JOHN MENZEL, J.D.
603 Mattison Avenue, Suite 320
Asbury Park, New Jersey 07712
(732) 899-1899, (732) 713-4100
Attorney ID Number 037231984
Attorney for Defendant

	: **SUPERIOR COURT OF NEW JERSEY**
STATE OF NEW JERSEY,	: **APPELLATE DIVISION**
	:
Plaintiff,	: DOCKET NO. A-000640-24-T4
	:
v.	: ON APPEAL FROM:
	: Superior Court, Law Division, Ocean County
CHRISTOPHER J. SLONIESKI,	: Docket No. Below 24-04
	: Sat Below: Hon. David M. Fritch, J.S.C.
Defendant.	:
	:**DEFENDANT'S BRIEF**

To: Honorable Judges
Superior Court of New Jersey, Appellate Division
25 Market Street, Box 006
Trenton, New Jersey 08625-0006

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Bradley D. Billhimer, Prosecutor
Attention: Cheryl Hammel, Assistant Prosecutor
Ocean County Prosecutor's Office
119 Hooper Avenue, Box 2191
Toms River, New Jersey 08754-2191

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Date submitted: February 27, 2025
On the Brief: John Menzel, J.D.

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ABBREVIATIONS:

BWC .....body worn camera
DWI ..... operating a motor vehicle while under the influence of alcohol
IDRC..... Intoxicated Driver Resource Center
IID..... breath alcohol ignition interlock device
MVR ..... mobile video recording
refusal..... refusing to submit breath samples
SFST ..... standardized field sobriety testing
TRO ..... temporary restraining order

PRELIMINARY STATEMENT

Defendant Christopher J. Slonieski, was arrested for operating a motor vehicle while under the influence of alcohol ["DWI"] after calling police to protect him from a woman brandishing a gaffers hook, ramming his car, and smashing its windows. Slonieski called police to defuse the emergency. They verified his claims, then victimized him further with an unjust DWI arrest. Slonieski told them so, repeatedly requested a lawyer, and declined standardized field sobriety testing ["SFST"] and breath testing, all without physical resistance. Still, he obtained a temporary restraining order ["TRO"] under the Prevention of Domestic Violence Act against his assailant.

Relying on observational evidence, the trial courts wrongly validated an unjust arrest and found Slonieski guilty of DWI, disregarding the necessity that precipitated police involvement and ignoring the State's obligation to disprove the necessity. The municipal court also convicted Slonieski of refusing to submit breath samples without any evidence of how he was advised. Given the strong public policy to protect victims of domestic violence, the State's failure to disprove the necessity arising therefrom, and the absence of competent evidence supporting the conviction for refusing to submit breath samples ["refusal"], this Court should acquit Slonieski of both DWI and refusal.

In convicting Slonieski, the Law Division judge relied heavily on parts of a video exhibit *J-1* which was neither viewed nor considered by the municipal court—all in violation of Slonieski's right to be present at every critical phase of the proceedings against him. Despite the presentation of ample evidence of necessity, both trial courts ignored it and refused to recognize the State's obligation to disprove the necessity defense beyond a reasonable doubt. This Court should also provide guidance to trial courts to avoid impermissibly expanding a trial record and negating the State's burden to disprove certain affirmative defenses in support of convicting an innocent defendant.

PROCEDURAL HISTORY

Charges and Appearances. On November 27, 2022, Lakewood Township Police Officer Nicholas Romeo issued complaints A-293650, A-296821, and A-296822 charging Defendant Christopher J. Slonieski with DWI, refusal, and careless driving in violation of *N.J.S.A.* 39:4-50, *N.J.S.A.* 39:4-50.2,[1] and *N.J.S.A.* 39:4-97, respectively. Da1a-3a.[2] John Menzel, J.D., appeared as defense counsel in the municipal court with a *Letter of Representation* dated February 2, 2023. Da4a-6a. Municipal Prosecutor Matthew Borriello represented the State at most

[1] The appropriate statutory reference should have been *N.J.S.A.* 39:4-50.4a. *State v. Cummings*, 184 *N.J.* 84, 90, n.1 (2005).

[2] Defendant's appendix, attached, is cited to as suggested in *R.* 2:6-8—*e.g.*, page one of the appendix is cited as "Da1a."

court appearances and the suppression hearing and trial. The Hon. Scott J. Basen, J.M.C., presided over all municipal court proceedings.

Pretrial Proceedings. After adjournments on April 28, July 26, August 24, September 14, and October 19, 2022, and July 14, November 2, and November 16, 2023 (1T5-15/20, 7-4/7; 2T7-9/9-14; 3T7-9/11-2; 4T13-23/15-11; 5T14-12/15-16; 6T13-10; 7T15-18/17-12[3]), the parties appeared on November 20, 2023, when Judge Basen dismissed a related defendant's matter (8T4-1/19) and denied a motion by Slonieski to dismiss the case against him based on a destroyed 911 call (8T5-11/7-14).

Suppression Motion. After adjournments on December 15, 2023 (9T3-18/4-25), and February 1, 2024 (10T16-6/25), Judge Basen heard Slonieski's motion to suppress evidence (11T3-8/11), with testimony from Lakewood Police Officer Nicholas Romeo and the viewing of two video files (11T6-25/113-6)—a mobile video recording ["MVR"] dashcam, identified as "extraction 1/2022/11:27" (11T49-6/8) and a second body worn camera ["BWC"] video received in evidence

[3] Transcripts are cited to by page and line as suggested in *R.* 2:6-8—*e.g.*, page 5 from line 15 to line 20 of the April 28, 2023, transcript is cited as "1T5-15/20," and page 7, line 9, to page 9, line 14, of the July 6, 2023, transcript is cited as "2T7-9/9-14. Other transcripts are cited as needed with the volume numbers indicated in the tables.

as *J-1* (11T75-9, 91-6).[4] After closing arguments (11T114-10/119-6), Judge Basen denied the motion to suppress (11T123-2/8).

Trial. Trial took place on February 29, 2024, when the parties stipulated the suppression hearing as part of the trial (12T3-20/4-4) and the court received additional testimony from Romeo (12T4-10/14-13). After closing arguments (12T15-13/25-6), Judge Basen found Slonieski not guilty of careless driving (12T25-9/11, 35-21) but guilty of both DWI and refusal, specifically denying a necessity defense (12T25-1/5, 26-8/31-10, 28-5/11).

Sentence. For DWI, the court ordered Slonieski to pay a $257 fine, $33 court costs, and $350 in various assessments, to attend an Intoxicated Driver Resource Center ["IDRC"] for 12 hours, and to forfeit his driving privilege until he installs and maintains a breath alcohol ignition interlock device ["IID"] for three months thereafter. 12T35-19/36-1. For refusal, the court ordered Slonieski to pay a $257 fine, $33 court costs, and a $100 assessment, to attend an IDRC for 12 hours, and to forfeit his driving privilege until he installs and maintains an IID for 12 months thereafter. 12T36-2/35-20. Judge Basen ran the IID and IDRC parts of the sentences concurrently. 12T35-13/20. Da7a.

[4] The MVR dashcam has a time signature erroneously set five hours in advance. *See* 11T49-20/50-4. The MVR was viewed from its beginning to time signature 09:47:02. 11T90-9/16. The BWC video has a more accurate time signature.

Law Division Appeal. Execution of sentence, except for fines and assessments, was stayed pending appeal. 12T35-25/36-16. Slonieski timely filed a Notice of Appeal with Superior Court, Law Division, Ocean County. Da9a-10a. The appeal was assigned to the Hon. David M. Fritch, J.S.C., and Assistant Prosecutor Cheryl Hammel represented the State. After a case management conference on June 12, 2024 (13T3-7/12-5), the parties, on trial *de novo* on the record below, argued the matter on August 14, 2024. Judge Fritch reserved decision (14T53-2/6) before issuing a *Memorandum Opinion and Order* (Da10a-34a) in which he again convicted Slonieski of DWI and refusal.

Motion for Reconsideration. Slonieski moved for reconsideration on the grounds that certain matters of record were overlooked and other matters outside of the record were improperly considered, and the case was adjourned on August 26, 2024. 15T3-13/25. The first issue on reconsideration arose from Judge Fritch's holding that there was "no record that Defense counsel ever filed a motion regarding the destruction of the 9-1-1 recording with the Municipal Court as directed to on November 30, 2023" (Da16a, *see* 16T33-14/38-2), despite the filing of such a motion with the municipal court (*see* Da35a-41a).[5] The second issue

[5] This point appears to be moot, given that Judge Fritch ruled on the merits, finding that, "even if the issue were properly raised before the Municipal Court, the remedy sought by the Defendant is not merited on the facts in the present record." Da27a. Given this apparent mootness, no further argument is offered here unless this Court invites it.

concerned the defense objection at oral argument to Judge Fritch's consideration of video contained in the physical exhibit marked *J-1* but outside of the time perimeters specified in the trial record. *See* Da27a. This motion was argued and denied on September 19, 2024. 16T33-5/13.

Present Appeal. Ultimately, Judge Fritch reaffirmed his previous holdings and denied Slonieski's request for a stay pending appeal. 16T48-12/17; *see* 16T26-23/33-13 (*J-1*). The same sentence as that imposed by the municipal court was reimposed (16T54-5/19, 56-22/57-8) and executed (16T55-16/19, 58-9/22). A final *Order* was entered on November 27, 2024. Da42a-44a. This appeal follows. *See* Da45a-50a. A Scheduling Order was entered. Da51a. Slonieski has requested oral argument. Da52a.

FACTS

Dispatch. At 3:06 a.m. (11T24-7/9) on November 27, 2022, Nicholas Romeo, a Lakewood Township Police Officer for six years, responded to Jackson Speedwash Laundromat at 1880 West County Line Road in Lakewood (11T18-8/25) to help a victim of domestic violence (11T33-24/34-2).[6] Police Officer Joseph Mendlebaum was first on scene. 11T17-15/18; *see J-1*, MVR at 08:18:22 and 18:21:34 (11T52-10/14, 53-9/11). Romeo arrived five minutes after Mendlebaum and 16 minutes before Officer Michelle Lopez. 11T13-6/14-2, 15-

[6] The State failed to preserve the recording of Slonieski's 911 call.

14/16/14; *see J-1*, MVR at 08:32:45 (11T63-3/14). Romeo, as the officer assigned to that zone, became the prime officer on scene. 11T17-20-24. Romeo found Defendant Christopher J. Slonieski in front of the business and his damaged car in the rear of the business. 11T7-15/8-13. Romeo did not know whether Slonieski called while he was driving or after he had parked. 11T46-25/47-10. Slonieski waved the officers down (11T19-5/6), walked alongside and to the back of the building with his keys in hand, got into his car, and met with Romeo (11T19-9/23; *but see* 12T5-16/18).

Domestic Violence Investigation. Romeo engaged Slonieski in several conversations over a period of about an hour and 15 minutes and received information that proved to be reliable. 11T34-3/18. Slonieski reported that he and his girlfriend, Demi Lynne Parenti, were having dinner at the Edge Restaurant in Jackson about one and one-quarter miles west of the scene when a fight ensued. 11T24-17/25-16, 46-1/5; *see J-1*, BWC at 03:35:30 (11T96-10/97-19, 92-2/101-4). Slonieski had no choice but to drive. 11T48-23/49-2. He explained that his girlfriend started the fight forcing him to flee, that she chased him from the restaurant in her car, that he tried to lose her down different side streets, and that she broke his car's window and damaged its bumper after cornering him in the Speedwash parking lot. 11T25-17/27-4, 45-10/22, 46-9/14; *see J-1*, MVR at

08:22:42 (11T57-2/59-14); *see also* 12T6-16/21. Slonieski drove no further. 11T46-19/21.

