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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 3

MOREL (AGUSTIN),

Appellant.

20 Eagle Street
Albany, New York
January 6, 2026

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Chrishanda Sassman-Reynolds
Official Court Transcriber

1 CHIEF JUDGE WILSON: Next case on the calendar is
2 People v. Morel.

3 MR. HAUSMAN: Good afternoon, Your Honors.

4 CHIEF JUDGE WILSON: Good afternoon.

5 MR. HAUSMAN: Lawrence Hausman for the defendant,
6 Agustin Morel. And I would like to request three minutes
7 for rebuttal.

8 CHIEF JUDGE WILSON: Yes.

9 MR. HAUSMAN: Because the four corners of the
10 misdemeanor complaint in this case contain allegations of
11 marijuana use, but no allegations regarding actual
12 impairment, I'd like to start today by just briefly - - -

13 JUDGE RIVERA: What about the physiological
14 effects of the marijuana use with respect to the eyes?

15 MR. HAUSMAN: Yes, Your Honor.

16 JUDGE RIVERA: Why isn't that enough, combined
17 with everything else?

18 MR. HAUSMAN: Well, let - - - let me get to that,
19 and let me get to that right now. Looking at the
20 allegations in the actual misdemeanor complaint because I
21 also want to address the People's argument that this court
22 should consider the record of refusal as part of the
23 accusatory instrument.

24 I think as to the allegations that the eyes were
25 watery and bloodshot, I think that's yet another form of an

1 allegation of use, but not impairment.

2 JUDGE CANNATARO: Well, it certainly could
3 confirm use, but do you categorically believe it states
4 nothing about impairment? It's a physical manifestation of
5 the ingestion of the drug, isn't it?

6 MR. HAUSMAN: Exactly. It's a physical
7 manifestation of the ingestion of the drug.

8 JUDGE RIVERA: Well, it's a physical
9 manifestation of the effect of the drug. That drug has had
10 a particular effect on the eyes. One needs clarity of
11 vision to be able to drive, right? It's telling you
12 something.

13 MR. HAUSMAN: Your Honor, I - - - I don't - - - I
14 certainly don't think there are allegations that the
15 bloodshot eyes impacted vision here. And I do think that
16 as one of the eighty million Americans who suffer from
17 seasonal allergies, that watery, bloodshot eyes don't even
18 satisfy - - - don't satisfy their Cruz standard of actual
19 impairment of ability to operate a vehicle reasonably and
20 prudently. And I - - - and so I think that - - -

21 JUDGE TROUTMAN: Would you agree it may be part
22 of establishing? It might be one thing, but not
23 necessarily enough standing alone?

24 MR. HAUSMAN: I - - - I think I would go farther
25 than that, Your Honor. I - - - I - - - I think it's not

1 enough. But I think everything else here certainly goes to
2 use. And I do think that the red eyes also go to use. It
3 goes to ingestion of the drugs. It goes to the fact that
4 TH - - - potentially anyway, that goes to the fact that THC
5 may have dilated the eyes and made them red shot - - -
6 bloodshot. But it doesn't establish - - - it's not a
7 symptom demonstrating impairment, like slurring of speech,
8 like swaying, like other field tests - - -

9 CHIEF JUDGE WILSON: Just so I have your position
10 - - -

11 MR. HAUSMAN: Yeah.

12 CHIEF JUDGE WILSON: - - - clearly. Your view is
13 that it's okay to drive while having smoked marijuana and
14 having it in your system as long as your driving ability is
15 not impaired?

16 MR. HAUSMAN: I think that's the law, Your Honor.
17 I mean, I - - -

18 CHIEF JUDGE WILSON: I'm just asking. That's - -
19 - that's your view of the law?

20 MR. HAUSMAN: Yes. And I - - - I think that is
21 the law. I think Cruz made clear that in - - - in the
22 context of alcohol, that a minimal - - - minimum
23 consumption of alcohol doesn't establish impairment.

24 And the same thing with marijuana. Minimal
25 consumption of marijuana, which red eyes confirm or at

1 least support, provide - - -

2 JUDGE RIVERA: But alcohol, the legislature does
3 allow for a minimum - - - a particular minimum consumption
4 that would not, right? Would not rise to the level.

