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STATE OF NEW JERSEY, Plaintiff/Respondent, vs. EDWIN R. RODRIGUEZ, Defendant/Appellant	:	SUPERIOR COURT OF NEW JERSEY LAW DIV.: MIDDLESEX COUNTY MUNICIPAL APPEAL NO: 39-2014 Civil Action

BRIEF ON BEHALF OF DEFENDANT/APPELLANT, EDWIN R. RODRIGUEZ

On the Brief:

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Statement of Facts

On September 5, 2013, at approximately 7:30 p.m., Officer Davis Salazar ("Salazar") responded to the area of State Street and Dillon Lane in the city of Perth Amboy to investigate a complaint involving mini motorcycles riding on the road. (1T 7:5-24). Upon his arrival, Salazar approached the defendant, Edwin Rodriguez ("Rodriguez"), who was on the sidewalk directly in front of his residence, located at 188 State Street. (1T 7:3; 1T 8:16-18) The residence is owned by Rodriguez's father. Rodriguez lives on the second floor with his family and his father rents out the first floor unit to another family.

Salazar approached Rodriguez and demanded his identification, "cause Rodriguez was acting a little squirrely for – for me." (1T 9: 20-22). Rodriguez declined and walked onto his front porch. (1T 9:17-10:15). Salazar followed Rodriguez onto his porch. Rodriguez opened the door and entered the house. Salazar was directly behind him. (1T 10:19-25). When he saw that Salazar had followed him, Rodriguez asked Salazar to wait outside while he retrieved his I.D. from inside the house (1T 11:1-3; 1T 27:24-25). Rather than do so, Salazar stuck his right foot inside the threshold of the home to prevent the door from closing (1T 12:20-25).

From inside of the house, Rodriguez asked Salazar to move his foot several times so that the door could be closed. (D-1). Salazar refused to move his foot preventing Rodriguez from closing the door, which Rodriguez was attempting to do with his left hand (1T 13:17; D-1). Salazar told Rodriguez he would wait there with the door open until Rodriguez retrieved his I.D. (1T 13:17). By this point, Rodriguez's father, mother and nephew had come into the upstairs hallway and witnessed the events that followed.

(1T 30:1-5; 1T 42:14-17). Orlando Gomez, the first floor resident also came into the hallway and witnessed the events.

Due to the actions of Salazar, Rodriguez removed his cell phone from his right pocket and began to record what was taking place holding the phone in his right hand. (1T 13:8-13) (Orlando Gomez similarly recorded the events with his cell phone). When Salazar continually refused to remove his foot, Rodriguez stated that he was not getting his I.D. He then walked in front of Salazar, his left hand and arm facing Salazar and began to walk up the stairs in the house. (1T 32:20-33:5).

Immediately, Salazar entered the home. As Rodriguez was walking away from Salazar up the stairs, Salazar "grabbed the suspect by the right wrist and ferociously took him down on the ground", pinning him to the floor at the base of the stairwell. (1T 37:1-20; 39:6-8). Rodriguez had severely injured his right wrist, arm and shoulder as a result of Salazar's "ferocious" take down. (1T 39:11-23). At the small landing at the base of the stairs lay Rodriguez on his stomach with his arms underneath his body; Salazar was on top of Rodriguez. (1T 39:6-8). Salazar claims that Rodriguez was resisting arrest by knowingly and purposefully keeping his arms underneath his body as Salazar attempted to handcuff him. (1T 41:5-42:9). However, due to his injuries[1] and the position that Rodriguez was in, with Salazar on top of him, Rodriguez was unable to move his arms from underneath his body. (1T 40:3-23). As a result, Salazar sprayed Rodriguez in the face with OC Spray and dragged Rodriguez by his ankles from inside of his home onto his front porch and completed the arrest. (1T 41:22-23). Salazar then forcefully ripped Rodriguez's arms out from underneath his body. (1T 41:10-42:9).

[1] Rodriguez was taken by Perth Amboy EMS to the hospital where he was diagnosed with a broken right clavicle. (1T 40:3-23).

Salazar noted in his report that as Rodriguez turned to walk up the stairs, he "advised the individual that he was now under arrest for Disorderly Conduct, at which point I observed while the individual was turning up the steps that he had a large kitchen knife cupped in his left hand against his forearm."[2] Remarkably, while following Defendant from the sidewalk, up his porch and into his residence and never losing sight of him (1T 30:11-12) this knife was never once observed until *after* Rodriguez was advised he was under arrest. In addition, this knife miraculously appeared in Rodriguez's left hand within seconds after Rodriguez is seen closing the front door in D-1 with his left hand. (D-1). Moreover, Salazar grabbed Rodriguez by his right wrist, thereby leaving the alleged knife exposed in Rodriguez's left hand. (1T 37:25 – 38:5). By Salazar's own testimony, the knife was not initially recovered but instead it lay on the steps in the close vicinity of the people that caused him to fear for his safety in the first place. Even with two other officers present, the knife was allegedly left there until Salazar re-entered the home after Rodriguez was placed in the police vehicle. (1T 42:13 – 44:12; D-1).[3]

Salazar's Testimony

Salazar's testimony was inaccurate and not credible. He fabricated a police report written sixteen days after the alleged offenses took place. (See ¶ 33 of the Certification of Brian S. Schiller). He is not familiar with search and seizure law, nor is he familiar with the offenses for which Rodriguez was charged, specifically Obstruction and Disorderly Conduct. He found himself in a situation where he unlawfully entered

[2] This knife (S-1) that Salazar claims Rodriguez had cupped in his left hand has a handle plus a six inch blade. The handle itself is at least three to four inches. It is clear from D-1 that Rodriguez was not holding a knife.

[3] Coincidentally, Salazar makes no mention of recovering a knife in his report. He also initially testified that he did not go back in and recover the knife – it was not included in his timeline of events until defense counsel specifically asked when he actually recovered the knife from inside. (1T 42:13 - 44:12). Furthermore, he never testified to telling the Defendant "Drop the Knife" or any equivalent phrase with respect to a knife." These statements are also not heard anywhere on D-1.

Rodriguez's home and viciously assaulted him, and subsequently covered his actions up by charging Rodriguez with possession of a knife. The video taken by Rodriguez completely contradicts much of Salazar's testimony. Most importantly, the video shows Rodriguez's left hand several times and within seconds of Salazar's claim that he saw a knife cupped in his left hand against Rodriguez's forearm. (D-1; 1T 34:1-7).[4]

With respect to S-1, the dull kitchen knife[5] that Salazar claims was the reason he entered the home and arrested Rodriguez, Salazar never testified about how or when he recovered the knife during direction examination. In addition, on cross-examination, he testified step by step of the sequence of events that took place from when he took Rodriguez down through the time when he left the scene – interestingly, there was, again, NO MENTION of recovering a knife on the steps. (1T 42:10 - 44:12). Further, he offered extremely questionable and implausible reasoning for taking Rodriguez down in the manner he did. Salazar testified that although Rodriguez had a kitchen knife with a six inch blade in his left hand, he grabbed Rodriguez by his right wrist. (1T 38:2-5). By grabbing Rodriguez by his right wrist, Salazar had not done anything to neutralize the knife. Further, in D-1, Salazar does make any mention of a knife, i.e. "Drop the Knife" or "Where is the Knife." (D-1; 1T).[6] In addition, Salazar claimed he felt threatened by the individuals in the hallway (1T 36: 15-16), however, he apparently left this knife on the steps in the home within feet of the individuals that he felt threatened by while he handcuffed Rodriguez outside. (1T 42:10 – 44:12).

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[4] Please see Exhibit "B" to this brief which provides three still photographs taken from D-1 at 11, 24, and 32 seconds. Aside from these still photographs, Rodriguez's left hand can be seen several additional times throughout the video and is seen opening and closing the door.

[5] Salazar testified that the knife can be used as a screwdriver for the remote control car (1T 84-85).

[6] Salazar didn't testify to any such comments.

Moreover, there were numerous other facts that Salazar testified to which were contradicted by D-1. He testified that he never lost sight of the Defendant. (1T 30: 6-23).[7] He testified that the front door was not opening and closing. (1T 31: 1-20). He also testified that he observed someone hand Rodriguez a cell phone (1T 12:15-18; 1T 30:6-8). Salazar testified that the Rodriguez placed his crate and remote control car on the front porch before entering the home. (1T 26:15 – 27:9). Further, Salazar testified that Rodriguez told him to "wait right here" in the context that Rodriguez was permitting him to keep his foot in the threshold. (1T 27:24). Salazar also testified that he was "one against six or seven" civilians. (1T 39: 24)[8] **All of this testimony is simply not supported by the video taken by Rodriguez.** (D-1). During a portion of the trial in which the Judge and Prosecutor asked Salazar questions regarding D-1, Salazar testified that he "reviewed the video but that its not complete." (1T 50:1-4). However, he offered little to no plausible explanation as to why the video was not accurate. **(1T 50: 5-19).**

Finally, it is clear that Salazar lacks requisite knowledge of N.J.S.A. 2C necessary to perform his duties properly as was seen in this case. He testified several times that Rodriguez was committing the offense of obstruction because he was not giving him identification. (1T 29:3-6).[9] He also testified that Rodriguez was guilty of disorderly conduct by refusing to hand Salazar his identification (1T 31:21-24) and that he was being disorderly because he was "refusing to obey a lawful order, which was I needed his

[7] If Salazar never lost sight of Rodriguez, where and when did the knife come from and when did it come into play?

[8] This part of Salazar's testimony is directly contradicted by D-2. D-2 was a video taken by someone in the house and was not allowed to be used by Judge Herman.

[9] Please refer to Section VI for a discussion on why Rodriguez is not guilty of obstruction.