Corroboration. Romeo saw the damage to Slonieski's car window and bumper. 11T27-5/6, 28-3/7, 47-17/19. Romeo learned that Parenti lived in Jackson and called Jackson Police, who reported back that they could not find her but did find her car with damage corresponding to what Slonieski had described. 11T27-7/28-2, 47-20/23; *see* 11T8-18/9-11; *see also J-1*, MVR at 08:22:42 (11T56-15/24) and 08:32:30 (11T62-5/23). Meanwhile, Officer Lopez had Slonieski complete a victim notification form to get a domestic violence TRO against Parente while at the scene. *J-1*, MVR at 08:36:00 (11T63-22/65-22); *see* 11T85-15/16, 92-10/18; *see also J-1*, BWC at 04:14:27. Romeo spoke with Parenti by phone and, after she hung up on him, concluded, "[S]he did it.... She's trying to play stupid." 11T72-18/73-13; *see J-1*, MVR at 08:41:51 (11T67-19/71-6), BWC at 03:41:45; *see also J-1*, MVR at 09:24:58 (11T85-2/7). Romeo compared the damage of Slonieski's car with what he was told about Parenti's car. 11T75-24/77-4; *see J-1*, MVR at 08:55:47; *see also J-1*. MVR 09:16:22 (11T82-18/83-4), 09:24:45 (11T84-6/20). The damage matched.

DWI Investigation. During this process, Romeo made observations of Slonieski's eyes, speech, odor of alcohol from his person, gait, and hands. 11T9-23/10-1; 12T5-25/6-6. At about 4:20 a.m., more than an hour and a quarter after

the initial call, the investigation's focus shifted from domestic violence to DWI. 11T23-14/24-16; *see* 11T91-17/20. After the TRO call, Romeo told Slonieski that he suspected him of DWI based on his eyes, speech, and odor. 11T10-19/25. Romeo asked Slonieski to do SFST. 11T20-1/15, 30-22/31-1, 31-21/25; 12T7-7/14; *see J-1*, BWC at 04:35:01 (11T102-5/103-22). Based on his training and because he was not sure whether Slonieski was under the influence, Romeo believed SFST was a necessary part of his investigation to determine whether to make an arrest and threatened Slonieski with arrest if he did not perform them. 11T32-1/33-23, 43-20/44-4; *see* 11T12-11; *see also* 12T13-10/25.

Outrage. Slonieski became upset. 11T11-3/6. "Why are you doing this to me?" he asked. 11T43-9/11, 43-17/19. "I'm the victim of domestic violence." 11T43-12/14. "I called you guys for help." 11T43-15/16. "I can't do the field sobriety test. I was chased by a crazy woman with a fish hook. I can't do it. I was running for my life, man. Seriously. So that's it. Serious. I was running for my life." 11T103-2/6. "So, I was running for my life from The Edge." 11T104-8/9. "I was scared for my life. She had a fish hook." 11T104-14/15. Romeo persisted, "Either perform the [field sobriety test]s, like, show me that you're not intoxicated so I can let you go home or you're going to have to be arrested...." 11T108-13/15.

Arrest. When Slonieski declined SFST, Romeo ordered him to turn around and submit to handcuffing; Slonieski cooperated at all times. 11T44-8/44-20. He

was arrested at 4:52 a.m. 11T16-15/17-8; 12T7-15/18. He requested a lawyer several times. 12T10-11/12; *J-1*, MVR at 9:45:40 (11T89-17/90-3, BWC at 04:45:27 (11T110-15/111-24). He argued during handcuffing, but offered no physical resistance. 12T10-2/10. Slonieski continued to argue back at the station, but complied with most commands. 12T11-21/12-1. Romeo took Slonieski to the booking room, read him *Miranda*[7] rights and a "general status statement," and asked him to submit breath samples into an Alcotest machine, but Slonieski refused (12T7-17/8-24), continued to argue (12T11-21/23), and asked for a lawyer (12T10-13/15).

LEGAL ARGUMENT

I.
WHEN BALANCED AGAINST THE PUBLIC POLICY OF ASSISTING THE VICTIMS OF DOMESTIC VIOLENCE AND ENFORCING DWI LAWS, POLICE IN THIS CASE LACKED PROBABLE CAUSE ON WHICH TO ARREST DEFENDANT FOR DWI

(Da21a-22a; 16T42-24/44-6)

A.
PROBABLE CAUSE GENERALLY

Given the unusual circumstances of this case, Slonieski's arrest was without probable cause. Whether this is probable cause in the constitutional sense under the Fourth Amendment of the federal constitution or Article 1, paragraph 7, of our State constitution or whether this is probable cause as an element of *N.J.S.A.* 39:4-

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

50.4a is an open question. As the former, the facts were developed at the hearing in the motion to suppress. As the latter, probable cause would be a trial question.

Slonieski does not question the subjective good faith of the officer making the arrest. But probable cause in this context demands an objective standard. "To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual...." *Brown v. Texas,* 443 *U.S.* 47, 51 (1979). "[T]he proper inquiry for determining the constitutionality of a search-and-seizure is whether the conduct of the law enforcement officer who undertook the search was objectively reasonable, without regard to his or her underlying motives or intent." *State v. Bruzzese*, 94 *N.J.* 210, 219 (1983).

"[T]he State is barred from introducing into evidence the 'fruits' of an unlawful search or seizure by the police." *State v. Badessa*, 185 *N.J.* 303, 311 (2005), citing *Wong Sun v. United States,* 371 *U.S.* 471, 485 (1963). "Even evidence indirectly acquired by the police through a constitutional violation is subject to suppression." *State v. Badessa, supra* at 311, citing *Murray v. United States,* 487 *U.S.* 533, 536-37 (1988). Unless the improperly acquired evidence was sufficiently attenuated to purge the unconstitutional taint from evidence offered by the State, it must be suppressed. This includes a defendant's refusal to take the test.

N.J.S.A. 39:4-50.4a provides

> The municipal court shall determine...whether the arresting officer had probable cause to believe that the person had been driving or was in actual physical control of a motor vehicle on the public highways or quasi-public areas of this State while the person was under the influence of intoxicating liquor or a narcotic, hallucinogenic, or habit-producing drug or marijuana; whether the person was placed under arrest, if appropriate, and whether he refused to submit to the test upon request of the officer; and if these elements of the violation are not established, no conviction shall issue.

Thus, the probable cause question has two components:

Is there probable cause to believe that the person had been driving or was in actual physical control of a motor vehicle on the public highways or quasi-public areas of this State? Is there probable cause to believe that the person was under the influence of intoxicating liquor or a narcotic, hallucinogenic, or habit-producing drug or marijuana? These components must be established beyond a reasonable doubt. *State v. Cummings*, *supra* at 89.

Probable cause is more than bare suspicion but less than legal evidence necessary to convict. *State v. Patino*, 83 *N.J.* 1, 10 (1980). It has been defined as a "well-grounded suspicion" that a crime is being committed. *Id.*, quoting *State v. Burnett*, 42 *N.J.* 377, 387 (1964). Probable cause is not a technical concept but one having to do with "the factual and practical considerations of everyday life" on which reasonable and prudent persons act. *State v. Patino*, *supra* at 10, quoting *Brinegar v. United States*, 338 *U.S.* 160, 175 (1949). The scope of the seizure

must be strictly tied to and justified by the circumstances which rendered its initiation permissible. *Terry v. Ohio*, 392 *U.S.* 1, 19 (1968).

B.
PROBABLE CAUSE AND PROTECTING VICTIMS OF DOMESTIC VIOLENCE

This case calls upon this Court to balance whether society's legitimate interests require the seizure of the particular individual. Those interests are the enforcement of DWI laws on the one hand and the protection of domestic violence victims on the other. So, was it reasonable and prudent to seize Slonieski and to arrest him for DWI after he sought protection in a domestic violence incident? "[T]he primary duty of a law enforcement officer when responding to a domestic violence call is to enforce the laws allegedly violated and to protect the victim." *N.J.S.A.* 2C:25-18.

Slonieski was a "[v]ictim of domestic violence" in that he was a person subjected to an assault "by a person with whom the victim has had a dating relationship." *N.J.S.A.* 2C:25-19(d); *see N.J.S.A.* 2C:25-19(a)(2). "It is...the intent of the Legislature to assure the victims of domestic violence the maximum protection from abuse the law can provide." *N.J.S.A.* 2C:25-18. "It is the intent of the Legislature to stress that the primary duty of a law enforcement officer when responding to a domestic violence call is to enforce the laws allegedly violated and to protect the victim" and "to assure the safety of the victims and the public." *Ibid.*

"Further, it is the responsibility of the courts to protect victims of [such] violence...." *Ibid.*

Given the totality of these unusual circumstances, police action here re-victimized a victim of domestic violence, violated the Legislative purpose and public policy of protecting victims of domestic violence, and aggravated a situation defused of any DWI threat that Slonieski may have posed. His DWI arrest was imprudent and unreasonable. Consequently, this Court should find no probable cause, both as a matter of constitutional law and as an element of the refusal offense.

II.
WITH DEFENDANT PRESENTING "SOME EVIDENCE" OF DOMESTIC VIOLENCE AND NECESSITY, THE STATE FAILED TO DISPROVE THE NECESSITY DEFENSE BEYOND A REASONABLE DOUBT
(Da30a-34a)

At issue here is whether the common-law defense of necessity entitles Slonieski to an acquittal. "The common-law defense of 'necessity' is often referred to as the 'choice-of-evils' defense." *State v. Tate*, 102 *N.J.* 64, 73 (1986), *rev'd on other grounds*, 102 *N.J.* 64 (1986) (citation omitted). "Conduct that would otherwise be criminal is justified if the evil avoided is greater than that sought to be avoided by the law defining the offense committed, or, conversely, if the conduct promotes some value higher than the value of compliance with the law." *Ibid.* The elements of the common-law defense of necessity are:

> (1) There must be a situation of emergency arising without fault on the part of the actor concerned;
>
> (2) This emergency must be so imminent and compelling as to raise a reasonable expectation of harm, either directly to the actor or upon those he was protecting;
>
> (3) This emergency must present no reasonable opportunity to avoid the injury without doing the criminal act; and
>
> (4) The injury impending from the emergency must be of sufficient seriousness to out-measure the criminal wrong.
>
> [*State v. Romano*, 355 *N.J.Super.* 21, 29 (App.Div. 2002), citing *State v. Tate, supra,* 194 *N.J.Super.* at 628.]

Judge Basen's finding that "the defense has not established...a single element of a necessity defense," 12T25-1/5, is incorrect. The municipal court's finding that "[t]he defense has not properly raised this," 12T29-9/10, or "put forth a proper necessity defense," 12T29-24/25, is without any basis. Contrary to the municipal court's assertion that "the testimony and...the videotape refute any elements of the necessity defense," 12T29-10/22, the testimony and video actually establish the necessity defense.

