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	: **SUPERIOR COURT OF NEW JERSEY**
STATE OF NEW JERSEY,	: **APPELLATE DIVISION**
	:
Plaintiff,	: DOCKET NO. A-003005-23
	:
v.	: ON APPEAL FROM:
	: Superior Court, Law Division, Ocean County
GERALD E. SIGMON, JR.,	: Docket No. below 23-18
	: Sat below: Hon. David M. Fritch, J.S.C.
Defendant.	:
	: **DEFENDANT'S BRIEF**

To: Honorable Judges
Superior Court, Appellate Division
in care of Joseph H. Orlando, Clerk
Hughes Justice Complex
25 West 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
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Date submitted: August 21, 2024
Date returnable: To be set
On the Brief: John Menzel, J.D.

CONTENTS

APPENDIX:[1]

TRANSCRIPTS:[2]

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

[2] Transcripts are cited to by page and line as suggested in *R.* 2:6-8—*e.g.*, page 3 from line 17 to line 24 of the August 3, 2023, transcript is cited as "7T3-17/24" and page 10, line 18, to page 11, line 3, of the September 12, 2023, transcript is cited as "8T10-18/11-3. Other transcripts are cited as needed with the volume numbers indicated in this table.

AUTHORITIES:

Cases:

ABBREVIATIONS:

DWI ..... driving while under the influence

HGN ..... horizontal gaze nystagmus

JAMA ..... Journal of the American Medical Association

MVR ..... mobile video recording

NHTSA ..... National Highway Traffic Safety Administration

OLS ..... one-leg-stand

SFST, FST ..... standardized field sobriety testing

W&T ..... walk-and-turn

PRELIMINARY STATEMENT

Defendant Gerald E. Sigmon, Jr., was arrested for operating a motor vehicle while under the influence of alcohol ["DWI"] because he could not do physical tasks like one-leg-stand ["OLS"] and walk-and-turn ["W&T"] tests which are part of a standardized field sobriety testing ["SFST" or "FST"] protocol developed by the National Highway Traffic Safety Administration ["NHTSA"]. More than half of the population has difficulty with SFST, even when sober. The nit-picky clues cited by the arresting officer and used by the municipal court to convict Sigmon were taken out of a context where he walks, talks, stands, and acts as any sober person would. Although the evidence shows that he made a poor choice in turning left through a red light at a traffic-free intersection, his driving was otherwise flawless. While he may be guilty of running a red light, he is not guilty of DWI. This Court should correct the manifest injustice imposed on him by the courts below.

Furthermore, there was a 603-day delay from issuance of the complaint and 289-day delay from when his case was ready for trial. Where our Supreme Court, albeit unrealistically, believes municipal courts should resolve DWI cases within 60 days of issuance, the delays in Sigmon's case violated this guideline and his right to a speedy trial. Thus, this Court should dismiss all charges.

PROCEDURAL HISTORY

Charges and Appearance. On December 8, 2021, Point Pleasant Beach Borough Police Officer David T. Marchetti issued complaints PPC-108074, PPC-108075, PPC-108076, and PPC-108077 charging Defendant Gerald E. Sigmon, Jr. with DWI, reckless driving, failure to observe signal, and failure to exhibit a driver's license in violation of *N.J.S.A.* 39:4-50, *N.J.S.A.* 39:4-96, *N.J.S.A.* 39:4-81, and *N.J.S.A.* 39:3-29, respectively. Da1a-2a. John Menzel, J.D., appeared as defense counsel with a *Letter of Representation* dated January 14, 2022. Da3a-5a. In this letter, Sigmon first asserted his right to a speedy trial. Da4a, par.IX.

Discovery Proceedings. On March 8, 2022, the matter was adjourned for discovery. 1T3-8/13. After that court appearance, defense counsel wrote to the municipal prosecutor about discovery, and the matter was adjourned again on April 22, 2022, for the prosecutor to respond to that letter. 2T3-8/14. On June 7, 2022, the matter was adjourned once more for the parties to assess their positions concerning discovery. 3T3-10/18. The defense then filed a motion for discovery, and the matter was adjourned on September 6, 2022, for the State to respond to the motion. 4T3-13/20. Argument on the motion took place on October 18, 2022, with the municipal court denying all of the remaining discovery requests. *See* 5T5-24/7-3 (New Standard Solution Report), 5T7-4/9-2 (Alcotest repair records), 5T9-3/10 (SFST manual citation), and 5T9-11/11-3 (past SFST reports). At this point, the

matter was ready for suppression hearing and trial (5T11-8/14), and the case was adjourned once more for that purpose on December 6, 2022 (6T3-7/13).

Pretrial Motions. After eight months, the matter resumed on August 3, 2023. The defense moved to dismiss the matter for a violation of Sigmon's right to a speedy trial; this motion was denied. 7T3-17/4-24. The municipal court next heard the motion to suppress evidence (7T5-3/9) with testimony from Marchetti (7T6-5/67-13) and admission of a mobile video recording ["MVR"] in evidence without objection as exhibit *S-2* (7T16-2/13; *see* 7T98-5-11). This motion was denied. 7T71-9/74-24. A defense motion to dismiss the charge of failing to exhibit a driver's license was granted. 7T75-1/77-13; *see* 8T7-11/16.

Trial. The parties stipulated the suppression hearing testimony into the trial (7T77-24/78-4), which continued with additional testimony by Marchetti (7T79-23/97-22). After reserving decision (7T105-105-11/22), the municipal court delivered its verdicts on September 12, 2023, finding Sigmon guilty of failing to observe a signal (8T7-17/8-1) and DWI (8T8-17/9-12; Da6a) and finding him not guilty of reckless driving (8T9-13/17). For failing to observe a traffic signal, the court imposed a $207 fine and $33 court costs. 8T10-8. For DWI, the court ordered Sigmon to pay a $257 fine, $33 court costs, and $350 in various assessments, to attend an Intoxicated Driver Resource Center for 12 hours, and to forfeit his driving

privilege until he installs a breath alcohol ignition interlock device for three months thereafter. 8T10-18/24.

Appeal. Execution of sentence was stayed pending appeal. 8T10-4/7, 15-23/25. Sigmon timely filed a Notice of Appeal with Superior Court, Law Division, Ocean County. Da7a-8a. The appeal was heard on March 6, 2024, when the Hon. David M. Fritch, J.S.C., reserved decision. 9T15-17/18. Later that day, he issued a Memorandum Opinion (Da9a-24a). On April 16, 2024, he convicted Sigmon and imposed the same sentence as that imposed in the municipal court. Da25a; *see* 10T4-1/3, 10T6-19/7-8. The court received Sigmon's driver's license and executed sentence. 10T7-9/13. A request for a stay of execution of sentence was denied. 10T11-11/13. Sigmon filed a Notice of Appeal and Case Information Statement with this Court (Da26a-33a), which docketed the appeal (Da34a-35a). Transcripts were transmitted (Da36a) and a Scheduling Order entered (Da37a-38a).

