IN THE SHAKER HEIGHTS MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO/ CITY OF PEPPER PIKE,	)	**CASE NOS. REDACTED**
Plaintiff,	)	**JUDGE REDACTED**
vs.	)	
REDACTED	)	**STATE/CITY'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS**
Defendant.	)	

The City of Pepper Pike, Ohio ("City"), by and through its Prosecutor REDACTED, respectfully submits its Brief in Opposition to Defendant REDACTED's ("Defendant") Motion to Suppress. Defendant's Motion to Suppress must be denied in its entirety for the following reasons, which are more fully set forth below:

1. City Police had reasonable suspicion to initiate an investigatory stop of Defendant;

2. City Police had reasonable suspicion to detain and investigate Defendant;

3. Based on a totality of the circumstances, City Police had probable cause to arrest Defendant for operating a motor vehicle while under the influence of alcohol ("OVI");

4. City Police properly administered Standardized Field Sobriety Test in, at a minimum, substantial compliance with applicable testing regulations;

5. Defendant's *Miranda* rights were not violated because no custodial interrogation occurred prior to Defendant's arrest; and

6. City Police, at a minimum, substantially complied with applicable BAC testing regulations.

As such, the City respectfully requests that this Honorable Court issue an Order denying Defendant's Motion to Suppress in its entirety.

I. City Police Had Reasonable Suspicion to Initiate an Investigatory Stop of Defendant.

A law enforcement officer may permissibly make an investigatory stop of an individual where the officer has a reasonable suspicion, based on specific and articulable facts, that the individual to be stopped may be involved in criminal activity.[1] "Reasonable suspicion entails some minimal level of objective justification for making a stop – that is, something more than an inchoate and unparticularzed suspicion or 'hunch,' but less than the level of suspicion required for probable cause."[2]

The existence of "reasonable and articulable suspicion" is determined by evaluating the totality of the circumstances, considering those circumstances "through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold,"[3] and due weight must be given to the police officer's experience and training.[4] The totality of the circumstances approach allows police officers to draw upon their own experience when deciding whether the requisite reasonable suspicion is present. For this reason, when a court reviews an officer's reasonable suspicion determination, it must give "due weight" to factual inferences drawn by law enforcement officers.[5]

Based on the totality of the circumstances in the present case, Officer Sorg clearly possessed the requisite reasonable suspicion to initiate an investigatory stop of Defendant. At approximately 8:38 PM on or about January 4, 2023, Officer Sorg was observing traffic at 30300 Chagrin Boulevard when he saw a black Porsche sedan fail to stop at the stop sign located at

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[1] *State v. Crumrine* (App. 5 Dist. 2003), 2003-Ohio-2178, ¶ 16 (Unreported) (citing *Terry v. Ohio* (1968), 392 U.S. 1, 21-22, 88 S.Ct. 1868, 20 L.Ed.2d 889).
[2] *State v. Chadwell* (App. 2 Dist. 2009), 2009-Ohio-1630, ¶ 21 (citing *Terry*, 392 U.S. at 27).
[3] *Id.* at ¶ 22 (citing *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88).
[4] *Bordelon v. Franklin Twp*. (App. 10 Dist. 2001), 2001-Ohio-3966 (Unreported) (citing *Andrews*, 57 Ohio St.3d at 87-88).
[5] *State v. Daniel* (App. 2 Dist. 2008), 2008-Ohio-3864, ¶ 13 (Slip Copy) (citing *United States v. Arvizu* (2002), 534 U.S. 266, 273-74).