5 MR. HAUSMAN: Well, on the per se they do. And
6 also I think just on - - - I just think Cruz recognizes
7 that minimal amounts of alcohol consumption that don't
8 impact in any way your ability to operate the vehicle
9 reasonably and prudently - - -

10 JUDGE RIVERA: But - - - but Cruz's standard is
11 impairment to any extent.

12 MR. HAUSMAN: Well, it's impairment to any
13 extent. There's more to it, though, of the physical and
14 mental abilities to operate - - -

15 JUDGE RIVERA: Yes.

16 MR. HAUSMAN: - - - the vehicle reasonably - - -

17 JUDGE RIVERA: Of course.

18 MR. HAUSMAN: - - - and prudently.

19 JUDGE CANNATARO: Can I just ask you, Counsel, to
20 finish your thought?

21 MR. HAUSMAN: Yeah.

22 JUDGE CANNATARO: You mentioned slurred speech
23 and wobbly walking.

24 MR. HAUSMAN: Yeah.

25 JUDGE CANNATARO: Why are slurred speech, like I

1 just did, and wobbly walking indicative of something that -
2 - - of - - - of impairment but not bloodshot, runny eyes?
3 I - - - I'm not sure I understand - - -

4 MR. HAUSMAN: Yeah.

5 JUDGE CANNATARO: - - - the difference.

6 MR. HAUSMAN: I think it's - - - I think it's an
7 essential question and I think it's an important
8 distinction. I think we talk about - - - what I, what I
9 think the distinction is, it's a distinction between
10 allegations of symptoms of use - - -

11 JUDGE CANNATARO: Yeah.

12 MR. HAUSMAN: - - - versus - - -

13 JUDGE CANNATARO: They're all symptoms of use,
14 right?

15 MR. HAUSMAN: Well, but - - - but something like
16 swaying and slurring speech is also at least some evidence
17 under - - - under the reasonable cause standard of motor or
18 cognitive impairment. And I think that's the critical
19 distinction that this court should focus on in establishing
20 if you - - - you know, under the - - -

21 JUDGE CANNATARO: So let me ask you this then - -
22 -

23 MR. HAUSMAN: Yeah.

24 JUDGE CANNATARO: - - - just as a hypothetical.
25 If - - - if the allegation of the accusatory instrument

1 were that the eyes were bloodshot, runny, and droopy, which
2 might suggest a motor impairment, would - - - would you be
3 arguing something different now?

4 MR. HAUSMAN: I suppose that there are some motor
5 impairments that are so arguably de minimis that they might
6 not reach even the lower level of - - -

7 JUDGE CANNATARO: That wouldn't even cut it?

8 MR. HAUSMAN: - - - impairment of Cruz. But I
9 think that would be as soon as you start talking about any
10 motor impairment, you - - - you have a drastically
11 different case than the case here, where all you have are
12 different manifestations of use.

13 You have really three categories of allegations
14 here in this accusatory instrument, all of which go to use.
15 You have the - - - you know, the smell of marijuana on his
16 clothes. You have a statement that he took two puffs of
17 marijuana. You have the marijuana ash. Those are all
18 direct evidence of use. And then you have - - -

19 JUDGE RIVERA: But there're also - - - excuse me.
20 There are also allegations about the timing of use.

21 MR. HAUSMAN: That he took - - - that he took the
22 - - - the - - - that he smoked - - - excuse me? That he
23 took two puffs of marijuana before the stop.

24 JUDGE RIVERA: Right.

25 MR. HAUSMAN: So - - - so I think that implies

1 some recency.

2 JUDGE RIVERA: As opposed to hours ago where one
3 might say, well, you may not be impaired now if it was
4 hours ago?

5 MR. HAUSMAN: I think the - - - and I agree that
6 also the odor also suggests some recency. But I think
7 what's important here, this is - - - this regime in New
8 York, this regime that requires impairment, is not, as in
9 other jurisdictions what we call - - - what they call a
10 zero tolerance regime.

11 So in some states, merely having used marijuana
12 recently and getting in a car violates the law. Here
13 there's an additional requirement. And I think the risk
14 here is that if you take proxies for use - - -

15 JUDGE RIVERA: Okay. So what what - - - is your
16 rule. What else - - - what else do you need here? What
17 was missing other than - - - or is it only the two things
18 you've identified?