FACTS

Training and Experience. David Marchetti has been a Point Pleasant Beach Borough Police Officer since June 2018 after attending the police academy from December 2015 to May 2016. 7T6-12/7-2. He has issued more than 10 DWI charges in his career. 7T7-19/21. He was trained to write a true, accurate, complete, chronological narrative to the best of his ability for each DWI investigation, including details about how a person walks, stands, and interacts. 7T83-14/84-10,

89-19/90-4. He received training in DWI investigations at the academy and attended a 40-hour SFST course run over five days by the New Jersey State Police. 7T35-13/36-3. SFST includes horizontal gaze nystagmus ["HGN"], OLS, and W&T tests. 7T36-3/5. The 40-hour course included lectures, administration of the tests under the supervision of multiple instructors who critiqued performance, gave improvement tips, and corrected errors, and a written test. 7T36-6/37-13.

DWI Investigations. SFST is the third phase of a three-phase DWI investigation—*i.e.*, (1) vehicle in motion, (2) personal contact, and (3) SFST—with a decision to be made at the end of each phase. 7T37-14/38-4. SFST's purpose is to assist the officer to decide whether there is probable cause to arrest a person for DWI for the purpose of obtaining breath samples. 7T62-17/22. SFST is not intended as proof of intoxication. 7T62-4/6. Marchetti employed each of these phases in Sigmon's case. 7T38-5/8.

Patrol. On a rainy December 8, 2021, just after 9:00 p.m., Marchetti was working a four-hour extra-duty detail like Click-It-or-Ticket or Drive-Sober-or-Get-Pulled-Over in Point Pleasant Beach (7T7-25/9-10, 11-9/19, 88-8/9), on patrol southbound on Sea Avenue--that part of Route 35 between the railroad tracks, past the Ark Restaurant, to Ocean Avenue, a north-south road that intersects with Route 35. 7T10-9/18. South of this intersection, Route 35 becomes Ocean Avenue. Traffic was very light off-season in this resort town. 7T11-20/12-7.

Vehicle in Motion. Marchetti turned left from Sea Avenue southbound onto Ocean Avenue northbound and saw a dark sedan heading south on Ocean Avenue about to pass. 7T10-19/22. Marchetti was about to loop back from where he came, when, through his sideview mirror, he saw the sedan about 100 feet behind him turn left against the red traffic light to continue on that part of Route 35 that is Ocean Avenue. 7T12-18/14-2, 38-9/19, 80-16/22. Marchetti turned around, followed the sedan, activated his overhead lights, and watched the sedan activate its turn signal, pull over with control, and come to rest parallel to the curb. 7T38-20/40-7. While the alleged infraction occurred in Point Pleasant Beach, the sedan pulled over in Bay Head. 7T15-18/22. There were no other infractions (7T15-15/17), only going through the red light (7T40-8/12). During this phase, the only vehicle's present were the sedan, Marchetti's patrol vehicle, and that of another officer who arrived on the scene after the motor vehicle stop. 7T82-4/20.

Personal Contact. Marchetti approached the sedan from the passenger side. 7T40-14/16. Sigmon was the driver (7T20-14/25), and his wife was a passenger (7T23-16/18). Marchetti immediately smelled what he called "an odor of alcoholic beverage" (7T23-14/15, 40-17/19), using the term he learned in the academy and later training. 7T40-20/22. From this odor, Marchetti could not tell whether, what, when, or how much Sigmon drank. 7T40-23/41-12. Although drinking alcohol and driving is not illegal (7T41-21/42-14), the odor raised Marchetti's suspicions (7T41-

13/15). In response to his question, Sigmon gave an answer consistent with the odor. 7T41-16/20. Asked where he was coming from, Sigmon said he was on his way from Broadway Bar in the north end of Point Pleasant Beach to his home in Brick. 7T21-8/24. Sigmon was nonchalant, swaying, a little rigid, relaxed. 7T21-5/7, 23-3/4. He said he did not have his license, but Marchetti could not recall anything else about documents. 7T23-5/9. Based on the car going through the red light, the odor, and what Marchetti perceived as a slight delay in answering questions, he decided to "play it safe" by running Sigmon through SFST. 7T23-23/24-10, 42-15/43-5. Marchetti tilted his video camera to capture SFST on an MVR. 7T24-18/21, 43-12/17.

Exit. Sigmon got out of the car and walked to where Marchetti pointed with his flashlight. 7T43-6/11. There, Marchetti stood face-to-face with Sigmon and administered the HGN test. 7T43-18/21, 44-7/9. Marchetti noted no swaying or anything unusual about how Sigmon stood as seen on the MVR. 7T44-10/46-8. After completing HGN, Marchetti continued SFST because it would not have been proper to make an arrest from the HGN alone. 7T46-9/47-2.

One-Leg-Stand. After HGN, Marchetti conducted OLS (7T25-14/19), a screening test that assists the officer in deciding whether to arrest a subject (7T52-1/4). Marchetti instructs OLS subjects to stand with their feet together, hands at side, nice and relaxed, then raise their foot about six inches parallel to the ground

while staring at the tip of the toe, keeping the leg straight, and counting from one-1,000 until told to stop. 7T25-23/26-6. For OLS, Marchetti was told to look for certain "clues" like whether a person raises their hands more than six inches from their sides, puts their foot down, hops, or sways. 7T58-2/20. Whether a person's foot is parallel to the ground or pointed upward is not considered a "clue" nor is whether a person looks at their toe. 7T58-23/59-10.

OLS is not a normal way to stand as it requires subjects to reduce the area over which they would normally distribute their weight and compromises balance even in normal sober people. 7T47-3/48-21, 52-13/15. Raising the leg further compromises balance by elevating the center of gravity. 7T49-4/18. Many things can impair performance, like being nervous, tired, injured, distracted, or unfamiliar with the test, and Marchetti never ruled out tiredness, nervousness, or unfamiliarity for Sigmon and conceded that the rain distracted him. 7T49-16/51-25.

Sigmon raised his right foot more than six inches high, pointed his toe to the sky, stepped out of position, then continued without reaching 30 seconds. 7T27-3/14. Sigmon complained about the rain. 7T27-18/19. This test led Marchetti to feel that Sigmon was intoxicated (7T28-8/9), but he had not yet decided to make an arrest because he believed it was necessary to do the W&T test (7T59-23/60-14; *see* 7T28-14).

Walk-and-Turn. For W&T, Marchetti places subjects in a starting position--hands at sides, right foot in front of left foot touching heel to toe--and has them remain in that position for further instructions. 7T29-20/30-1. While subjects stand in the starting position, Marchetti instructs them to take nine steps heel-to-toe while counting each step aloud, turn with short choppy steps after the ninth step out, and come back nine paces to the starting position while counting each step aloud and keeping hands to their sides. 7T30-2/12, 52-16/21. Standing heel to toe is not a normal way to stand unless you are a gymnast on a balance beam--someone Sigmon was not. 7T53-19/54-4. Nor is walking heel to toe. 7T54-21/23. While most people normally stand shoulder width apart, much the way Sigmon stood before his arrest, standing heel to toe reduces the area over which they would normally distribute their weight and compromises balance. 7T54-5/20; *see S-2*.

