officer Pittius' testimony was inconsistent with his report – a point that was covered on cross-examination, but the trial court found that he could not consider it since the report was not in evidence. (3T11:12-12:4; see 1T29:10-31:17; 2T9:23-10:9.) Moreover, just because the trial court did not consider the police report does not mean that other items were not considered.

For instance, the Alcotest report was discussed at the trial de novo even though it was never moved and should not have been discussed at all because the only issues occurred prior to Defendant's arrest and the Alcotest was

administered after the arrest. (Da17; 3T7:12-20.) The trial de novo court's inquiry into the Alcotest report was improper because Defendant had no right to cross-examine Lt. Loos, who authored the report. (3T5:4-11:19.) Because the trial court raised the issue, and given the concern for a pattern as mentioned in the Case Information Statement[2], this Court should review whether R. 3:23-8(a)(2) was followed in terms of what was considered through a remand. Considering documents beyond the scope of the municipal court's record violates Mr. Morton's rights to confrontation protected by the Sixth and Fourteenth Amendments.

The State argues that any Sixth Amendment violation is irrelevant if there was sufficient evidence to convict (Sb9), but the Court has explained that Defendant has a right to know what was considered for the conviction. State v. Gibson, 219 N.J. 227, 249 (2014). Because the trial court did consider issues regarding the Alcotest that exceeded the scope of the appeal, and there is a question about whether the trial court considered reports that the clerk requested, under Gibson, this Court should reverse and remand for review by a different judge.

[2] Defendant referenced State v. Nicole K. Chopp, MA-22-016, and docketed and pending in this Court under A-2798-22.

POINT TWO

The De Novo Court Exhibited Bias that Prejudiced the Result. (Da17; Da43-44.)

The State argues the de novo court's consideration of the Alcotest result that exceeded the bounds of the scope of review did not amount to bias. (Sb10-11.) But there was no reason to inquire into the Alcotest when it had not been before the municipal court. See State v. Robertson, 228 N.J. 138, 147 (2017)(explaining on a trial de novo the Law Division "judge 'may reverse and remand for a new trial or may conduct a trial de novo on the record below'")(quoting R. 3:23–8(a)(2)). Defendant only has to show the potential for bias, which has been shown by the consideration of items that exceeded the scope of appeal. See P.M. v. N.P. 441 N.J. Super. 127, 141 (App. Div. 2015).

The State further justifies the inquiry pursuant to Guideline 4, but there was no reason for the inquiry into why the Alcotest was not introduced to occur during the trial de novo. The de novo Rule is clear that the record is limited to what occurred in the municipal court. R. 3:23-8(a)(2). The de novo judge's conduct presents the appearance of bias to an objective person because the Alcotest inquiry had nothing to do with the issues that were on appeal before the de novo court, and the de novo court could have considered it after rendering a decision on the trial de novo. P.M., 441 N.J. Super. at 141.

Under P.M., the appearance of impartiality is enough for a remand. There were three main issues: the clerk's request for documents that exceeded the scope of appeal; the de novo court's consideration of the Alcotest and HGN test without Lt. Loos' testimony, and the denial of the adverse inference when the State did not call Lt. Loos. (Da16-18; Da43-44.) Here, the State assumes the de novo court did not have the additional reports that had been requested by email. (Da43-44.) But there is no proof of that fact sufficient to establish an inference that the documents were considered given two other reports that exceeded the scope were considered. (Da16-18.) Therefore, this Court should reverse and remand.

POINT THREE

Defendant Was Entitled to an Adverse Inference. (Da18.)

The State argues that the MVR video was "far superior than the supposed testimony of Lt. Loos on the 'scoring factors' of said tests." (Sb15.) But this argument overlooks that standardized field sobriety tests have objective scoring factors that must be utilized in order for the tests to be valid. State v. Olenowski, 255 N.J. 529, 555, n. 8 (2023); see State v. Homan, 732 N.E.2d 952, 955 (Ohio 2000)(explaining unless standardized field sobriety tests are performed correctly, the results are "inherently unreliable"), mod. as stated in, State v. Boczar, 863 N.E.2d 155, 159-60 (Ohio 2007). Officer Pittius was unaware of

these scoring factors, even though he conceded that in order for the tests to be valid they had to be performed in a certain manner and be scored correctly. (1T62:1-63:12.) Thus, the State's argument to this Court overlooks the potentially exonerating evidence of cross-examination of Lt. Loos – that if the tests were properly scored, they would not support a finding that there was probable cause to arrest Defendant.

The State then cites to the municipal court's conclusions as to that observations of the video, but Defendant was unable to cross-examine Lt. Loos as to those scoring factors that the municipal judge provided her own testimony, including "[h]e didn't do heel to toe at all;" "he clearly was unable to do the leg raise test in any sufficient fashion;" and "the walk and turn he wasn't able to do well." (Sb16.) Obviously, Defendant could not cross-examine the municipal court judge's observations of the video as to the scoring factors. Officer Pittius could not testify to the scoring factors – despite being asked about them on cross-examination. (1T62:1-63:12.) Thus, the only witness that Defendant could have cross-examined as to the scoring factors was Lt. Loos – whom the State did not call as a witness.

