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STATE OF NEW JERSEY	:	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NOS. A-004052-12T4 (Direct Appeal) and A-004477-12 (Appeal of Violation of Probation)**
Plaintiff-Respondent,	:	
v.	:	
EDWARD R. FORCHION,	:	**CRIMINAL ACTION**
Defendant-Appellant.	:	**On Appeal From Judgments of Conviction (of a Criminal Conviction and a Violation of Probation) of the Superior Court of New Jersey, Law Division, Burlington County** **Sat Below:** **Hon. Charles A. Delehey, J.S.C., and A Jury and Judge Delehey on the Violation of Probation**

PRO SE SUPPLEMENTAL BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT EDWARD R. FORCHION

DEFENDANT IS NOT CONFINED

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PRELIMINARY STATEMENT

The defendant-appellant Edward R. Forchion, also known as the "NJWeedman," has always maintained that New Jersey's claim that marijuana has no medicinal value is a legal lie. The defendant is a long-time and very vocal medical marijuana advocate, medical marijuana patient and outspoken "legalizer". He is also a long-time practicing Rastafarian. The Rastafarian religion includes the sacramental use of cannabis—-specifically, the smoking of Ganja (marijuana).

In February of 2001 when defendant (born in July of 1964) was 36 years old, he was diagnosed with a form of bone cancer which results in painful giant cell tumors. He has undergone surgeries and other medical procedures to remove the tumors and ameliorate his condition. His use of marijuana shrinks or slows the growth of these painful tumors. Due to this continued painful condition and success of marijuana as a medicine, he has been a California Medical Marijuana card holder since 2006.

Being a marijuana activist, the defendant closely followed the changes in the marijuana laws throughout the country, but particularly in New Jersey. Several years ago he left New Jersey to open and run a marijuana dispensary in California (the Liberty Bell Temple located in Los Angeles). He was totally aware of the passage of the "New Jersey Compassionate Use

Medical Marijuana Act; N.J.S.A. 24:6I-1 et seq.; "CUMMA") and its being signed into law on January 18, 2010 by then-Governor Jon Corzine. Factually, this is the date New Jersey officially recognized marijuana's medicinal value. The defendant immediately recognized that when CUMMA was written there was no "exemption" to the (N.J.S.A. 2C:35-10a(3)) criminal statutes written into either (the medical or criminal) law.

New Jersey has a provision (N.J.S.A. 24:21-3(d)) within the Department of Health that would allow the director to change marijuana from its present schedule 1 status (under N.J.S.A. 24:21-5e(10)); but the state has failed to do so. In February 2010, the defendant contacted Allan Marain, Esq. of the National Organization for the Reform of Marijuana Laws (NORML) and told him that defendant planned to be the first defendant to challenge these laws and the "conflicting" legal situation that the New Jersey legislature presented. Then, as now, the defendant believes that when CUMMA became New Jersey law it "null and voided" the State's marijuana laws (which defines marijuana as having no medical value and thus erroneously defines it as a Schedule 1 drug).

Defendant submits that New Jersey became the first state to legalize marijuana, by legislative oversight. Thus, when he returned from California to New Jersey in April of 2010 (to

visit his children during Easter break) he felt secure in bringing his required medicine (the marijuana in this case). It cannot be overemphasized that defendant was arrested three months after New Jersey had recognized marijuana as a medicine on January 18, 2010 with the signing of CUMMA into law. The defendant's arrest, prosecution, conviction and 270 day jail sentence violates the Due Process, Equal Protection, Commerce, and Full Faith and Credit Clauses of the Constitution, along with the Fourth Amendment right to be free from unreasonable searches and seizures. The statutes under which the defendant was charged (Count One: N.J.S.A. 2C:35-5a(1)/2C:35-5b(11) and Count Two: N.J.S.A. 2C:35-10a(3)) are unconstitutional and violate the First Amendment Religious Freedom Clause, along with due process and equal protection.

The defendant is the future defendant hypothesized by the sharply divided (4 to 3) Supreme Court in State v. Tate, 102 N.J. 64 (1986). Defendant always believed marijuana is improperly classified as a Schedule I drug (N.J.S.A. 24:21-5e(10)) and that the CUMMA preempts the criminal marijuana laws (N.J.S.A. 2C:35-5a(1)/2C:35-5b(11)/2C:35-10a(3)). The defendant refused to plead guilty, was tried, with the court subsequently forcing a plea of "guilty" on March 12, 2013 to a probation violation by denying defendant's healthcare/cancer treatments.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Burlington County Indictment Number 2010-08-0866-I, charged the defendant Edward R. Forchion, in Count One with possession with intent to distribute a controlled dangerous substance) (marijuana), contrary to N.J.S.A. 2C:35-5a(1) and 2C:35-5b(11), and in Count Two with possession of CDS (marijuana), contrary to N.J.S.A. 2C:35-10a(3). (Da[2] 1-3). At the first appearance on October 10, 2010, the Honorable Jeanne T. Covert, J.S.C., recused herself citing past case work on the defendant's and defendant's brother Russell Forchion's 1998 Camden County indictment (Indictment No. 3596-10-98).

Judge Covert assigned the Honorable Charles A. Delehey, J.S.C. (aged 74 at the time of trial and who had retired on

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[1] Defendant respectfully requests permission to combined the "Procedural History" and "Statement of Facts" portions of this brief as the two are closely related.

[2] "Da" – Defendant's appendix to the brief filed by counsel (dated March 18, 2014).
"1T" - March 15, 2011, pretrial transcript (motion to suppress).
"2T" - June 15, 2011, pretrial transcript (motion to proceed pro se).
"3T" - July 19, 2011, pretrial transcript (motion to dismiss).
"4T" - October 19, 2011, pretrial transcript (pretrial conference).
"5T" – April 10, 2012, pretrial transcript (postponement).
"6T" – May 1, 2012 jury selection transcript.
"7T" – May 3, 2012 (Volume 2) jury selection transcript.
"8T" - May 3, 2012, trial transcript (opening statements, testimony).
"9T" - May 8, 2012, trial transcript (testimony).
"10T" - May 9, 2012, trial transcript (verdict).
"11T" - August 14, 2012, transcript of judgment of acquittal motion.
"12T" - January 16, 2013, sentencing transcript.
"13T" – March 12, 2013, VOP plea and sentence.
"14T" – September 10, 2013, resentencing (staggered jail schedule).

February 1st, 2009 in disgrace after having been charged with improper ex parte communications). However, Judge Covert retained oversight and continued to be a part of case in violation of the spirit of the recusal provisions.

Retired Judge Delehey was "unconstitutionally" assigned as presiding Judge. Retired Judges are not approved by the legislative branch to un-retire and preside over cases.

On March 15, 2011, the retired Charles A. Delehey, denied defendant's motion to suppress. (1T50-1 to 10). Retired Judge Delehey also agreed to issue a "stay of sentence pending the appeal" that everyone knew the defendant would file. As the Judge stated: "The Court is going to do this, it's going to schedule the matter for trial on April 12. And in the event of a conviction, Mr. Forchion isn't going to have his liberty taken from him immediately that will be stayed pending resolution Of the Constitutional matter". (1T56-1 to 6).

The Motion to Dismiss (dated April 20, 2011) was later denied by retired Judge Delehey in a memorandum of law dated September 6, 2011. (Da4 to 15).

On June 15, 2011, Judge Delehey granted the defendant's motion to proceed pro se. (2T33-13 to 15; 3T2-4 to 6), but reversed that ruling at a pretrial conference on October 19, 2011. (4T10-5 to 15). On January 5, 2012, Judge Delehey again

reversed himself, and granted the pro se application with the condition that the defendant "will advance no arguments to the jury to suggest that marijuana is not or should not be a substance proscribed by law in the State of New Jersey." (Da16). Judge Delehey therefore deprived the defendant of his constitutional rights by curtailing his right to present the truth to the jury. New Jersey Constitution Article 1 Paragraph 6 specially states: "In All Prosecutions; . . . the jury may be given the truth as evidence . . . and the jury shall have the right to determine the law and the fact."

Trial was conducted before retired Judge Delehey and a jury from May 3 to 9, 2012, following which the jury found the defendant guilty of Count II, but was unable to reach a verdict on Count I. (Da18 to 20). On August 4th, 2012 the court proceeded in an ex parte manner. This defendant, who was representing himself pro se, had the constitutional right to be a part of all proceedings related to his case, yet he was prevented from participating. The defendant was subsequently retried and found not guilty of Count II on October 18, 2012.