Judge Fritch affirms Judge Basen based on several assertions contradicted by a record that, without doubt, establishes an emergency arising from domestic violence. Judge Fritch dismisses the concept of *impending* injury to the victim's person by requiring *actual* injury. He presumes that Slonieski is somehow at fault, perhaps based on some "conversation" about which nothing is known. Da32a. Judge Fritch asserts that there is "nothing in the present record to support this

claim that Defendant was assaulted at the restaurant." Da31a. This is contradicted by Slonieski's call to 911. "[A] call placed and processed via the 9-1-1 system carries enhanced reliability not found in other contexts." *State v. Golotta*, 178 *N.J.* 205, 218 (2003). "Our statutes...criminalize the false reporting of emergencies and explicitly include within their ambit calls placed to 9-1-1." *Id.* at 219. "The police maintain records of 9-1-1 calls not only for the purpose of responding to emergency situations but to investigate false or intentionally misleading reports." *Ibid.* In light of the criminal penalties associated with false 9-1-1 calls, "a 9-1-1 call carries a fair degree of reliability inasmuch as it is hard to conceive that a person would place himself or herself at risk of a criminal charge by making such a call." *Ibid.* (internal quotation marks omitted); *see N.J.S.A.* 2C:33-3(e) (fourth-degree crime). Information imparted by a 9-1-1 caller should not be "viewed with the same degree of suspicion that applies to a tip by a confidential informant." *State v. Golotta*, *supra* at 220 (citation omitted). Ultimately, Slonieski's report of domestic violence proved true, and he obtained a TRO with police assistance.

Judge Fritch asserts that there was no "recognizable likelihood" of a physical "threat being carried out." Da32a. This is contradicted by the fact that Slonieski's car was damaged with corresponding damage on his assailant's car, confirmed by Romeo in his phone conversation with Slonieski's assailant. Judge Fritch believes that because there was no damage to Slonieski's person, there was no "compelling

emergency of a reasonable expectation of harm...." Da32a. Apparently, in Judge Fritch's view, the threat of harm, however imminent and compelling, does not give rise to an emergency unless the victim is actually harmed, hurt, and injured.

Was there an opportunity for Slonieski to avoid driving? Judge Fritch echoes his incorrect contention that there is no evidence that Slonieski was assaulted at the restaurant. Da32a. Forgetting that it is the State's burden to disprove the defense once "some evidence" is brought forward by the defense, *State v. Romano, supra* at 36, Judge Fritch infers that, because a restaurant is a public place, he "was able to leave without being harmed...and leave the premises without injury...." Da32a. Without any basis, Judge Fritch presumes that Slonieski "could have contacted the police from his car in the parking lot without operating his vehicle." Da33a. Perhaps Slonieski was seeking to avoid the damage and threat that ultimately and unavoidably descended on him when he was cornered in the laundromat parking lot.

Judge Basen wondered "why someone who is alleging a necessity defense believes he is under imminent physical harm would drive in the manner that Mr. Slonieski did and drive to this lot, rather than driving either to the Lakewood Police Headquarters or to the Jackson Police Headquarters or to some well-lit, open area." 12T29-14/20. But so many doubts undermine this supposition. How did the threat to Slonieski manifest itself? How imminent was that threat at the

restaurant? How familiar was Slonieski with the area? Did he know where the police stations were? How far was he from either police station? Given the immediacy of the threat, did he even have a chance to consider these options? How was he followed? How did he convey the chase in his call to 911? What is the open well-lit area to which Judge Basen alludes? And how does this open well-lit area compare to the area where Slonieski ultimately stopped?

In *State v. Romano, supra,* the facts there were not in dispute. An officer, on routine patrol, saw the defendant's vehicle traveling without its headlights on. The officer stopped the vehicle and saw the defendant, his face covered in blood, bleeding profusely from his nose, physically shaken and frightened. The defendant said he had been jumped by some individuals at a local restaurant, was scared, and needed help. *Id.* at 24.

Like *Romano*, the underlying facts leading to Slonieski's DWI are not in dispute. He faced aggression from Parente, who smashed a window and damaged his car. She chased him with her car. He called 911. She blocked Slonieski in for a time after she cornered him in the parking lot to which Slonieski fled to hide behind a local business. Police obtained corroboration. Parente admitted being at the restaurant with Slonieski. Police observed damage to Parente's car consistent with and corresponding to what Slonieski had described. After a telephonic hearing, Slonieski obtained a TRO.

Here, as to the first element of a necessity defense, an emergency arose when Parente assaulted Slonieski at the restaurant. As to the second and third elements, this assault created an emergency so imminent as to raise a reasonable expectation of harm that compelled Slonieski with no reasonable opportunity to avoid further injury without driving away from the scene. When freed from the compulsion that caused him to drive, Slonieski tried to hide, called police for help via 911, and met them when they arrived, thereby satisfying element four.

Of course, there are differences between *Romano* and *Slonieski*. Romano was driving in the course of fleeing an emergency and engaged police for help during a traffic stop. Slonieski called police for help and ceased driving at the first opportunity after the emergency dissipated to some degree. Slonieski fled to avoid impending injury, while Romano suffered actual injury, then fled. Slonieski was a victim of domestic violence; Romano was not. But these are differences without sufficient legal distinction.

As in *Romano*, "[t]he question we must resolve is whether on this set of facts, the common-law defense of necessity applies, so as to warrant an acquittal of the DWI charge." *Id.* at 28. When a defendant "come[s] forward with some evidence of the defense,...the State bears the ultimate responsibility to disprove the defense beyond a reasonable doubt." *Id.* at 36. The State failed to do so in the present case, and both Judge Fritch and Judge Basen relieved the State of its

burden to disprove necessity by ignoring the facts. *See* 12T25-1/5. Like *Romano*, Slonieski "is entitled to the common-law defense of necessity in the circumstances presented here." *Id.* at 30.

III.
THE REFUSAL CHARGE WAS INTEGRALLY RELATED TO, AND NOT SO ATTENUATED FROM, THE DWI CHARGE THAT IT SHOULD BE DISMISSED
(16T44-24/45-7)

"DWI and refusal to submit to a breathalyzer test are part of a comprehensive statutory scheme...and may be viewed as two sides of the same statutory coin." *State v. Badessa, supra* at 313. "After all, to secure a refusal conviction, the State must prove that 'the arresting officer had probable cause to believe that the person had been driving' while under the influence and 'was placed under arrest' for DWI." *Ibid.* (quoting *N.J.S.A.* 39:4-50.4a). "Accordingly, the refusal statute and its severe penalties are directly related to the enforcement of the DWI statute." *State v. Badessa, supra* at 314. "The facts necessary to prosecute those two offenses are inextricably intertwined." *Id.* at 313.

Because it was readily apparent that Slonieski acted out of necessity in driving while allegedly under the influence of alcohol, he is not guilty of the DWI offense. If Slonieski cannot be convicted of DWI when driving is impelled by necessity, the absence of a breath test would not deprive the State of evidence that might have been used in a DWI case. *See id.* at 314. Because the refusal charge is

so integrally related to the DWI charge, this Court should dismiss the refusal charge as well as the DWI charge.

IV.
THE STATE FAILED TO ESTABLISH WHAT, IF ANY, ADVISE DEFENDANT WAS GIVEN CONCERNING HIS RIGHTS AND OBLIGATIONS AS TO SUBMITTING BREATH SAMPLES
(Da25a-28a)

"The purpose of the refusal statute is to encourage all suspected drunk drivers to take the breathalyzer test." *State v. Widmaier*, 157 *N.J.* 475, 487 (1999); *State v. Wright*, 107 *N.J.* 488, 504 (1987). An essential element to sustain a refusal conviction is that "the officer requested defendant to submit to chemical breath test and informed defendant of the consequences of refusing to do so...." *State v. Marquez*, 202 *N.J.* 485, 503 (2010).

N.J.S.A. 39:4-50.2(e) provides, "A standard statement, prepared by the chief administrator, shall be read by the police officer to the person under arrest"--specifically, that the "police officer shall, however, inform the person arrested of the consequences of refusing to submit to such test in accordance with" *N.J.S.A.* 39:4-50.4a. *See State v. Marquez, supra* at 506; *see also State v. Duffy*, 348 *N.J.Super.* 609, 612-13 (App.Div. 2002). *N.J.S.A.* 39:4-50.2(d) also requires that the "police officer shall inform the person tested of his rights under subsections (b) and (c) of this section." Subsection (b) provides: "A record of the taking of any such sample, disclosing the date and time thereof, as well as the result of any

chemical test, shall be made and a copy thereof, upon his request, shall be furnished or made available to the person so tested." Subsection (c) provides: "In addition to the samples taken and tests made at the direction of a police officer hereunder, the person tested shall be permitted to have such samples taken and chemical tests of his breath, urine or blood made by a person or physician of his own selection."

A person asked to submit breath samples should be told about all of these rights and consequences. But in the present case, what was conveyed to Slonieski is not in the trial record. Rather than a "standard statement," he was read a "general status statement." 12T7-21/24. Without evidence of what this misnomer is, the proofs failed to establish whether Romeo complied with the requirements of *N.J.S.A.* 39:4-50.2(e) and *N.J.S.A.* 39:4-50.4a(a). Consequently, this essential element of a refusal conviction was not proven, and this Court should find Slonieski not guilty of the refusal charge.

V.
THE LAW DIVISION JUDGE IMPERMISSIBLY EXPANDED THE MUNICIPAL COURT RECORD BY RELYING ON PARTS OF VIDEO NEITHER OFFERED IN EVIDENCE IN THE MUNICIPAL COURT TRIAL NOR RELIED ON BY THE MUNICIPAL COURT JUDGE, THUS DEPRIVING DEFENDANT OF THE RIGHT TO BE PRESENT AT EVERY CRITICAL STAGE OF THE PROCEEDINGS AGAINST HIM

(Da25a-28a; 16T25-6/33-13)

"The right to be present at trial to confront witnesses or evidence against a defendant is protected by the Sixth Amendment to the United State Constitution, as applied by the Fourteenth Amendment, and by Article I, Paragraph 10 of the New Jersey Constitution." *State v. A.R.*, 213 *N.J.* 542, 557 (2013) (citations omitted). "The presence of a defendant at trial is a condition of due process to assure a fair and just hearing, which is protected by the Fourteenth Amendment." *Ibid.* (citations omitted); *see State v. Hudson*, 119 *N.J.* 165, 171 (1990); *see also R.* 3:16 and *R.* 7:8-7(a). "Vindication of that right requires a defendant to be present at every stage of the proceedings, whenever presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *State v. A.R.*, *supra* at 557-58 (cleaned up, citations omitted); *see State v. Hudson*, *supra* at 171. "The right of a defendant to be present at trial permits a defendant to consult with counsel and to assist with the presentation of the defense and cross examination, while also assuring public confidence in the trial process." *State v. A.R.*, *supra* at 558 (citations omitted); *State v. Hudson*, *supra* at 172. Judge Fritch violated this constitutional guarantee by considering evidence not part of the trial record. He deprived Slonieski of his right to be present at every critical stage of the proceedings against him.

Contrary to the municipal court record and what Judge Basen reviewed and considered there, Judge Fritch considered *J-1* as admitted "in its entirety [and]

accepted into evidence without objection," despite his acknowledgement that "only portions of this footage were played before the Municipal Court...." Da27a. Judge Fritch exceeded the time perimeters of that portion reviewed by Judge Basen, from its beginning (11T48-5/49-18) until time signature 9:47:02,[8] (11T90-9/16), and as incorporated into the municipal court trial record (12T3-20/24). While taking judicial notice of a document on the Attorney General's website which was not part of the municipal court record (Da25a-26a), Judge Fritch "relied on the direct video recording of the advisement given to the defendant prior to asking him to submit to an Alcotest sample...as J-1." 16T32-8-13. In his written decision, Judge Fritch chastised defense counsel because he "did not ask any questions to Officer Romeo regarding the 'general status statement' read to the Defendant." Da26a. Judge Fritch continued,

> Although this document was not presented at trial, [i]f Defense counsel wished to challenge the sufficiency of what Officer Romeo had described as the "general statement," they could have asked Officer Romeo for additional information and created a full record of what, precisely, Officer Romeo was referring to when he stated he issued the Defendant the "general statement" but failed to do so at trial.
>
> [Da27a.]