Chagrin Boulevard and Lander Circle, near Waterway.[6] Subsequently, Officer Sorg pulled behind the black Porsche, which was heading eastbound from Lander Circle onto Chagrin Boulevard.[7] As the black Porsche continued on Chagrin Boulevard, Officer Sorg observed the driver fail to signal their lane change from the right lane of travel to the left lane of travel.[8] Officer Sorg then activated the emergency overhead lights and siren of his police cruiser to initiate a traffic stop.[9] The black Porsche then slowly pulled over to the side of the road, running over the curb in the process, near Chagrin Boulevard and Lewis Road.[10] After stopping the vehicle, Officer Sorg approached the vehicle and identified the Defendant as the operator of the black Porsche.[11]

Ohio courts have consistently held that, for the purpose of a properly initiated traffic stop, a vehicle which commits traffic offenses – such as, failing to signal prior to a lane change and failing to observe a stop sign – sufficiently creates a reasonable, articulable, suspicion to justify a traffic stop.[12] Here, the Defendant committed both of the aforementioned traffic offenses when Defendant failed to stop at a stop sign, and failed to signal prior to a lane change, which was both observed visually by Officer Sorg, and by the mounted dashcam unit in his police vehicle. Therefore, City Police had, at minimum, a reasonable articulable suspicion (and/or probable cause) to stop Defendant and initiate an investigatory stop of the Defendant. Thus, Defendant's Motion must be denied.

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[6] *See*, Pepper Pike Police Department Investigative Report, Incident Number: 23-50006, at 4.
[7] *Id*.
[8] *Id*.
[9] *Id*.
[10] *Id.*
[11] *Id*.
[12] *Dayton v. Erickson*, 76 Ohio St. 3d 3, 11–12, 665 N.E.2d 1091, 1097–98 (1996); *Cleveland Hts. v. Brisbane*, 2016-Ohio-4564, ¶ 14, 70 N.E.3d 52, 57 (8th Dist.).

II. City Police Had Reasonable Suspicion to Detain and Investigate Defendant.

"If during the scope of the initial stop an officer encounters additional specific and articulable facts which give rise to a reasonable suspicion of criminal activity beyond that which prompted the stop, the officer may detain the vehicle and driver for as long as the new articulable and reasonable suspicion continues."[13]

In the instant matter, Officer Sorg encountered several additional specific and articulable facts beyond the initial observations which gave City Police reasonable suspicion to detain and investigate Defendant. When Officer Sorg approached Defendant in his vehicle, he observed: an **odor of alcoholic beverage emanating from Defendant's vehicle**; Defendant **had slurred speech**; Defendant **had glassy eyes**; Defendant was on a phone call with his wife, which was broadcasted via Defendant's car speaker – Defendant informed her that he had been stopped by the police, which prompted her to refer to him as an "idiot", Defendant replied to this comment by stating that "he would be coming home tonight", Defendant's wife then responded with an obvious tone of distress in her voice, "I hope so"; Defendant then **admitted that he had consumed alcohol**; and, **was unable to produce his license** during the stop.[14]

In addition, Defendant had **errors on all three of his pre-exit tests**, despite Officer Sorg providing proper instruction and demonstration for each. Defendant was **unable to perform the finger dexterity test** properly.[15] Defendant erred in reciting the alphabet when instructed to start at the letter "D" and stop at "T" – **started at "D", stopped at "V", then started again at "H", and stopped at "P"**.[16] Defendant was then instructed to **count down from 84 to 69**, Defendant

[13] *State v. Key* (App. 11 Dist. 2008), 2008-Ohio-2759, 18 (Slip Copy) (citing *State v. Myers* (1990), 63 Ohio App.3d 765, 771).
[14] *See*, Pepper Pike Police Department Investigative Report, Incident Number: 23-50006, at 4.
[15] *Id*.
[16] *Id*.

started: **84, 83, 82, 81, 80, 79, 78, 77, 78, 77, 76, 74, 75, 74, 73, 72, 71, 73, 72, 71, 70, 60, 69, 69, 68, 67, 66, 65, 64, 63, 62, 61, 60, 59, 58, 57, 56, 55**, Officer Sorg then stopped the test.[17]

The facts set forth above beyond those which gave rise to the initial stop provided, at a minimum, the requisite reasonable suspicion that Defendant was operating a vehicle under the influence of alcohol.[18] As such, Officer Sorg properly detained and further investigated Defendant, including the administration of standardized field sobriety testing.