ID." (1T 32:8-10). He further substantiates his lack of knowledge when he testified that he was going to arrest Rodriguez before he saw the knife. (1T 34:16-17).[10]

Charges and Disposition

Rodriguez was charged with Disorderly Conduct contrary to *N.J.S.A.* 2C:33-2(a) (count one); Obstruction contrary to *N.J.S.A.* 2C:29-1(a) (count 2); Resisting Arrest contrary to *N.J.S.A.* 2C:29-2 (count three); and, Unlawful Possession of a Weapon, in violation of *N.J.S.A.* 2C:39-5(d) (count four). Count four was later downgraded to the disorderly persons offense of *N.J.S.A.* 2C:33-2(A)(2).

Judge Herman ultimately found Rodriguez guilty of Disorderly Conduct pursuant to *N.J.S.A.* 2C:33-2(a) (count one) and *N.J.S.A.* 2C:33-2(b) (revised count four). Defendant was found not guilty of Obstruction contrary to *N.J.S.A.* 2C:29-1(a) and not guilty of count three, Resisting Arrest contrary to *N.J.S.A.* 2C:29-2 (count three). This appeal of that judgment was timely filed on June 5, 2014.

Procedural History

Please refer to the Certification of Brian S. Schiller, Esq. for the Procedural History.

Legal Argument

STANDARD OF REVIEW

Defendant seeks a *de novo* review in the Law Division, which "provides a reviewing court with the opportunity to consider the matter anew, afresh [and] for a second time." In re Phillips, 117 N.J. 567, 578 (1990); State v. Kashi, 180 N.J. 45, 48 (2004). The court conducting a *de novo* review must give due, but "not necessarily

[10] Please refer to the arguments set forth in Section I with regard to the illegal arrest made by Salazar.

controlling, regard to the opportunity of the [municipal court] to judge the credibility of the witnesses." State v. Johnson, 42 N.J. 146, 157 (1964).

POINT I

ALL CHARGES AGAINST DEFENDANT SHOULD BE DISMISSED DUE TO A VIOLATION OF THE DEFENDANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS

(A) Salazar illegally seized Rodriguez pursuant to an illegal investigative detention.

Not all police-citizen encounters constitute searches or seizures for purposes of the warrant requirement. State v. Rodriguez, 172 N.J. 117 (2002). One such encounter, a field inquiry, is a limited form of police investigation that, except for impermissible reasons such as race, may be conducted "without grounds for suspicion." Ibid. In general terms, a police officer properly initiates a field inquiry by approaching an individual on the street, or in another public place, and " 'by asking him if he is willing to answer some questions[.]' " State v. Davis, 104 N.J. 490, 497, 517 *A.*2d 859 (1986) (citations omitted).

A field inquiry is not considered a seizure "in the constitutional sense so long as the officer does not deny the individual the right to move." State v. Sheffield, 62 N.J. 441, 447, 303 *A.*2d 68 (1973). The officer's demeanor is relevant to the analysis. Davis, supra, 104 *N.J.* at 497, 517 *A.*2d 859. For example, "an officer would not be deemed to have seized another if his questions were put in a conversational manner, if he did not make demands or issue orders, and if his questions were not overbearing or harassing in nature." *Id.* at 497 n. 6, 517 *A.*2d 859 (citing Lafave, 3 *Search and Seizure,* § 9.2 at 53–54 (1978)). Neither the officer's subjective intent, Maryland, supra, 167 N.J. at 483, 771 *A.*2d 1220, nor the subjective belief of the citizen, State v. Tucker, 136 N.J. 158, 165–66, 642 *A.*2d 401 (1994), determines whether a seizure has occurred. An encounter becomes

more than a mere field inquiry when an objectively reasonable person feels that his or her right to move has been restricted. Davis, supra, 104 N.J. at 498, 517 *A.*2d 859.

An investigatory stop (sometimes called a *Terry* stop or investigative detention) is considered more intrusive than a field inquiry and, therefore, a different analysis applies when evaluating that form of police conduct. *Maryland, supra,* 167 *N.J.* at 486, 771 *A.*2d 1220. An officer does not need a warrant to make such a stop if it is based on "specific and articulable facts which, taken together with rational inferences from those facts," give rise to a reasonable suspicion of criminal activity. *Terry v. Ohio,* 392 *U.S.* 1, 21, 88 *S.Ct.* 1868, 1880, 20 *L.Ed.*2d 889, 906 (1968). The "[r]easonable suspicion necessary to justify an investigatory stop is a lower standard than the probable cause necessary to sustain an arrest." *State v. Stovall,* 170 *N.J.* 346, 356, 788 *A.*2d 746 (2002).

In determining the lawfulness of an investigative stop, we have explained:

> An investigatory stop is valid only if the officer has a "particularized suspicion" based upon an objective observation that the person stopped has been or is about to engage in criminal wrongdoing. The "articulable reasons" or "particularized suspicion" of criminal activity must be based upon the law enforcement officer's assessment of the totality of circumstances with which he is faced. Such observations are those that, in view of [the] officer's experience and knowledge, taken together with rational inferences drawn from those facts, reasonabl[y] warrant the limited intrusion upon the individual's freedom.
>
> [Davis, supra, 104 N.J. at 504, 517 *A.*2d 859.]

The fact remains, however, that classification of a particular encounter, for constitutional purposes, necessitates "careful examination of the facts in each case, to determine, and balance, the seriousness of the criminal activity under investigation, the degree of police intrusion, and the extent of the citizen's consent, if any, to that intrusion." *Rodriguez, supra,* 336 *N.J.Super.* at 559, 765 *A.*2d 770 (quoting *State v. Maryland,* 327 *N.J.Super.* 436, 449, 743 *A.*2d 876 (App.Div.2000), *rev'd on other grounds,* 167 *N.J.* 471, 771 *A.*2d 1220 (2001)). *See also Alexander, supra,* 191 *N.J.Super.*

at 576–77, 468 *A*.2d 713. State v. Sirianni, 347 N.J. Super. 382, 389-90, 790 A.2d 206, 211 (N.J. Super. Ct. App. Div. 2002)

In accordance with the testimony of Salazar and the above cited case law, Salazar initiated his contact with Rodriguez pursuant to a valid field inquiry. However, that field inquiry quickly converted into an illegal seizure once he made a demand to see Rodriguez's ID.[11] Salazar converted this field inquiry into an investigative detention once he made these harassing demands as seen in D-1 and restricted Rodriguez's ability to move, as he was confined to his home. In order to perform a legal investigative detention, an officer does not need a warrant to make such a stop if based on specific and articulable facts, taken together with rational inferences from those facts, give rise to a reasonable suspicion of criminal activity. Terry at 21.

The Supreme Court in Davis held that an officer must have a particularized suspicion that the person has been or is about to be engaged in criminal wrongdoing. Davis at 504. In this case, Salazar was specifically asked whether he had seen Rodriguez commit any criminal offenses at the point that he had entered the house. (1T 28:14 – 29:8). Salazar avoided answering the question and instead stated that Rodriguez was obstructing by not identifying himself. (1T 29: 3-8). Since failing to identify oneself to an officer is not obstruction, Rodriguez had not committed any criminal offenses while in the presence of Salazar.[12] Further, Salazar cannot claim that he had some particularized suspicion that Rodriguez had engaged in criminal wrongdoing prior to his arrival, as he

[11] In a field inquiry, individuals are permitted to decline speaking to police officers, as Rodriguez did here. State v. Rodriguez, 172 N.J. 117 (2002).
[12] Please refer to Section __ which addresses the law surrounding obstruction, N.J.S.A. 2C:29-1(a).

responded to a report of mini-motorcycles riding in the street – a nuissance. Again, there was no mention or suspicion of criminal activity.

Finally, the court must consider the totality of the circumstances including the seriousness of the criminal activity under investigation, the degree of police intrusion, and the extent of the citizen's consent, if any, to that intrusion. There were no crimes being investigated and Salazar eventually entered Rodriguez's home without permission. Therefore, pursuant to Davis and Terry, Salazar was not permitted under the case law to conduct an investigative detention. In this situation, an objectively reasonable person would feel as though there freedom to leave was restricted. As such, Rodriguez was illegally seized and all evidence against him should be suppressed.

(B) Rodriguez Was Illegally Seized in His Home

It is generally recognized that the home must be given the highest degree of protection. "A person's home holds a favored position in the list of those areas which are protected from unreasonable searches and seizures. Different considerations apply to movable property such as boats and motor vehicles. The high degree of judicial sanctity which the Courts have accorded to dwellings is based upon the concept of privacy and the right to be left alone." U.S. v. Davis, 423 F.2d 974, 977 (5th Cir.1970); *cert. den.*, 400 U.S. 836 (1971).

In Silverman v. United States, 365 U.S. 505 (1961), Justice Stewart wrote:

> "The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."

The Supreme Court reaffirmed the principle that only in extraordinary circumstances may a warrantless home arrest or search be justified. See Welsh v. Wisconsin, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984).

Justice Garibaldi, for our Supreme Court, echoed the same sentiment: 'The [United States] Supreme Court has consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment ... are to be regarded as of the very essence of constitutional liberty.... 'Historically, the Court has applied a more stringent standard of the Fourth Amendment to searches of a residential dwelling. Indeed, one of this country's most protected rights throughout history has been the sanctity and privacy of a person's home". State v. Bruzzese, 94 N.J. 210, 217 (1983) *cert. denied* 465 U.S. 1030 (1984). Accordingly, a search and seizure of a citizen's home without a search warrant is presumptively unreasonable. Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).

The sanctity of the home was recently reaffirmed in State v. Johnson, 193 N.J. 528 (2008):

> Law enforcement officers must be particularly careful to observe the dictates of the warrant requirement before undertaking a search or seizure within a home. As the United States Supreme Court observed in Welsh, supra:
>
> "The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." Id., at 556.

Pursuant to the testimony presented at trial, Rodriguez was illegally seized in his home without a warrant.