Sigmon stepped out of the starting position twice whenever Marchetti gave additional instructions; then Sigmon walked nine paces out, pivoted in the turn, reset, and returned to the starting position. 7T30-16/31-4, 52-16/53-18. Marchetti believed Sigmon walked 10 steps back (7T30-21/23), turned improperly (7T33-17/19), and stepped off the line (7T33-22). For the MVR, we see Sigmon step out of the starting position with control two times when Marchetti gives additional instructions, but then resumes the position when told to do so. 7T52-16/53-18. Sigmon walks nine steps out, pauses after those first nine steps, and asks for

clarification about the rest of the test. 7T54-25/55-3. Sigmon resets with his feet side-by-side rather than heel-to-toe, then walks back, touching heel to his toe with his hands at his sides on every step. 7T55-19/57-12. After W&T, Marchetti decided to arrest Sigmon. 7T61-13/16.

Arrest. Sigmon voluntarily submitted to SFST, appeared to understand the instructions, complied with them in good faith as best he could, and was fully cooperative. 7T66-17/67-13. Nonetheless, based on these tests, Marchetti believed Sigmon could not safely operate a vehicle (7T33-2/3), believed he was DWI (7T80-11/15), and arrested him based on this suspicion (7T34/12/14) unsupported by any tools with which to measure breath or blood alcohol content. 7T63-15/20. Sigmon voluntarily cooperated with handcuffing without resistance. 7T84-11/15. He did not look intoxicated while walking. 7T85-8/24. From the arrest forward, Marchetti noted nothing that indicated that Sigmon was intoxicated (7T90-22/92-6) and neither noted nor recalled much about Sigmon after his arrest (*see* 7T86-3/15, 87-1/6, 88-21/89-9, 92-7/16, 95-19/96-13).

At Headquarters. Marchetti took Sigmon's wife to Point Pleasant Beach Police Headquarters. 7T87-14/16. Another officer took Sigmon there (7T34-15/19), where Marchetti advised Sigmon of his constitutional rights (7T92-17/23, 93-10/12) and read a standard statement about submitting breath samples (7T96-14/16). Sigmon voluntarily agreed to do so. 7T97-14/16. Marchetti watched Sigmon stand

up from a prisoner bench, have his handcuffs removed, walk to the breath test instrument, receive instructions on how to submit breath samples, and follow those instructions. 7T95-6/20. On release, Marchetti handed the summonses to Sigmon. 7T81-14/19.

STANDARD OF REVIEW

In this appeal, Defendant Gerald E. Sigmon, Jr., asks this Court to review the legal determination concerning speedy trial on a plenary basis. *State v. Handy*, 206 *N.J.* 39, 45 (2011). He also asks this Court to review video here and find that the only reasonable inference is that the State failed to prove his guilt beyond a reasonable doubt.

This Court "does not weigh the evidence anew but merely determines whether the evidence supports the judgment of conviction. *State v. Johnson*, 42 *N.J.* 146, 157 (1964) (citation omitted). As our Supreme Court observed,

> It is not our function in reviewing the conviction in question to weigh the evidence anew and to make independent findings of fact as if we were sitting in first judgment on the case. Rather, our obligation is to determine whether there is adequate evidence to support the judgment rendered below.
>
> [*State v. Emery*, 27 *N.J.* 348, 353 (1958).]

"The aim of the review at the outset is rather to determine whether the findings made could reasonably have been reached on sufficient credible evidence present in the record." *State v. Johnson, supra* at 162. "When the reviewing court is satisfied

that the findings and result meet this criterion, its task is complete and it should not disturb the result, even though it has the feeling it might have reached a different conclusion were it the trial tribunal." *Ibid.* However,

> if the appellate tribunal is thoroughly satisfied that the finding is clearly a mistaken one and so plainly unwarranted that the interests of justice demand intervention and correction..., then, and only then, it should appraise the record as if it were deciding the matter at inception and make its own findings and conclusions. While this feeling of 'wrongness' is difficult to define, because it involves the reaction of trained judges in the light of their judicial and human experience, it can well be said that that which must exist in the reviewing mind is a definite conviction that the judge went so wide of the mark, a mistake must have been made. This sense of 'wrongness' can arise in numerous ways--from manifest lack of inherently credible evidence to support the finding, obvious overlooking or underevaluation of crucial evidence, a clearly unjust result, and many others.
>
> [*Ibid.*]

The contention that the trial court erred in its determination of the facts, whether underlying or ultimate, may be urged on appeal in any nonjury case.... *Id.* at 161. "Although we generally defer to a court's fact findings based on its review of a recording, [*State v.*] *S.S.*, 229 *N.J.*[360,] 379 [(2017)], we are required to do so only where 'more than one reasonable inference can be drawn from the review of a video recording,'" *id.* at 380. "Where a recording does not support more than one reasonable inference, and a trial court's 'factual findings' based on its interpretation of a recording 'are so clearly mistaken—so wide of the mark—that the interests of

justice demand intervention[,]' a reviewing court owes no deference to a trial court's fact findings drawn from the recording." *Id.* at 381 (brackets in original).

LEGAL ARGUMENT

I.
THIS COURT SHOULD DISMISS THIS MATTER BECAUSE DEFENDANT'S RIGHT TO A SPEEDY TRIAL WAS VIOLATED
[Da19a-23a, 10T10-22/11-6]

Speedy trial and principles have become paramount in this case. *See Barker v. Wingo*, 407 *U.S.* 514 (1972); *State v. Cahill*, 213 *N.J.* 253, 258 (2013); *State v. Prickett*, 240 *N.J.Super.* 139, 143 (App.Div. 1990). As of the trial date, this matter was **603** days old--*i.e.*, one year and 238 days. The defense filed a discovery motion as of September 6, 2022, when the matter was adjourned for the State to respond. The case was ready for trial as of October 18, 2022, when the discovery motion was resolved, and the case was **314** days old. But the municipal court elected to have one more virtual court appearance on December 6, 2022, just shy of the case's first anniversary.

No unreasonable delay can be attributed to Sigmon. He asserted his right to a speedy trial in the *Letter of Representation* and in a motion when the parties appeared for the motion to suppress and trial on August 3, 2023, when the matter was **603** days old and **289** days after it was ready for trial. Adjournments were due to prosecutorial delays in dealing with discovery requests, which were not resolved

until the case was more than ten months old. After that, there is no explanation why it took so long to schedule testimony.