On January 16, 2013, retired Judge Delehey reneged on pre-trial ruling to "stay sentence pending appeal" and sentenced the defendant to a 2 year period of probation on Count Two, together with fines and a 6 month license suspension. (Da21 to 24).

Retired Judge Delehey permitted the defendant to travel to California, directing "that this matter be transferred to Los Angeles County, California, for supervision." (12T23-7 to 12). This was to permit the defendant to receive his monthly cancer treatments. However, retired Judge Delehey "reneged or forgot" his promise to stay the sentence (possibly due to his advanced age) and he then unexpectedly denied the defense motion for a "stay of sentence" as agreed upon previously. (12T25-7 to 15).

A Notice of Appeal was filed on May 1, 2013. (Da25).

On January 17, 2013, an ex parte hearing occurred, as Judge Grant interfered in this case and communicated with retired Judge Delehey, resulting in a fugitive arrest warrant subsequently being issued by retired Judge Delehey for defendant. Defendant and his assigned assistant counsel had no knowledge of hearing or communications by Judge Grant. Defendant was arrested on January 30, 2013, going to California for his cancer treatments that retired Judge Delehey allowed on January 16 (http://www.njweedman.com/jan17_exparte_hearing.pdf) and held until March 14, 2013. Defendant was unconscionably denied monthly cancer treatments and medical marijuana for the months of February and March, 2013.

On March 12, 2013, defendant was forced to "plead guilty" to a bogus violation of probation, in exchange for his being

released to resume monthly cancer treatments and medical marijuana. The "plea of guilty wasn't voluntarily or factual" and it was made solely by the defendant to resume his life-saving medical treatment. There was no paperwork from the Probation Department of a violation; no complaint was made by any probation officers. Defendant submits that this probation violation was a creation of the January 17, 2013 ex parte telephonic/video hearing conducted with Judge Glenn Grant, J.A.D. (the Acting Administrative Director of the New Jersey Courts) and Retired Judge Delehey. Retired Judge Delehey stated: "Mr. Forchion has played his health with this Court as if it were a Stradivarius" (13T10-3 to 4) as he terminated probation and re-sentenced the defendant to 270 days in the County Jail (thereby achieving the desired jail-time outcome sought by Judge Grant). (Da28-30).

A Notice of Appeal was filed on April 29, 2013.

On March 14, 2013, the previously recused Judge Covert, still acting in an oversight manner, unethically signed/filed an Order releasing the defendant so that he could continue with treatment. (Da33). The defendant was released from jail after serving approximately 45 days. Again, defendant filed a Motion for "Stay of Sentence Pending Appeal" (Da32 to Da38; without the March 15, 2011 transcripts to rely upon) which was denied by

retired Judge Delehey on September 11, 2013. (Da39). Retired Judge Delehey then ordered the defendant to serve a staggered jail sentence to accommodate the defendant's medical treatment. (Da39-40). The defendant filed an Amended Notice of Appeal as to the denial of the stay of sentence, along with an "Application for Permission to File Emergent Motion." On September 11, 2013, the Honorable George S. Leone, J.A.D., granted leave to file a motion for emergent relief. (Da41). In an Order filed September 23, 2013, the Appellate Division denied the stay of the nine-month VOP sentence. (Da42).

On September 24, 2013, the Supreme Court denied defendant's application for a stay "pending further review by the N.J. Supreme Court on October 1, 2013." (Da43). On October 3, 2013, the New Jersey Supreme Court denied the motion for a stay of sentence. (Da44). On October 22, 2013, the Appellate Division sua sponte consolidated the direct appeal and the VOP appeal. (Da45).

On October 14, 2013, the defendant filed a "Motion to [Withdraw THE] Guilty Plea per Court Rule 3:21-1 and on October 24, 2013, retired Judge Delehey denied the motion without holding an evidentiary hearing (as required). (Da46-47).

On January 28, 2013, retired Judge Delehey held a hearing and terminated the remainder of defendant's jail time.

LEGAL ARGUMENT

POINT I

THE RECALL STATUTE (N.J.S.A. 43:6A-13(B)) IS UNCONSTITUTIONAL AND VIOLATES NOT ONLY TWO PROVISIONS OF THE NEW JERSEY CONSTITUTION, NAMELY, N.J. CONST. (1947) ARTICLE VI, § 6, ¶ 3 (THE JUDICIAL ARTICLE) AND N.J. CONST. (1947) ARTICLE XI, § 4, ¶ 1 (THE SCHEDULE ARTICLE) BUT ALSO DEFENDANT'S DUE PROCESS RIGHT TO A FAIR TRIAL UNDER THE FOURTEENTH AMDENDMENT TO THE UNITED STATES CONSTITUTION

Preliminarily, it should be stated that this issue is presently pending in the New Jersey Supreme Court since there was a dissent by Judge Harris in State v. Buckner, 437 N.J. Super. 8 (App. Div. 2014). The New Jersey Supreme Court's decision in Buckner will unquestionably impact this issue raised by defendant.

Defendant challenges the constitutionality of N.J.S.A. 43:6A-13(b), which authorizes the New Jersey Supreme Court to recall retired judges for temporary service, including those who have reached the age of 70, and retired under scrutiny. Defendant asserts that he is entitled to a new trial because the presiding judge was constitutionally disqualified from serving as a Superior Court judge based solely on his age – 74 at time of trial. This age factor was evident (and harmful to defendant's case) by the

74-year-old year old retired Judge reneging on the pre-trial agreement for a stay due to his age limitations and forgetfulness.

As detailed in the "Procedural History," retired Judge Delehey denied defendant's previously agreed upon "motions for stay of sentence." The practice of the New Jersey Supreme Court of reinstating retired judges without legislative approval violates not only the New Jersey Constitution but defendant's Fourteenth Amendment right to Due Process and a fair trial.

N.J. Const. (1947) art. VI, § 6, ¶ 3 (the Judicial Article) provides:

> **The Justices of the Supreme Court and the Judges of the Superior Court shall hold their office their offices for initial terms of seven years and upon reappointment shall hold their offices during good behavior. Such Justices and Judges shall be retired upon attaining the age of seventy years. Provisions for the pensioning of the Justices of the Supreme Court and the Judges of the Superior Court shall be made by law. (Emphasis supplied).**

N.J. Const. (1947) art. XI, § 4, ¶ 1 (the Schedule Article) provides, in relevant part, that:

> **Subsequent to the adoption of this Constitution the Governor shall nominate and appoint, with the advice and consent of the Senate, a Chief Justice and six Associates of the new Supreme Court from among the**

> **persons then being the Chancellor, the Chief Justice and Associate Justices of the old Supreme Court, the Vice Chancellors and Circuit Court Judges. The remaining judicial officers enumerated and such Judges of the Court of Errors and Appeals as have been admitted to the practice of law in this State for at least ten years, and are in office on the adoption of the Constitution, shall constitute the Judges of the Superior Court. The Justices of the Supreme Court and the Judges of the Superior Court so designated shall hold office each for the period of his term which remains unexpired at the time the Constitution is adopted; and if reappointed he shall hold office during good behavior. No Justice of the new Supreme Court or Judge of the Superior Court shall hold his office after attaining the age of seventy years, except, however, that such Justice or Judge may complete the period of his term which remains unexpired at the time the Constitution is adopted. (Emphasis supplied).**

It is quite clear that the accepted American common-law does not support the New Jersey Supreme Court's practice of establishing an alternative route and/or alternative qualifications for judicial assignments via the recall of retired Judges. The authority of a State's people to determine the qualifications of their most important government officials lies "at the heart of representative government," and is reserved under the Tenth Amendment and guaranteed by the Guarantee Clause of Article IV, § 4. See, e.g., Sugarman v. Dougall, 413 U.S. 634, 648,

93 S.Ct. 2842, 2850, 37 L.Ed.2d 853 (1973) (United States Supreme Court held that New York civil service law provision that only citizens may hold permanent positions in the competitive class of the state civil service violates the Fourteenth Amendment's equal protection guarantee).

Because the [legislature's] interference with the New Jersey people's decision to establish a qualification for their judges would upset the usual constitutional balance of federal and state powers, the [legislature] Congress must make its intention to do so "unmistakably clear in the language of the statute." See, e.g., Will v. Michigan Dept. of State Police, 491 U.S. 58, 65, 109 S.Ct. 2304, 2308, 105 L.Ed.2d 45 (1989) (Michigan state employees brought action against Department of State Police and its director under federal civil rights statute; the United States Supreme Court held that neither state nor its officials acting in their official capacities were "persons" under federal civil rights statute).