(C) No Exigency Existed

In State v. Walker, 213 N.J. 281 (2013), the Supreme Court elaborated what will allow a law enforcement officer to enter an individual's home to make an arrest:

> The warrant requirement is strictly applied to physical entry into the home because the primary goal of the Fourth Amendment and Article I, Paragraph 7 of the state constitution is to protect individuals from unreasonable home

> intrusions. **This is so because home intrusions are the 'chief evil' against which constitutional provisions were directed. Accordingly a warrantless arrest in an individual's home is 'presumptively unreasonable.'** Nonetheless, we have adopted the principle that exigent circumstances in conjunction with probable cause may excuse police from compliance with the warrant requirement. Therefore, warrantless home arrests are prohibited absent probable cause and exigent circumstances." Walker at 289. (Emphasis Added).

As such, either the combination of probable cause and a warrant are necessary to enter one's home and make an arrest, or probable cause and exigent circumstances. In the instant case, a warrant was not obtained, so the focus will be on probable cause and exigent circumstances. Exigent circumstances include the need to apprehend and subdue an armed felon who enters a residence when under hot pursuit, or when a felon flees law enforcement, or when there is potential for the destruction of evidence. State v. Hutchins, 116 N.J. 457 (1989). The gravity of the underlying offense for which the arrest is being made is an important factor that must be considered when determining whether exigency exists. Welsh at 753.

In State v. Bolte, 115 N.J. 579, 597 (1989), the defendant sped away from officers who attempted to perform a motor vehicle stop. After a considerable chase, he drove to his house, parked his car, and ran inside. Officers followed him inside his home and arrested him. The Supreme Court held that the arrest was unlawful, holding that **"disorderly persons offenses...are within the category of minor offenses held by the Welsh Court to be insufficient to establish exigent circumstances justifying a warrantless home entry."** (Emphasis Added).

In the instant case, Rodriguez had walked inside his home and was attempting to close his door politely; however, Salazar prevented the door from closing because he had stepped inside the home and was holding to door open with his foot. (D-1). Even after several requests to move his foot so Rodriguez could close the door, Salazar refused. At

that point, Rodriguez turned around and began to walk up the stairs away from Salazar in his own home. It was at this time that Salazar testified that he advised Rodriguez that he was under arrest for Disorderly Conduct, and he entered the house further to effectuate that arrest. Salazar also testified that he was going to arrest the Rodriguez before he allegedly saw the knife. (1T 34:16-17). This entry without a warrant is entirely inexcusable and unjustified, and requires this court to find that Rodriguez's Constitutional Rights were violated resulting in a dismissal of all charges.

Without a warrant or exigent circumstances, Salazar had no right to enter Rodriguez's home. Even if the court was to take Salazar at his word that Rodriguez had committed the disorderly persons offense of Disorderly Conduct (which the defense disputes due to D-1 and Salazar's conflicting testimony), Salazar needed exigent circumstances to enter the home without a warrant. These exigent circumstances cannot be "police-created." See Hutchins, supra, 116 N.J. 457 (1989). Pursuant to the lack of exigent circumstances and the multitude of case law cited above, Salazar violated Rodriguez's Federal (Fourth Amendment to the U.S. Constitution) and State (Article I, Paragraph 7) Constitutional rights by entering his home.

Even assuming, arguendo, that Rodriguez actually possessed a knife (which the defense disputes and as is clearly shown in D-1), Salazar's actions do not apply under the exigent circumstances exception, as Rodriguez was **walking away from the officer** in his home. Our Supreme Court emphasized the heavy burden that must be overcome to justify a warrantless entry into a home and has set forth a limited number of situations that have been categorized as exigent circumstances sufficient to overcome the warrant requirement. State v. Hutchins, 116 N.J. 457 (1989). Among them are the hot pursuit of

a fleeing armed felon, the avoidance of serious injury to police officers or others, and the potential destruction of evidence. Id. at 463. The burden rests on the State to show the existence of an exceptional situation. Id. at 463.

The State failed to carry its burden with respect to the existence of an exceptional situation. Rodriguez was not a fleeing armed felon. By Salazar's own admission and testimony, Rodriguez did not pose any threat of serious injury to any police officer or others as Salazar testified that Rodriguez was walking away from Salazar (1T 13:21-23; 1T 32:20-33:5; 1T 33:2-25; 1T 36:23 - 37:2) As such, Salazar was not in a position where his actions can be justified as his attempt to avoid serious injury as Rodriguez clearly posed no threat of same. Lastly, there was no risk for the potential destruction of evidence. Therefore, this encounter did not involve any exigent circumstances justifying Salazar's warrantless entry and seizure of Rodriguez in his home.

(D) Salazar Was Not Privileged to Enter the Residence

Further, although at trial Salazar testified that this home is a multi-family home, with the area in which the incident took place constituting a common area, the State in no way proved that anyone other than the residents were permitted to enter the home. The officer's "proofs" were the presence of internal doors and several people. Several of these "people" were family members of Rodriguez, including his mother, nephew and father. In fact, during his testimony Salazar stated that it was Rodriguez's father who eventually retrieved his I.D. from his room upstairs. This was a home, and Rodriguez was subjected to unlawful entry and brutality in front of his family. Without any evidence or even the faintest question to Salazar regarding familiarity with the area itself, any findings regarding the home should be disregarded by this court.

The argument that Salazar's invasion of Rodriguez's home was somehow justified because it was a multi-family home **is also not supported by case law.**[13][14] In State v. Jefferson, 413 N.J. Super. 344 (App. Div. 2010), the Appellate Division held that under factually similar circumstances the police had no right to enter a multi-family home as the **common hallway of the multi-family house was not open to the public and police were not privileged to enter the hallway.**[15] Further the court held that after an officer wedged herself into the defendant's front door, the subsequent entry and arrest of the defendant under suspicion he was armed violated his Fourth Amendment rights. Id. at 348. In Jefferson the police received an anonymous complaint from a "concerned citizen" about drug dealing, arguments, and a possible gunshot originating from a block in the City of Plainfield. Id. at 349-50. The citizen identified a car, and gave a description of an individual to police. Id. at 350. When the police arrived on the scene, they found the car, and approached the multi-family home. Ibid. One of the officers saw the defendant, and while his shoulders and head were visible, he assured them he was not armed. The officer then wedged herself into the door to prevent defendant from closing it. Id. at 350-51. After defendant attempted to close the door, the officers, claiming that they were looking for a weapon, forced open the door and violently subdued the defendant under the pretense that he had assaulted the officer by struggling with her in his attempts to close the door. Ibid.

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[13] Defendant requests that this court take judicial notice pursuant to N.J.R.E. 201(b) that the photograph in Exhibit "A" to this brief is a accurate depiction of 188 State Street, Perth Amboy, New Jersey. Judicial Notice in this instance is necessary because of the repeated untruthfulness by Salazar while testifying under oath. Salazar eventually described 188 State Street as a building. (1T 23: 18). It clearly shows that 188 State Street is a home with a front door with two separate locks. (D-1 also shows the presence of locks).

[14] D-1 further substantiates this fact.

[15] Jefferson held that the defendant's possible willingness to speak to the police from inside his house did not translate into permission for them to enter. Jefferson at 354. Rodriguez's words and actions clearly indicate that Salazar did not obtain the consent of Rodriguez to enter his home.

Judge Ashrafi, writing for the Appellate Division, found that the officers had no right to enter the home, and that their doing so, even if they had probable cause for a Terry stop, was not enough to justify their violation of defendant's Fourth Amendment rights. Id. at 353. Judge Ashrafi held that this invasion still required a warrant. Id. at 354.[16] "If the police need a warrant or a recognized exception to enter a home to make an arrest, clearly they may not enter a home to effect a warrantless Terry-type detention."[17] Pursuant to Jefferson, the State failed to meet its burden to show that Salazar legally entered Rodriguez's home without a warrant.

(E) This Warrantless Entry Cannot Be Justified Pursuant to Plain View Doctrine

Judge Herman's finding that Salazar saw the knife in plain view (1T 123:1-2) is also **not supported by the case law** as Salazar was not lawfully in the viewing area. Pursuant to State v. Bruzzese, 94 N.J. 210, 237 (1983), one of the elements of plain view is that police officers must lawfully be in the viewing area. In State v. Lewis, 116 N.J. 477, 485-86 (1989), an officer stuck his foot in the door keeping it partially open as the defendant attempted to close the door, where he observed illegal contraband. The Supreme Court in Lewis held that the officer's actions were unlawful and affirmed the Appellate Division's findings in which the State failed to justify the warrantless entry into a home. The Lewis court further held that "proper application of the plain view doctrine...requires not only the preexistence of probable cause by also that the officer's access to an object have some prior justification under the Fourth Amendment." The Lewis court held that the officer's observations of narcotics on the kitchen table of the

[16] The court in Jefferson found that the conduct of the police infringed upon the firm line at the entrance to the house when applying the protections of the Fourth Amendment. Jefferson at 355.
[17] "We have repeatedly held that an intrusion into someone's home may not be premised on Terry's reasonable suspicion standard." Jefferson at 355.

apartment after the officer used his foot to stop the defendant from closing the door was not alone sufficient to support warrantless entry and seizure of items under plain view doctrine. Id. at 485. When applying the holdings in Lewis to the instant case, it is clear that Salazar was not lawfully in the viewing area for the plain view exception to apply.[18] Lastly, the Appellate Division in State v. Berlow, 284 N.J. Super. 356, 363 (App. Div. 1995), held that:

> "When ... the officer has no right to enter [a home] because it is only in certain carefully defined circumstances that lack of a warrant is excused, an occupant can act on that presumption and refuse admission. He need not try to ascertain whether, in a particular case, the absence of a warrant is excused. He is not required to surrender his Fourth Amendment protection on the say so of the officer. The Amendment gives him a Constitutional right to refuse to consent to entry. His asserting is cannot be a crime."

Rodriguez attempted to assert his Constitutional rights. Any arguments set forth by the State that Obstruction or Disorderly Conduct allowed Salazar to enter Rodriguez's home and effectuate a warrantless arrest cannot prevail. In State v. Bolte, 115 N.J. 579, 597 (1989), the defendant sped away from officers who attempted to perform a motor vehicle stop. After a considerable chase, he drove to his house, parked his car, and ran inside. Officers followed him inside his home and arrested him. The Supreme Court held that the arrest was unlawful, holding that "**disorderly persons offenses...are within the category of minor offenses held by the Welsh Court to be insufficient to establish exigent circumstances justifying a warrantless home entry.**" (Emphasis Added).