Therefore, the State's citation to the municipal court judge's findings on the scoring factors supports why it was unfair to deny Defendant the Clawans adverse inference and demonstrates that but for these errors, the result could

have been different. As the State concedes, the Clawans adverse inference should be given if "the person was within the power of the party to produce and that his testimony would have been superior to that already utilized in respect to the fact to be proved." (Sb15)(citing Clawans, 38 N.J. 162). Because only Lt. Loos could testify to the scoring factors (1T62:1-63:12) and both the municipal court and de novo court relied upon the accuracy of those scoring factors supporting a finding of intoxication, the remedy is reversal.

The State further argues that Lt. Loos' testimony would be "cumulative, at best" (Sb17), but this argument overlooks that Defendant could not cross-examine the video as to the scoring factors. Nor could Defendant cross-examine Officer Pittius as to the scoring factors. (1T62:1-63:12.) Thus, Defendant was deprived of essential evidence that could have been used to defend himself.

The State also argues that the Clawans adverse inference is disfavored under State v. Hill, 199 N.J. 545, 566 (2009) while ignoring Defendant's argument in the opening appellate brief. (Sb17.) The Court in Hill was concerned that the charge would be used against a Defendant who has the presumption of innocence. 199 N.J. at 566. Here, Defendant had a presumption of innocence yet without calling Lt. Loos, the State obtained an unfair advantage of permitting standardized field sobriety tests to be used to establish the conviction without offering Defendant an opportunity to cross-examine the only witness with

awareness of the scoring factors that the State's witness conceded were required for those tests to be valid. (1T62:1-63:12; 2T65:10-66:19.)

Moreover, Lt. Loos had administered the HGN test, but the de novo court relied upon Lt. Loos' result while depriving Defendant the opportunity to cross-examine Lt. Loos as to his administration of this test. (Da16-18; 1T14:23-15:3; 1T65:4-7.) Because the State choose not to call Lt. Loos that deprived Defendant of the opportunity to cross-examine an essential witness of the tests, Defendant was entitled to an adverse inference under Clawans and a reversal in this matter.

POINT FOUR

Defendant is Entitled to Reversal Because the State's Officer Did Not Comply with Scoring Protocols for Standardized Field Sobriety Tests. (Da21-22.)

The State argues that it does not matter that Officer Pittius could not testify to scoring factors since the municipal and de novo courts observed the MVR showing the administration of the tests. (Sb18.) This argument is misplaced because as explained above, the State was able to bolster the evidence by only calling as a witness Officer Pittius who did not know of the scoring factors while insulating Lt. Loos' from all cross-examination as to the administration of the tests. (1T62:1-63:12.) Defendant was deprived of cross-examination as to the scoring of the tests.

Even the State's citation to State v. Morton, 39 N.J. 512 (1963), does not further its argument that this Court should affirm Defendant's conviction. (Sb18.) Instead, in Morton, the Supreme Court affirmed the Appellate Division's reversal of a DWI conviction where the officers provided conclusory statements as to the results of the administration of field sobriety tests. Id. at 514. The Court distinguished between an officer providing testimony based upon training and experience from a lay person providing a lay opinion of intoxication. Id.

Here, the State is attempting to equate Officer Pittius, who conceded there are standard scoring factors but that he did not know what they were, to a lay person without training. Under Morton, the Court held "where the significance of results of tests depends upon a conclusion of the witness as to whether the motorist's reaction is a departure from the normal or standard, such conclusion may not be given unless the examiner is shown to have some skill or training which will qualify him to make an evaluation." State v. Morton, 39 N.J. at 514.

The State's reliance on Morton is misplaced because Officer Pittius was not providing lay opinion testimony – he was attempting to rely upon the results of standardized field sobriety tests, but he did not know the standard scoring factors. (1T62:1-63:12.) The State then obtained an advantage in not calling as a witness Lt. Loos who could have been cross-examined if called. This result is unfair, and should be remedied by this Court.

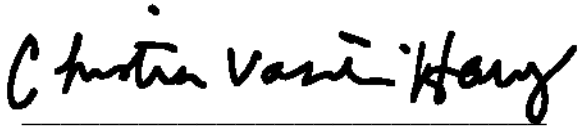
CONCLUSION

Defendant Jeffrey Morton is entitled to reversal in this matter because a series of prejudicial errors deprived him of a fair result. First, the de novo court violated Defendant's Sixth Amendment right to confrontation because the de novo court considered issues beyond the scope of the hearing: the Alcotest, the HGN test conducted by Lt. Loos, who did not testify, and potentially, other reports. Second, the de novo court showed bias such that recusal was appropriate because the de novo judge inquired on the record as to the State's reasons for not admitting the Alcotest, which exceeded the scope of the evidence before the municipal court. The State's justification based upon the no longer operative Guideline 4 should not be used to justify prejudice to a Defendant, who had a presumption of innocence, when the de novo court could have exercised such review without showing any bias towards Defendant, such as making the inquiry after concluding and rendering an opinion on Defendant's trial de novo.

Third, the de novo court erred because Defendant was entitled to an adverse inference when the State did not call Lt. Loos, who was the only officer with the knowledge of the scoring factors for the standardized field sobriety tests. By denying Defendant the adverse inference, the de novo court further denied Defendant the ability to cross-examine Lt. Loos as to the evidence that both lower courts used to justify Defendant's DWI conviction. In order to

remedy this prejudice, this Court should reverse and remand for a de novo hearing before an impartial judge.

Respectfully submitted,
LOMURRO MUNSON, LLC
Attorneys for Defendant-Appellant,
Jeffrey Morton



By: CHRISTINA VASSILIOU HARVEY, ESQ.

Dated: July 1, 2024