[8] The time signature incorrectly label the time five hours ahead of the actual time. 11T49-20/50-4.

"Under *R.* 3:23-8(a), with certain enumerated exceptions not applicable to these facts, when a verbatim transcript of the municipal court trial is available, the Superior Court review of the conviction is a trial De novo on the municipal court record." *State v. Musgrave*, 171 *N.J.Super.* 477, 479 (App.Div. 1979) (citations omitted). Slonieski "was entitled to trial of the appeal on that record." *Ibid.*

In the present case, the State attempted to reopen and supplement the trial record with new evidence *de novo*; Slonieski objected both in a reply brief, a motion to reconsider, and during oral argument. *See* Sb19; Ra1. Judge Fritch erred in permitting this supplementation along with parts of video, *J-1*, which were not in the record on the theory that all of the contents of *J-1* was reviewable, even parts not seen by the municipal court. Da27a. He injected, presumably as a mistaken use of judicial notice, a form of standard statement on the Attorney General's website. Da25a-26a. His holding that the "uncontested testimony on the record before the Municipal Court is that Officer Romeo read the Defendant the 'standard statement' before asking him to take a breathalyzer test" (Da27a) is just not true. Notwithstanding findings of the trial judges about a "standard statement" (12T30-9/10), Romeo's actual words were that he read Slonieski a "general status statement." 12T7-20/22.

"If the court to which the appeal is taken decides the matter *de novo* on the record, the court may permit the record to be supplemented for the limited purpose

of correcting a legal error in the proceedings below." *R.* 3:23-8(a)(2). But in the present case, "*R.* 3:23-8(a) does not expressly provide for 'supplementation' in these circumstances." *State v. Hermanns*, 278 *N.J.Super.* 19, 26 (App.Div. 1994). "[T]he *de novo* review is '*appellate*.'" *State v. Allen*, 236 *N.J.Super.* 58, 62 (Law Div. 1989) (emphasis in original). This Court's consideration of evidence is limited to the municipal court record. *R.* 3:23-8(a)(2). "[T]he appeal from the municipal court must be heard *de novo* on the record below." *State v. Sparks*, 261 *N.J.Super.* 458, 461 (App.Div. 1993). "This language might be read, in its reference to 'on the record,' as limiting the record to the *evidence* produced below or...as limiting the record not only to that evidence but also to the issues raised *below*." *State v. Allen*, *supra* at 61-62 (emphasis in original). "Courts undertaking appellate reviews are not permitted to consider issues which were not raised below unless they are jurisdictional, constitutional or amount to plain error" *Ibid.* "Nowhere in the rule is the State given the right to correct or bolster its case in chief...." *State v. Hardy*, 211 *N.J.Super.* 630, 634 (App.Div. 1986). "It surely is not intended to provide the State with a second opportunity to plug holes in a case deficient of proof beyond a reasonable doubt." *State v. Sparks*, *supra* at 461-62.

In *State v. Sparks*, a laboratory certificate was excluded from evidence on appeal, leaving the State without proof necessary to sustain a conviction. *Id.* at 460. When the Law Division judge remanded the case for a new trial, the

Appellate Division granted leave to file an interlocutory appeal and reversed and remanded to the Law Division for entry of a judgment of acquittal. *Id.* at 462.

In State v. Musgrave, supra, the defendant was tried for speeding in the municipal court. She "objected to admission into evidence of the speed reading, pointing out that the State had not proven the scientific reliability of the K-55, either by expert testimony or through judicial notice." *Id.* at 479-80. On appeal to Law Division, "over defendant's objection, the Superior Court judge granted the prosecutor's request for leave to present expert testimony regarding the scientific reliability of the K-55 unit." *Ibid.* The Appellate Division ruled that "the Superior Court judge erred in permitting the State to supplement the municipal court record with evidence of the scientific reliability of the K-55 unit and that, inasmuch as that reading was the sole evidence of her speed, her conviction should be reversed." *Ibid.*

In the present case, there is no evidence about a "standard statement"—only a "general status statement." Contrary to Judge Fritch's holding, no video of occurrences after arrest was placed in evidence. Nor was any document showing what Romeo read to Slonieski. No testimony as to what was actually said was offered. This Court's consideration of the document offered by the State for the first time in its Law Division brief and appendix and this Court's resort to the

Attorney General's website were inappropriate. As the Appellate Division stated in *Scott v. Salerno,* 297 *N.J.Super.* 437 (App.Div. 1997):

> Not only is the issue inappropriate here, but any evidence on the issue which is not in the record cannot be considered. Appellate courts can consider a case only to the point at which it had been unfolded below.... Thus, appellate review is confined to the record made in the trial court,...and appellate courts will not consider evidence submitted on appeal that was not in the record before the trial court....
>
> [*Id.* at 447.]

"[T]he conduct of the trial below was in the hands of the municipal court judge." *State v. Allen, supra* at 63. He considered only part of *J-1*, not its entirety. Nor was he presented with a "standard statement" or testimony about what was read to Slonieski when asked to submit breath samples. Slonieski "would be prejudiced unacceptably under these circumstances if this court agreed to consider" those parts of *J-1* not included in the record or any document either proffered by the State or posted on a website. *Id.* at 64.

Judge Fritch ignored the foregoing legal precedent foreclosing consideration of this kind of inappropriate evidence. He should have reconsidered his previous guilty finding as to the refusal and found Slonieski not guilty. This Court should correct his error.

VI.

THE LAW DIVISION JUDGE IMPERMISSIBLY SHIFTED THE STATE'S BURDEN OF PROVING EVERY ELEMENT OF THE BREATH TEST REFUSAL OFFENSE BEYOND A REASONABLE DOUBT BY STATING THAT THE DEFENSE HAD AN OBLIGATION TO QUESTION THE ADVISING OFFICER AS TO WHETHER HE READ DEFENDANT A STANDARD STATEMENT

(16T38-3/42-1)

The Judge below impermissibly, improperly, and unconstitutionally implies that the defense had a burden of proof to refute the absence of sufficient evidence, holding, "Defense counsel did not ask any questions to Officer Romeo regarding the 'general status statement' read to the Defendant." Da26a; *see* 16T38-3/41-21. This Court should not have allocated that burden to the defense.

> The defendant...is presumed to be innocent. Unless each and every element of the offenses charged are proved beyond a reasonable doubt, the defendant must be found not guilty of that charge.
>
> The burden of proving each element of the charges beyond a reasonable doubt rests upon the State and that burden never shifts to the defendant. It is not the obligation or the duty of the defendant in a criminal case to prove his innocence or offer any proof relating to his innocence.
>
> A reasonable doubt is an honest and reasonable uncertainty in your minds about the guilt of the defendant after you have given full and impartial consideration to all of the evidence. A reasonable doubt may arise from the evidence itself or from a lack of evidence. It is a doubt that a reasonable person hearing the same evidence would have.
>
> [N.J. Judiciary, *Model Jury Charges*, Reasonable Doubt (1997); *see State v. Clausell*, 121 *N.J.* 298, 334 (1990).]

Reasonable doubt arises here from the lack of evidence described above. Any intimation by the trial court that the defense should have even mentioned the lack of evidence is error and should be corrected.

VII.
DEFENDANT'S REPEATED AND CONSISTENT ASSERTIONS OF HIS RIGHT TO COUNSEL THROUGHOUT HIS ENCOUNTER WITH POLICE ESTABLISHED A VALID CLAIM OF CONFUSION SUFFICIENT TO CONSTITUTE AN AFFIRMATIVE DEFENSE TO THE REFUSAL CHARGE
(Da28a-30a)

When a person is arrested, police generally advise them of their constitutional rights pursuant to *Miranda v. Arizona, supra*. *See Berkemer v McCarty*, 468 *U.S.* 420 (1984), cited in *State v. Leavitt*, 107 *N.J.* 534, 538 (1987). "Our traditions presuppose access to counsel or family by persons in police custody. Many states provide for this by statute or court rule." *Id.* at 541. "And superimposed upon the fifth-amendment distinctions between testimonial and non-testimonial compulsion is the sixth-amendment guarantee of the effective assistance of counsel at the critical stages of criminal proceedings." *Id.* at 540.

But in New Jersey, "there is no constitutional sixth amendment right or constitutional due process right to Counsel for purposes of consultation prior to the administration of a breathalyzer test." *Id.* at 536. Indeed, those who are asked to submit breath samples must be so advised. *See id.* at 542, *N.J.S.A.* 39:4-50.2.

> The *Miranda* warnings basically state that a defendant has the right to remain silent and the right to consult with an attorney; the

> "implied consent" or "refusal" warnings, however, inform the suspect that the right to remain silent and right to consult with an attorney do not apply to the taking of breath tests and do not give a right to refuse to take the breath test....
>
> [*State v. Leavitt. supra* at 535.]

Yet confusion can arise between the conflict between these traditions of access to counsel and the obligation to provide breath samples pursuant to our implied consent statute, *N.J.S.A.* 39:4-50.2. "We recognize that despite the best of efforts some confusion may remain." *State v. Leavitt, supra* at 542. Thus, there is an "exclusive, narrow exception to the general rule that refusals cannot be validly justified" based on such confusion. *Ibid.* The "defendant bear[s] the burden of persuasion if he wishes to establish a confusion claim." *Ibid.*

As mentioned above, the State must establish whether a person charged with breath test refusal is guilty beyond a reasonable doubt. *State v. Cummings, supra* at 89. There is enough evidence in the State's case for Slonieski to come forward with the affirmative defense that he was confused as to his rights and obligations concerning submission of breath samples. *See State v. Kelly*, 97 *N.J.* 178, 200 (1984). The quantum of evidence necessary to raise this affirmative defense is "very slight." *See State v. Powell*, 84 *N.J.* 305, 317 (1980). Once the evidence is produced, the State must disprove the defense beyond a reasonable doubt. *Ibid*.

In the present case, the evidence shows how, once the tables turned on Slonieski, he repeatedly and consistently asserted his right to an attorney whenever

any testing was requested. His behavior established a confusion defense and shifted the burden to the State to disprove it beyond a reasonable doubt. As it did with the necessity defense, the State failed to disprove the confusion defense. Thus, this Court should find Slonieski *not guilty* of the refusal charge.

CONCLUSION

When balancing society's interests in enforcing DWI laws against the need to protect victims of domestic violence, police in this case lacked probable cause on which to arrest Defendant Christopher J. Slonieski, given the extended period that passed before they commenced a DWI investigation and the readily apparent necessity that impelled Slonieski to flee a dangerous situation. This Court should, therefore, acquit Slonieski of both the DWI and refusal charges. This Court should also acquit Slonieski of the refusal charge, given the inextricable link between the DWI and associated breath test refusal. For these and other reasons expressed herein, Slonieski asks this Court to either dismiss or acquit him all of the charges.

Respectfully,

/s/ *John Menzel*

John Menzel, J.D.

Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-0640-24

CRIMINAL *ACTION*

STATE OF NEW JERSEY, Plaintiff-Respondent, v. CHRISTOPHER J. SLONIESKI, Defendant-Appellant.	*ON APPEAL FROM* A Final Order of Conviction of the Superior Court of New Jersey Law Division, Ocean County *SAT BELOW* Hon. David M. Fritch, J.S.C.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

BRADLEY D. BILLHIMER
OCEAN COUNTY PROSECUTOR
119 HOOPER AVENUE
P.O. BOX 2191
TOMS RIVER, N.J. 08754
(732) 929-2027

ATTORNEY(S) FOR
The State of New Jersey

CHERYL L. HAMMEL, ESQ.
ATTY ID# 000602001
ASSISTANT PROSECUTOR
ON THE BRIEF

SAMUEL MARZARELLA
ATTY ID# 038761985
CHIEF APPELLATE ATTORNEY
OF COUNSEL

Submitted: July 1, 2025

DEFENDANT IS NOT CONFINED

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PROCEDURAL HISTORY[1]

On Sunday, November 27, 2022, Defendant received 3 summonses; Summons No. 1514-A-293650 charged him with DWI, contrary to N.J.S.A. 39:4-50; Summons No. 1514-A-296821 charged him with refusal, contrary to N.J.S.A. 39:4-50.2; and Summons No. 1514-A-296822 charged him with careless driving, contrary to N.J.S.A. 39:4-97. (Da1-Da3)

On 8 dates beginning April 29, 2023 through November 20, 2023, the parties appeared before the Hon. Scott J. Basen, J.M.C., at the Lakewood Township Municipal Court. Each time the matter was adjourned for a

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[1] The State adopts Defendant's appendix designations noted at Db3-Db4;
"Ra" refers to State's appendix;
"1T" refers to transcript of proceedings dated April 28, 2023;
"2T" refers to transcript of proceedings dated July 6, 2023;
"3T" refers to transcript of proceedings dated August 24, 2023;
"4T" refers to transcript of proceedings dated September 14, 2023;
"5T" refers to transcript of proceedings dated October 19, 2023;
"6T" refers to transcript of proceedings dated November 2, 2023;
"7T" refers to transcript of proceedings dated November 16, 2023;
"8T" refers to transcript of proceedings dated November 20, 2023;
"9T" refers to transcript of proceedings dated December 15, 2023;
"10T" refers to transcript of proceedings dated February 1, 2024;
"11T" refers to transcript of proceedings dated February 29, 2024;
"12T" refers to transcript of proceedings dated April 4, 2024;
"13T" refers to transcript of proceedings dated June 12, 2024;
"14T" refers to transcript of proceedings dated August 14, 2024;
"15T" refers to transcript of proceedings dated August 26, 2024;
"16T" refers to transcript of proceedings dated September 19, 2024.

discovery-related reason. (1T7-12 to 8-1; 2T7-6 to 9-13; 3T9-10 to 11-10; 4T14-2 to 14-11; 18-4 to 18-9; 5T14-8 to 15-16; 6T12-11 to 13-13; 7T17-7 to 17-9; 8T4-6 to 5-24; 6-8 to 7-24)

On December 15, 2023, a case management conference was held during which Defendant requested the matter be relisted so that he could file a motion to suppress. (9T3-18 to 3-21) Judge Basen granted Defendant's request and the matter was adjourned. (9T4-4 to 4-25)

On February 1, 2024, Defendant asserted his right to a speedy trial and moved to dismiss his case due to the officer's unavailability. (10T15-2 to 15-16) Judge Basen denied Defendant's motion and relisted the matter for February 29, 2024. (10T16-6 to 16-7; 16-24 to 16-25)

On February 29, 2024, Defendant challenged his arrest via a motion to suppress. At the end of the hearing, Judge Basen denied Defendant's motion and again relisted the matter for trial. (11T123-2 to 123-23)

On April 4, 2024, the parties stipulated that all testimony from the suppression hearing would be made part of the trial, which commenced immediately thereafter. (12T3-20 to 4-3) At its conclusion, Judge Basen found Defendant guilty of both refusal and DWI but dismissed the careless driving charge. (12T31-3 to 31-10; 35-21) Because it was "factually a second offense but legally a first," the Judge sentenced Defendant to 12 months ignition

interlock, 12 hours IDRC and related fines/costs. (12T33-19 to 35-20)

Defendant filed a notice of appeal with the Law Division, Ocean County.

Trial de novo was held on August 14, 2024. At its conclusion, the Hon. David M. Fritch, J.S.C., reserved decision. (14T52-25 to 53-6) In a written opinion issued later that day, Judge Fritch also found Defendant guilty of refusal and DWI. (Da10-Da34)

Defendant filed a notice of motion for reconsideration. (15T3-13 to 4-5)

On September 19, 2024, a hearing was held on Defendant's motion for reconsideration. At its conclusion, Judge Fritch denied both that motion and Defendant's request for a stay of sentence pending appeal. (16T48-12 to 48-17) The Judge then imposed sentence. On the DWI charge, Defendant was sentenced to 3 months ignition interlock, 12 hours IDRC and related fines and penalties. (Da43) On the refusal charge, Defendant was sentenced to 12 months ignition interlock, 12 hours IDRC and related fines and penalties. (Da43) These sentences would run concurrently (but not necessarily coterminous) with each other. (Da43)

This appeal follows.

STATEMENT OF FACTS

Shortly after 3:00 a.m. on Sunday, November 27, 2022, Ptl. Nicholas Romeo, a 6-year veteran with the Lakewood Police Department, was

dispatched to the Jackson Speedwash Laundromat located at 1880 West County Line Road. (11T7-5 to 7-23; 8-2 to 8-5; 15-10 to 15-21; 18-20 to 19-2) Ptl. Romeo was dispatched to this location due to a 9-1-1 call in which Defendant – the reporting party - said he was a victim of domestic violence. (11T8-6 to 8-9) When Ptl. Romeo arrived at the scene, Defendant was alone in front of the laundromat waving the officer down and his car was in the parking lot behind the building. (11T8-10 to 8-12; 19-3 to 19-23)

All events at the scene were recorded by body-worn camera(s) ("BWC"). While the record is unclear whether the video recordings were derived from only Ptl. Romeo's BWC, all of the videos were viewed by the Trial Court and moved into evidence as "J-1[2]." (11T91-2 to 91-6; 12T26-2)

Ptl. Romeo began speaking with Defendant and noticed Defendant's speech was slurred and his eyes were watery and bloodshot. (11T9-20 to 9-25) The officer also noticed an odor of alcohol emitting from Defendant who "retrieved a mouthwash bottle from his trunk and rinsed his mouth out mid-conversation." (11T9-25 to 10-9)

Defendant, a resident of Toms River, told Ptl. Romeo that he had been out with "D.P." (his girlfriend) at The Edge, a restaurant located approximately

[2] The thumb drive containing all of the video footage was identified and moved into evidence as "J-1" (11T91-2 to 91-6). However, in what is either a misstatement or a typographical error, that same thumb drive is later referred to as "S-1" (12T26-2)

1.25 miles west of the laundromat, where he had two drinks. (Da1-Da3; 11T25-1 to 25-13;109-17 to 109-24) Defendant said while they were at The Edge they got into a fight in which D.P. was the aggressor. (11T26-10 to 26-12;) Defendant said he was forced to leave The Edge and drive away to get away from D.P. (11T26-10 to 26-15)

Defendant admitted he had been "swerving in and out driving," because D.P. was "chasing [him] in her Jeep Grand Cherokee" and he "was trying to avoid her." (11T96-19 to 96-22; 97-16) Defendant told Ptl. Romeo that he drove in many directions and down different side streets trying to lose D.P. before he pulled behind the laundromat. (11T26-16 to 26-23)

In addition to Defendant's admissions, Ptl. Romeo observed the car keys in the ignition of Defendant's car. (11T109-4 to 109-5) When Ptl. Romeo spoke with D.P. via telephone, she told the officer Defendant "was driving drunk." (11T69-21)

After completing his investigation of Defendant's domestic violence claim, Ptl. Romeo began investigating a DWI charge against Defendant. (11T93-8 to 93-11) When the officer asked Defendant to perform the standard field sobriety tests ("SFSTs"), Defendant repeatedly refused, stating he "can't do it" because he was "running for his life." (11T102-16 to 106-11) Defendant then claimed Ptl. Romeo "pulled him over" while Defendant was standing in

front of the officer and his car was parked in the laundromat parking lot. (11T110-8) The following colloquy occurred:

> DEFENDANT: I want a lawyer for this. There's no way this is – this is oppressive. I want a lawyer.
>
> OFFICER ROMEO: Okay. First off, you don't get a lawyer at this point.
>
> DEFENDANT: Well, I – then I'll get a lawyer.
>
> OFFICER ROMEO: You either –
>
> DEFENDANT: I want a lawyer.
>
> OFFICER ROMEO: You either do the – listen.
>
> DEFENDANT: I was running for my life from a –
>
> OFFICER ROMEO: First off –
>
> DEFENDANT: -- woman with a fish hook.
>
> OFFICER ROMEO: Christopher –
>
> DEFENDANT: I want a lawyer. I want a lawyer.
>
> OFFICER ROMEO: Christopher –
>
> DEFENDANT: I want a lawyer.
>
> OFFICER ROMEO: You don't get a lawyer right now.
>
> DEFENDANT: Well, then take me in. I want a lawyer.
>
> OFFICER ROMEO: Ok. So you're refusing SFSTs?
>
> DEFENDANT: Yeah. I want a lawyer.
> (11T110-8 to 111-24)

Shortly thereafter, Defendant exclaimed, "I'll get a lawyer and then they can take a statement. This is bullshit. Complete bullshit. Wait until my lawyer gets a hold of this. My car is sit – sitting here in a parking lot. (11T112-16 to 112-20)

THE TRIAL/MUNICIPAL COURT

After hearing the above colloquy and viewing the BWC, Judge Basen denied Defendant's motion to suppress which challenged his arrest. The Judge found Ptl. Romeo was credible and corroborated by the BWC, noting that, "to my mind, I would have to agree with the State that his voice sound slurred as Officer Romeo testified earlier." (11T121-7 to 121-9) The Judge then found:

> So I'm satisfied that Officer Romeo was completely credible and the videotape pretty much backs that up because we saw it all with our own eyes.
>
> ***
>
> I think there's no other inference that anyone can make that the Defendant drove the vehicle there. It's on the – in the back of a carwash at 3:00 in the morning and given all reasonable inferences…the demeanor, if you will, of [Defendant] on the scene…to my mind, watching [Defendant], which is what the officers saw, clearly there's a reasonable and articulable suspicion that this gentleman was operating a motor vehicle while under the influence and also clearly there was probable cause for the arrest based upon that.
>
> ***
>
> So at this point, I am satisfied that, based upon all of this, that the officer clearly had probable cause for the

> arrest, the stop, if you will, at that point, to continue the investigation. I'm satisfied that the officers did everything constitutionally as required, so I must respectfully deny the motion.
> (11T121-16 to 123-8)

When trial commenced on April 4, 2024, Ptl. Romeo, the sole witness for the State, testified that after Defendant refused to perform the SFSTs, he was placed under arrest for DWI. (12T7-9 to 7-18) After being read his Miranda rights and New Jersey Attorney General's Standard Statement for Motor Vehicle Operators, Defendant refused to provide breath samples. (12T7-19 to 8-3) Subsequently, Ptl. Romeo issued the three summonses to Defendant who was later released. (12T8-10 to 8-13)