In conclusion, Salazar violated Rodriguez's rights, which precludes any conviction for offenses Rodriguez was charged with thereafter.

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[18] Again, the defense asserts that Rodriguez never possessed the knife on his person which is clearly shown on D-1. Rodriguez's left hand is seen in D-1 at 5, 10, 24, and 32 seconds. Further it becomes clear that Rodriguez is using his left hand to open and close the door while speaking with Salazar and holding the cell phone in his right hand.

POINT II

DEFENDANT WAS DENIED HIS 6TH AMENDMENT RIGHT TO CONFRONTATION OF THE STATE'S SOLE WITNESS REQUIRING REVERSAL

The Sixth Amendment "commands, not that evidence be reliable, but that reliability be assessed in a particular manner; by testing in the crucible of cross examination. Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." Crawford v. Washington, 541 U.S. 36, 61-62 (2004).

"The right to confront and cross-examine accusing witnesses is 'among the minimum essentials of a fair trial.' " State v. Budis, 125 N.J. 519, 531, 593 A.2d 784 (1991) (quoting Chambers v. Mississippi, 410 U.S. 284, 294-95, 93 S.Ct. 1038, 1045, 35 *L.Ed.*2d 297, 308 (1973)). The cross-examination of a witness is "directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 *L. Ed.*2d 347, 354 (1974). Thus, it is during cross-examination that the credibility of a witness may be impeached. N.J.R.E. 611(b); State v. Martini, 131 *N.J.* 176, 255, 619 A.2d 1208 (1993). In this light, cross-examination is the " 'greatest legal engine ever invented for the discovery of truth[.]' " California v. Green, 399 *U.S.* 149, 158, 90 *S.Ct.* 1930, 1935, 26 *L. Ed.*2d 489, 497 (1970) (quoting 5 Wigmore on Evidence § 1367; First Nat'l Bank of Freehold v. Viviani, 60 N.J.Super. 221, 225, 158 A.2d 704 (App.Div.1960)).

Trial courts are given broad discretion to determine the scope of cross-examination, State v. Siegler, 12 N.J. 520, 526-27, 97 A.2d 469 (1953), and the court may properly allow or limit areas of inquiry. State v. Silva, 131 N.J. 438, 444, 621 A.2d 17 (1993); Budis, supra, 125 N.J. at 532, 593 A.2d 784. "Considerable latitude is customarily allowed in the cross-examination of a witness." State v. Steele, 92 N.J.Super. 498, 503, 224 A.2d 132 (App.Div.1966). Permissible limitations on cross-examination testimony promote policies designed to avoid "unfairness to the witness, confusion of issues, and undue consumption of time." State v. Guenther, 181 N.J. 129, 140, 854 A.2d 308 (2004); N.J.R.E. 403.

The scope of our review is limited in that an appellate court will not interfere with the trial court's exercised discretion in circumscribing the scope of cross-examination " 'unless clear error and prejudice are shown' " State v. Wakefield, 190 N.J. 397, 452, 921 A.2d 954 (2007) (quoting State v. Murray, 240 N.J.Super. 378, 394, 573 A.2d 488 (App.Div.), certif. denied, 122 *N.J.* 334, 585 A.2d 350 (1990)). State v. Zaidi, A-1497-07T4, 2008 WL 4391629 (N.J. Super. Ct. App. Div. Sept. 30, 2008). In this matter, Judge Herman's limitations on the scope of cross-examination of Salazar was clear error and resulted in prejudice to Rodriguez.

(A) The Court committed harmful error by not allowing defense counsel to cross-examine Salazar with D-1 thus requiring reversal.

The court erred in refusing to allow either video to be used for purposes of impeachment. The failure of the court below to consider these videos, which completely

undermine the credibility of the State's sole witness[19], represents a critical, harmful legal error.

Harmful, as opposed to plain, error occurs when a particular error below was brought to the Courts attention, and that error is clearly capable of producing an unjust result. Rule 2:10-2. An error will be found harmless unless there is a reasonable doubt that the error contributed to the verdict. See State v. Macon, 57 N.J. 325, 337-38 (1971). In the case at bar, Rodriguez was denied his right to effectively cross-examine the sole witness against him pursuant to N.J.R.E. 607. Such a denial is capable of producing and did, in fact, produce an unjust result. As such, reversal is necessary to ensure Rodriguez receives a fair trial.

N.J.R.E. 607 states that, "for the purpose of impairing . . . the credibility of a witness, any party . . . may examine the witness and introduce extrinsic evidence relevant to the issue of credibility." N.J.R.E. 607. In the case at bar, the extrinsic evidence sought to be introduced for purposes of impeachment were two separate videos[20] taken of the events leading to the Defendant's arrest, each demonstrating that the State's sole witness upon whose credibility **the entire case is dependent,** had clearly fabricated his report and the facts surrounding the incident and was perjuring himself at the trial. By not allowing defense counsel to cross-examine Salazar with these videos, [21] Rodriguez was denied his constitutional right to confront the witness against him in a court of law using the best materials available to his defense.

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[19] Salazar testified on direct that "Someone came out of the residence downstairs, handed him a cell phone and he presented a phone in my face." (1T 12:16-18). He also testified that "I'm assuming he was recording the conversation." These statements go towards authentication of the videos.

[20] In addition to the videos, defense counsel was precluded from cross-examining Salazar with two still photographs taken from D-1.

[21] Defendant also contends that the municipal court judge committed harmful error by not allowing defense counsel to show the State's witness still photographs from the videos. (1T 77-78).

By limiting cross-examination, Judge Herman severely prejudiced Rodriguez and violated his right to confront the State sole witness against him. As such, Rodriguez was denied his due process right to a fair trial. For these reasons, reversal is necessary.

(B) The Court's limiting of Cross Examination resulted in Depriving Rodriguez of Effective Assistance of Counsel.

Further, the court's decision to limit cross-examination had the effect of depriving Rodriguez of effective assistance of counsel. By stopping counsel from effectively cross-examining the State's sole witness, the court effectively satisfied the two-part test set forth in Strickland v. Washington, 466 U.S. 668, 687-96 (1984), and adopted by the New Jersey Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). See Preciose, supra, 129 N.J. at 463.

By not allowing counsel to effectively use any extrinsic evidence to impeach the credibility of Salazar, the court created a situation in which Rodriguez's "representation fell below an objective standard of reasonableness", satisfying the first prong of Strickland/Fritz. Strickland, supra, 466 U.S. at 687-88. Additionally, the second prong, that, "any deficiencies in counsel's performance must be prejudicial" to or have an adverse effect on the defense is also met. Strickland, supra, 466 U.S. at 692, 693. Under this analysis, "[i]t is not enough for defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Rather, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. The courts actions created a situation in which counsel was incapable of combating even the

most insufficient proofs of the state. Rodriguez was denied the right to counsel by the courts failure to allow for effective cross-examination of the state's proofs.

POINT III

JUDGE HERMAN COMMITTED STRUCTURAL ERROR WHEN HE ORDERED TO DEFENDANT TO LEAVE THE COURT DURING THE TRIAL; SUCH ERROR REQUIRES REVERSAL

The United States and New Jersey Constitutions guarantee a criminal defendant "the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10. Essential to that guarantee is the right of the accused to be present in the courtroom at every stage of the trial. Illinois v. Allen, 397 U.S. 337, 338, 90 S.Ct. 1057, 1058, 25 *L.Ed.*2d 353, 356 (1970) (citing Lewis v. United States, 146 *U.S.* 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892)); State v. Whaley, 168 N.J. 94, 99, 773 *A.*2d 61 (2001); Finklea, supra, 147 *N.J.* at 215, 686 *A.*2d 322; Hudson, supra, 119 *N.J.* at 171, 574 *A.*2d 434. That right is also protected by the due process clause of the Fourteenth Amendment "to the extent that a defendant's absence would hinder a fair and just hearing." Finklea, supra, 147 N.J. at 216, 686 *A.*2d 322.

Our system of justice functions best when the accused is present throughout trial. Defendants are able to communicate with counsel, participate in trial strategy, assist in presenting a defense, and aid with cross-examination. Finklea, supra, 147 N.J. at 216, 686 *A.*2d 322; Hudson, supra, 119 N.J. at 172, 574 *A.*2d 434. The right to be present encompasses the independent right defendants have to represent themselves, if they so choose. See Faretta v. California, 422 *U.S.* 806, 95 S.Ct. 2525, 45 *L.Ed.*2d 562 (1975); State v. Reddish, 181 N.J. 553, 859 *A.*2d 1173 (2004). Overall, a defendant's presence

promotes public confidence in our courts as instruments of justice, Hudson, supra, 119 N.J. at 172, 574 *A.*2d 434, and helps insure the integrity of a trial's outcome.

The right to be present at trial is not absolute. Otherwise, defendants could halt trials simply by absenting themselves. Diaz v. United States, 223 *U.S.* 442, 458, 32 S.Ct. 250, 255, 56 *L.Ed.* 500, 506 (1912). As a result, our rules provide that when a defendant explicitly or implicitly waives the right to be present, a trial may be held *in absentia.*

Rule 3:16(b) codifies this balancing of interests:

> The defendant shall be present at every stage of the trial, including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, unless otherwise provided by Rule. Nothing in this Rule, however, shall prevent a defendant from waiving the right to be present at trial. A waiver may be found either from (a) the defendant's express written or oral waiver placed on the record, or (b) the defendant's conduct evidencing a knowing, voluntary, and unjustified absence after (1) the defendant has received actual notice in court or has signed a written acknowledgment of the trial date, or (2) trial has commenced in defendant's presence.
>
> [R. 3:16(b).]

At the municipal trial in the instant matter, Judge Herman ordered the Defendant to leave the courtroom in order to conduct an *in camera* Rule 104 hearing. (1T 63: 3-10).[22] Rodriguez has the right to be present at every stage of his trial. This action, alone, is structural, reversible error pursuant to United States Constitution and the litany of above-referenced case-law.