19 MR. HAUSMAN: So what you need - - - so there are
20 different ways, obviously, you could establish impairment.
21 And I think the three most common ways are an impact on
22 actually driving.

23 JUDGE CANNATARO: An observed impact on driving?

24 MR. HAUSMAN: An observed impact on driving, or
25 you know, it can - - -

1 JUDGE RIVERA: So if they don't put on a turn
2 signal, would that be enough?

3 MR. HAUSMAN: I don't think so. But that's at
4 least distinguishable from this case, where, on the four
5 corners that - - - that's not alleged. I think that - - -

6 JUDGE SINGAS: This is a complaint though, right?
7 It's not an information, and does that matter?

8 MR. HAUSMAN: I mean, it certainly makes - - - it
9 dictates what standard applies. And so it's not the higher
10 prima facie case standard.

11 JUDGE SINGAS: Right.

12 MR. HAUSMAN: It's the reasonable cause standard.
13 But you still have to have facts, like many cases in this
14 court that are the leading cases on facial sufficiency,
15 like Dreyden and Dumas, and Afilal that provide the factual
16 basis for the element.

17 And here what we're saying is that you need facts
18 establishing not mere use but impairment. And to go back
19 to Judge Rivera's - - -

20 JUDGE RIVERA: That is hard - - - it's hard for
21 me to follow your argument when you've got factual
22 allegations of use close in time to the stop. You've got
23 the individual themselves admitting the use. You have an
24 officer who says based on my training, based on my
25 observations, based on all the arrests, I think this person

1 was impaired, right?

2 MR. HAUSMAN: Well, he didn't say that.

3 JUDGE RIVERA: Well, I think he does, but okay,
4 for one moment. And then he refuses to take the urine
5 test.

6 MR. HAUSMAN: Well, yeah. I'd like to speak to
7 the refusal of the urine test. But I also would like to go
8 back and answer your last question, which I don't think I
9 actually - - -

10 JUDGE RIVERA: I still don't see how all those
11 things that are known.

12 MR. HAUSMAN: Got you.

13 JUDGE RIVERA: And then the physical
14 manifestation of smoking the marijuana, why that doesn't
15 get you back to this - - - what is clear from Cruz of very
16 low level. Right?

17 MR. HAUSMAN: Well, because I - - - because I
18 think - - -

19 JUDGE RIVERA: Any impairment.

20 MR. HAUSMAN: Because I think it's - - - because
21 I think you need impairment. And I think that the critical
22 distinction is that evidence of use, even if - - - even if
23 you had, like, ironclad, solid proof - - -

24 JUDGE HALLIGAN: But isn't that the question? I
25 mean, I - - - I - - - I take your point that use itself is

1 not criminalized, but it seems to me it's a physiological
2 question, right, as to whether or not the watery and
3 bloodshot eyes are, in fact, some indication of impairment?
4 And the People make an argument that it is. And you know,
5 they - - - they cite some studies and you say that even if
6 they have shown that it dilates the blood vessels, that
7 doesn't show impairment.

8 I mean, this is a complaint. So where does that
9 question get resolved? Because perhaps the science would
10 show - - - I don't know. But perhaps the science would
11 show that the bloodshot and watery eyes, in fact, correlate
12 with impairment sufficiently for that to manifest
13 impairment and not just use. Where does that get resolved?

14 MR. HAUSMAN: I think that's an excellent
15 question. Because I think, one, that could have been
16 solved with different pleadings if - - -

17 JUDGE HALLIGAN: But it's a complaint.

18 MR. HAUSMAN: - - - your supposition is true.
19 No, even at the complaint stage - - -

20 JUDGE RIVERA: Or - - - or those are questions
21 for trial?

22 JUDGE HALLIGAN: Yes.

23 MR. HAUSMAN: Well, but see that's the - - -
24 that's the problem here. If - - - if we allow use because
25 I think it's important to answer the question about whether

1 or not bloodshot eyes constitute evidence - - -

2 JUDGE HALLIGAN: How is a complaint - - -

3 MR. HAUSMAN: - - - of impairment.

4 JUDGE HALLIGAN: Okay. So so - - - how is a
5 complaint, though, a viable vehicle in which to set all
6 that out? Which I take it is what you're suggesting if
7 you're saying that we - - - you know, you couldn't rely on
8 that.