Defendant did not testify at trial. However, during closing arguments, defense counsel asserted a necessity defense and argued that the State had failed to disprove it. (12T21-9 to 21-16)

After hearing all of the evidence and considering the arguments of counsel, Judge Basen found Defendant not guilty of careless driving, noting there had been no testimony to support the charge. (12T25-9 to 25-11)

Next, Judge Basen found Ptl. Romeo was "a credible witness" who "testified accurately, credibly as to what happened," and "simply answered the questions in a professional manner." (12T25-17 to 25-24) The Judge also found that the officer's testimony was corroborated by the BWC videos in

evidence. (12T25-25 to 26-7)

Judge Basen then found Defendant had ingested alcohol at The Edge where he got into an argument with D.P. and wanted to get away. (12T26-9 to 26-17) The Judge specified, "I believe the testimony was that he kind of zigzagged through, didn't take a direct route, tried to lose his ex-girlfriend…you know, sort of like in a spy movie or a detective movie, the in-and-out of streets and back and forth and ended up eventually, as we know, at the parking lot 1880 West County Line Road." (12T26-17 to 27-1)

The Judge went on to find that, "When the officers arrived, they observed that [Defendant] his eyes were bloodshot. He had slurred speech. He had the odor of alcohol. He also, at some point, admitted – admitted to having two drinks and that is on the videotape." (12T27-6 to 27-11) Ultimately, Judge Basen found Defendant guilty of DWI, stating:

> I watched the tape. And the tape – and anyone who watches S1 in evidence, will see the behavior of [Defendant], which probably would do more, I think, to convict him than even the testimony of Officer Romeo.
>
> We can all – we all saw and observed [Defendant's] behavior and I certainly can say, as a layperson, watching him, hearing him, hearing his manner, hearing his movements, he appeared to me to be certainly under the influence of alcohol. As I said, he had slurred speech at that point to me…He appeared drunk and he did admit – he did admit to two drinks, having two drinks.

> I think taking all that together, clearly the State has proven beyond a reasonable doubt that [Defendant] operated his vehicle while under the influence of alcohol at the date, time and place of this incident. (emphasis added) (12T28-10 to 29-4)

As to Defendant's necessity defense, Judge Basen found, "there is no viable necessity defense in this matter. The defense has not properly raised this and I think the testimony and the videotape refute any elements of the necessity defense." (12T29-8 to 29-11) The Judge found:

> I am also curious as to why someone who is alleging a necessity defense believes he is under imminent physical harm would drive in the manner that [Defendant] did and drive to this lot, rather than driving either to the Lakewood Police Headquarters or to the Jackson Police Headquarters…
>
> ***
>
> I am satisfied that the…defense has not put forth a proper necessity defense. And I am also satisfied that, based on the testimony, even if it were a proper necessity defense and I don't believe it was under these facts, that the State has beyond a reasonable doubt refuted that defense.
> (emphasis added) (12T29-14 to 30-4)

Finally, Judge Basen also found Defendant guilty of refusal, concluding:

> Officer Romeo did testify, and I did hear him clearly, that as to what he did with regard to the machine, that he – he asked the Defendant to take the Breathalyzer. Defendant refused. He also did mention, did state, that he read the standard statement to the Defendant. I also note that Defendant had a prior DWI in 2009 and, to my mind, he knew and understood the procedures. There was some – there – he clearly, to my mind,

> willfully, without any reason, simply refused to take the chemical test.(emphasis added) (12T30-5 to 31-10)

THE DE NOVO COURT

Trial de novo was held on August 14, 2024 before the Hon. David M. Fritch, J.S.C., who, after hearing the arguments of counsel, reserved decision. 14T53-3 to 53-6) Later that same day, Judge Fritch issued a comprehensive written opinion addressing all seven of Defendant's arguments[3]. (Da10-Da34)

PROBABLE CAUSE

Judge Fritch "echoe(d)" Judge Basen's assessment of Ptl. Romeo's credibility. (Da21) The Judge noted the Officer's observations of Defendant's blood shoot eyes and slurred speech, the odor of alcohol about him and his effort to use mouthwash from the trunk of his car in the middle of conversing with officers. (Da22) The Judge also acknowledged Defendant's admission that he had "two drinks at the Edge" in Jackson before driving to Lakewood and refusing to perform SFSTs. (Da22) Having also found that the officer's testimony was corroborated by video footage in evidence, Judge Fritch concluded, "the arresting officer had more than adequate probable cause to arrest the Defendant on the DUI charge that evening." (Da22)

THE NECESSITY DEFENSE

Judge Fritch began by acknowledging the four elements established in

[3] Defendant resurrects 5 of those 7 arguments in this appeal.

State v. Romano, 355 N.J. Super. 21 (App. Div. 2002), for the necessity defense, noting it is commonly referred to as a "choice of evils," defense. See State v. Tate, 102 N.J. 64, 74 (1986) (Da30)

The Judge found Defendant failed to meet the first element (that there was a situation or emergency arising without fault on the part of the actor) because there was "nothing in the present record to support his claim that Defendant was assaulted at the restaurant." (Da31)

Judge Fritch then found Defendant failed to meet the second element (that the emergency was so compelling as to raise a reasonable expectation of harm) because "[he] was able to leave the restaurant without being harmed and was able to leave the premises in his vehicle without injury." (Da32)

Next, the Judge found Defendant failed to meet the third element (the emergency must present no reasonable opportunity to avoid the injury without doing the criminal act) by reasoning:

> If D.P. presented a threat to Defendant, there is no evidence that Defendant could not have contacted police from the safety of the restaurant allowing responding law enforcement officers to address the issue at the restaurant. Defendant could also have contacted the police from his car in the parking lot of the restaurant without operating the vehicle. This, presumably, would appear to have been a safer option than driving, while impaired by the influence of alcohol, to a dark, unpopulated parking lot where D.P. eventually confronted him – which is what the Defendant did. (Da32-Da33)

Finally, Judge Fritch found Defendant failed to meet the fourth element, as Defendant could not show that any impending injury from the emergency was of sufficient seriousness to outmeasure:

> [T]he danger [Defendant's] conduct created by engaging in an alcohol-impaired automobile chase with D.P. 'in many different directions down different side streets' which placed the safety of the Defendant, D.P., and everyone on the roads of Jackson and Lakewood that evening in grave jeopardy. (Da33)

Concluding that the State proved beyond a reasonable doubt that Defendant did not satisfy the four elements needed to sustain a necessity defense, Judge Fritch found the Trial Court properly denied Defendant's claim of necessity. (Da33-Da34)

THE STANDARD STATEMENT/ADVISEMENT OF RIGHTS

Recalling Ptl. Romeo's credibility, Judge Fritch noted there was uncontested testimony that Ptl. Romeo read the Standard Statement to Defendant prior to asking him to provide breath samples. (Da26-Da27) Additionally, the corroborating video footage from Ptl. Romeo's BWC had been admitted in evidence and accepted in its entirety without objection. (Da27) Judge Fritch thus found:

> Judge Basen correctly noted the unchallenged testimony of Ptl. Romeo was sufficient for the State to have met their burden of proof on this issue and found Defendant guilty of refusal. This determination is

> further reinforced by the video evidence submitted before the Municipal Court as J-1 which recorded the issuance of the appropriate Standard Statement to Defendant prior to asking him to submit a breathalyzer sample. (Da28)

DEFENDANT'S CLAIM OF CONFUSION

Preliminarily, Judge Fritch noted that Defendant's argument - that "confusion between his rights to counsel and his rights and obligations regarding providing a breath sample gave rise to an affirmative defense of refusal" - had not been presented to the Trial Court. (Da28)

Next, the Judge reviewed State v. Leavitt, 107 N.J. 534 (1987), and recognized that, "in the years following Leavitt, the Court has never recognized confusion as a defense to refusal to produce a breath sample; accordingly, the confusion defense is not cognizable here as a matter of law." (Da29) Further, Judge Fritch found, "the record is devoid of any evidence that Defendant was confused about his obligation to provide a breath sample when read his rights and asked to give a breath sample at the police station." (Da29)

LEGAL DISCUSSION

Where an appeal is taken to the Appellate Division from the decision of the Law Division, the standard of review is the ordinary standard for judicial fact-finding; namely, whether there was sufficient credible evidence in the record to support the Law Division's conclusions. See State v. Robertson, 228

N.J. 138, 148 (2017); State v. Johnson, 42 N.J. 146, 161-162 (1964).

In this appeal, Defendant continues to argue: (1) there was no probable cause for his arrest; (2) the State failed to disprove his necessity defense; (3) because his refusal charge is "integrally-related" to his DWI charge it should be dismissed; (4) the State failed to prove the elements of refusal, and (5) his "repeated assertion of his right to counsel established a valid claim of confusion sufficient to constitute an affirmative defense to the refusal charge."

Additionally, Defendant now argues that the De Novo Court erred, first by "impermissibly expanding the record" and also by "impermissibly shifting the burden of proof on the refusal charge to Defendant."

All of Defendant's seven arguments are without merit.

POINT I

THE DE NOVO COURT PROPERLY FOUND THERE WAS PROBABLE CAUSE FOR DEFENDANT'S ARREST
(responsive to Defendant's Point I)

Defendant continues to argue that there was no probable cause to arrest him for DWI. Defendant's argument is without merit.

Police-citizen encounters generally occur at three distinct levels, but only two require constitutional justification. See State v. Harris, 384 N.J. Super. 29, 44 (App. Div.), *certif. den.* 188 N.J. 357 (2006) citing State v. Pineiro, 181 N.J. 13, 20-21 (2004). "'It is well-settled that the police may

arrest only if they have probable cause; may stop for brief investigatory questioning if they have an articulable, reasonable basis for suspicion; and may make an inquiry without any grounds or suspicion.'" Harris at 44-45, quoting State v. Sirianni, 347 N.J. Super. 382, 387 (App. Div. 2002) (citing other sources).

Here, there was no stop of Defendant's car. Ptl. Romeo encountered Defendant after being dispatched to 1880 West County Line Road as a direct result of Defendant's call to 9-1-1. Defendant, was alone at that location and his car was parked - after he had called to report that he was a victim of domestic violence. It is inarguable that Ptl. Romeo had a duty to investigate.

During the course of investigating, Ptl. Romeo developed a reasonable and articulable suspicion that Defendant had been driving while intoxicated. Indeed, Defendant admitted he had been at The Edge where he had two drinks before driving to 1880 West County Line Road. Thus the officer's expansion of investigatory questioning of Defendant was not unconstitutional.

Similarly, Defendant's admissions to Ptl. Romeo gave rise to probable cause for his arrest. N.J.S.A. 39:5-25 provides that an officer may arrest for DWI whenever there is probable cause to believe that the defendant has been operating in violation of N.J.S.A. 39:4-50. A probable cause determination is based upon the totality of circumstances presented to the officer and need only

be objectively reasonable to be legally sustainable. See Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed.2d. 527 (1983); see also Robert Ramsey, New Jersey Drunk Driving Law, Chapter 5:2 (2016 ed.)