POINT IV

JUDGE HERMAN ADMITTED AND RELIED UPON IMPROPER AND PREJUDICIAL HEARSAY TESTIMONY REQUIRING REVERAL.

During the trial, the following colloquy took place between Judge Herman and Salazar during his testimony:

Court: Officer, you testified earlier that you were dispatched to the scene?

[22] A lexis nexus search was performed to determine whether a 104 hearing can or should be done *in camera.* No results provided any guidance.

Salazar: Yes, you Honor.

Court: And you were dispatched by whom?

Salazar: Central Dispatch.

Court: And you were - - why were you dispatched to the scene?

Salazar: I was dispatched on the report of motorcycles racing up and down the street and someone with a remote control car essentially going in and out of traffic, which was causing a hazard.

(1T 87:2-13).[23]

In addition, on cross examination, the following colloquy took place between defense counsel and Salazar. An objection was made and the Court overruled the objection:

Mr. Schiller: Officer Salazar, I fact in your report, you write that you were dispatched to the area on a report of mini motorcycles sliding and swerving in and out. Correct?

Salazar: That's what I just stated before.

Mr. Schiller: But not a remote control car. Correct?

Salazar: I'd have to look at my report.

Mr. Schiller: Please.

Salazar: I was dispatched for that. And when the person flagged me down, they stated, "That's the individual right there."

Mr. Schiller: I'm going to object to that answer as hearsay.

Court: You just asked him the question and he answered it for you.[24]

Mr. Schiller: Well, I'll ask you to strike that part of the answer to that as hearsay.

Mr. Cassese: Judge, he asked the question. He got any answer. There's no jury here.

Mr. Schiller: Well then for your consideration, Judge, I would ask that you strike that part of his answer as hearsay.

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[23] Defense counsel properly objected to the hearsay testimony. (1T 88: 8-11).

[24] This was a misstatement of what actually occurred as I cleared asked Salazar whether he wrote that he was dispatched to the area because of mini motorcycles or a remote control car. At no point did I ask him what someone else said. (1T 88:13 -89:6).

> **Court:** Well, I'm going to allow it. You asked him the question; he answered the question.
>
> (1T 88:13 – 89:11)

Testimony regarding an officer's actions as a result of receiving a dispatch is completely acceptable according to our court rules and our Supreme Court. However, "when an officer becomes more specific by repeating what some other person told him concerning a crime by the accused," that testimony violates both the hearsay rule and the accused's Sixth Amendment right of confrontation. State v. Bankston, 63 N.J. 263, 268-69 (1973); see also State v. Frisby, 174 N.J. 583, 592 (2002); State v. Irving, 114 N.J. 427, 446-47 (1989); State v. Farthing, 331 N.J. Super. 58, 75 *certif. denied,* 165 N.J. 530 (2000). Particularly, in State v. Vandeweaghe, 177 N.J. 229 (2003), the court held while remanding to the lower court for retrial, that, although the State may elicit evidence that the police went to a certain place based upon information received, it may not introduce evidence that the reason for the dispatch. Vandeweaghe, supra, 177 N.J. at 241.

In Powell, the Appellate Division provided an explanation of the Supreme Court's reworking in State v. Branch, 182 N.J. 338 (2005), of the Bankston principle that confirms the interpretation of Branch. Specifically, in Powell, the Court stated:

> The State argues that Branch expressly acknowledges that it is a "well-established principle" that police may testify that they took particular actions based on "information received." Although the State is correct, a fair reading of Branch suggests that the Court essentially modified the "well-established principle" to create a three prong test which must be satisfied before police officers may testify that they took a particular action based upon "information received." Accordingly, in order to be admissible, such testimony: (1) must be "necessary to rebut a suggestion that they acted arbitrarily"; (2) must be limited to the phrase "based on information received"; and (3) cannot "create an inference that the defendant has been implicated in a crime by some unknown person." Id. at 352.

Pursuant to Branch, Bankston, and Powell, all testimony regarding Salazar's conversation with the alleged caller including all statements made by the caller while

speaking with Salazar. In order for that testimony to be admissible, such testimony must be necessary to rebut a suggestion that the police acted arbitrary, must be limited to the phrase "based on information received, and cannot create an inference that the defendant had been implicated in a crime by some unknown person. In this case, defense counsel made no suggestion of arbitrariness, the testimony was not limited to "based upon information received," and it created an inference that the defendant was implicated in a crime by an unknown person.

Objections were timely made to all hearsay evidence testified to by Salazar. Such testimony violates both N.J.R.E. 803 and Rodriguez's Sixth Amendment right of confrontation. Judge Herman improperly admitted and considered this prejudicial hearsay testimony. Furthermore, Judge Herman relied on and cited the improper Bankston testimony in his decision. (1T 115: 10-14; 1T 119: 15-19). This constitutes harmful error necessitating reversal.[25]

POINT V

DEFENDANT WAS DENIED HIS RIGHT TO A SPEEDY TRIAL, NECESSITATING DISMISSAL OF THE CHARGES AGAINST HIM.

The State violated Rodriguez's right to a speedy trial, guaranteed by the Sixth Amendment of the United States Constitution. The case was listed as try or dismiss for April 4, 2014. Despite this judicial promise, the case was again delayed inexplicably. Under the holding of State v. Perkins, 219 N.J. Super 121 (Law Div. 1987), the violation of such a judicial promise is grounds for dismissal of the complaint. Even if this court chooses not to follow this authority, despite its acceptance by both the Appellate Division

[25] In addition, admission of this testimony violates case law set forth in State ex rel. J.A., 195 N.J. 324 (2008).

(State v. Tsetsekas, 411 N.J. Super. 1, 10 (App. Div. 2009)), and our Supreme Court (State v. Cahill, 213 N.J. 253, 271 (2013)), under the speedy trial analysis of Barker and Cahill, dismissal is nonetheless necessary. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

In Perkins, just as in this case, the defendant was awaiting trial before a municipal court that had listed the defendant's case as try or dismiss following several delays. On the date of the trial, despite the preparedness of the defendant, the Municipal Court Judge nonetheless adjourned and re-scheduled the trial for a later date. On appeal to the Law Division, Judge Haines, A.J.S.C., stated that "[a] court's promise is sacrosanct . . . It is a promise which must be kept. The integrity of the judicial system demands no less." Perkins, supra, 219 N.J. Super. at 125. The court then dismissed the case.

Here, the same promise was made to Rodriguez and counsel on February 4, 2013, yet through no fault of the defendant, his trial was again delayed. Rodriguez was made a promise by the Judiciary of this State, a promise that was subsequently broken; reversal is not only warranted, but is necessary.

Further, in 1972, in Barker, the United States Supreme Court established a balancing test to evaluate claims of speedy trial violations. The Court identified four non-exclusive factors that a court should assess when a defendant asserts that the government denied his right to a speedy trial: (1) length of the delay, (2) reason for the delay, (3) assertion of the right by a defendant, and (4) prejudice to the defendant. Barker, supra, 407 U.S. at 530, 92 S.Ct. at 2192, 33 L.Ed.2d at 117. In 2013, our Supreme Court adopted the Barker test for purposes of municipal prosecutions in Cahill. Under any

accepted form of this analysis, Rodriguez is entitled to dismissal of the charges leveled against him.

An analysis of factor 1, the length of delay, is clearly supported by the case law. As stated above, our court has held lengths of time as short as three months, as held in Perkins, supra, can result in violation of the right to speedy trial and result in dismissal. Additionally, our courts have held delays of five to six months can also satisfy this first factor. Cahill, supra, 213 N.J. at 270-271; See State v. Berezansky, 386 N.J. Super. 84 (2006) (Five months); State v. Prickett, 240 N.J. Super. 139 (1990) (Six months). This case clearly falls within that timeline – from the time Rodriguez was charged through the trial was a span of over eight months. For this reason the court should find that the first element of the Barker analysis is met, and proceed to consideration of the remaining elements.

Factor 2, analysis of the reasons for the delay, also weighs heavily in Rodriguez's favor. Throughout the trial process the State, Perth Amboy's Police Department, and most significantly, the Municipal Judiciary, have frustrated the process with copious delays, ranging from Salazar's failure to appear on several occasions, to the defiance of subpoenas, to failures to provide discovery in a timely manner, and finally to inexplicable and arbitrary decisions to adjourn. (See Cert. of Brian Schiller, Esq.). At every turn the State has offered no excuse for its continued failure to abide by the Rules of this Court and the most basic of discovery obligations. For this reason, this court should find that the second Barker factor weighs heavily in favor of Rodriguez.

Factor 3, assertion of the right is also clearly met. As both of our Courts have stated, a defendant does not have an obligation to bring himself to trial. Barker, supra,

407 U.S. at 531-532, 92 S.Ct. at 2192-93, 33 L.Ed.2d at 117; Cahill, supra, 213 N.J. at 274. However, it is also true that the assertion of a defendant's right to a speedy trial is weighed heavily in the Barker analysis. Barker, supra, 407 U.S. at 531-532, 92 S.Ct. at 2192-93, 33 L.Ed.2d at 117; Cahill, supra, 213 N.J. at 274. Here, on multiple occasions and as early as December 12, 2013 and December 30, 2013, Rodriguez attempted to assert his right to a speedy trial, as is memorialized in letters attached as part of the certification in support of this brief. (See attached Certification, ¶ 10 and 14). The state failed to meet its obligation to prosecute and do so in a manner consistent with the defendant's right to a speedy trial, and this factor must be weighed heavily in favor of Rodriguez. See Cahill, supra, 213 N.J. at 274.