In *State v. Evans*, the Eleventh District Court of Appeals enumerated eleven (11) factors a trial court should consider in evaluating whether a law enforcement officer's decision to conduct field sobriety tests is warranted.[19] While the factors are *not* conditions precedent for a constitutionally valid decision to further detain a driver for a field sobriety test, they aid in courts' analysis of the propriety of such a decision by an officer. In considering an officer's decision to detain a driver for the administration of roadside sobriety tests, a court must rely on the totality of the circumstances.[20] The factors a trial court should consider are as follows:[21]

> (1) the time and day of the stop (Friday or Saturday night as opposed to, e.g., a weekday morning);
> (2) the location of the stop (whether near establishments selling alcohol);
> (3) any indicia of erratic driving before the stop that may indicate a lack of coordination (speeding, weaving, unusual braking, etc.);
> (4) whether there is a cognizable report that the driver may be intoxicated;
> (5) the condition of the suspect's eyes (bloodshot, glassy, glazed, etc.);
> (6) impairments of the suspect's ability to speak (slurred speech, overly deliberate speech, etc.);
> (7) the odor of alcohol coming from the interior of the car, or, more significantly, on the suspect's person or breath;
> (8) the intensity of that odor as described by the officer ('very strong,' 'strong,' 'moderate,' 'slight,' etc.);

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[17] *Id*. at 4-5.
[18] *Key*, 2008-Ohio-2759, at ¶¶24, 27-28.
[19] *State v. Evans* (App. 11 Dist. 1998), 127 Ohio App.3d 56, 63; *see also Strongsville v. Troutman* (App. 8 Dist. 2007), 2007 WL 853224, 2007-Ohio-1310, ¶ 17 (Slip Copy) (recognizing the *Evans* non-exhaustive list of factors to be considered in a totality of the circumstances analysis of whether an officer had a reasonable suspicion sufficient to conduct roadside sobriety tests).
[20] *Key*, 2008-Ohio-2759 at ¶ 22 (citing *Evans*, 127 Ohio App.3d at 63); *see also Troutman*, 2007-Ohio-1310).
[21] *Id.* at ¶ 21.

(9) the suspect's demeanor (belligerent, uncooperative, etc.);
(10) any actions by the suspect after the stop that might indicate a lack of coordination (dropping keys, falling over, fumbling for a wallet, etc.); and
(11) the suspect's admission of alcohol consumption, the number of drinks had, and the amount of time in which they were consumed, if given."

In the present case, Defendant met the following factors: (1) Defendant was **stopped at night** – at or around 8:38 PM on Wednesday, January 4, 2023; (3) **there was indica of erratic driving in Defendants commission of traffic violations**; (5) Defendant **had glassy eyes**; (6) Defendant **had slurred speech**; (7) An **odor of alcoholic beverage was emanating from Defendant's vehicle**; (8) the odor of alcoholic beverage emanating from Defendant's vehicle was **obvious**; (9) Defendant's **demeanor was indicative of appreciable inebriation**; (10) Defendant was **unable to locate his license** when prompted; and (11) the Defendant **admitted to consuming alcohol**.[22]

Courts have upheld reasonable suspicion to perform field sobriety tests where even fewer factors were present. For example, in *State v. Key*, the officer in question smelled a strong odor of alcohol coming from defendant's vehicle and defendant admitted to having a few beers.[23] Based on the totality of the circumstances, and even in the absence of factors such as eye appearance and impaired speech, the court concluded that specific and articulable facts gave rise to a reasonable suspicion that defendant was operating a vehicle under the influence of alcohol.[24]

In *State v. McKivigan*, a highway patrolman stopped to investigate a parked car on the side of the road.[25] When the officer ordered the driver out for testing, the following factors were present: It was 10:34 p.m. on a Sunday night; the officer noticed a strong odor of alcohol; the driver's eyes were bloodshot and glassy; and the driver's speech was slurred. The *McKivigan*

[22] *See*, Pepper Pike Police Department Investigative Report, Incident Number: 23-50006, at 4.
[23] *Key*, 2008-Ohio-2759 at ¶ 24.
[24] *Id.* at ¶¶ 27-28.
[25] *State v. McKivigan* (App. 11 Dist. 1989), 1989 WL 6111 (Unreported).

court upheld the trooper's request that the driver submit to field sobriety tests because the trooper had reasonable grounds to believe that the driver may have been driving under the influence.[26]

Therefore, because Defendant exhibited a majority of the factors set forth in *Key*[27], as set forth above, City Police had, at a minimum, the requisite reasonable suspicion to detain and investigate Defendant. As such, Defendant's Motion must be denied.