9 MR. HAUSMAN: There's a couple ways. One is to
10 observe indicia of actual motor skill impairment or
11 cognitive impairment.

12 JUDGE HALLIGAN: Okay. But - - -

13 MR. HAUSMAN: We don't have that.

14 JUDGE RIVERA: But then - - - but then you're
15 looking for a certain level of impairment. Whereas Cruz
16 sends a - - - sets a minimal level - - -

17 MR. HAUSMAN: It's a minimal level - - -

18 JUDGE RIVERA: - - - of impairment?

19 MR. HAUSMAN: - - - but it still needs to be
20 impairment, and I think - - -

21 JUDGE HALLIGAN: And I think do you agree - - -
22 let me ask you this if I can. Do you agree that if a court
23 were to conclude, having evaluated robust scientific
24 evidence, that, in fact, contrary to what you argue, that
25 the eyes did correlate with impairment, that that would be

1 sufficient on a complaint?

2 MR. HAUSMAN: If all that were alleged? And - -
3 - and in fact, I think that the - - -

4 JUDGE HALLIGAN: But - - - but if that's - - - if
5 that's fair, then - - - then where - - -

6 MR. HAUSMAN: Well - - -

7 JUDGE HALLIGAN: - - - where is - - - where's the
8 question get joined?

9 MR. HAUSMAN: So I think - - - I think one answer
10 to your question that I think would - - - may be helpful is
11 that if this were all true, the prosecution could have the
12 police officer who - - - who - - - who if they have the
13 requisite training and experience in impairment, to say
14 that bloodshot eyes correlate with other - - - with actual
15 motor skill impairment. And - - -

16 JUDGE HALLIGAN: Perhaps. But - - - but perhaps
17 another response would be that - - - that in a case where
18 it proceeded past a complaint and a plea, that that would
19 get sorted out at trial?

20 MR. HAUSMAN: But I think without that, Your
21 Honor, again, I - - - I think that the allegations of
22 bloodshot eyes, all we know from the four corners of this
23 instrument, without an - - - without an allegation tying
24 red, bloodshot eyes to some kind of motor impairment, is
25 that we have evidence of recent use. But evidence of

1 recent use - - -

2 JUDGE RIVERA: But - - - I'm sorry. Did you say
3 that if the officer had said either expressly or one could
4 infer it from the language the officer chose, that based on
5 their experience and training bloodshot eyes is - - - I
6 forgot what the other thing is. Oh, my goodness.
7 Bloodshot eyes. What was the other one? Watery - - -
8 watery and bloodshot eyes by someone who's recently smoked
9 marijuana, it gives reasonable cause to believe that
10 they're impaired? Would that have been enough if they had
11 grounded it in their experience and training?

12 MR. HAUSMAN: Yes. And I think they wouldn't be
13 able to, honestly - - -

14 JUDGE RIVERA: Recent use with these particular
15 physical manifestations is reasonable cause to believe that
16 they're impaired?

17 MR. HAUSMAN: I - - - well, yes, I think that - - -
18 - see, I - - - I think that - - - I think that red - - -
19 based on the four corners, all we know is that red
20 bloodshot - - -

21 JUDGE RIVERA: No, no, no. If - - - if that is
22 the way one could read - - -

23 MR. HAUSMAN: Yeah.

24 JUDGE RIVERA: - - - this, would that - - -

25 MR. HAUSMAN: Oh, I see what you're saying.

1 JUDGE RIVERA: - - - have been enough?

2 MR. HAUSMAN: I - - - I don't read it that way.

3 I don't read the - - - the officer as alleging that - - -

4 JUDGE RIVERA: Yes, yes. I understand you.

5 MR. HAUSMAN: But - - - but so I think that's the
6 problem because I think that under these - - -

7 JUDGE RIVERA: But if one could - - -

8 MR. HAUSMAN: Yes. Yes.

9 JUDGE RIVERA: - - - would that have been enough
10 under your rule?

11 MR. HAUSMAN: Yes. And I think - - - yes. And I
12 think the problem here is that it doesn't. And I think
13 that - - -