Factor 4, prejudice to the defendant, also weighs heavily in favor of Rodriguez, as interpreted by our court in Cahill. "Speedy trial provisions seek . . . to minimize the anxiety and attendant evils which are invariably visited upon one under public accusation but not tried." Hanrahan v. United States, 348 F.2d 363, 366-367 (D.C. Cir. 1965). "The defendant automatically endures 'restraints on his liberty' and lives 'under a cloud of anxiety, suspicion, and often hostility.' " Barker, supra, 407 U.S. at 533, 92 S.Ct. at 2193, 33 L.Ed.2d at 118). Here, in addition to the average anxiety any defendant would feel given the gravity of the charges, Rodriguez was also burdened by the knowledge that any new convictions would lead to a violation of his probation on unrelated charges. This burden was carried through no fault of his own, and due to the neglect of the State and the Municipal Judiciary. As such, this factor should be considered to be strongly in favor of the finding that the State violated Rodriguez's right to a speedy trial.

For reasons beyond his control, Rodriguez was subjected to undue personal harm, as well as prejudice at his trial. With each of these factors, as well as the Perkins case standing on its own, necessitating a finding that Rodriguez's Sixth Amendment rights were violated by the State and the Municipal Judiciary, it is incumbent upon this court to dismiss the charges against him.

POINT VI

DEFENDANT MUST BE FOUND NOT GUILTY OF ALL CHARGES

(1) Disorderly Conduct, N.J.S.A. 2C:33-2(a).

Rodriguez was charged with Disorderly Conduct, pursuant to N.J.S.A. 2C:33-2(a). The complaint reads:

> "Within the jurisdiction of this court, purposefully cause or recklessly create the risk of public inconvenience, annoyance or alarm, by engaging in tumultuous behavior, specifically by screaming and yelling at police officer during an investigative stop in violation of N.J.S. 2C:33-2A."

(a) Rodriguez did not engage in Tumultuous Behavior

In State v. Stampone, 341 N.J. Super. 247 (App. Div. 2001), the Appellate Division examined the language of the disorderly statute after the defendant had been convicted of disorderly conduct at trial. In Stampone, the defendant engaged in a verbal argument with a police officer after the officer approached the defendant in his vehicle and asked for identification. The defendant refused to give his last name to the officer and provide him with ID. The defendant cursed at the officer and slammed his car door in front of him, almost hitting the officer. After analyzing the facts of the case against the language contained in the statute, the Appellate Division reversed the defendant's conviction for disorderly conduct.

The court in Stampone was unable to find any case law which set forth the definition of tumultuous; however, it did hold that according to Webster's Third New International Dictionary, the definition of tumult speaks in terms of disorderly and violent movement, agitation or milling about of a crowd, usually with great uproar and confusion of voices, a noisy and turbulent popular uprising, a riot. Id. at 255. Based on this definition, the court found that the facts presented did not amount to tumultuous conduct as a matter of law. Further, the court held that the actions of the defendant and his testy exchange with the officer had no capacity to cause public inconvenience, public annoyance or alarm. Last, the court determined that there was no evidence that the defendant acted with purpose to cause such public reactions. Ibid.

The cell phone videos (D-1) taken on the night in question (one which was not even allowed to played by the court), which show the nature of the exchange, depict a stark contrast to Salazar's testimony and further show that Rodriguez is not guilty of disorderly conduct as he did not engage any behavior that could be even closely considered as tumultuous in nature.

(b) The State failed to meet its burden that the exchange between Rodriguez and occurred in a public place

N.J.S.A. 2C:33-2 defines public as:

> "means affecting or likely to affect persons in a place to which the **public or a substantial group has access**; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood."

In the instant case, the testimony showed that Rodriguez and Salazar engaged in a dispute inside of Rodriguez's home. The State failed to prove that Rodriguez acted with any purpose to cause public inconvenience, annoyance or alarm. Further, since this entire

exchange between Rodriguez and Salazar took place in Rodriguez's home, it cannot be considered public because the public or a substantial group does not have access inside. Further, the municipal court judge improperly found that the home was open to the public based upon observations of Salazar as to the number of doors and layout inside. Cases such as Jefferson and State v. Sanchez 2013 WL 6231171 (2013) have held that a court must take into consideration whether there were locks on the doors and whether the defendant's conduct translated into permission for the police to enter. Jefferson, supra, 413 N.J. Super. at 354.[26] D-1 shows that Salazar did not have permission to enter from Rodriguez as he repeatedly asked him to move. D-1 also shows that the door has a door knob and separate chain lock evidencing that the public was not free to access the home.[27] The State failed it meet its burden of proof with respect to whether this home was open to the public or that a substantial group had access. Therefore, Rodriguez must be found not guilty of this charge.

(2) Disorderly Conduct, N.J.S.A. 2C:33-2(a)(2).

N.J.S.A. 2C:33-2(a)(2) reads:

> A person is guilty of a petty disorderly persons offense, if with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating the risk thereof, he...creates a hazardous or physically dangerous condition by any act which serves no legitimate purpose of the actor." N.J.S.A. 2C:33-2(a)(2).

In order to meet its burden of proof pursuant to this charge, the State relied on Salazar's testimony that Rodriguez possessed a knife in his home. Salazar's credibility should be called into question after viewing D-1 and reviewing his testimony with regard to the knife which he testified he saw in Rodriguez's left hand. First, Salazar spoke with

[26] Refer to Page 10, Line 25 of the Transcript in which Officer Salazar testified that the defendant walked through his doorway and tried to close the door and stated "I want to close my door."
[27] Salazar testified that he followed Rodriguez up to "his" doorway. (1T 10: 25).

the defendant on the street. (1T 10:4-7). Next, he followed Rodriguez up to the porch of his home (1T 10:14-21) and waited in the doorway as Rodriguez entered his home. Salazar testified he watched Rodriguez put down a large remote control car and crate on the porch before entering. (1T 26:18-22). He also testified that he never lost sight of Rodriguez while inside the house. (1T 30:11-12). When viewing D-1, which is the cell phone video taken by Rodriguez as he held the phone in his right hand (1T 12:15-18; 1T 13:8-10), it becomes clear that as Rodriguez is asking the officer to close the door, he is using his left hand to close the door, as his hand is briefly seen on the door knob at five, eleven, twenty-four, and thirty-two seconds on D-1.

Rodriguez never had a knife in his hands. Despite following Rodriguez throughout their entire encounter, and a video showing his hand being empty moments before the knife was "discovered", the trial court found Rodriguez guilty of its possession *beyond a reasonable doubt.* Based on the evidence presented including D-1, the State has failed to meet its burden by failing to present evidence that Rodriguez possessed a knife. Therefore, the defendant should be found not guilty of N.J.S.A. 2C:33-2(a)(2).

(3) Obstruction, N.J.S.A. 2C:29-1(a)

Rodriguez was also charged with Obstruction, in violation of N.J.S.A. 2C:29-1(a). The complaint reads as follows:

> "Within the jurisdiction of this court, purposely obstruct, impair, or pervert the administration of law or a governmental function by means of an independently unlawful act, specifically by refusing to give police officers identification during an investigations in violation of N.J.S. 2C:29-1(a)."

In State v. Camillo, 382 N.J. Super. 113 (App. Div. 2005), the defendant refused to provide his name, date of birth, and social security number to a state trooper who required the information to prepare an incident report. The defendant was charged with

Obstruction and was convicted of the offense in Municipal Court which was later affirmed by the Law Division. The Appellate Division reversed defendant's conviction, and laid out the proper analysis for determined whether a violation under 2C:29-1 has occurred. The court held the following:

> "The purpose of this statute is to prohibit a broad range of behavior designed to impede or defeat the lawful operation of government. Nevertheless, language was placed in the enactment to confine its limits to (1) violent or physical interference, (2) other acts which are 'unlawful' independently of the purpose to obstruct the government. Given the statutory purpose, defendant argues that merely refusing to answer the officer's questions is not a criminal act; that in the absence of any violent or physical interference with the officer's duties, or obstruction by means of an independently unlawful act, he could not have been convicted of the statute. We agree." Id. at 117.
>
> "Here, defendant did not...physically interfere with Trooper Deichman. What he did was refuse to provide information the trooper required to complete his incident report. While defendant's actions may, in fact, have in a real sense obstructed the trooper from preparing the report, that conduct, in the absence of physical interference, is not a violation of N.J.S.A. 2C:29-1a." Id. at 118.

In the instant case, Rodriguez did not (a) physically interfere with Salazar's administration of any governmental function. In fact, the complaint does not include this portion of the statute. Rather, Rodriguez was charged under the second portion of this statute - that he engaged in any independent unlawful act. Among those acts other than violence which are independently unlawful are those which violate other statutes. Rodriguez's actions on that day – his refusing to provide identification – clearly cannot be classified as an independently unlawful act, as he was not violating another statute.

Furthermore, in Berlow, the court held that a person is not in violation of this statute if he asserts his constitutional right to privacy by refusing to allow police to enter his residence without a warrant or probable cause. In Berlow, the defendant closed his door to refuse entry to a police officer acting on a report that an assault victim needing

assistance was inside. Believing that there were exigent circumstances, the police broke down the door and searched the premises. Although the court found that all of the elements of the offense had been proven, it concluded that the defendant was properly asserting his state and federal constitutional rights, precluding conviction.

(4) Resisting Arrest, N.J.S.A. 2C:29-2

The defendant was also charged with Resisting Arrest, in violation of N.J.S.A. 2C:29-2. The complaint states:

> "Within the jurisdiction of this court, did resist police control specifically by refusing to take his hands and wrists from underneath his in order for police officers to complete a lawful arrest in violation of N.J.S. 2C:29-2."

In State v. Branch, 301 N.J. Super. 307, 321 (App. Div. 1997), the court held that a defendant must know that he is being arrested, but if the arrest is legal, the police do not need to announce it. The facts must simply show that the defendant knew he was being arrested and he nevertheless resisted. Further, the Appellate Division held in State v. Ambroselli, 356 N.J. Super. 377, 384-85, 388 (App. Div. 2003) that the State must prove beyond a reasonable doubt that it was the defendant's **"conscious object"** to prevent his or her own arrest, and that the lack of announcement that the defendant was being placed under arrest might case doubt on the defendant's guilt.