III. Based On a Totality of The Circumstances, City Police Had Probable Cause to Arrest Defendant for Operating His Vehicle Under the Influence of Alcohol ("OVI").

The legal standard for determining whether the police had probable cause to arrest an individual for OVI is whether, "at the moment of arrest, the police had sufficient information, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence."[28] The arrest merely has to be supported by the arresting officer's observations of indicia of alcohol consumption and operation of a motor vehicle while under the influence of alcohol.[29] In making this determination, the trial court must examine the totality of facts and circumstances surrounding the arrest.[30]

In the instant matter, City Police clearly had probable cause to arrest Defendant for OVI. More specifically: Officer Sorg **observed the Defendant's erratic driving**; Defendant was **stopped at night**; Defendant **erred on all pre-exit screening tests**; Defendant **exhibited slurred speech** and **had glassy eyes**; an **obvious odor of alcoholic beverage was emanating from Defendant's vehicle**; Defendant's **demeanor was indicative of appreciable inebriation**;

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[26] *Id.*
[27] *Key*, 2008-Ohio-2759, at ¶¶24, 27-28.
[28] *State v. Eustis* (App. 5 Dist. 2008), 2008-Ohio-5955, ¶ 11 (Slip Copy) (citing *State v. Adair* (App. 5 Dist. 2007), 2007-Ohio-7176, ¶ 16; *State v. Homan* (2000), 89 Ohio St.3d 421, 427, 732 N.E.2d 952; *Beck v. Ohio* (1964), 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142).
[29] *Id.* (citing *State v. Van Fossen* (1984), 19 Ohio App.3d 281, 484 N.E.2d 191).
[30] *Id.* (citing *State v. Miller* (1997), 117 Ohio App.3d 750, 761, 691 N.E.2d 703; *State v. Brandenburg* (1987), 41 Ohio App.3d 109, 111, 534 N.E.2d 906).

Defendant **was unable to find his license**; and Defendant **admitted that he had consumed alcohol**.[31]

Courts have upheld probable cause to arrest for OVI where even fewer indicia of alcohol consumption were present. For instance, in *State v. Eustis*, the court ruled that the officer had probable cause to believe that the defendant was operating a motor vehicle under the influence of alcohol.[32] The *Eustis* court based its ruling on the officer's observation that the defendant's face was flushed, he was chewing gum, there was a moderate odor of an alcoholic beverage coming from the defendant, the defendant stated that he had been drinking the previous night, and the defendant was stopped for a speeding violation at 9:42 a.m.[33] The court affirmed the trial court's overruling of the defendant's motion to suppress because, based upon the totality of the facts and circumstances surrounding the arrest, the officer had probable cause to arrest the defendant based upon the officer's observations of indicia of alcohol consumption and the operation of a motor vehicle while under the influence of alcohol.[34]

Based on a totality of the circumstances and supporting case law, City Police had probable cause to arrest Defendant for OVI even *prior to* the administration of standardized field sobriety testing. The field sobriety tests results serve as *further* evidence of probable cause for arrest. As such, Defendant's Motion must be denied.

IV. City Police Properly Administered Standardized Field Sobriety Test in, at a Minimum, Substantial Compliance with Applicable Testing Regulations.