While the majority in Buckner held that the recall statute did not contravene the constitutional provision precluding judges from holding office after age 70 and did not conflict with the compulsory retirement provision, Judge Harris dissented

and concluded, inter alia, that the plain language of the Judicial Retirement paragraph mandates retirement at age 70. This Court should adopt the rationale of Judge Harris' dissent in Buckner. Turning to Judge Harris' dissent, he writes:

> **Warning: the elegantly pragmatic approach of the able and well-researched opinion of my colleagues may seduce the reader into undiscerning agreement. I urge caution and a willingness to disagree.**
>
> **The majority endorses the thirty-nine-year utilization of Section 13(b) of the Judicial Retirement System Act (the JRSA), N.J.S.A. 43:6A-1 to -47, as a proper source, and apt means, of conferring judicial power upon septuagenarians who once were Superior Court judges but "retired on pension or retirement allowance" and are then "recalled by the Supreme Court for temporary service within the judicial system other than the Supreme Court." N.J.S.A. 43:6A-13(b). Those familiar with our publicly funded system of dispute resolution recognize that such recall judges "serve[] the people of New Jersey with skill, diligence and integrity." DePascale v. State, 211 N.J. 40, 93 (2012) (Patterson J., dissenting). Alongside active judges, this grey-haired army of retiree jurists cloaked yet again with their former sovereign authority by N.J.S.A. 43:6A-13(b) and -13(c) reliably deliver tangible benefits for "real parties and actual people who are trying to vindicate their rights as they await justice." Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 340 (2010) (Rabner, C.J., concurring).**
>
> **The problem, however, is that the statute--and, inescapably, the long-standing practice of deploying recall troops for temporary judicial service--are both unconstitutional.**

Accordingly, I dissent. Buckner, supra, 437 N.J. Super. 8 at 38-39 (emphasis supplied).

As Judge Harris further writes in his dissent:

> **The standard of review that governs this case is formidable: has defendant James Buckner demonstrated, beyond a reasonable doubt, see Gangemi v. Berry, 25 N.J. 1, 10 (1957), that Article VI, Section 6, Paragraph 3 of the New Jersey Constitution (the Judicial Retirement paragraph) was intended by its framers and the people who adopted it in 1947 to not permit the Legislature to authorize reinstatement of this state's judicial power to pensioner judges? FN3 Because the enabling legislation--N.J.S.A. 43:6A-13(b)--that purports to accomplish this (1) offends the plain "shall be retired upon attaining the age of 70 years" language of the Judicial Retirement paragraph, and (2) irreparably rends the Constitution's fabric of separation of powers by legislatively authorizing the Supreme Court--rather than the Governor--to make the selection decisions to implement recalls, the high threshold of presumptive constitutionality has been surmounted. Buckner, supra, 437 N.J. Super. at 39-40.**

Judge Harris continues:

> **Even with awareness of the admonition that it is the "policy of our law not to invalidate a statute which has been in force without substantial challenge for many years,"**
>
> **I cannot stand mute when a statute's unconstitutionality is obvious.**

> In re Loch Arbour, 25 N.J. 258, 265 (1957). "It is a familiar rule of construction that where phraseology is precise and unambiguous there is no room for judicial interpretation or for resort to extrinsic materials. The language speaks for itself, and where found in our State Constitution the language is the voice of the people." Vreeland v. Byrne, 72 N.J. 292, 302 (1977); see also The Federalist No. 78 (Alexander Hamilton) ("[T]he Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."). In the present case, I see nothing that permits the placement of executive powers within the orbit of our highest court. The law, while arguably well-informed and foresighted from a policy standpoint, cannot withstand constitutional scrutiny, and we should say so, even after almost four decades of going unchallenged. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60, 73 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

Judge Harris continued:

> The majority observes that the Judicial Retirement paragraph licenses the practice of recalling post-age-seventy former judges because it "does not bar a retired judge from being recalled for temporary service." Ante at 27, 96 A.3d at 273. However, nothing in the Constitution authorizes it. Does the majority believe that, in the absence of enabling legislation, the Constitution's silence would permit, hypothetically, the implementation of an ad hoc recall-of-retired-judges system by, say, the Supreme Court on its own initiative, or the Governor through an Executive Order, or the Legislature by joint resolution? I doubt it. Thus, the essence of the present

analysis focuses not just upon what is left unsaid by the Constitution, but also upon the question of whether the particular statute is a valid exercise of legislative power.

I start with the language of the Constitution's Judicial Retirement paragraph, which, in pertinent part, states the following:

> **The Justices of the Supreme Court and the Judges of the Superior Court shall hold their offices for initial terms of 7 years and upon reappointment shall hold their offices during good behavior or . . . Such Justices and Judges shall be retired upon attaining the age of 70 years. Provisions for the pensioning of the Justices of the Supreme Court and the Judges of the Superior Court shall be made by law.**
>
> **[N.J. Const. art. VI, 6, 3 (emphasis added).]**

The plain language of the Judicial Retirement paragraph must be construed with thorough attention to the framers' choice of language, noting not only what they included, but also what they excluded from the document presented to, and approved by, the people in November 1947. "The polestar of constitutional construction is always the intent and purpose of the particular provision." State v. Apportionment Comm'n, 125 N.J. 375, 381, 593 A.2d 710 (1991). Although a literal reading of a constitutional declaration may be rejected when it is inconsistent with the spirit, policy, and true sense of the declaration, Lloyd v. Vermeulen, 22 N.J. 200, 205-06, 125 A.2d 393 (1956), "'the words employed [in the Constitution] have been carefully measured and weighed to convey a certain and

> **definite meaning, with as little as possible left to implication . . . .'" Apportionment Comm'n, supra, 125 N.J. at 382, 593 A.2d 710 (citation omitted).**
>
> **The phrase "shall be retired upon attaining the age of 70 years," simply connotes (1) the compulsory abdication of a judicial office; (2) the surrender of judicial power previously conferred by N.J. Const. art. VI, 1, 1; and (3) the permanent loss of the ability to exercise for the benefit of the public the sovereign functions of government that had previously been made possible by the Governor's selection, with the advice and consent of the Senate. See N.J. Const. art. VI, 6, 1. Buckner, 437 N.J. Super. at 41-42. (Emphasis in original).**

Justice Harris concludes as follows:

> **I conclude that there is nothing about the plain language of the Judicial Retirement paragraph that supports the majority's view. Alternatively, the majority "discern[s] a clear, compelling distinction between the proscriptive language in the Schedule Article against 'hold[ing] office' and the 'shall be retired' terminology used in the Judicial [Retirement paragraph]." Ante at 27, 96 A.3d at 273. This is comparing apples to oranges. (Emphasis supplied).**

In the case sub judice, since Judge Delehey was not only was more than four years past the 70-year mandatory retirement age, but since he also had recently been publicly admonished by the New Jersey Supreme Court (discussed, infra), his presiding over the defendant Edward R. Forchion's trial deprived defendant

of not only his New Jersey Constitutional rights but also his Due Process right to a fair trial under the Fourteenth Amendment to the United States Constitution.

For the foregoing reasons and authorities cited, the defendant-appellant Edward R. Forchion's conviction must be reversed.

POINT II

THE EX PARTE ACTION BY THE COURT BELOW VIOLATED RULE 1:2-1 AND DEPRIVED DEFENDANT OF HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL

Defendant claims that his right to a fair trial was denied not only with the unconstitutional assignment of a "retired" Judge, but also that this very Judge (who was publicly admonished by the New Jersey Supreme Court for engaging in improper ex parte action and retired under this cloud) then engaged in similar conduct through the defendant's trial proceedings – rendering these proceedings tainted from start to finish.

Retired Judge Delehey retired on Feb 1, 2009 under a cloud, and he had been accused of engaging in improper ex parte communications. Specifically, in In the Matter of Charles A. Delehey, a former Judge of the Superior Court, 200 N.J. 278 (2009), the New Jersey Supreme Court publicly reprimanded Judge Delehey for violating Canon 1 (a judge should observe high standards of conduct so the integrity and independence of the judiciary may be preserved), Canon 2A (a judge should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary), Canon 3A(1) (a judge should be faithful to the law and maintain professional

competence in it), Canon 3A(6) (a judge shall neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding), and Rule 3:9-3 (a judge shall take no part in plea discussions), conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of Rule 2:15-8(a)(6).