Delay itself causes prejudice:

> [O]ne of the major purposes of the provision is to guard against inordinate delay between public charge and trial, which, wholly aside from possible prejudice to a defense on the merits, may "seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends."
>
> [*Barker v. Wingo, supra* at 537 (White, J., concurring), quoting *United States v. Marion*, 404 *U.S.* 307, 320 (1971).]

Prejudice caused by pretrial delay "intensifies over time." *Doggett v. United States,* 505 *U.S.* 647, 652 (1992). The asserted right to a speedy trial "should prevail if the only countervailing considerations offered by the State are those connected with crowded dockets and prosecutorial caseloads." *Barker v. Wingo, supra* at 537 (White, J., concurring). ["U]nreasonable delay in run-of-the-mill criminal cases cannot be justified by simply asserting that the public resources provided by the State's criminal-justice system are limited and that each case must await its turn." *Ibid.* These appear to be the only justifications for delay here.

This delay approaches or exceeds that described in other reported cases. *See, e.g.*: *State v. Cahill, supra* (16 months); *State v. Tsetsekas*, 411 *N.J.Super.* 1 (App.Div. 2009) (344 days); *State v. Farrell*, 320 *N.J.Super.* 425 (App.Div. 1999) (633 days); *Strunk v. United States*, 412 *U.S.* 434 (1973) (10 months). *Cf. State v.*

Szima, 70 *N.J.* 196, 198-99 (1976) (trial beginning seven months, inclusive of an interlocutory appeal, after indictment). The parties in the present case were ready for a motion to suppress and trial as of October 18, 2022 (day 314). The next in-person court appearance takes place 49 days later on December 6, 2022 (day 363), but nothing happens. An unexplained hiatus of 240 days takes place before trial on August 3, 2023 (day 603), 20 months after issuance.

"[T]he primary burden [is] on the courts and the prosecutors to assure that cases are brought to trial." *Barker v. Wingo, supra* at 529. Thus, delays attributable to the court are attributed to the State. "When there is no reasonable explanation or justification for the excessive delay, speedy trial principles have been violated." *State v. Farrell, supra* at 453. Here, "the denial of fundamental fairness was so great, and the integrity of the judicial process so crippled, as to require that the convictions be vacated." *Ibid.*

II.
THIS COURT SHOULD ACQUIT DEFENDANT OF DWI BECAUSE THE PROOFS FAIL TO ESTABLISH THAT HE WAS UNDER THE INFLUENCE OF ALCOHOL BEYOND A REASONABLE DOUBT

[Da24a-25a, 10T4-1/4]

The evidence in this case fails to establish that Defendant Gerald E. Sigmon, Jr., was under the influence of alcohol. While there is no substantive challenge to the facts supporting the probable cause determination to arrest Sigmon, there is an enormous difference between that probable cause determination and the quantum of proof necessary to prove whether Sigmon was under the influence beyond a reasonable doubt. On review, particularly MVR evidence, this Court will see that no reasonable inference of intoxication beyond a reasonable doubt can be drawn, given the overly heavy reliance on SFST--techniques intended not to diagnose alcohol impairment but rather to assist an officer in deciding whether to arrest.

Consuming alcoholic beverages and driving a car is not illegal. "The language 'under the influence' used in the statute has been interpreted many times. Generally speaking, it means a substantial deterioration or diminution of the mental faculties or physical capabilities of a person whether it be due to intoxicating liquor, narcotic, hallucinogenic or habit-producing drugs," *State v. Tamburro*, 68 *N.J.* 414, 420-21 (1975); "a condition which so affects the judgment or control of a motor vehicle operator as to make it improper for him to drive on the highway," *State v. Johnson,*

supra at 165; *see State v. Bealor*, 187 *N.J.* 574 (2006). However, as the Hon. Nathan S. Kirsch, J.M.C. (Retired), put it in the context of a DWI prosecution:

> All the facts creating probable cause for the police stopping, interrogating, observing and eventually arresting the defendant may be perhaps the most important elements in the eventual determination of guilt or innocence of a defendant. A judge, after a detailed hearing of the facts surrounding this probable cause or overt act of the defendant, should ask the question, "Would the totality of these overt acts have occurred even if the defendant had not been drinking?" If the answer to this question is "yes", then a reasonable doubt may exist as to a defendant's guilt.
>
> [Kirsch, Nathan S., Guide to Hearing Drunk Driving Cases, *N.J. Dept. of Health, Div. of Alcoholism, Intoxicated Driving Programs Unit* (1988) at p.1.]

Whether Sigmon was impaired by alcohol rather than nervousness, stress, distraction, or other cause is a question which the evidence presented fails to resolve beyond reasonable doubt. As in *State v. Morton*, 74 *N.J.Super.* 528 (App.Div. 1962), *aff'd* 39 *N.J.* 512 (1963):

> It is to be conceded that there was evidence as to defendant's appearance, odor and behavior at or shortly after the arrest and as to his prior consumption of beer which might have supported an affirmative finding on the issue of his transgression of the statute. There were also, however, some indicia of normality of condition.
>
> [*Id.*, 74 *N.J.Super.* at 531.]

In *State v. Johnson, supra*, our Supreme Court explained the difficulty of relying on observational evidence in support of a DWI conviction:

> The criterion of operating 'under the influence of intoxicating liquor' always presented practical enforcement difficulties, both from the standpoint of the public interest intended to be protected and the

> accused defendant. Opinions based on objective-symptom observations and tests, whether lay or medical, were bound to be somewhat inexact in fairly applying such a broad statutory standard. On the one hand, many guilty defendants escaped conviction because all of the external manifestations of the effects of alcohol are not displayed by every person and, on the other, certain individual pathological conditions may cause a non-intoxicated person to manifest one or more of the symptoms also produced by the use of liquor.
>
> [*Id.* at 167.]

Both testimonial and MVR evidence bear out the prosecution's inability to prove that Sigmon was under the influence of alcohol beyond a reasonable doubt. Indeed, video in this case is "equal or superior to testimonial evidence." *State v. Stein*, 225 *N.J.* 582, 596 (2016).

In making his determination to arrest Sigmon, Marchetti relied on three factors: the red-light infraction, what he called an odor of alcohol with the confirming admission made in a "slightly delayed" response not noticeable on MVR and in SFST. He delivers an opinion of alcohol impairment, couched as suspicion--understandable given the odor, admission, and traffic violation. But his reliance on SFST raises doubt and fails to prove Sigmon's guilt for several reasons:

First, the purpose of SFST is not to prove the influence of alcohol but merely to assist an officer in making an arrest decision.

Second, Sigmon was unfamiliar with SFST. While "practice makes perfect"--Marchetti had academy training and took a five-day course in which to learn these tests and practiced them at least 10 times or more outside of class during his short

career--Sigmon had neither training nor experience with SFST.

Third, while Sigmon's decision to attempt these tests was supposedly voluntary, Marchetti never gave him an option, insisting that Sigmon attempt them despite the weather conditions, and Sigmon was not free to leave.