The Trial Court denied Defendant's motion after finding Ptl. Romeo's testimony was "completely credible" and "backed up" by the BWC. There was "no other inference" anyone could make but that Defendant drove the vehicle to the back of a carwash at 3:00 in the morning. The Trial Court then found that given Defendant's demeanor, there was "clearly both a reasonable and articulable suspicion that Defendant was driving while intoxicated and probable cause for an arrest based upon that." (11T121-16 to 123-8)

An appellate court reviewing a motion to suppress must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record. See State v. Elders, 192 N.J. 224, 234 (2007) (citing other cases). This is true even for fact findings based solely on video or documentary evidence. State v. S.S., 229 N.J. 360, 379 (2017) Here, the De Novo Court found sufficient credible evidence to support Judge Basen's denial of Defendant's motion.

Specifically, the De Novo Court echoed Judge Basen's assessment of Ptl. Romeo's credible testimony and found that testimony was corroborated by the video evidence. (Da22) Moreover, Defendant admitted he drank before

driving. (Da22) The De Novo Court thus properly found there was "more than adequate probable cause to arrest Defendant" and that finding should be affirmed.

POINT II

THE DE NOVO COURT PROPERLY FOUND THAT DEFENDANT FAILED TO ASSERT A NECESSITY DEFENSE
(responsive to Defendant's Point II)

The necessity defense is explained in N.J.S.A. 2C:3-2(a), which states:

> Conduct which would otherwise be an offense is justifiable to the extent permitted by law and as to which neither the code nor other statutory law defining the offense provides exceptions or defenses dealing with the specific situation involved and a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

Rule 3:12-1 requires a defendant who intends to rely on the necessity defense to serve written notice on the prosecutor and to furnish the prosecutor with discovery pertaining to such defense.

"To claim the defense of 'necessity' a defendant must show the absence of an available alternative." State v. Tate, 102 N.J. 64, 74 (1986) The elements of the common-law defense of necessity were enumerated in State v. Romano, 355 N.J. Super. 21 (App. Div. 2002). They are:

> (1) There must be a situation of emergency arising without fault on the part of the actor concerned;
>
> (2) This emergency must be so imminent and

> compelling as to raise a reasonable expectation of harm, either directly to the actor or upon those he was protecting;
>
> (3) This emergency must present no reasonable opportunity to avoid the injury without doing the criminal act; and
>
> (4) The injury impending from the emergency must be of sufficient seriousness to outmeasure the criminal wrong. Id. at 29

"The 'necessity' defense is based on public policy." Romano, 355 N.J. Super. at 29. "What that public policy means in an individual case is not left to the jurors but rather is decided by the public official presiding-the judge." State v. Tate, 194 N.J. Super. at 634.

A high potential for pretext in the defense should result in the denial of the defense. State v. Romano 355 N.J. Super. at 30. "'When evaluating whether a particular defense has a high potential for pretext, [courts should] focus . . . on the ease with which . . . defendant[s] can allege a frivolous defense.'" Ibid. (quoting State v. Inglis, 304 N.J. Super. 207, 212 (Law Div. 1997)

The Trial Court found that Defendant had "not properly raised" the necessity defense (12T29-9 to 29-10). Nevertheless, the De Novo Court considered it, ultimately finding that Defendant failed to show any of the elements required by Romano.

As to the first element (a situation or emergency arising without fault on the part of the actor), Defendant drank alcohol before engaging in a verbal argument with D.P. at a restaurant. Defendant was a willing participant. The De Novo Court thus found Defendant failed to demonstrate this element because there was "nothing in the present record to support Defendant's claim that he was assaulted at the restaurant." (Da31)

As to the second element (that the emergency was so compelling as to raise a reasonable expectation of harm), Defendant was still at The Edge when the argument with D.P. began. Yet Defendant "was able to leave the restaurant without being harmed and was able to leave the premises in his vehicle without injury." (Da32) This readily supported the De Novo Court's finding that Defendant failed to demonstrate the second element.

As to the third element (that the emergency must present no reasonable opportunity to avoid the injury without doing the criminal act), the De Novo Court found Defendant could have called police from inside the restaurant or from his car while parked in the restaurant parking lot – either of which would have been a "safer option than driving…to a dark unpopulated parking lot." (Da32-Da33) This obviously supported the Court's conclusion that Defendant failed to show this element.

Finally, as to the fourth element (that the injury impending from the

emergency must be of sufficient seriousness to outmeasure the criminal wrong), the De Novo Court recalled the findings of the Trial Court, concluding that Defendant's conduct of "engaging in an alcohol-impaired automobile chase in many different directions down different side streets" presented a greater danger not just to Defendant but to everyone on the road in Jackson and Lakewood that evening. (Da33)

Defendant failed to make any showing under Romano. Hence the De Novo Court properly found that Defendant failed to assert a necessity defense and that finding should be affirmed.

POINT III

DWI AND REFUSAL ARE TWO SEPARATE CHARGES
(responsive to Defendant's Point III)

Defendant continues to argue that (1) because he "acted out of necessity in driving while intoxicated", (2) the "absence of a breath test would not deprive the State of evidence that might have been used in a DWI case," and (3) "because the refusal charge is so integrally related to the DWI charge, this Court should dismiss the refusal charge as well as the DWI charge. Defendant's convoluted argument is without merit.

DWI and refusal are separate charges under Title 39, Chapter 4, Article 9 of New Jersey Statutes Annotated. As discussed below in Points IV and VIII, each charge has its own elements. The four elements of refusal were

outlined in State v. Marquez, 202 N.J. 485 (2010), while DWI is proven either by one's blood alcohol level or physical condition. See State v. Kashi, 360 N.J. Super. 538 (App. Div. 2003), aff'd, o.b., 180 N.J. 45 (2004). Like the charges they comprise, these elements stand alone and are not interchangeable.

The De Novo Court obviously concluded Defendant's argument was without merit such that warranted discussion in its opinion. Because Defendant's argument raises no claim upon which relief may be granted, this Court should reach the same conclusion.

POINT IV

THE STATE MET ITS BURDEN OF PROOF AND THE DE NOVO COURT PROPERLY FOUND DEFENDANT GUILTY OF REFUSAL (responsive to Defendant's Point IV)

The elements of refusal were found by the Court in State v. Marquez, 202 N.J. 485, 503 (2010):

> A careful reading of the two statutes reveals four essential elements to sustain a refusal conviction: (1) the arresting officer had probable cause to believe that defendant had been driving or was in actual physical control of a motor vehicle while under the influence of alcohol or drugs; (2) defendant was arrested for driving while intoxicated; (3) the officer requested defendant to submit to a chemical breath test and informed defendant of the consequences of refusing to do so; and (4) defendant thereafter refused to submit to the test. (citing N.J.S. 39:4-50.2(e); N.J.S. 39:4-50.4a(a); State v. Wright, 107 N.J. 488, 490 (1987)

Here, Defendant admitted drinking at The Edge before driving to the laundromat where Ptl. Romeo encountered him at 3:00 a.m. After observing Defendant's appearance and behavior and hearing Defendant's admissions, Ptl. Romeo had probable cause to believe Defendant had been driving under the influence of alcohol and arrested him for DWI. Ptl. Romeo clearly and credibly testified that upon being informed of the consequences of refusing to provide breath samples and being asked to provide said samples, Defendant refused.

The De Novo Court found that Ptl. Romeo's credible testimony was uncontested and corroborated by video footage. (Da26-Da27) Both that testimony and the video confirmed that Defendant had been read the Standard Statement before being asked to provide breath samples. (Da26-Da27)

Defendant continues to press that rather than a 'standard statement,' he was read a 'general status statement.'" (See Db at 28) Yet Defendant's argument relies on what is obviously either a typographical error or a misstatement. Again, Judge Basen "clearly heard" Ptl. Romeo testify that he read the standard statement to Defendant. (12T30-5 to 31-10)

Noteworthy here is the utter lack of candor underlying Defendant's argument. The discovery in this case included a copy of the New Jersey Attorney General's Standard Statement for Motor Vehicle Operators which

was presented to Defendant on the date of the incident. (Ra1) At no time during any of the 8 adjournments for discovery did Defendant identify this Statement as a missing item.

In any case, Marquez does not require that a paper copy of the Standard Statement be admitted in evidence at trial. Because all of the elements of Marquez were met, the De Novo Court properly found Defendant guilty of refusal.

POINT V

THE DE NOVO COURT PROPERLY REVIEWED THE RECORD
(responsive to Defendant's Point V)

Defendant argues that the De Novo Court impermissibly expanded the record by viewing portions of the video footage which "exceeded the time perimeters of that portion reviewed by Judge Basen." (Db at 29-30) However, the record confirms - and Defendant concedes - that "J-1", the thumb drive containing all of the available video footage, was moved into evidence at trial without objection. (11T91-2 to 91-6; 12T26-2)

Further, the De Novo Court recognized, "While only portions of this footage were played before the Municipal Court, the entirety of this footage was entered into evidence and is part of the record." (Da27) A de novo review on the record requires the Law Division to make its own findings and rulings

based on the evidentiary record of the municipal court. See State v. Loce, 267 N.J. Super. 102, 104 (Law Div. 1991), aff'd o.b. 267 N.J. Super. 10 (App. Div.), *certif. den* 134 N.J. 563 (1993); Rule 3:23-8(a)(2). The De Novo Court was thus required to review the entirety of the video as it was part of the evidentiary record. To do otherwise would have been contrary to Rule 3:23-8.

POINT VI

THE DE NOVO COURT DID NOT IMPROPERLY SHIFT THE BURDEN OF PROOF FOR THE REFUSAL CHARGE TO DEFENDANT
(responsive to Defendant's Point VI)

Defendant argues that the De Novo Court improperly shifted the burden of proof as to the refusal charge when it found, "Defense counsel did not ask any questions to Officer Romeo regarding the 'general status statement' read to the Defendant." (Db at 35; Da26)

Defendant's meritless argument clearly misapprehends this finding. The De Novo Court did not shift any burden, it merely observed that Ptl. Romeo's testimony was unrebutted. (Da26)

POINT VII

THE DE NOVO COURT PROPERLY FOUND DEFENDANT'S CLAIM OF CONFUSION WAS NOT COGNIZABLE
(responsive to Defendant's Point VII)

Preliminarily, the De Novo Court noted that Defendant had failed to present his claim of confusion to the Trial Court. (Da28)

Nevertheless, the De Novo Court examined State v. Leavitt, 107 N.J. 534 (1987). In Leavitt, the Court considered defendant's argument that an "inherent conflict between the Miranda[4] warnings and the instructions prior to administration of the breath test created a violation of constitutional rights such that mandated dismissal of his case. Id. at 537. First, the Leavitt Court found that "the municipal court correctly recognized that 'there is no constitutional sixth amendment right or constitutional due process right to Counsel for purposes of consultation prior to the administration of a breathalyzer test.'" Id. at 536. The Leavitt Court went on to conclude:

> Without resolving whether any defendant may validly assert the defense, we agree with the view expressed in the Attorney General's brief that the 'exclusive, narrow exception to the general rule that refusals cannot be validly justified,' would have to be premised on a record developed by a defendant to show that he had indeed been confused. We also agree that it is entirely appropriate that a defendant bear the burden of persuasion if he wishes to establish a confusion claim. Id. at 542.