In *State v. Homan*, the Ohio Supreme Court initially held that "[i]n order for the results of a field sobriety test to serve as evidence of probably cause to arrest, the police must have

[31] *See*, Pepper Pike Police Department Investigative Report, Incident Number: 23-50006, at 4.
[32] *Eustis* 2008-Ohio-5955 at ¶ 13.
[33] Id. at ¶¶ 14-16.
[34] Id. at ¶ 17.

administered the test in strict compliance with standardized testing procedures."[35] Despite the *Homan* court's exclusion of the non-complying field test results from consideration, the court nevertheless concluded that the totality of circumstances surrounding the defendant's arrest supported a finding of probable cause. In particular, the *Homan* court found relevant the officer's observations of the defendant, including the fact that the officer observed the defendant's erratic driving, that the defendant's eyes were red and glassy, and that the defendant smelled of alcohol.[36] Moreover, Ohio courts have recognized that "[t]o prove impaired driving ability, the state can rely on physiological factors (*e.g.*, slurred speech, bloodshot eyes, odor of alcohol) and coordination tests (*e.g.*, field sobriety tests) to demonstrate that a person's physical and mental ability to drive is impaired.[37]

Since *Homan,* however, the Ohio General Assembly has amended R.C. § 4511.19 such that an arresting officer need not administer field sobriety tests in strict compliance with testing standards for the test to be admissible at trial. Rather, an officer can testify concerning the results of a field sobriety test administered in substantial compliance with the testing standards.[38]

In the present case, Officer Sorg administered three (3) standardized field sobriety tests ("SFST") to Defendant: (1) the Horizontal Gaze Nystagmus ("HGN"); (2) the Walk and Turn ("WAT"); and, (3) the One Leg Stand ("OLS"). All of these tests were administered by Officer Sorg in, at a minimum, substantial compliance with applicable testing regulations.

Regarding the HGN test, Officer Sorg provided proper instruction to Defendant.[39] Defendant stated that he understood the instructions including that he needed to keep his head

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[35] *Homan*, 89 Ohio St.3d 421, Syllabus ¶ 1.
[36] *State v. Schmitt* (2004), 101 Ohio St.3d 79, 82, 2004-Ohio-37, 801 N.E.2d 446, at ¶ 11 (*citing Homan*, 89 Ohio St.3d at 427).
[37] *Id.* at ¶ 12 (*citing State. v. Wargo* (App. 11 Dist. 1997), 1997 WL 7033373 (Unreported)).
[38] *Id.*
[39] *See*, Pepper Pike Police Department Investigative Report, Incident Number: 23-50006, at 5.

still and follow Officer Sorg's finger with his eyes only.[40] Officer Sorg proceeded to administer the test, initially checking for equal pupil size and equal tracking – Defendant had equal pupil size and both eyes equally tracked Officer Sorg's finger. Subsequently, Officer Sorg checked for lack of smooth pursuit and **observed clues for lack of smooth pursuit in both eyes**.[41] During this part of the test, **Defendant almost fell over and thus required Officer Sorg's assistance to ensure he did not fall**.[42] Officer Sorg then performed the second portion of the HGN test, checking both eyes for distinct and sustained nystagmus at maximum deviation.[43] **Defendant was unable to perform this part of the test due to an inability to follow Officer Sorg's instructions**.[44] Thus, Officer Sorg proceeded to the next SFST.[45]

Regarding the WAT test, Officer Sorg began by properly explaining and demonstrating the starting position to Defendant.[46] **Defendant then placed his right foot in front of his left, but did not place his feet touching heel to toe**, as Officer Sorg had instructed.[47] Subsequently, **Defendant started the test prior to Officer Sorg having an opportunity to provide the test instructions**.[48] During the test, **Defendant stumbled and almost fell multiple times**.[49] Thus, **due to Defendant's inability to maintain his balance**, the test was stopped.[50]

Regarding the OLS test, Officer Sorg properly explained the test to Defendant.[51] Defendant then: **failed to raise his foot the requisite six (6) inches off of the ground**; **placed**

[40] *See,* Pepper Pike Police Department Investigative Report, Incident Number: 23-50006, at 5..
[41] *Id*.
[42] *Id*.
[43] *Id*.
[44] *Id*.
[45] *Id*.
[46] *Id*.
[47] *Id*.
[48] *Id*.
[49] *Id*.
[50] *Id*.
[51] *Id*.

his foot down multiple times; and, **while balancing, almost fell over after swaying**.[52] Due to Officer Sorg's concerns regarding Defendant's safety, Officer Sorg then stopped the test.