In the instant case, D-1 shows that Rodriguez was not advised and was therefore not aware that he was under arrest. D-1 shows that as Rodriguez was walking up his stairwell, Salazar abruptly grabbed Rodriguez, viciously ripped him down the stairs and pinned him to the ground in a very tight space. As such, Rodriguez had no idea what had happened as he was blindsided. He was pinned to the ground with substantial injuries to his wrist, arm and shoulder. He was unable to move his arm as it was pinned underneath him and due to the injuries he sustained during the fall. As such, Rodriguez lacked the

necessary *mens rea* to be convicted of resisting arrest, as it was not his conscious object to prevent his arrest.

POINT VI

THE STATE VIOLATED ITS DISCOVERY OBLIGATIONS PURSUANT TO R. 7:7-7 AND BRADY V. MARYLAND REQUIRING DISMISSAL OF ALL CHARGES

The state violated its discovery obligations under Rule 7:7-7, and as such critical, exculpatory evidence has been kept from Rodriguez and defense counsel. *Rule* 7:7-7(b) provides that Defendant,

> [O]n written notice to the municipal prosecutor or private prosecutor in a cross complaint case, shall be provided with copies of all relevant material, including but not limited to the following:
>
> . . . .
>
> (6) books, originals or copies of papers and documents, or tangible objects, buildings or places that are within the possession, custody or control of the government, including, but not limited to, writings, drawings, graphs, charts, photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form
>
> . . . .
>
> (9) police reports that are within the possession, custody or control of the prosecuting attorney. . .
>
> Rule 7:7-7(b)

Rule 7:7-7(h) titled Continuing Duty to Disclose; Failure to Comply reads:

> "If a party who has complied with this rules discovers, either before or during trial, additional material...previously requested..., that party shall promptly notify the other party or that party's attorney of the existence of these additional materials..."
>
> Rule 7:7-7(h)

In this case, the State has failed to provide various discovery items requested by Rodriguez and his counsel, including, but not limited to, the actual radio transmissions related to this case, the reasons for Salazar being placed on administrative leave, and most importantly, the original police reports and/drafts and contemporaneous notes of

Salazar. (See Cert. of Brian S. Schiller, Esq.).[28] This evidence is critical to the ability of the defense to effectively represent Rodriguez, and more importantly, has the potential to exculpate the defendant, yet has not been made available through the discovery process.

Suppression by the prosecution of evidence favorable to a defendant violates due process of law where the evidence is favorable to the defense, and is material. State v. Russo, 333 N.J. Super. 119, 134 (App. Div. 2000); Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1197, 10 L.Ed.2d 215, 218 (1963); State v. Martini, 160 N.J. 248, 268-69 (1999); State v. Nelson, 155 N.J. 487, 497 (1998), *cert. denied*, 525 U.S. 1114, 119 S.Ct. 890, 142 L.Ed.2d 788 (1999). In order to establish a Brady violation, defendant must show that: (1) the prosecution suppressed evidence; (2) the evidence is favorable to the defense; and (3) the evidence is material. Martini, supra, 160 N.J. at 268 – 69; Nelson, supra, 155 N.J. at 497. Exculpatory evidence includes not only material that is directly exculpatory of a defendant, but also evidence that may impeach the credibility of a State witness. State v. Spano, 69 N.J. 231, 235 (1976); State v. Nelson, 330 N.J. Super. 206, 213-15 (App. Div. 2000); State v. Rodriguez, 262 N.J. Super. 564, 570-71 (App. Div. 1993); State v. Laganella, 144 N.J. Super. 268, 282 (App. Div.), *appeal dismissed*, 74 N.J. 256 (1976). The materiality standard is satisfied if defendant demonstrates that there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d, 481, 494 (1985); State v. Nelson, supra, 330 N.J. Super. at 214. Stated another way, the question is whether in the absence of the undisclosed evidence did the defendant receive a fair trial which is understood as a trial

[28] The Prosecutor mentioned that a summons was issued in error, but never advised defense counsel as what it contained or why it was written in error. (1T 4:25 – 5:3).

resulting in a verdict worthy of confidence. Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490, 506 (1995); State v. Martini, supra, 160 N.J. at 269.

In the case at bar, the evidence suppressed by the prosecution is both favorable and material to Rodriguez. The original reports (inclusive of any drafts and/or notes), the actual radio transmissions and the failure of the State to provide the reasons for Salazar being placed on administrative leave could be seen by *any* reasonable person of having the potential of undermining the Officers credibility, who happens to be the sole witness at trial upon whom all of the State's proofs are based, therefore easily satisfying the materiality standard. Clearly, the lack of such evidence, critical to defendant's case undermines any confidence in the verdict and the assertion that Rodriguez received a fair trial.

Additionally, the failure of the state to provide Salazar's contemporaneous notes, as well as the original reports and "summons issued in error" referenced in the transcript (1T 4), has been the subject of recent case law and memoranda by the State Attorney General's Office.[29] In State v. W.B., 205 N.J. 588 (2011), the defendant was convicted of aggravated sexual assault based on a confession extracted after a grueling interrogation that lasted several hours. Id. at 600-01. The detective who oversaw the interrogation destroyed her contemporaneous notes. Id. at 607. The Court held that appropriate sanctions were warranted for such conduct, stating that law enforcement officers may not destroy contemporaneous notes of observations after producing their reports. Id. at 607 More importantly, the rules provide for discovery of all statements under the prosecutor's

[29] Attorney General Directive No. 2011-2 sets forth that contemporaneous notes means any notation that describes or memorializes the officer's personal observations at the scene of the crime. This includes all drafts of Salazar's reports. A copy of the directive has been attached to this brief as Exhibit "B."

control encompasses writings of any police officer under the prosecutor's supervision. Id. at 608. Knowledge of police officers is imputed to the prosecutor. Russo at 133-135. Our court then held that "if notes of a law enforcement officer are lost or destroyed before trial, a defendant, upon request, may be entitled to an adverse inference charge..." Ibid.

Here, the prosecutor's failure to turn over any of the contemporaneous notes/drafts of reports, recordings from dispatch, results of the internal investigation or the reasons for Salazar's administrative leave is a gross violation of the discovery rules of our courts. *This failure is evident when the earliest report provided to Rodriguez is dated September 21, 2013 for an incident that took place on September 5, 2013.* The failure of the state, its officers, and the municipal prosecutor to provide any documents made prior to that date necessitates an adverse inference, and at the very least should substantially call into question the accuracy of any account provided by Off. Salazar. Pursuant to Brady and Russo, the prosecutor had knowledge of prior drafts and/or notes and prior summonses, therefore, all charges must be dismissed.

POINT VIII

JUDGE HERMAN IMPROPERLY SHIFTED THE BURDEN OF PROOF TO THE DEFENDANT REQUIRING REVERSAL.

A reasonable doubt instruction must be analyzed in its entirety. *See State v. Medina,* 147 *N.J.* 43, 51–52, 685 *A.*2d 1242 (1996), *cert. denied,* —— *U.S.* 1476, 117 *S.Ct.* 1476, 137 *L.Ed.*2d 688 (1997); *State v. Marshall,* 123 *N.J.* 1, 135, 586 *A.*2d 85 (1991), *cert. denied,* 507 *U.S.* 929, 113 *S.Ct.* 1306, 122 *L.Ed.*2d 694 (1993). Taken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury.

See Victor v. Nebraska, 511 *U.S.* 1, 6, 114 *S.Ct.* 1239, 1243, 127 *L.Ed.*2d 583, 591 (1994); *State v. Medina, supra,* 147 *N.J.* at 51–52, 685 *A.*2d 1242. "**Only those instructions that overall lessen the State's burden of proof violate due process.**" *State v. Medina, supra,* 147 *N.J.* at 52, 685 *A.*2d 1242. (Emphasis Added) A jury instruction that fails to communicate the State's burden to prove guilt beyond a reasonable doubt requires reversal. *See Sullivan v. Louisiana,* 508 *U.S.* 275, 278–81, 113 *S.Ct.* 2078, 2081–83, 124 *L.Ed.*2d 182, 189–90 (1993); *State v. Medina, supra,* 147 *N.J.* at 50, 685 *A.*2d 1242. State v. Dreher, 302 N.J. Super. 408, 467-68, 695 A.2d 672, 701 (N.J. Super. Ct. App. Div. 1997) abrogated by State v. Brown, 170 N.J. 138, 784 A.2d 1244 (2001) and disapproved of by State v. Brown, 190 N.J. 144, 919 A.2d 107 (2007).

In this case, Judge Herman improperly shifted the burden of proof to the Defendant on multiple occasions thereby lessening the burden of proof for the State. In its decision, the court states:

> "I have had the opportunity to hear the testimony in this case. Frankly, there's only been one officer. So the initial decision that the Court has to make, based on the testimony of that one officer, is whether or not I believe that the officer's testimony is credible and whether he was telling the truth. There have been no other witnesses. The only uncontroverted testimony I have is the testimony of Officer Salazar. If I believe the testimony to be truthful, then I believe that the State will prevail in proving its case." (1T 114:7-16)

Further, the court makes mention of the other individuals present as testified by Salazar:

> "There's been no testimony - - if there were actually six people in the area, maybe one or two of them should have come forward and said whatever they saw. Maybe they would have said the officer was lying because of whatever else. But you're trying to impeach the credibility of the State's case by cross examining its only witness, but without presenting any other witnesses." (1T 119: 3-13).
>
> "I'm really hard pressed, Counsel, to find that this officer is not telling the truth, especially since he's the only one that testified." (1T 124:7-9)

These comments clearly indicate that the burden of proof was shifting to the defendant. By lessening the State's burden of proof and shifting it to Rodriguez, the Court violated Rodriguez's Due Process Rights and reversal is required.