R. 1:2-1 [Proceedings in Open Court] provides, in pertinent part:

> **All trials, hearings of motions and other applications, pretrial conferences, arraignments, sentencing conferences (except with members of the probation department) and appeals shall be conducted in open court unless otherwise provided by rule or statute. If a proceeding is required to be conducted in open court, no record of any portion thereof shall be sealed by order of the court except for good cause shown, which shall be set forth on the record.**

Ex parte is Latin for "On one side only" also meaning "*Done by, for, or on the application of one party alone.*" An ex parte judicial proceeding is conducted for the benefit of only one party. Ex parte may also describe contact with a person represented by an attorney, outside the presence of the attorney.

In the instant case, "retired" Judge Charles Delehey presided over a clear ex parte hearing on August 4, 2012 and

again on January 17, 2013 (see New Jersey Promis/Gavel Event Detail reflecting an "unscheduled event on January 17, 2013; annexed to this pro se brief at Dsa1).

In addition, a letter from Donald Ackerman, Esq., Assistant Deputy Public Defender to retired Judge Delehey dated February 26, 2013 (annexed to this pro se brief at Dsa2-3) confirms an ex parte action by Judge Delehey which resulted in defendant's arrest for a violation of probation and consequent imprisonment:

> **Apparently, one or two days after sentencing when Mr. Forchion had not appeared at probation Mr. Luciano was contacted and he appeared before Your Honor to request a warrant. Quite frankly, I find this whole series of events to be highly unusual and contrary to my experience in other cases. In the past when a client has failed to appear, I will often be called to reach out to my client or at the minimum I will be asked to confirm contact information by probation. In this case none of this happened. I was not aware that Mr. Forchion had failed to appear at probation nor was I aware that after only one or two days that the prosecutor had already requested a warrant. (Emphasis supplied; Dsa2 to 3).**

Yet another blatant example of an ex parte violation occurred during the entire August 14, 2012 motion for a judgment of acquittal. In spite of the fact that retired Judge Delehey stated on the record that "Mr. Forchion apparently yesterday spoke with Mrs. Roche, the Court's secretary, and asked if he

could be heard on speaker phone" (11T3-8 to 10) retired Judge Delehey denied this request and proceeded to hear and then deny the judgment of acquittal motion without the defendant's presence or participation in that most crucial court proceeding (which would decide whether a charge would be submitted to the jury). (11T22-2 to 5).

For the foregoing reasons and authorities cited, the defendant-appellant Edward R. Forchion's conviction must be reversed.

POINT III

DEFENDANT'S COUNSEL'S FAILURE TO CORRECT THAT JUDGE DELEHEY EITHER RENEGED OR FORGOT (DUE TO HIS AGE) AS TO THE STAY OF SENTENCE PENDING APPEAL DEPRIVED DEFENDANT OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL AND TO HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL

Defendant incorporates by reference the arguments and authorities in Points I and II and submits that his right to effective counsel and due process right to a fair trial/appeal/sentence were violated when retired Judge Delehey was able to renege on the promise of the defendant remaining free on bail during his appeal.

As established earlier, retired Judge Delehey ruled that he would stay the sentence pending appeal. This courtroom deal squelched the defendant's desire to pursue constitutional issues by way of an "interlocutory" appeal. The defendant knew he had the services of an appellate attorney (his present attorney on this appeal) to assist him in filing an interlocutory appeal as to certain trial issues. However, since retired Judge Delehey agreed to stay the imposition of any sentence there was no need to file any interlocutory appeals.

However, in late December 2012 Judge Delehey entered in ex parte communications with PD Attorney Donald Ackerman and reneged on this deal and prepared the petition for probation.

Giving retired Judge Delehey the benefit of the doubt, it is possible that, due to his advanced age, he simply forgot that he had promised to stay the sentence pending appeal. This possibility supports the arguments raised in Point I, and explains why the New Jersey Constitution sought to avoid having Judges too old to remember complicated case intricacies and required Judges to retire at 70. Retired Judge Delehey was 74 at the time of these trials.

Either way, Donald Ackerman did not have the defendant's permission to negotiate probation; in fact, all of the defendant's e-mail communications with him all call for him to prepare stay of sentence paperwork. See (http://www.njweedman.com/EMAILS.pdf).

Defendant submits that his Sixth Amendment right to effective counsel was violated by this egregious act, as the defendant's legal assistant Ackerman did just the opposite by engaging in ex parte communications with retired Judge Delehey for imposing "probation" on defendant. Unbeknownst to defendant until just a few minutes before the sentencing hearing, Judge Delehey and Burlington County Public Defender Donald Ackermann had entered into ex parte communications to place the defendant on probation, as opposed to the promised "stay of sentence."

Defendant knew nothing of these ex parte conversations and agreement which, ultimately, resulted in the defendant having to serve a 270-day jail sentence.

As pointed out in Point II, another blatant example of an ex parte violation occurred during the entire August 14, 2012 motion for a judgment of acquittal. In spite of the fact that retired Judge Delehey stated on the record that "Mr. Forchion apparently yesterday spoke with Mrs. Roche, the Court's secretary, and asked if he could be heard on speaker phone" (11T3-8 to 10), retired Judge Delehey denied this request and proceeded to hear and then deny the judgment of acquittal motion without the defendant's presence or participation in that most crucial court proceeding (which would decide whether the sole charge would be submitted to the jury). (11T22-2 to 5).

It should be stated that at the last court appearance in May of 2012, Judge Delehey set the August date and advised defendant that he did not have to appear in person but could participate via phone. The defendant confirmed his number and times to call and everything was (to the defendant) set. Then Judge Delehey either forgot or intentionally reneged when he did not allow the defendant to participate in the crucial motion for judgment of acquittal.

The United States Supreme Court has ruled that a criminal

defendant has the right to be present during all critical stages of trial, allowing them to hear the evidence offered by the prosecution, to consult with their attorneys, and otherwise to participate in their defense. See Illinois v. Allen, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).

In the case at bar, the ex parte communications greatly harmed the defendant Forchion. Retired Judge Delehey and attorney Ackerman had agreed that the defendant should get probation without any input from the defendant! Ackerman presented the Judge with a "petition for probation". Several times during these proceedings, the defendant made it clear that he was representing himself pro se, and the defendant was (as was his right) following his own legal strategies and legal tactics. The defendant never would have pushed for a sentence of probation; there had been a firm deal for a "Stay of Sentence". Instead, both retired Judge Delehey and Ackerman engaged in this ex parte communication and line of legal planning (without defendant's presence, input or affirmation) to the great detriment of defendant! Defendant was ambushed at sentencing by his own "assistant" (Ackerman) and retired Judge Delehey who placed the defendant on probation and did not stay the imposition of this sentence (as previously agreed). The defendant understandably refused to sign onto that; defendant

violated no legally obtained probation, and did not report to probation or sign any probation paperwork. Defendant did not violate probation since probation was unlawfully imposed.

However, the legal skulduggery described above (and in Points I and II) resulted in the defendant receiving (and serving) a 270-day jail sentence.

For the foregoing reasons and authorities cited, the conviction must be reversed.

POINT IV

NEW JERSEY MARIJUANA LAWS (N.J.S. 2C:35-5 AND 2C:35-10) ARE INHERENTLY DISCRIMINATORY AGAINST AFRICAN-AMERICANS AND ALSO DISCRIMINATORY AS APPLIED BY LAW ENFORCEMENT

In October of 2013, defendant's counsel moved before the Appellate Division for leave to supplement the appellate rcord with a June 2013 report by the American Civil Liberties Union (ACLU) titled "The War On Marijuana In Black And White – Billions of Dollars Wasted on Racially Biased Arrests." This report is 186 pages in length.

By way of an Order filed on October 31, 2014, the Appellate Division (Judges Douglas M. Fasciale and Richard S. Hoffman) granted the motion, with the Supplemental statement: "The merits panel will give the report the attention to which it deserves." (Order annexed at Sda4; the ACLU Report found in the Appendix to the Letter Reply Brief at Dra1 to 187).