14 JUDGE RIVERA: But the answer is yes?

15 MR. HAUSMAN: Yes.

16 JUDGE RIVERA: Okay.

17 MR. HAUSMAN: And I think that - - -

18 JUDGE CANNATARO: Counsel, the red light is on.
19 And you said you were going to address the refusal.

20 MR. HAUSMAN: Yes.

21 JUDGE CANNATARO: And I just want to hear what
22 you have to say about that.

23 MR. HAUSMAN: Yeah. So I think on the refusal of
24 the test, it's - - - it's - - - it's important to look at
25 what he was refusing. Because it was refusal of a test of

1 presence of drugs in urine. And so again, this refusal is
2 - - - asked to do a test that would establish presence of
3 marijuana, i.e., use. Again, not impairment.

4 And so that's why all of these facts alleged are
5 facts that go to use, not impairment. And - - -

6 JUDGE HALLIGAN: So how could - - -

7 MR. HAUSMAN: - - - and it's like the zero plus
8 zero problem.

9 JUDGE HALLIGAN: - - - how could you ever - - -
10 I'm sorry. I realize your light's on. But how could you
11 ever justify a urine test under - - - under that view? I
12 take it you're saying that a urine test only establishes
13 use, and so it is, what, therefore not probative, and - - -
14 and you can't get it?

15 MR. HAUSMAN: I think a urine test that only
16 establishes use is not particularly - - -

17 JUDGE HALLIGAN: What - - - what does that mean?

18 MR. HAUSMAN: - - - probative.

19 JUDGE HALLIGAN: A - - - a urine test would
20 establish the presence?

21 MR. HAUSMAN: Yes.

22 JUDGE HALLIGAN: And if your position is that the
23 presence can only show use, then I think you're saying that
24 a urine test can only show use and therefore is not
25 something that is - - - is relevant and can't be obtained?

1 MR. HAUSMAN: Well, I - - - I don't want to say
2 it's not relevant. I don't think it's sufficient.

3 So I think the - - - the allegations - - -

4 JUDGE CANNATARO: Does the refusal have any value
5 in terms of consciousness of guilt?

6 MR. HAUSMAN: Consciousness of guilt of use.

7 JUDGE CANNATARO: Which is not a crime?

8 MR. HAUSMAN: Well, it was a crime at the time of
9 this. And so it is consciousness of guilt of use, but not
10 - - - because it was a - - - a test for the mere presence,
11 it was not consciousness of guilt of - - -

12 JUDGE RIVERA: But is - - - but is - - -

13 MR. HAUSMAN: - - - impairment.

14 JUDGE RIVERA: - - - it a fair inference that it
15 could be consciousness of guilt of impairment also?

16 MR. HAUSMAN: I don't think it's a fair inference
17 when someone is told this is - - - will test for presence.
18 They're not being told it will test for impairment. So I
19 don't think their refusal simply goes to the issue of
20 impairment. And I - - - and I think I - - - I do want to
21 say, because I think, Judge Rivera, your questions earlier
22 suggested that, like - - - that recent use alone could
23 establish impairment. And I - - - and I think that's - - -
24 I think the risk of that is that you really end up,
25 particularly at the inception of a prosecution, and

1 prosecutions, even misdemeanor prosecutions, derail
2 people's lives, you end up turning this statute into a kind
3 of zero tolerance - - -

4 JUDGE RIVERA: But I don't think that's - - - I
5 don't think that's the prosecution's - - -

6 MR. HAUSMAN: - - - statute.

7 JUDGE RIVERA: - - - position. I - - - was not
8 trying to articulate it that way. But if you have recent
9 use and the physical manifestations as a consequence, and
10 the refusal of the test - - -

11 MR. HAUSMAN: Right, but - - -

12 JUDGE RIVERA: - - - that that in this context,
13 given that the officer says their determination is based on
14 their training and observations and arrests, that might - -
15 - that's the question.

16 MR. HAUSMAN: Well, I think where we - - - where
17 we disagree or where I'm disagreeing with the premise of
18 your question, is that a physical manifestation is
19 indicative of impairment as opposed to mere use. And I - -
20 - and I - - - I see that my time is more than up, and so I
21 - - - I'll - - - I'll return to make a few more points
22 after.