Fourth, OLS and W&T required Sigmon to stand in abnormal unusual ways that induce signs of impairment, whether from alcohol, nervousness, tiredness, distraction, or other reason, and nothing in evidence ruled out these innocent explanations for alleged impairment.

Fifth, while HGN is not admissible at trial to prove intoxication, *State v. Doriguzzi*, 334 *N.J.Super*. 530, 547 (App.Div. 2000), and it was not offered in this case other than as a placeholder, nonetheless, while Sigmon did this test, he apparently followed directions and had no difficulty standing still while it was administered.

Sixth, the courts below failed to account for the many signs of sobriety which Sigmon exhibited. Marchetti's testimony notwithstanding, MVR shows Sigmon's speech as clear and distinct. He was forthright and direct in expressing his feelings. He was oriented to his surroundings and responded appropriately to Marchetti's questions and instructions. Outside of OLS and W&T, Sigmon walked and stood without difficulty.

Finally, OLS and W&T have high false-positive rates. There are "palpable

risks" that such police administered "tests" focusing on DWI detection are prone to confirmation bias, the tendency to believe that the tests prove that for which you are looking "despite an officer's good faith and training to remain objective." *See State v. Olenowski*, 255 *N.J.* 529, 608 (2023). Also, SFST is "used by the officer to develop probable cause for arrest and as evidence in court." NHTSA, *DWI Detection and Standardized Field Sobriety Testing Refresher Course* (2018), Session 8, p.3, https://www.nj.gov/njsp/division/investigations/pdf/adtu/2023_DWI_Detection_and_Standardized_Field_Sobriety_Testing-Participant_Guide.pdf at 216 (viewed July 21, 2024).[3] According to this *2023 SFST Manual*, original research indicated that W&T was "68% accurate" and OLS was "65% accurate." *Ib.* at 218. The *2023 SFST Manual* claims that an officer using W&T will "accurately classify 79% of your subjects" (Session 8, p.47, website at 260) and, with OLS, "accurately classify 83% of the people you test as to whether their BAC's [blood alcohol contents] are at or above 0.08" (Session 8, p.53, website at 266. While the cited studies were neither scientific nor peer reviewed and suspect due to their sponsorship by law enforcement, they still indicate a false positive rate of 21% to 32% for W&T and a false positive rate of 17% to 35% for OLS.

In a "double-blind placebo-controlled parallel randomized clinical trial ...

[3] This document is not directly accessible via the cited link by can be reached by initiating a search for "SFST" on the NJSP website at https://www.nj.gov/njsp/.

conducted from February 2017 to June 2019 at the Center for Medicinal Cannabis Research, University of California, San Diego" reported in a Journal of the American Medical Association ["JAMA"], researchers studied the use of SFST to detect persons under the influence of cannabis. Marcotte, *et al.*, *Evaluation of Field Sobriety Tests for Identifying Drivers Under the Influence of Cannabis: A Randomized Clinical Trial*, *JAMA Psychiatry* (2023), https://jamanetwork.com/journals/jamapsychiatry/fullarticle/2807719 (viewed July 21, 2024).[4] Study participants "were to abstain from cannabis for at least 2 days prior to the training and experiment days." *Id.* at 5.[5] Despite the study's focus on cannabis, a key finding was that the officers involved in the study classified 49.2% to 54.0% of the placebo group as impaired using OLS and W&T, among other tests. *Id.* at 7. "[A] substantial proportion of the placebo group performed poorly on the [OLS and W&T], and officers classified 49.2% of the placebo group as FST impaired. Of all participants who officers believed to have received THC whether they received THC or placebo, 92.8% were classified as FST impaired." *Id.* at 9. This suggested a strong tendency for confirmation bias. *Id.* at 5 and 12.

[4] The treatise is not viewable at this link, but can be downloaded from it.

[5] Page references refer to the downloaded version of this article.

CONCLUSION

Viewing the evidence against Defendant Gerald E. Sigmon, Jr., through the prism of that highest of evidentiary burdens, this Court, having reviewed not only the testimony but the MVR evidence as well, should find him *not guilty* of DWI. Alternatively, he asks this Court to dismiss his case because his right to a speedy trial was violated.

Respectfully,

/s/ *John Menzel*

John Menzel, J.D.

BRADLEY D. BILLHIMER
Ocean County Prosecutor

ANTHONY U. CARRINGTON
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MICHAEL T. NOLAN JR.
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October 23, 2024

Honorable Judges of the Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex, P.O. Box 006
Trenton, New Jersey 08625

RE: State of New Jersey (Plaintiff-Respondent) v.
Gerald Sigmon, Jr. (Defendant-Appellant)
Docket No. A-003005-23

Criminal Action: On appeal from a final order of conviction in the Superior Court of New Jersey, Law Division, Ocean County

Sat Below: Hon. David M. Fritch, J.S.C.

Appellant is not confined.

Honorable Judges:

Pursuant to R. 2:6-2(b) and R. 2:6-4(a), this letter in lieu of a formal brief is submitted on behalf of the State of New Jersey.

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TABLE OF CONTENTS

PROCEDURAL HISTORY[1]

On December 8, 2021, Defendant received 4 summonses: Summons No. 1525-PPC-108074 charged him with DWI, contrary to N.J.S.A. 39:4-50; Summons No. 1525-PPC-108075 charged him with reckless driving, contrary to N.J.S.A. 39:4-96; Summons No. 1525-PPC-108076 charged him with failure to observe a traffic signal, contrary to N.J.S.A. 39:4-81, and Summons No. 1525-PPC-108077 charged him with failure to exhibit documents, contrary to N.J.S.A. 39:3-29. (Da1-Da2)

On March 8, 2022, Defendant appeared with counsel before the Hon. Robert M. Lepore, J.M.C., at the Point Pleasant Beach Municipal Court where he requested and received an adjournment for discovery. (1T3-8 to 3-14)

On April 12, 2022, Defendant appeared with counsel who advised Judge Lepore that he had submitted a written request for additional discovery which the State needed time to review. As a result, Defendant requested and received

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[1] The State adopts Appellant's appendix designations noted at Db3-Db4;
"1T" refers to transcript of proceedings dated March 8, 2022;
"2T" refers to transcript of proceedings dated April 12, 2022;
"3T" refers to transcript of proceedings dated June 7, 2022;
"4T" refers to transcript of proceedings dated September 6, 2022;
"5T" refers to transcript of proceedings dated October 18, 2022;
"6T" refers to transcript of proceedings dated December 6, 2022;
"7T" refers to transcript of proceedings dated August 3, 2023;
"8T" refers to transcript of proceedings dated September 12, 2023;
"9T" refers to transcript of proceedings dated March 6, 2024;
"10T" refers to transcript of proceedings dated April 19, 2024.

another adjournment. (2T3-8 to 3-14)

On June 7, 2022, Defendant appeared with counsel who advised Judge Lepore that he was going to "make an assessment about whether there was a need for a discovery motion." As a result, Defendant requested and received another adjournment. (3T3-10 to 3-18)