Defendant (a practicing African-American Rastafarian who is prescribed medical marijuana in California to treat his painful giant cancerous cell tumors) submits that the MTA of 1937 remains one of the toughest Jim Crow laws still being enforced. It is no mistake that blacks are disproportionately incarcerated. In Point II of the defendant's appellate brief, he again raises the issue of racially biased marijuana arrests:

"The MTA remains one of the toughest Jim Crow laws still being enforced; to this day African-Americans are disproportionately incarcerated." (Db30).

The ACLU Report analyzes how in America "blacks were on average over six times more likely to be arrested for marijuana possession than white." (Dra9). This report also includes a state-by-state break down of racial disparities in marijuana possession arrest rates, with blacks being "2.8 times more likely than whites to be arrested for marijuana possession" in New Jersey (Dra165). The chart that references the New Jersey arrest rates is on page 165 of the report.

Defendant is a practicing Rastafarian. Since his religion involves the smoking of ganja (marijuana) as a holy sacrament, then any law which illegalizes said sacrament (marijuana) is inherently discriminatory (not only on racial but religious grounds).

New Jersey's marijuana laws are also de facto discriminatory as applied by law enforcement. The ACLU report supports defendant's argument as to the de facto racially biased nature of marijuana arrests in the United States generally and in the State of New Jersey specifically. This Report details the discriminatory application of New Jersey's marijuana laws; as stated: "Blacks are 2.8 times more likely than whites to be

arrested for marijuana possession" in New Jersey. (Dra166).

De facto means "in fact." This means that people are being discriminated against in reality even if there is no official law to do that. De facto discrimination means discrimination in practice but not necessarily ordained by law. It can be discrimination based on a person's race, ethnicity, religion, gender, sexual orientation, etc. faced by that person or group in the daily conduct of everyday life in a particular society that is not supported or mandated by the laws of that society. Sexual harassment in the workplace is an example of de facto discrimination. New Jersey's marijuana laws are used in a similar fashion against African-Americans.

New Jersey marijuana laws are racist, as the ACLU Report concludes. The State of New Jersey (through its lawmakers) have utilized the 13th Amendment to re-enslave African-Americans. Because the Thirteenth Amendment prohibited slavery except as punishment for a crime, white lawmakers quickly realized that they could use the criminal law to effectively return the freedmen to a condition of de facto slavery. See Harold M. Hyman & William M. Wiecek, Equal Justice Under Law: Constitutional Development 1835-1875 at 319 (1982) ("Many northerners, including Republican rank-and-file in Congress, saw in the Code's thinly disguised efforts to reenact the substance of

slavery, including race control and labor discipline . . .” Russell, supra, note 21 at 20 (“In their totality, the Black codes created a new system of involuntary servitude . . .”); see also Roberts, supra, note 37, at 1955.

Justice Harlan stated in his dissent in Hodges v. United States, 203 U.S. 1, 27 S.Ct. 6, 51 L.Ed. 65 (1906) that “by its own force, that Amendment [the Thirteenth] destroyed slavery and all its incidents and badges, and established freedom.” Memphis v. Green, 451 U.S. 100, 126 n. 40 (1981) (citing Hodges, 203 U.S. at 27). The badges and incidents analysis examines modern-day inequalities to determine whether such inequalities are rationally traceable to the system of slavery. Cf. Williams v. City of New Orleans, 729 F.2d 1554, 1577 (5th Cir. 1984) (Judge Wisdom, concurring in part and dissenting in part) (“[w]hen a present discriminatory effect upon blacks as a class can be linked with a discriminatory practice against blacks as a race under the slavery system, the present effect may be eradicated under the auspices of the Thirteenth Amendment”).[3]

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[3] Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery, William M. Carter, Jr. University of California, Davis, School of Law, Vol. 40, No. 4, April 2007 (http://lawreview.law.ucdavis.edu/issues/40/4/articles/davisvono4_carter.pdf) A Thirteenth Amendment Framework for Combating Racial Profiling, William M. Carter, Jr. http://www.law.harvard.edu/students/orgs/crcl/vol39 1/carter.pdf?1=combating-test-panic.

Further proof as to the discriminatory origins and nature of the marijuana laws can be found in the history of Harry J. Anslinger, who became "America's first drug czar in 1930." (Dsa5). The article titled "The Devil Weed and Harry Anslinger" (annexed at Dsa5) elaborates:

> **When he was named America's first drug Czar in 1930 Anslinger initially tried to keep the Bureau of Narcotics clear of the marijuana issue because he knew eradication would be impossible. The stuff grows, he said, "like dandelion." But in the budget squeeze of the Great Depression he decided to create a little excitement by transforming marijuana from a low grade nuisance into an evil "as hellish as heroin." To add a little spice he played the race card.**
>
> **"Reefer makes darkie think they're as good as white men," said Anslinger, " . . . the primary reason to outlaw marijuana is its effect on the degenerate races." To make sure nobody missed the point he offered this profile of the average toker: " . . . most are Negroes, Hispanics, Filipinos, and entertainers. Their Satanic music, jazz, and swing, result from marijuana use. This marijuana causes white women to seek sexual relations with Negroes, entertainers, and any others." (Dsa5).**

For the foregoing reasons and authorities cited, including the ACLU Report, the marijuana laws are unconstitutional as they are inherently and de facto discriminatory. The defendant's conviction must be reversed and the indictment dismissed.

POINT V

JUDGE COVERT RECUSED HERSELF BUT REMAINED INVOLVED IN THE CASE DEPRIVING DEFENDANT OF HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL

At the defendant's first appearance on October 10, 2010, the Honorable Jeanne T. Covert, J.S.C., recused herself citing past case work on the defendant's and defendant's brother Russell Forchion's 1998 Camden County indictment (Indictment No. 3596-10-98).

Judge Covert assigned the Honorable Charles A. Delehey, J.S.C. (over aged 70 and who had retired on February 1st, 2009 in disgrace after having been charged with improper ex parte communications). However, Judge Covert retained oversight and continued to be a part of case in violation of the spirit of the recusal provisions.

On March 14, 2013, the previously recused Judge Covert, still acting in an oversight manner, unethically signed/filed an Order releasing the defendant so that he could continue with treatment. (Da33).

Recusal decisions are entrusted to the sound discretion of the judge to whom they are addressed. R. 1:12-2. Judges must "refrain . . . from sitting in any causes where their objectivity and impartiality may fairly be brought into

question." Id. at 43. The applicable standard is: "Would a reasonable, fully informed person have doubts about the judge's impartiality?" DeNike v. Cupa, 196 N.J. 502, 517 (2008).

As explained in DeNike, judicial ethical standards

> include the bedrock principle articulated in Canon 1 of the Code of Judicial Conduct that "[a]n independent and honorable judiciary is indispensable to justice in our society. To that end, judges are required to maintain, enforce, and observe "high standards of conduct so that the integrity and independence of the judiciary may be preserved." Ibid.

Judges are "to act at all times in a manner that promotes public confidence," id. Canon 2(A), and "must avoid all impropriety and appearance of impropriety," id. commentary on Canon 2 (emphasis added). Indeed, as this Court recognized nearly a half century ago, "justice must satisfy the appearance of justice.'" State v. Deutsch, 34 N.J. 190 (1961) (quoting Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11, 16 (1954)). That standard requires judges to "refrain . . . from sitting in any causes where their objectivity and impartiality may fairly be brought into question." Ibid. In other words, judges must avoid acting in a biased way or in a manner that may be perceived as partial. To demand any less would invite questions about the impartiality of the justice system and thereby "threaten[ ] the integrity of our judicial

process." State v. Tucker, 264 N.J. Super. 549, 554 (App. Div. 1993).

In State v. McCabe, 201 N.J. 34 (2010), the New Jersey Supreme Court held that the appearance of impropriety required recusal of a municipal court judge who was overseeing a criminal case in which the defense attorney was the judge's adversary in an unrelated, pending probate case, even though the probate case had been dormant for two years, and there was no evidence of bias or unfairness, nor proof of any animosity between the municipal court judge and the defense attorney. See, e.g., State v. McCann, 391 N.J. Super. 542, 554 (App. Div. 2007) (requiring recusal for appearance of impropriety when municipal court judge issued search warrant for residence of defendant he once represented); State v. Perez, 356 N.J. Super. 527, 532 (App. Div. 2003) (requiring recusal when municipal court judge made comments that a "reasonable person would take as reflecting bias" against a minority group).

In the case at bar, there is no question that Judge Covert recused herself. There is also no question that she retained oversight of this case in technical violation of her recusal and in violation of the spirit of the recusal provisions.