POINT IX

IF THIS COURT DOES NOT DISMISS THE CHARGES DUE TO CONSTITUTIONAL VIOLATIONS OR FIND THE DEFENDANT NOT GUILTY ON THE RECORD, THIS COURT SHOULD CONDUCT A TRIAL DE NOVO AND SUPPLEMENT THE RECORD PURSUANT TO *R.* 3:23-8(A)(2) AS THE RIGHTS OF THE DEFENDANT WERE PREJUDICED BELOW AND REMAND WOULD BE INAPPROPRIATE AS PERTH AMBOY HAS PROVEN TO BE AN IMPARTIAL FORUM FOR THIS DEFENDANT'S TRIAL.

R. 3:23-8(a)(2) reads, "The court to which the appeal has been 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." As set forth herein at length and in the accompanying certification, Judge Herman committed a multitude of legal errors in the Rodriguez's trial. Therefore, this court should retain the trial and allow the record to be supplemented.

Pursuant to R. 1:12-1(g), a judge shall be disqualified if, among other things, there is any reason which might preclude a fair an unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so. In State v. Perez, 356 N.J. Super. 527 (App. Div. 2003), the Appellate Division held that a trial *de novo* on the record, based on acceptance of the credibility determinations of a judge who ought to have recused himself, is inconsistent with due process, and further held that the Law Division judge in that case erred in denying defendant's request for a plenary trial de novo. Id. at 533.

Here, as attested to in the attached certification, the City of Perth Amboy, as well as various members of the Judicial Branch of that municipality engaged in behaviors that at the very least give the appearance of bias, and at the most represent grounds for immediate recusal.[30] Specifically, Judge Herman made so many judicial errors at the municipal trial in this matter that lead a reasonable person to believe that he is either unable to act impartially or he is simply incompetent to be a member of the judiciary. During the course of the trial, the following errors occurred:[31]

(A) Misstatements of Facts by the Court

Judge Herman stated that there was "no testimony that Rodriguez was walking into his residence." (1T 24:8-15). This was a misstatement of the facts. Salazar had already testified: "I followed him onto his porch" (1T 10:15), "I followed him into his doorway" (1T 10:25), and "it's a multi-family house." (1T 10:18). In addition, D-1 clearly shows that this was Rodriguez's home.

After attempting cross examine Salazar with both videos, Judge Herman stated that he "didn't hear anything about both videos." (1T 51:19-25). This statement took place within moments of Salazar testifying about two videos. (1T 50: 7-16).

With regard to D-1, Judge Herman stated that he didn't "know when it was taken" or "who took it." (1T 57: 6-9). This misstatement occurred after Salazar testified on direct

[30] Please refer to the Certification of Brian S. Schiller for additional statements of facts with regard to the appearance of bias.

[31] The errors presented in this Section are only a portion of the errors committed by the court. Several additional errors have already been incorporated into other sections of this brief. However, some errors not mentioned include: (i) the Court held an *in camera* 104 hearing (1T 63); (ii) the Court held that Rodriguez obstructed justice by failing to identify himself (1T 120:24-25); (iii) the Court allowed Salazar to read from his report without needing to refresh his recollection in violation of N.J.R.E. 612 (1T 9: 23-25); (iv) and the Court concluded that Salazar observed the knife in plain view, when he was not lawfully in the viewing area (1T 122-123).

and cross examination that Rodriguez had a cell phone in his right hand and was presumably recording the encounter. (1T 13: 8-13;1T 44: 16-22).

(B) Bias

After defense counsel attempted to show D-1 to Salazar, the Prosecutor did **not** object. In fact, the prosecutor stated: "If that's what you sent me, I have no objection." (1T 45:11-13). Despite no objection by the prosecutor, Judge Herman asked the prosecutor if he wanted to *voir dire* anybody as to how this video came about, where it came from." (1T 46:6-8). He then questioned defense counsel while Salazar was on the witness stand in order to divulge statements made by the defendant to defense counsel which were totally irrelevant to admissibility. (1T 47: 20- 49:9).

In deciding that defense counsel would not be permitted to cross examine Salazar with extrinsic evidence, Judge Herman did not cite one single case and on numerous occasions he misstated the standard for the use of extrinsic evidence during cross examination and the use of videos at trial in general. (1T 53; 1T 55, 1T 60, 1T 66, 1T 73). He then proceeded to offer arguments on behalf of the prosecutor and witness as to why this witness could not authenticate the videos. (1T 61: 8-14; 1T 67:10 – 68:10). Even after defense counsel read the relevant case law directly from the 2014 Edition of the New Jersey Court Rules and 2014 Rules of Evidence with regard to the use of extrinsic evidence and videos at trial (1T 50-67), Judge Herman did not allow the videos to be used for cross examination and further did not allow defense counsel to use the second video[32] or the still photographs from D-1. In addition, Judge Herman stated that

[32] The second video was barred by the Court even though Salazar testified twice about viewing two videos. (1T 50: 7-16) (1T 52:9-16).

"there are some – I mean based on the testimony that I heard, it appeared that the video does in some way depict some of the events that the officer's testified to." (1T 68: 17-20).[33][34] Even the prosecutor stated that the video depicts some of the events that took place. (1T 71:17-21). Despite those comments, the Court did not allow defense counsel to use the video to impeach Salazar. (1T 70).

Even after the Court admitted D-1 into evidence, the Court did not allow defense counsel to use still photographs taken from D-1. (1T 77-78). Moreover, Judge Herman showed bias towards the witness when he suggested that defense counsel was badgering the witness. (1T 28:14 – 29:1). It is clear from the record that defense counsel had asked a question which required a "yes" or "no" answer and such badgering occurred.

Most importantly, however, the Court showed its clear inability to remain partial when Judge Herman stated in his decision his findings about what occurred inside of Rodriguez's home. He referred to the event as an altercation, suggesting that Rodriguez engaged in an altercation with Salazar, despite the fact that there was **absolutely no testimony** presented through Salazar or D-1 which would support such a finding. (1T 118:10-19). Further, the Court stated that it was unaware what caused the altercation and that it has "no idea whether the defendant jumped at the officer, whether the defendant tried to use the knife on the officer." (1T 118:10-19). This statement was made despite the fact the Salazar testified upon seeing the knife, he took the defendant to the ground and despite D-1 confirming Salazar's actions. There was **absolutely no testimony or**

[33] In addition, the Court stated that the videos are "not of much probative value." (1T 51: 17-18).
[34] Further, the Court stated that "there's no doubt that that video does show some portion of the events that took place on the date in question." (1T 81: 17-19).

evidence presented which could have allowed a reasonable person to make such statements with regard to how Rodriguez acted or responded.

In addition, the court stated in its decision:

> "I frankly don't find any - - anything in the testimony that would indicate to me that this officer wasn't telling the truth." (1T 121:14-17).
>
> "And the video confirms exactly what the officer stated..." (1T 122: 10-11)

These statements were made despite D-1 being admitted into evidence, which contradicts Salazar's testimony and further indicates the inability of this court to remain impartial.

(C) Improperly Admitted Testimony

Judge Herman did not *sua sponte* strike Salazar's testimony when Salazar stated: "Besides with his begging for me to let him go because he's going to go back to jail." (1T 43:2-3). This testimony was clearly prejudicial to a finder of fact and should have been disregarded. Further, this argument is intended to include all of the improper hearsay testimony allowed by the Court and set forth herein above.[35]

Clearly, each of these events separately would give rise to the reasonable belief of bias in the proceedings, but taken together point to a clear and systemic effort by the municipal courts in the City of Perth Amboy to ***deprive Rodriguez of a fair trial*** under our State Constitution. However, it is not necessary to prove actual prejudice under State v. Marshall, 148 N.J. 89, 279 (1997), rather the mere appearance of bias may require disqualification along with the objectively reasonable belief that the proceedings were unfair.

[35] Refer to ¶ 29(B) of the Certification of Brian S. Schiller, Esq.

An appellate court's review of the trial court's findings is limited to confirming only that "those findings are supported by sufficient credible evidence in the record." *State v. Elders,* 192 *N.J.* 224, 243, 927 *A.*2d 1250 (2007) (internal quotation marks omitted). If that standard is satisfied, the reviewing court's "task is complete[,] and it should not disturb the result, even though ... it might have reached a different conclusion were it the trial tribunal." *Johnson, supra,* 42 *N.J.* at 162, 199 *A.*2d 809. Occasionally, however, a trial court's findings may be so clearly mistaken "that the interests of justice demand intervention and correction." *Ibid.* In such instances, an appellate court properly reviews "the record as if it were deciding the matter at inception and make[s] its own findings and conclusions." *Ibid.* Furthermore, legal conclusions are subject to de novo review. *State v. Gandhi,* 201 *N.J.* 161, 176, 989 *A.*2d 256 (2010). State v. Hreha, 217 N.J. 368, 382, 89 A.3d 1223, 1231 (2014). In Hreha, the New Jersey Supreme Court concluded that the trial judge misconstrued the testimony of the officer, and therefore, it held that the court's credibility finds were unsupported by sufficient credible evidence in the record. Ibid.

Reversal is warranted because the trial court's factual findings do not comport with the evidence presented. See State v. Zaidi, A-1497-07T4, 2008 WL 4391629 (N.J. Super. Ct. App. Div. Sept. 30, 2008). The credibility ~~findings of Judge Herman have~~ no ~~support from the record and evidence presented at trial. It is therefore requested~~ pursuant to the ~~Certification~~ submitted herewith and the holding of ~~Sparks and Perez~~ that if this court provides for the requested relief under *R.* 3:23-8(a), that the record be supplemented, ~~rather than remand to the City of Perth Amboy,~~ as the Rodriguez did not receive a fair trial, his rights were prejudiced and the "image of justice would be better served by a new trial." Id. at 53.

CONCLUSION

Based on the arguments set forth herein, the defendant respectfully requests that all charges be dismissed due to violations of Rodriguez's Constitutional Rights. In the alternative, Rodriguez should be found not guilty of all charges. In the event that this court reverses the municipal court's holding, it should retain the trial and supplement the record. Finally, should this court remand, this trial should be heard by a competent and impartial judge and in an impartial forum.

Respectfully Submitted,

SCHILLER & PITTENGER, P.C.

By: _____
Brian S. Schiller

Dated: August 28, 2014