On September 6, 2022, Defendant appeared with counsel who advised Judge Lepore that he submitted a motion for additional discovery. As a result, Defendant requested and received another adjournment. (4T3-10 to 3-20)

On October 18, 2022, a hearing was held on Defendant's motion for additional discovery. After hearing the arguments of counsel, Judge Lepore denied the motion. (5T7-3; 9-1 to 9-2; 9-10; 9-24 to 9-25; 10-6; 11-3)

On December 6, 2022, Defendant appeared with counsel who advised Judge Lepore that he submitted a motion to suppress. As a result, Defendant requested and received another adjournment. (6T3-7 to 3-11)

On August 3, 2023, Defendant moved to dismiss his case for "failure of the State to provide a speedy trial." After Judge Lepore denied that motion, a hearing commenced on Defendant's motion to suppress. (7T3-21 to 4-24) At the conclusion of the hearing, Judge Lepore denied Defendant's suppression motion. (7T74-22 to 74-24)

Defendant then stipulated that the testimony from the suppression

hearing would be made part of the trial and successfully moved to dismiss the charge of failure to exhibit documents. (7T75-1 to 77-13; 77-24 to 78-7) After it was confirmed the matter would be tried based on the officer's observations, trial immediately commenced. (7T78-15 to 79-20) At the conclusion of trial, Judge Lepore reserved judgment. (7T105-9 to 105-22)

On September 12, 2023, Judge Lepore found Defendant guilty of DWI and failure to observe a traffic signal and merged the charge of reckless driving. (8T7-17 to 9-17) Because it was Defendant's first DWI conviction, Judge LePore sentenced him to 3 months' ignition interlock, 12 hours IDRC, $257.00 fine, $33.00 costs, $225.00 DWI surcharge, $50.00 VCCB and $75.00 SNSF. (8T10-18 to 10-24) As to the charge of failure to observe a traffic signal, the Judge sentenced Defendant to $207.00 fine and $33.00 costs. (8T10-8) Defendant requested a stay pending appeal which was granted. (8T11-21 to 11-24)

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

Trial de novo was held on March 6, 2024. At its conclusion, the Hon. David M. Fritch, J.S.C., reserved decision. (9T15-17 to 15-18) In a written

opinion issued later that day, Judge Fritch found Defendant guilty of DWI[2]. (Da9-Da24)

On April 19, 2024 Judge Fritch sentenced Defendant to 3 months' ignition interlock, 12 hours IDRC, and related fines and penalties. (10T6-23 to 7-8) The Judge also denied Defendant's motion for a stay pending appeal. (10T11-11 to 11-13)

This appeal follows.

STATEMENT OF FACTS

On Wednesday, December 8, 2021, Officer David Marchetti of the Point Pleasant Beach Police Department was on specific duty patrol enforcing traffic violations. (7T8-1 to 9-10) Shortly after 9:00 p.m., the officer was traveling on Ocean Avenue and observed Defendant make a left turn against a red light. (7T11-1 to 13-7) Officer Marchetti, whose view was clear and unobstructed, briefly followed Defendant before effectuating a motor vehicle stop. (7T14-3 to 14-12; 15-9 to 15-22) The officer's car was equipped with an MVR which recorded all events at the scene. A copy of this MVR was viewed by the trial court and moved into evidence as S-2. (7T16-2 to 16-11; 17-11 to 17-13; 98-5 to 98-11)

Upon approaching Defendant's car and attempting to speak with him, the

[2]A companion order confirming Defendant's conviction and sentence was also issued, albeit with a date of April 16, 2024. (Da25)

officer immediately detected an odor of alcohol coming from both the car and Defendant's breath. (7T23-10 to 23-15; 8T5-8 to 5-11) Defendant, whose speech was delayed, "nonchalantly" denied going through the red light and claimed it was "going green." (7T21-1 to 21-7; 8T5-1 to 5-16) Defendant also admitted he was coming from the Broadway Bar where he drank two beers. (7T21-13 to 21-20; 8T5-5 to 5-11) When the officer asked him to step out of the car, Defendant was "swaying" and "a little rigid." (7T22-25 to 23-15)

Officer Marchetti then administered several standard field sobriety tests ("SFSTs"), all of which Defendant failed.

Despite being given specific instructions, Defendant kept moving his head and had to be reminded to look at the pen during the HGN test. (8T5-23 to 6-4)

Officer Marchetti then administered the one-legged stand test. Defendant denied having any injuries that would limit his ability to perform the test and the officer gave him two opportunities to complete it. (7T27-11 to 27-18) Both times Defendant stumbled and lost his balance, raised his foot higher than 6 inches, pointed it to the sky, and put it down before being told to do so. (7T26-7 to 27-19; 8T6-5 to 6-21)

Finally, Officer Marchetti administered the walk-and-turn test. Defendant was unable to maintain the starting position, swayed and lost his

balance, and had to reset and reposition his feet. (7T10-16 to 31-21; 8T6-22 to 7-5) Defendant was then arrested for DWI.

On October 18, 2022, Defendant moved to compel the State to provide additional discovery which included a new standard solution report; the Alcotest repair/maintenance records; the testing manual relied upon by the officer, and reports of past administrations of the SFSTs by the officer. (5T6-2 to 9-25) After considering the arguments of counsel on each item seriatim, Judge Lepore denied Defendant's motion in its entirety, finding Defendant's request was "a fishing expedition," that some of the items were already provided (to the extent that they existed), and that others were not required by Chun[3]. (5T7-3; 9-1 to 9-2; 9-10; 9-24 to 9-25; 10-6; 11-3)

Although samples of Defendant's breath were obtained, the State moved to exclude those results due to an issue with the 20-minute observation period. (S-1; D-1[4]; 7T78-9 to 79-20) As a result, the matter proceeded to trial based on the officer's observations.