For these reasons the defendant Edward R. Forchion's conviction must be reversed.

POINT VI

DEFENDANT WAS DEPRIVED OF HIS RIGHT TO AN IMPARTIAL JURY IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, PARAGRAPH 10 OF THE NEW JERSEY CONSTITUTION DUE TO JURORS NUMBER ONE AND NUMBER FOUR POSSIBLY BEING BIASED AGAINST THE DEFENDANT (WHO THEY FOUND GUILTY)

Defendant submits that his trial counsel should have requested that retired Judge Delehey voir dire in camera both juror number one and juror number four for possible bias against the defendant (who they found guilty).

As to juror number one (the forewoman), she introduced herself as a member of Republican Congressman Jon Runyan's staff and an avid follower of reggae music. The defendant was running for Congress against Mr. Runyan that year. Juror number one claimed in court that her ex-boyfriend had played reggae music with Bob Marley and Peter Tosh (well known reggae artists). The following occurred in Court during jury voir dire:

> THE JUROR: The first response is just because I want to be honest, my ex-fiance was a famous musician and went on tour with several Rastafarians. I consider some of them my friends so that's my honest answer.
> THE COURT: So that wouldn't be any problem for you then?
> THE JUROR: No.
> THE COURT: Would that cause favoritism or a negative?
> THE JUROR: No. (6T145-12 to 22).

Later, this juror explained her background further in open court:

> **THE COURT: Would you be nice enough to stand and tell us something about yourself?**
>
> **THE JUROR: Certainly. My name is [Juror Number One]. I am 51. I am a congressional staffer. I do constituent services. I am single. I have a beautiful 13 year old boy who is my pride and joy. Source of news, Internet. Television shows, I love history, comedies. Spare time is with my son, of course, soccer and then more soccer. I sing, I love music. No bumper stickers and no military service.**
>
> **THE COURT: Thank you, ma'am.**
>
> **MR. LUCIANO: Judge, just a question or two if I may.**
>
> **THE JUROR: Certainly, sir.**
>
> **MR. LUCIANO: What band, what –- you said your husband was a musician?**
>
> **THE JUROR: My ex-fiance was a bass player. He toured with Bob Marley when he was young. And he was –- he toured with Peter Tosh, he was his bass player and he had his own band. And I went to Europe for three weeks, it was a wonderful trip, yeah.**
>
> **MR. LUCIANO: What member of congress do you serve as a congressional staffer?**
>
> **THE JUROR: It's Congressman John Runyan, Third Congressional District. (6T146-24 to 147-23).**

The defendant at that time (understandably) believed that this juror was telegraphing a message to him that he (a Rastafarian ganja smoker) should want her on the jury as she would be comfortable about the issue of marijuana use (as all reggae bands smoke marijuana).

When this juror was questioned by retired Judge Delehey and the prosecutor the defendant believed that she was going to be removed "for cause" by the retired Judge, but she was not so removed and sat on the jury.

As soon as court broke that first day of jury selection, the defendant was told by members of the audience that this juror was a Facebook "friend" of one of the defendant's friends and that they possibly had mutual marijuana associates. This Facebook Friend of the defendant's is a Reverend at the Liberty Bell Temple II, the defendant's former place of worship in Los Angeles. Defendant believes that the juror was not only a "Facebook Friend" but possibly a social friend of the Reverend, as well. Most significantly, the Reverend friend of the defendant's was a co-defendant with the defendant's brother (in a separate marijuana indictment) at the time of the Forchion trial.

Accordingly, it appears that this juror at the Forchion trial possibly was not completely honest (or had honestly forgotten) when she had claimed that she did not know the defendant Forchion. The defendant had publicized his trial while it was happening and this publicity included updates on the Reverend's Facebook page (where the Reverend's friends would see them). It is quite conceivable that the juror saw these

postings during the trial. The only way to know this would be to question this juror.

Defendant submits that after the finding of guilt by the jury his attorney should have moved to have this juror questioned in camera by the judge as to any possible bias against the defendant (and possible withholding of facts during the voir dire, whether inadvertently or not). Instead, the defendant was advised by his attorney that there was nothing to be done about the juror issue at that time.

A new trial will be granted where jury misconduct or intrusion of irregular influences into the jury deliberation "could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge." Panko v. Flintkote Co., 7 N.J. 44, 61 (1951). This is so because a jury verdict must be "based solely on legal evidence . . . and entirely free from the taint of extraneous considerations and influences." Id. The test, thus, "is not whether the irregular matter actually influenced the result, but whether it had the capacity of doing so." Panko, 7 N.J. at 61.

The decision as to whether to voir dire a juror to explore alleged jury misconduct lies in the sound discretion of the trial court. See State v. R.D., 169 N.J. 551, 560-61 (2001). Individual in camera voir dire is preferable. State v. Tindell,

417 N.J. Super. 530 (App. Div. 2011).

Defendant submits that his counsel should have either moved for a new trial or, at the very least, moved for an in camera voir dire of juror number one.

In addition, the defendant advised retired Judge Delehey that he had witnessed juror number 4 (the lone African-American juror) getting out of the elevator with assistant prosecutor Luciano; the Judge chose not to take the defendant's issue of possible jury tampering seriously. He did not comment or question either the prosecutor or the juror. This event was witnessed by a Courier Post reporter as well as the defendant's supporters. The defendant and his supporters had taken painstaking measures not to say anything to any juror or to be seen near one, then they saw the assistant prosecutor Mr. Luciano step out of a elevator with one by himself.

Retired Judge Delehey should have explored this issue of possible juror bias and possible legal impropriety.

POINT VII

THE PROSECUTOR'S SUMMATION DEPRIVED THE DEFENDANT OF HIS SIXTH AMENDMENT RIGHT TO A FAIR TRIAL AND FOURTEENTH AMENDMENT DUE PROCESS RIGHT AND STATE CONSTITUTIONAL RIGHT TO A FAIR TRIAL

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantees a fair trial to all persons accused of a crime. In that context, the United States Supreme Court in Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935), discussed the function of the prosecution:

> **The [prosecuting attorney] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done . . . He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from a wrongful conviction as it is to use every legitimate means to bring about a just one.**

A prosecutor may not improperly denigrate defendant, defense counsel or the defense. See State v. Lockett, 249 N.J. Super. 428 (App. Div. 1991) (Court revered defendant's conviction for first-degree aggravated manslaughter due to the

prosecutor's conduct on cross-examination and summation); State v. Pindale, 249 N.J. Super. 266 (App. Div. 1991) (Court reversed defendant's aggravated manslaughter and assault by auto convictions since the prosecutor improperly demeanor the role of the defense attorney and demeaned the defendant and defense); State v. Acker, 265 N.J. Super. 351 (App. Div.), certif. den. 134 N.J. 485 (1993) (court reversed defendant's conviction for sexual assault due to the prosecutor's summation which characterizes the defense attorney and defense as "absolutely preposterous" and "absolutely outrageous" and misleadingly informed the jury that if it believed one of the victims, it essentially had to believe the other).

In addition to not degrading a defendant, a prosecutor may not improperly vouch for the State's case. As stated by the United States Supreme Court in Berger v. United States, 295 U.S. 78, 55 S.Ct. 629 (1935):

> **It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations [to bring about only just convictions], which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. (emphasis supplied).**

A prosecutor may not declare his personal belief in a

defendant's guilt in such a manner as to lead the jury to believe that his opinion is based on something other than the evidence adduced at trial. State v. Ramseur, 106 N.J. 123, 321 (1987); See State v. Thornton, 38 N.J. 380 (1982), cert. den., 374 U.S. 816, 83 S.Ct. 1710, 10 L.Ed.2d 1039 (1963).

Finally, while a prosecutor is allowed great latitude during summation, he is permitted to comment only on the facts in evidence and reasonable inferences which could be drawn therefrom. See State v. Carter, 91 N.J. 86, 125 (1982); State v. Farrell, 61 N.J. at 102; United States v. Somers, 496 F.2d 723, 739 (3d Cir.), cert. den. 419 U.S. 832, 95 S.Ct. 56 (1974) (It is error to suggest that evidence other than that presented could have been submitted to support the conviction).