Officer Sorg's administration of the above SFSTs were conducted in accordance with applicable NHTSA regulations and therefore possess the requisite scientific validity necessary to establish probable cause to arrest. In *State v. Boczar*, the Ohio Supreme Court specifically noted that R.C. 4511.19(D)(4)(b), which provides that the results of field sobriety tests are admissible when the tests are administered in *substantial* compliance with testing standards, is constitutional.[53] Defendant has not, and cannot, set forth any evidence contrary to the fact that Officer Sorg administered the SFSTs in substantial compliance with standardized testing procedure. Therefore, the results of the SFSTs are admissible as further evidence that City Police had probable cause to arrest Defendant.

Moreover, Officer Sorg will provide competent testimony at any hearing on this matter as further evidence that the SFSTs were administered in, at a minimum, substantial compliance with applicable testing regulations.

V. Defendant's *Miranda* Rights were Not Violated because, Based on the Totality of the Circumstances, No Custodial Interrogation Occurred Prior to Defendant's Arrest.

Miranda v. Arizona protects a defendant's 5th Amendment right against self-incrimination by prohibiting admission of exculpatory statements resulting from custodial interrogation unless law enforcement officers have followed enumerated procedural safeguards.[54] A suspect in police custody "must be warned prior to any questioning that he has the remain silent, that anything he says can be used against him in a court of law, that he has the right to

[52] *See*, Pepper Pike Police Department Investigative Report, Incident Number: 23-50006, at 5.
[53] *State v. Boczar* (2007), 113 Ohio St. 3d 148, 153 (emphasis added).
[54] *See Miranda v. Arizona* (1966), 384 U.S. 36, 444, 16 L.Ed2d 694.

presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."[55]

The police are not required to issue *Miranda* warnings to everyone they question; rather they must issue such warnings *only when they subject a suspect to a "custodian interrogation*."[56] "Custodial interrogation" is defined as questioning initiated by a law enforcement officer after a person has been taken in to custody "or otherwise deprived of his freedom of action in any significant way."[57] Custody of purposes of *Miranda* exists only where there is a restraint on freedom of movement of the degrees associated with a formal arrest. Whether a suspect is in custody depends on the facts and circumstances of each case. The test to be applied to each case is whether, under the totality of the circumstances, a "reasonable person would have believed he was not free to leave.[58] The duty to provide *Miranda* warnings is only invoked when both custody and interrogation coincide.[59]

Here, after Officer Sorg observed Defendant's poor performance on the properly administered standardized field sobriety testing, Defendant was placed under arrest and immediately *Mirandized*.[60] Because Defendant was *Mirandized* after his arrest, and prior to custodial interrogation, no violation of Defendant's 5th Amendment rights occurred, and his Motion must be denied.

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[55] *State v. Lather* (2006), 110 Ohio St.3d 270, 2006-Ohio-447, ¶ 6 (*citing Miranda v. Arizona* (1966), 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.E.2d 694).
[56] *State v. Bolish* (App. 12 Dist. 2006), 2006-Ohio-5375, ¶ 14 (Unreported) (*citing State v. Biros* (1997), 78 Ohio St.3d 426, 440, 1997-Ohio-204) (emphasis added).
[57] *Id.* (*citing Miranda,* 384 U.S. 36, 444).
[58] *State v. Antoline* (App. 9 Dist. 2003), 2003-Ohio-1130, ¶ 13 (*quoting State v. Gumm* (1995), 73 Ohio St.3d 413, 429 (citations omitted)).
[59] *Id.*
[60] *See*, Pepper Pike Police Department Investigative Report, Incident Number: 23-50006, at 5; *See also*, City body cam video of the arrest.

VI. Conclusion.

Based on all of the foregoing, the City respectfully requests that Defendant's Motion to Suppress be denied in its entirety.

Respectfully submitted,

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REDACTED

Prosecutor
City of Pepper Pike, Ohio