Officer Marchetti was the sole witness for the State. Defendant did not testify. After hearing the officer's testimony and viewing the MVR, Judge Lepore found:

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[3] State v. Chun, 194 N.J. 54 (2008)

[4] The record reflects that both the police report (S-1) and the DWI packet (D-1) were moved into evidence at trial (7T98-5 to 98-11)

> The aggregate of the observations of the Defendant's demeanor and physical appearance, as testified to by Officer Marchetti, all of which was credible and forthright, the Defendant's admissions of alcohol consumption and a poor performance on the one-leg stand and the walk-and-turn test, which were documented by the approximate 20-minute video, were more than sufficient to sustain a finding of guilt…The statute does not require the State to prove that the Defendant was absolutely drunk, but only that the Defendant imbibed to the extent that his physical coordination or mental faculties were deleteriously affected.
>
> Clearly in the present matter, the field sobriety testing and overall observations of Officer Marchetti, along with the video, provided ample evidence of the Defendant's guilt beyond a reasonable doubt.
> (8T8-17 to 9-12)

Trial de novo was held on March 6, 2024 before the Hon. David M. Fritch, J.S.C.. Judge Fritch had already viewed the MVR before hearing the arguments of counsel and, ultimately, reserving decision. (9T3-25 to 4-7; 15-17 to 15-18)

Later that same day, Judge Fritch issued a written opinion. (Da9-Da24) In it, Judge Fritch acknowledged and agreed with Judge Lepore's finding that Officer Marchetti was credible. (Da17-Da18) Judge Fritch then cited Officer Marchetti's testimony that:

> Defendant had made a left turn against a red traffic light; told the police officer that he was on his way home from a bar; believed the light was "turning" when he went through; smelled of alcohol; admitted

> he had consumed alcohol that evening; and had a delayed response to [Officer Marchetti's] questions (Da18)

As to the field sobriety tests, Judge Fritch found:

> The administration of these tests did not occur in a vacuum. These tests were administered after Officer Marchetti had already observed the Defendant operating his motor vehicle in an unsafe manner by making an illegal left turn at a red light, Defendant's breath and vehicle smelled of alcohol, Defendant admitted to drinking alcohol that evening, and the Defendant had a noticeable delayed response to Officer Marchetti's questions. (Da18)

The Judge then concluded that the State proved beyond a reasonable doubt that Defendant was guilty of DWI, finding:

> The observations of Officer Marchetti, both before and during the administration of these field sobriety tests were sufficient, credible evidence that the Defendant as intoxicated…In this matter, this Court does not believe there is another reasonable explanation for Defendant's driving behavior on the evening of the offense other than that he had consumed alcohol to a point where his driving would be impaired. (emphasis added) (Da18-Da19)

Next, Judge Fritch examined Defendant's claim that his right to a speedy trial had been violated by applying the four-prong test established in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

As to the first prong (length of delay), the Judge found that although the case had been delayed for approximately 20 months, the length of time "in and

of itself does not control the analysis" and went on to examine the three remaining prongs. (Da21)

As to the second prong (reason for the delay), Judge Fritch noted the case "was adjourned six times before the municipal court tried the matter after denying a suppression motion and a speedy trial motion." (Da22) The Judge continued:

> On October 18, 2022, Judge Lepore heard the discovery motion and denied the motion – finding the discovery requests by the Defendant to be moot at best, and 'a fishing expedition at worst.' After ruling on the motion, defense counsel asked the municipal court to schedule a hearing on a suppression motion he was filing. The municipal court reconvened to hear the matter on December 6, 2022, at which time defense counsel requested an additional adjournment for a hearing on Defendant's suppression motion and trial. On August 3, 2023, defense counsel argued a motion to dismiss for failure to provide a speedy trial. This was the first assertion of the right to a speedy trial on the record in this matter.
> (emphasis added) (Da22)

Judge Fritch then found Defendant failed to meet the second Barker prong, stating, "this Court's conclusion is that the delays were part of the normal course of the life of a DWI case, and that the delays were attributable almost entirely to defense counsel with the majority of the delay attributable to defense counsel's pursuit of what was ultimately determined to be a futile and overly-broad discovery effort." (emphasis added) (Da22-Da23)

As to the third prong (assertion of the right), Judge Fritch recognized Defendant's argument that he asserted his right in a letter of representation filed in January, 2022. (Da23) However, because the amount of time between the date of Defendant's arrest and his trial equaled the amount of time between the date of his arrest and his assertion of his right on the record, Judge Fritch found Defendant also failed to meet the third Barker prong. (Da23)

Finally, as to the fourth prong (prejudice to the defendant), Judge Fritch found:

> [O]ther than the possible prejudice from the delay itself, no claim of prejudice to Defendant has been demonstrated in this matter. As to prejudice from the delay itself, this Court does not find that, given that most of the delay was attributable to Defendant. (emphasis added) (Da23)

Finding the Barker test had not been met, Judge Fritch then concluded that Defendant had not been deprived of his right to a speedy trial. (Da23)

LEGAL DISCUSSION

In this appeal, Defendant continues to argue that his right to a speedy trial was violated and that the State failed to meet its burden that he was driving while intoxicated. Both arguments remain without merit.

POINT I

THE DE NOVO COURT PROPERLY FOUND THAT THERE WAS NO VIOLATION OF DEFENDANT'S RIGHT TO A SPEEDY TRIAL
(responsive to Defendant's Point I)

The test for determining whether the right to a speedy trial has been violated was established by Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Barker held:

> We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of this right. Though some might express them in different ways, we identify four such factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. Barker, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L.Ed.2d 101.

Four years later, New Jersey adopted Barker's four-prong test in State v. Szima, 70 N.J. 196 (1976). Szima noted that Barker rejected the suggestion that a fixed time period be set, holding instead that the right to a speedy trial is relative and depends upon circumstances. Id. at 200. Szima emphasized that the conduct of both the State and a defendant must be weighed in evaluating delays under the Barker test. Id. at 201-202

In State v. Cahill, 213 N.J. 253 (2013), defendant was convicted of DWI after his motion to dismiss based on speedy trial grounds was denied. Notice of trial date in the Pennsauken Municipal Court was 29 months from the date of

his arrest. Ultimately, the Cahill Court declined to adopt "a rigid bright-line try-or-dismiss rule" and reaffirmed "adherence to the four-factor Barker analysis" noting that "knowledge of the facts of an individual case are the best indicators of whether a right to a speedy trial has been violated." Id. The Cahill Court found, "None of the Barker factors is determinative, and the absence of one or some of the factors is not conclusive of the ultimate determination of whether the right has been violated." Id. at 267

Here, the De Novo Court found that none of the Barker factors weighed in Defendant's favor. Although there was approximately 20 months from the date of Defendant's arrest until the date of his trial, the Court correctly found that length of time by itself did not control the analysis. (Da21) The Court recognized that it wasn't until 20 months after his arrest that Defendant even asserted his right to speedy trial on the record. (Da23) The Court also found Defendant failed to demonstrate any prejudice from this delay and, significantly, that this delay was mostly attributable to Defendant and his "futile and overly-broad" discovery effort. (Da22-Da23)

Accordingly, the De Novo Court properly found that there was no violation of Defendant's right to a speedy trial and that decision should be affirmed.

POINT II

THE DE NOVO COURT PROPERLY FOUND DEFENDANT WAS DRIVING WHILE INTOXICATED
(responsive to Defendant's Point II)

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, the record reflects overwhelming sufficient credible evidence to

support Defendant's DWI conviction on the observation prong.