In the case at bar, the prosecution's entire closing statement was a threat to the jurors to follow the law or else; the assistant prosecutor demanded that they follow the law:

> **First the State's opening where we asked you, number one, to live up to your oath, to not debate, not question, not wonder but to apply the laws of the state of New Jersey to the facts as you'll hear them in evidence, not something he says or claims but here from the stand under oath. (11T95-4 to 9; emphasis supplied).**
>
> *** * ***
>
> **There's no question in this case that defendant, they start out with (sic) from**

the position that the defendant possessed, had in his possession, had in the trunk of his car a pound of marijuana. Again without question, need not even consider that charge for much or for too long . . . Simply put and without putting too fine a point on it, you cannot have marijuana in the state of New Jersey. (11T95-25 to 96-13).

*** * ***

This is an idea of having a fair trial for all sides. Mr. Forchion is entitled to a fair trial and so is the State. Use those oaths to enforce the law in the state of New Jersey. That's it. No explanation. No story. No song and dance. No political argument. You can't have it. Now I'll hold you to your oaths. (11T98-4 to 10).

*** * ***

Any discussion back in that jury room as to what the law means or what it implies or what medical marijuana is versus marijuana to enjoy yourself, it's got no place. It's got no place in this case.

The Judge can be pretty strict. The Judge has been correct as he characterizes as I try to do in my opening and trying to do now again, this is a legal determination not a political decision. It's not a referendum It's a criminal case. There are elements the State has to prove. It's proven, it's proven both possession and possession with intent to distribute.

All this other stuff is irrelevant for your determination. He's guilty of both charges. You've sworn an oath and I'm going to hold you to it. The State proved those elements. My expert said so. His expert said so. You can go back there and not do the right thing, but do what the law demands you, what your oath demands you to do and

> find him guilty on both charges. (9T111-16 to 112-10; emphasis supplied).

The assistant prosecutor improperly told the jurors that he is the holder of the State's power and he ordered them to convict the defendant based on the law telling them they must follow the law; in reality the jury does not have to do this.

In addition, the assistant prosecutor improperly referred to the defendant as a drug dealer:

> Lieutenant Leon notices no other indicia of distribution. There's no baggies, no scales, does not concern him, doesn't affect his opinion as to the fact that this is possession with intent to distribute. And why is that. Because a person that moves a pound of marijuana, moved in that size of marijuana is considered a drug dealer. (9T104-6 to 12).

Defense counsel objected and the judge instructed the jury "that defendant has no obligation to testify." (9T104-16 to 19).

The assistant prosecutor continued to improperly mischaracterize the evidence: "Lieutenant Leon though explains what that is. He explained away his opinion as to the fact that a brick of marijuana says that that is a mid level dealer." (9T105-7 to 10). Defense counsel objected and the judge instructed the prosecutor: "That's where the Court stands on it and would like you to refrain from arguing that mid level, upper

level dealer." (9T105-11 to 108-2).[4]

For the foregoing reasons and authorities cited, the defendant's conviction must be reversed.

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[4] During the prosecutor's opening, he belittled the defendant by calling him "a charlatan" and "a wolf in hemp clothing." (8T14-16 to 18). This lack of compassion was reiterated by Judge Delehey when he proclaimed that the defendant "has played his health with this Court as if it were a Stradivarius." (13T10-3 to 4). The New Jersey Compassionate Use Medical Marijuana Act of 2010 section (e) states: Compassion dictates that a distinction be made between medical and non-medical uses of marijuana. Hence, "the purpose of this act" is to protect from arrest, prosecution, property forfeiture, and criminal and other penalties, those patients suffering from debilitating medical conditions, and their physicians and primary caregivers, if such patients engage in the medical use of marijuana.

Defendant submits that the prosecutor's and judge's statements cited above fly in the face of the spirit and goals of the NJ-CUMMA.

POINT VIII

THE COURT BELOW IMPROPERLY CURTAILED THE DEFENDANT'S CLOSING ARGUMENTS AND GAVE THE JURY A MISLEADING INSTRUCTION RELATED TO THIS IMPROPRIETY DEPRIVING DEFENDANT OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT

During the defendant's closing statement, he was interrupted several times by retired Judge Delehey (9T88-21 to 22; 89-10 to 12; 90-25 to 91-7; 91-19 to 20; 92-13 to 23). Defendant submits that retired Judge Delehey improperly curtailed him during his closing.

The defendant during his closing statement to the jury read Article 1, Paragraph 6 of the New Jersey Constitution to the jury:

> Every person may freely speak, write or publish his sentiments on all subjects being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press, which would generally be considered the free speech aspect . . . in all prosecutions . . . the truth may be given in evidence to the jury . . . and the jury shall have the right to determine the law and the fact. Shall have the right to determine the law and the facts." (9T89-16 to 90-14).

However, retired Judge Delehey vitiated this proper argument by stating to the jury: "Ladies and gentlemen, that is a misconstruction of the New Jersey State Constitution. By virtue of your oath you are obligated to accept the law as this

Court conveys it to you no matter what anyone tells you. That's your obligation under your oath." (9T91-1 to 6). Retired Judge Delehey also refused defendant's request for the jurors to have a copy of the relevant portion (Article I, Paragraph 6) of the New Jersey Constitution. (9T118-5 to 19).

Article I, Paragraph 6 of the New Jersey Constitution provides, in pertinent part, as follows:

> **In all prosecutions . . . the truth may be given in evidence to the jury; and the jury shall have the right to determine the law and the fact.**

It is clear that the Constitution of New Jersey states that the jury has the right to determine the law, yet when the Judge gave his jury charge he essentially lied to them and stated that they had to follow the law. Every lawyer in America knows this is not the case and that a jury can do as it pleases; accordingly, retired Judge Delehey's instructions were a lie, misleading and unconstitutional.

Correct jury instructions are essential for a fair trial. State v. Collier, 90 N.J. 117 (1982); State v. Green, 86 N.J 281 (1981). A charge is a road map to guide the jury and without an appropriate charge a jury can take a wrong turn in its deliberations. Thus, the court must explain the controlling legal principles and the questions the jury is to decide. Green,

supra, 86 N.J. at 288. So critical is the need for accuracy that erroneous instructions on material points are presumed to be reversible error. State v. Grunow, 102 N.J. 133 (1986); Collier, supra, 90 N.J. at 123.

The defendant's request to have the judge balance his lie with the truth and to read Article 1(6) of the New Jersey Constitution to the Jury about Jury power/rights was denied and, at that point, all semblance of fairness was lost. What makes the United States different from our countries is that our system of justice is supposed to be fair and not shams or kangaroo courts. In Forchion the judge's charge to the jury was misleading as it led them to believe that they had to convict when it was in their constitutional power not to do so.[5]

For the foregoing reasons and authorities cited the conviction must be reversed.

---

[5] The Judge in Forchion tried in open court chastise the defendant about tampering with the judicial process. He complained that jury nullification fliers were passed out that stated the Judge would lie; defendant was correct as the judge did lie to the jury with his instruction. The judge also complained that the defendant was giving interviews on a radio station (101.5), and to the print media (The Burlington County Times). However, the judge did not issue any gag order nor did the prosecutor request one. The judge did order the jury not to listen to 101.5 or read the Burlington County times but, apparently, he should have also forbid them from viewing Facebook. The press has a right to know what is occurring in the court system and the defendant has a First Amendment right to speak to the press.

POINT IX

THE COURT BELOW DEPRIVED DEFENDANT OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL BY PRECLUDING THE DEFENDANT FROM SPEAKING TO THE JURY ABOUT THE NEW JERSEY COMPASSIONATE USE ACT AND PRECLUDING HIM FROM ARGUING THAT MARIJUANA SHOULD NOT BE A SUBSTANCE PROSCRIBED BY NEW JERSEY LAW AS PART OF HIS DEFENSE AT TRIAL

This issue is raised in Point VIII of counsel's appellate brief (dated March 18, 2014); defendant incorporates by reference those arguments and wishes to add the following. The defendant's case was handcuffed from the beginning by pretrial rulings of retired Judge Delehey—most significantly, the pretrial ruling that defendant could not speak of New Jersey's medical marijuana law that was passed 3 months before defendant was arrested. This was very important to defendant's defense and it prevented him from arguing that his state of mind was such that he believed he was protected from prosecution under the marijuana law after the CUMMA law was signed. The pretrial rulings also precluded defendant from arguing that marijuana, in fact, does not fit the description of a schedule 1 drug any longer. The pretrial rulings prevented defendant from arguing that the law he was being prosecuted under was contradictory and thus constitutionally flawed. In addition, defendant should have been permitted to argue that, as a valid California medical

marijuana patient who needed his marijuana medicine, his rights to due process and equal protection were violated as he was prosecuted and punished for a law under which others were protected (under the CUMMA).