Over a decade later, the Court found in State v. Widmaier, 157 N.J. 475 (1999) that because breath samples are a nontestimonial form of evidence, a defendant does not have a Fifth Amendment right to consult with an attorney before taking the test, nor does a defendant have a right to have an attorney present when the test is performed. The Widmaier Court held:

[4] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d.694 (1966)

> We emphasize that a defendant's subjective intent is irrelevant in determining whether the defendant's responses to the officer constitute a refusal to take the test. A suspect's conditional or ambiguous response to a police officer's final demand to submit to the breathalyzer test constitutes a violation of the refusal statute whether or not the suspect intended to refuse to take the test. We also note that a motorist has no right to delay a breathalyzer test. Because granting a request to consult with counsel would delay the administration of the test and would affect the results, voicing a mere "preference" to have an attorney present, as defendant in the instant case argues he did, is a delay tactic that cannot be indulged. Id. at 487.

This led the De Novo Court to correctly conclude that in the years following Leavitt, confusion has never been recognized as a defense to refusal. (Da29) Yet even if confusion was a valid defense to refusal, the De Novo Court found the record "devoid of any evidence that Defendant was confused about his obligation to provide a breath sample when read his rights and asked to give a breath sample at the police station." (Da29) Thus Defendant's argument is without merit and his request for relief should be denied.

POINT VIII

THE STATE MET ITS BURDEN OF PROOF AND THE DE NOVO COURT PROPERLY FOUND DEFENDANT GUILTY OF DWI

A charge of driving while intoxicated can be proven either by a defendant's physical condition or by a defendant's blood alcohol level. See State v. Kashi, 360 N.J. Super. 538, 545 (App. Div. 2003), aff'd, o.b., 180 N.J.

45 (2004). Therefore, testimony of an officer who observes signs of a defendant's intoxication is sufficient to prove guilt of DWI beyond a reasonable doubt. See State v. Johnson, 42 N.J. 146, 166 (1964). Although the various factors an officer observes may be insufficient on their own to convict under N.J.S.A. 39:4-50, the factors should be considered in their totality to determine if there was sufficient evidence of intoxication. See State v. Kent, 391 N.J. Super. 352, 384 (App. Div. 2007).

In Kent, defendant's conviction was affirmed where the officer observed the defendant's slurred speech, disheveled appearance, red and bloodshot eyes, and strong odor of alcoholic beverage on his breath. Additionally, a conviction for DWI was upheld upon evidence of slurred speech, disheveled appearance, odor of alcohol on the defendant's breath, loud behavior, and red, bloodshot eyes. State v. Morris, 262 N.J. Super. 413, 421 (App. Div. 1993).

Here, sufficient credible evidence in the record supports the findings of both the Trial Court and the De Novo Court on the observation prong.

Ptl. Romeo's encounter with Defendant occurred after 3:00 a.m. in a laundromat parking lot where Defendant was found alone with his car. The laundromat was closed. Defendant neither lives nor works at this location.

Upon approaching and speaking with Defendant, Ptl. Romeo detected an odor of alcohol on Defendant's breath. The officer also noticed that

Defendant's speech was slurred and his eyes were watery and bloodshot. Ptl. Romeo continued to observe as Defendant proceeded to retrieve a bottle of mouthwash from the trunk of his car and rinse his mouth out while speaking with the officer. Defendant went on to admit that he had been drinking before driving his car in a zigzag fashion down different side streets in many different directions before he pulled behind the laundromat.

Judge Basen found Ptl. Romeo's testimony was credible and corroborated by the video evidence. Indeed, the Judge remarked that anyone who watched the video and saw Defendant's behavior that "would do more to convict Defendant than even the testimony of Officer Romeo."

The De Novo Court later concurred with Judge Basen's findings, noting:

> In addition to the panoply of credible observational evidence presented to the Municipal Court, coupled with the Defendant's refusal to submit to a field sobriety test and subsequent refusal to take a breathalyzer test indicating a guilty mind, the Defendant also engaged in otherwise inexplicable behavior at the scene including retrieving mouthwash from his trunk and rinsing his mouth out in the middle of his conversation with law enforcement – conduct that could only be logically explained by an effort to mask the alcohol on his breath and evidencing a guilty mind. (emphasis added) (Da24-Da25)

Both the Trial Court and the De Novo Court found Defendant guilty of DWI. "When there are concurrent judgments of two lower courts upon pure questions of fact, a court of last resort will not ordinarily make an independent

finding of facts in the absence of a showing of a manifest miscarriage of justice." Midler v. Heinowitz, 10 N.J. 123, at 128-129 (1952) citing 3 Am.Jur., Appeal & Error, sec. 908, p. 474. Under the "two-court rule", appellate courts ordinarily should not undertake to alter concurrent findings of facts and credibility determinations made by two lower courts absent a very obvious and exceptional showing of error. Id.

Notwithstanding the "two-court rule," the record is clear: the evidence against Defendant was overwhelming. Hence the State met its burden of proof and the De Novo Court properly found Defendant guilty of DWI.

CONCLUSION

Based on all of the above, it is respectfully submitted that this Court deny Defendant's request for relief.

Respectfully submitted,
/S/ Cheryl L. Hammel, Esq.
Cheryl L. Hammel, Esq.
Assistant Prosecutor
Attorney ID#000602001
CHammel@co.ocean.nj.us

Samuel Marzarella
Chief Appellate Attorney
Of Counsel
Attorney ID#038761985

Date submitted: July 1, 2025

cc: John Menzel, Esq.

JOHN MENZEL, J.D.
603 Mattison Avenue, Suite 320
Asbury Park, New Jersey 07712
(732) 899-1899, (732) 713-4100
Attorney ID Number 037231984
Attorney for Defendant

	: **SUPERIOR COURT OF NEW JERSEY**
STATE OF NEW JERSEY,	: **APPELLATE DIVISION**
	:
Plaintiff,	: DOCKET NO. A-000640-24-T4
	:
v.	: ON APPEAL FROM:
	: Superior Court, Law Division, Ocean County
CHRISTOPHER J. SLONIESKI,	: Docket No. Below 24-04
	: Sat Below: Hon. David M. Fritch, J.S.C.
Defendant.	:
	:**DEFENDANT'S REPLY BRIEF**

To: Honorable Judges
Superior Court of New Jersey, Appellate Division
25 Market Street, Box 006
Trenton, New Jersey 08625-0006

–

Bradley D. Billhimer, Prosecutor
Attention: Cheryl Hammel, Assistant Prosecutor
Ocean County Prosecutor's Office
119 Hooper Avenue, Box 2191
Toms River, New Jersey 08754-2191

–

Date submitted: July 3, 2025
On the Brief: John Menzel, J.D.

CONTENTS

PRELIMINARY STATEMENT

Defendant Christopher J. Slonieski replies to the State's response to his initial brief to address the State's attempt to expand the record (a) via its proffered appendix coupled with the assertion that the defense acted without candor and (b) the State's suggestion that the necessity defense was procedurally barred.

Convicted of operating a motor vehicle while under the influence of alcohol, Slonieski asserted a necessity defense based on "some evidence" demonstrating his flight from an aggressor, a call to police for help, and ample corroboration in the record, including only the initial portion of a video exhibit *J-1*. The Law Division Judge impermissibly expanded the record by viewing the part of *J-1* showing events that occurred post-arrest—events for which the State presented no evidence in the municipal court trial record. The State's now attempts to compound the Law Division Judge's error with its attempt to bootstrap via its appendix a document never previously offered in evidence in this matter. *See* Ra1a.[1]

In reply to the State's response to his initial brief, Slonieski offers the following supplemental arguments in reply while incorporating here by reference the arguments contained in his initial brief, repeating his request for this Court to

[1] The State's appendix is cited to as suggested in *R.* 2:6-8 and in keeping with the designation used by the State in its response brief—*i.e.*, page one of the appendix is cited as "Ra1."

caution trial courts to avoid impermissibly expanding a trial record, and praying that this Court reverse his convictions.

LEGAL ARGUMENT

I.
THE STATE IMPROPERLY CHARACTERIZES THE RECORD AND IMPROPERLY ATTEMPTS TO SUPPLEMENT IT VIA ITS PROFFERED APPENDIX—EFFORTS THIS COURT SHOULD STOP

In the State's response to Mr. Slonieski's initial brief, it asserts:

> Recalling Ptl. Romeo's credibility, Judge Fritch noted there was uncontested testimony that Ptl. Romeo read the Standard Statement to Defendant prior to asking him to provide breath samples. (Da26-Da27) Additionally, the corroborating video footage from Ptl. Romeo's BWC had been admitted in evidence and accepted in its entirety without objection.
>
> [Sb13.[2]]

In fact, there was no testimony that Officer Romera read a standard statement. Rather, he read a "general status statement." 12T7-19/24.

The State's claims at Sb23-24 of an "utter lack of candor underlying Defendant's argument" is inappropriate. Discovery is not part of the trial record. A defense attorney has no burden to provide the State with a roadmap to conviction. Whether a copy of the New Jersey Attorney General's Standard Statement for Motor Vehicle Operators was presented to Mr. Slonieski after his arrest or provided to his attorney in discovery is irrelevant, immaterial, and

[2] The State's brief is cited to as suggested in *R.* 2:6-8—*e.g.*, page 13 of the brief is cited as "Sb13."

inadmissible. The defense is under no obligation to identify missing evidence, regardless whether it was provided in discovery.

What matters, of course, is what the State offers, and the trial court receives, in the municipal court. The standard statement proffered by the State was not part of the trial record in this matter. *See* Db27-34.[3] No doubt this Court will correctly understand the record. Except to the extent that the State's appendix constitutes an exemplar of what a standard statement looks like, this Court should strike the appendix and disregard portions of video not considered in the trial record—Judge Fritch's ruling and State's argument in support of his decision to do so notwithstanding. Judge Fitch and the State are simply wrong to consider those parts of exhibit *J-1* not played in the municipal court. *See* Da22a-23a. Contrary to the State's assertion, Sb24, the entirety of *J-1* was *not* admitted into evidence—only the initial portion up to time signature 9:47:02.[4] *See* 11T48-5/49-18, 11T90-9/16, and 12T3-20/24 establishing these time perimeters.[5]

[3] Defendant's initial brief is cited to as suggested in *R.* 2:6-8—*e.g.*, pages 27 to 34 of the brief are cited as "Db27-34."

[4] The time signature incorrectly label the time five hours ahead of the actual time. 11T49-20/50-4.

[5] Transcripts are cited to by page and line as suggested in *R.* 2:6-8. *See* Db9, n.3.

II.
EVEN THOUGH THE STATE RECEIVED PRETRIAL NOTICE OF DEFENDANT'S NECESSITY DEFENSE WITH THE SUPPRESSION HEARING, NO RULE REQUIRES THE DEFENSE TO GIVE SUCH NOTICE

The State's response to Mr. Slonieski's initial brief asserts, "*Rule* 3:12-1 requires a defendant who intends to rely on the necessity defense to serve written notice on the prosecutor and to furnish the prosecutor with discovery pertaining to such defense." Sb18. While there are provisions for advance notice to the State as to alibi, *R.* 7:7-3(a), and insanity, *R.* 7:7-4(a), no provisions in the rules of Part VII governing the practice and procedure in the municipal courts requires advance notice to the State about a necessity defense. *See R.* 7:1-1 et seq. Thus, there is no procedural bar to the necessity defense. Even so, the suppression hearing record amplified facts establishing the necessity defense. Regardless, the issue was discussed (Da30a-34a), and argued on the merits (Db20-26, Sb18-21).

CONCLUSION

For reasons set forth in this and his initial brief, Defendant Christopher J. Slonieski asks this Court to strike the State's appendix, limit the record to that which was originally offered in the municipal court, and acquit him of all charges.

Respectfully,

/s/ *John Menzel*

John Menzel, J.D.