Officer Marchetti testified that he was on patrol when he observed Defendant make an illegal left turn against a red light. (Da17-Da18) The officer's view was unobstructed and his testimony was corroborated by his MVR. Officer Marchetti also testified that after observing Defendant make this illegal turn, he detected an odor of alcohol on and around Defendant. (Da17) Defendant then admitted to the officer in slurred speech that he was on his way home from the bar where he had been drinking beer before driving. (Da17)

Subsequently, Defendant went on to fail all of the SFSTs. (Da18)

The De Novo Court echoed the Trial Court's finding that Officer Marchetti's testimony was both credible and corroborated by the MVR. (Da18) All of this evidence readily supported the De Novo Court's finding that there was no other "reasonable explanation" for Defendant's driving behavior other than that he was driving while intoxicated. (Da19)

Significantly, the Law Division's de novo review ultimately mirrored the Trial Court's proceedings. "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.

Both the De Novo and Trial Courts properly found that Defendant was driving while intoxicated and that conviction should be affirmed.

CONCLUSION

Based on all of the above, the State respectfully submits that the Defendant's conviction be affirmed and his request for relief be denied.

Respectfully submitted,

/S/ Cheryl L. Hammel, Esq.
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Date submitted: October 23, 2024

cc: John Menzel, Esq.

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	: **SUPERIOR COURT OF NEW JERSEY**
STATE OF NEW JERSEY,	: **APPELLATE DIVISION**
	:
Plaintiff,	: DOCKET NO. 23-18
	:
v.	: ON APPEAL FROM:
	: Superior Court, Law Division, Ocean County
GERALD E. SIGMON, JR.,	: Docket No. below 23-18
	: Sat below: Hon. David M. Fritch, J.S.C.
Defendant.	:
	: **DEFENDANT'S REPLY LETTER BRIEF**

To: Honorable Judges
Superior Court, Appellate Division
in care of Jeffrey A. Newman, Clerk
Hughes Justice Complex
25 West 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
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Date submitted: November 14, 2024
Date returnable: To be set
On the Brief: John Menzel, J.D.

CONTENTS

[1] Defendant's appendix, attached, is cited to as suggested in *R.* 2:6-8—*e.g.*, pages 19 to 23 are cited as "Da19a-23a."

PRELIMINARY STATEMENT

Defendant Gerald E. Sigmon, Jr., challenges his conviction for operating a motor vehicle while under the influence of alcohol ["DWI"] because his right to speedy trial was violated and because the evidence, based on *de novo* review of video and objective review of subjective findings, fails to support a finding of guilt beyond a reasonable doubt. Please accept this letter brief in reply to the State's response to Sigmon's initial legal arguments.

LEGAL ARGUMENT

I.
WITH A FOCUS ON THE LENGTH OF UNEXPLAINED DELAY, THIS COURT SHOULD DISMISS THE COMPLAINTS
[Da19a-23a, 10T10-22/11-6]

Of the four speedy trial factors—assertion, length, cause, and prejudice—the focus in the present case is on the delay from when the case was ready for trial and when the trial actually occurred—a period of 289 days from October 18, 2022, to August 3, 2023, and 603 days after issuance of the complaint on December 8, 2021. Such an unexplained delay, attributable to the State and the municipal court, warrants dismissal. *See* Db18-20[2]; *but see* Sb11-12[3].

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[2] Defendant's initial brief is cited as suggested in *R.* 2:6-8—*e.g.*, pages 18 to 20 are cited as "Db18-20."

[3] The State's response brief is cited as suggested in *R.* 2:6-8—*e.g.*, pages 11 to 12 are cited as "Sb11-12."

II.
THIS COURT, REVIEWING VIDEO *DE NOVO* AND CONSIDERING THE EVIDENCE OBJECTIVELY RATHER THAN RELYING ON SUBJECTIVE FINDINGS, SHOULD ACQUIT DEFENDANT OF DWI

[Da24a-25a, 10T4-1/4]

Sigmon drove through a red light in an area free of any traffic in a rush to get home (7T12-18/14-2, 38-9/40-7, 80-16/22[4])—a reasonable explanation completely divorced from the consumption of alcohol and contrary to the finding of the Hon. David M. Fritch, J.S.C., that "this Court does not believe there is another reasonable explanation for Defendant's driving behavior on the evening of the offense other than that he had consumed alcohol to a point where his driving would be impaired." Da18a-Da19a. The State's emphasis on this finding is misplaced. *See* Sb8.

Observational evidence is similarly ambiguous. The odor of an alcoholic beverage and admission to having two drinks establish legal activity—*i.e.*, it is simply not an offense to drink and drive. This Court can objectively assess *de novo* subjective observations of Sigmon's speech, stance, and gait recorded on video (*State v. S.S.*, 229 *N.J.* 360, 379 (2017))—observations even the arresting officer believed did not establish probable cause to arrest Sigmon for DWI (7T44-10/47-2). Reliance on one-leg-stand and walk-and-turn tests, while supportive of

[4] Transcripts are cited to by page and line as suggested in *R.* 2:6-8—*e.g.*, page 12, line 18, to page 14, line 2, of the August 3, 2023, transcript is cited as "7T12-18/14-2.

probable cause to arrest, does not constitute proof of intoxication in this case based on (a) the stated purpose of such standardized field sobriety tests ["SFSTs"] to only support an arrest decision due to its conceded imprecision (*see* authorities cited at Db25-26) and (b) *de novo* review of video (*Ibid.*).

Just as "there are palpable risks of confirmation bias when a DRE [drug recognition expert] officer administers the protocol, particularly in the more subjective aspects of the examination, such as the SFSTs and the eye tests," *State v. Olenowski*, 255 *N.J.* 529, 608 (2023), so, too, is there a danger of confirmation bias with allegations of alcohol impairment. Without any objective evidence of a substance that would cause intoxication, the evidence fails to establish that Sigmon was under the influence of either alcohol or drugs. *See id.* at 548.

CONCLUSION

For the reasons expressed herein and in his precious brief, Defendant Gerald E. Sigmon, Jr., asks this Court to either find him *not guilty* of DWI or dismiss his case because his right to a speedy trial was violated.

Respectfully,

/s/ *John Menzel*

John Menzel, J.D.

CERTIFICAITON RE CONFIDENTIAL INFORMATION

1. I am an attorney at law admitted to practice in New Jersey. I make this certification as part of the submission of *Defendant's Reply Letter Brief* submitted presently.

2. I have reviewed *Rules* 1:38-3, 1:38-5, and 1:38-7 and certify that this document or pleading does not contain any confidential information or any confidential personal identifiers.

3. I understand that if any confidential information is discovered in this submission and brought to the court's attention, the court will return the document or pleading to me, and I will be responsible to redact or anonymize the confidential information before resubmission. I understand the court may impose sanctions, including suppression of the brief, dismissal in extraordinary cases, and other measures for a failure to accurately make this certification or for the discovery of confidential information in a document that has been filed.

4. I understand that the presence of confidential information or confidential personal identifiers in a document that has been posted on the Judiciary's public website will be grounds for the removal of such online posting, pending correction by the filing party, on an expedited timeline. The court in its discretion may postpone further proceedings pending the resubmission of the document.

5. The foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ *John Menzel*

John Menzel, J.D.