These pretrial rulings were exacerbated by the judge openly lying to the jurors about their rights, and by the judge not preventing the prosecutor from threatening the jury during his closing statement.

CONCLUSION

For the foregoing reasons and authorities cited, defendant-appellant Edward R. Forchion respectfully submits that his conviction should be reversed and the indictment dismissed with prejudice. In addition, his marijuana (or its equivalent value) should be returned to him. In addition, any of his DNA in databanks (including federal, state, private and local) should be destroyed.

At the very least, defendant is entitled to a reversal of his conviction and a new trial before a different judge without any conflicts or bias.

Respectfully submitted,

Dated: November 17, 2014

Edward R. Forchion, Pro Se

CCM0707 NEW JERSEY PROMIS/GAVEL 07/15/2013
PAGE : 0005 EVENT DETAIL 15:33
JUZMCF0

CASE NUMBER : 10001082 DEFENDANT NO : 001
DEFENDANT NAME : FORCHION EDWARD R

ACTUAL DATE	: 01 17 2013	ACTUAL PROCEED	: BWI
SCHED DATE	: 01 17 2013	SCHED PROCEED	: UNSCHEDULED EVENT
COURT JURISDICT	:	REQUESTOR	:
EVENT ACTION	: COMPLETED	REASON	:
PROSECUTOR	:		
JUDGE	: DELEHEY	CHARLES	
DEFENSE ATTY	:		
INVESTIGATOR	:		
COURT REPORTER	: VIDEO	VIDEO	
CT REP COMMENTS	:		
	:		

PROCEED COMMENTS:
: BW ISSUED AT 2:45PM . DF FTA @ PROB AFTER SENT. ON 1/16

PF6-NEXT 25 PAGES PF7-PRIOR PF8-NEXT

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Name: Lois.McFadden - Date: 7/15/2013 Time: 3:34:18 PM

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

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JOSEPH E. KRAKO
Public Defender

February 26, 2013

Honorable Charles A. Delehey, R.J.S.C.
Burlington County Superior Court
49 Rancocas Rd
Mount Holly NJ 08060

Re: State v. Forchion
Ind 10-08-0866-I
System. 10-1082

Dear Judge Delehey:

Mr. Forchion is currently in the Burlington County Jail on a bench warrant issued by Your Honor for failing to report to probation. I am writing to Your Honor because I am concerned that Mr. Forchion did not understand that he was required to immediately report to probation. I am also very concerned that the prosecutor and probation acted precipitously and without informing counsel before seeking a warrant from Your Honor.

As you know, you had permitted hybrid representation of Mr. Forchion in this case. At the time of his sentencing, Mr. Forchion was very thankful that Your Honor decided to not sentence him to a period of incarceration. However, it was his understanding that he could request a reconsideration of Your Honor's sentence and that he had 30 days to do so. It was his intention to request that Your Honor reconsider the stay of his probationary sentence pending his appeal. He mistakenly thought he would not have to sign up for probation until Your Honor made a decision on his request.

Apparently, one or two days after sentencing when Mr. Forchion had not appeared at probation Mr. Luciano was contacted and he appeared before Your Honor

to request a warrant. Quite frankly, I find this whole series of events to be highly unusual and contrary to my experience in other cases. In the past when a client has failed to appear, I will often be called to reach out to my client or at the minimum I will be asked to confirm contact information by probation. In this case none of this happened. I was not aware that Mr. Forchion had failed to appear at probation nor was I aware that after only one or two days that the prosecutor had already requested a warrant. When I spoke to Teri Costello probation intake supervisor this past Friday, she told me that they did not have a good telephone number and had not contacted me because she thought he was pro se. I also can say that never in my 20 years as a public defender in Burlington County have I seen the prosecutor's office request a warrant when only one or two days have elapsed.

Mr. Forchion during this case has appeared on numerous occasions and no warrant was ever issued. During the last trial, he even flew out to California for a treatment and returned on time. I am confident that if I had know that he had not reported and that a warrant would immediately issue that I could have explained the situation to Mr. Forchion and he would have signed up for probation. This whole situation could have been avoided, if only someone had reached out to me.

I have met with Mr. Forchion at the jail. He is very contrite and he will sign up for probation as required whether or not Your Honor agrees to reconsider the stay of your sentence. Mr. Forchion believes strongly in his cause but meant no disrespect. He understands that he can sign up for probation and also pursue his appeal rights.

In addition, I have a attached a letter which I obtained from Dr. Chawla M.D. one of the doctors running the experimental medical study in which Mr. Forchion was enrolled. This letter indicates that he is welcome back into the study if he does not miss a third treatment. He will have missed two treatments but if Your Honor sees fit to release him soon, Mr. Forchion will not miss this third treatment. Mr. Forchion is an intelligent man but he unfortunately knows less then he thinks. Your Honor was very compassionate before and I ask you to consider the importance of Mr. Forchion continuing his treatment. For your information, I am also enclosing a letter from Dr. Steven Fenichel which was e-mailed to me. Finally, I am also requesting that Your Honor move up his probation violation hearing from 3/12/13 so that he can make it back to California on time.

Sincerely,

Donald Ackerman
Assistant Deputy Public Defender

cc: Michael Luciano

ORDER ON MOTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-004052-12T4
MOTION NO. M-001385-14
BEFORE PART G
JUDGE(S): DOUGLAS M FASCIALE
RICHARD S. HOFFMAN

STATE OF NEW JERSEY
V.
EDWARD R FORCHION

MOTION FILED: 10/08/2014 BY: EDWARD R. FORCHION

ANSWER(S) FILED: 10/17/2014 BY: STATE OF NEW JERSEY

SUBMITTED TO COURT: October 30, 2014

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS, ON THIS 30th day of October, 2014, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT

MOTION TO SUPPLEMENT THE RECORD WITH ACLU REPORT — GRANTED

SUPPLEMENTAL:

The merits panel will give the report the attention to which it deserves.

FOR THE COURT:

Douglas M. Fasciale

DOUGLAS M FASCIALE, J.A.D.

10-08-00866-I BURLINGTON
ORDER - REGULAR MOTION
BJM

The Devil Weed and Harry Anslinger

Harry J. Anslinger, a former railroad cop and Prohibition agent, is almost single-handedly responsible for outlawing marijuana. A law-and-order evangelist -- one biographer called him "a cross between William Jennings Bryan and Reverend Jerry Falwell"--Anslinger believed that alcohol prohibition could have succeeded if only the penalties had been tougher.

When he was named America's first drug czar in 1930 Anslinger initially tried to keep the Bureau of Narcotics clear of the marijuana issue because he knew eradication would be impossible. The stuff grows, he said, "like dandelions." But in the budget squeeze of the Great Depression he decided to create a little excitement by transforming marijuana from a low grade nuisance into an evil "as hellish as heroin." To add a little spice he played the race card.

"Reefer makes darkies think they're as good as white men," said Anslinger, **"...the primary reason to outlaw marijuana is its effect on the degenerate races."** To make sure nobody missed the point he offered this profile of the average toker: **"... most are Negroes, Hispanics, Filipinos, and entertainers. Their Satanic music, jazz, and swing, result from marijuana use. This marijuana causes white women to seek sexual relations with Negroes, entertainers, and any others."**

Most Americans had never heard of the weed. Clearly Congress hadn't either. The transcript of the 1937 Congressional Hearings on the Taxation of Marihuana are "near comic examples of dereliction of legislative responsibility," according to one legal observer. The principal witness was Commissioner Anslinger and his evidence consisted of newspaper clippings. The solitary medical expert, Dr. William Woodward of the American Medical Association, undermined Anslinger's testimony by pointing out that the facts in these newspaper clippings had originated with the Commissioner himself.

But the hour was late and it was time to move on. In a vote they didn't bother to record, on a matter of little interest, a handful of Congressmen forwarded a bill that would one day fill the nation's prisons to the roof beams.

Common Sense for Drug Policy
www.CommonSenseDrugPolicy.org www.DrugWarFacts.org
www.ManagingChronicPain.org www.MedicalMJ.org
www.TreatingDrugAddiction.org
info@csdp.org

Text excerpted from *Drug Crazy*, Mike Gray, Random House 1998