23 Thank you, Your Honor.

24 MS. SOUSOU: Good afternoon, Your Honors. May it
25 please the court. Julianna SouSou for the People.

1 Judging the accusatory instrument under the
2 deferential standard of a misdemeanor complaint, the
3 accusatory instrument here was facially sufficient. The
4 allegations and the reasonable inferences to be made from
5 those allegations that defendant consumed marijuana shortly
6 before being stopped, had an odor of marijuana on his
7 clothing, marijuana ash on his pants was - - -

8 JUDGE TROUTMAN: What about actual impairment?
9 It has no role? Is that what you're suggesting?

10 MS. SOUSOU: I'm sorry? What was the - - -

11 JUDGE TROUTMAN: Are you suggesting that actual
12 impairment has no role? That simple use is sufficient to
13 sustain the charge?

14 MS. SOUSOU: No, Your Honor. The allegations
15 establish that the defendant was actually impaired, not
16 just that he - - -

17 JUDGE HALLIGAN: Well, which - - -

18 JUDGE CANNATARO: Which one?

19 MS. SOUSOU: The - - - the bloodshot, watery eyes
20 specifically.

21 JUDGE HALLIGAN: Okay.

22 MS. SOUSOU: They don't just - - -

23 JUDGE HALLIGAN: Okay. And - - - and what about
24 - - - what about your adversary's point that absent some
25 statement from the officer that the officer knows, if in

1 fact, this is correct, that that correlates with
2 impairment, that that it - - - it doesn't get you to
3 impairment?

4 MS. SOUSOU: No. This is not - - - that - - -
5 the officer's professional training and experience are
6 allegations that are needed to be made for what - - -
7 conclusions that are of specialized knowledge. Here, an
8 individual exhibiting bloodshot, watery eyes after
9 admittedly consuming - - -

10 JUDGE HALLIGAN: Well - - - well, both of you - -
11 - you - - - it seems to me that you and your adversary
12 disagree about whether, as a physiological matter, the eyes
13 correlate with impairment or are merely a symptom of use.
14 Right?

15 MS. SOUSOU: Yes.

16 JUDGE HALLIGAN: And so why is simply asserting
17 the - - - the eyes - - - the observation of the eyes,
18 sufficient to also allege impairment?

19 I mean, do - - - do we have to decide whether
20 that's enough? And based on what? As a physiological
21 matter, based on what would we do that?

22 MS. SOUSOU: It we're not just looking at the
23 eyes. We're also looking at the other allegations in the
24 complaint.

25 JUDGE HALLIGAN: Okay. But I thought you said

1 the impairment is demonstrated by the - - - the eyes? Are
2 there any other allegations that go to impairment?

3 MS. SOUSOU: The - - - the refusal to take the
4 test.

5 JUDGE CANNATARO: That goes to impairment?

6 JUDGE HALLIGAN: To impairment or consciousness
7 of guilt?

8 MS. SOUSOU: It goes to the negative inference of
9 the consciousness of guilt of being - - - of committing the
10 offense of driving while impaired. That the defendant knew
11 - - -

12 JUDGE HALLIGAN: Okay.

13 MS. SOUSOU: - - - he shouldn't have been
14 impaired.

15 JUDGE HALLIGAN: But with respect to the
16 impairment specifically, I - - - I take it you're saying
17 that the eyes are the only allegation; is that - - - is
18 that right?

19 MS. SOUSOU: It is the only classic sign of drug
20 impairment.

21 JUDGE HALLIGAN: But in this particular - - -

22 JUDGE TROUTMAN: What about the time of day? It
23 was midnight?

24 MS. SOUSOU: Yes. And that's a defense that
25 defendant can raise at trial that his eyes were the result

1 of being fatigued. Not of - - -

2 JUDGE TROUTMAN: So - - - so what you're saying
3 is anyone who has red, watery eyes, that is sufficient to
4 establish an impairment as opposed to an allergy, as
5 opposed to being up and it being late?

6 MS. SOUSOU: No - - - no, Your Honor. The
7 allegations, along with the other allegations in the
8 complaint - - -

9 JUDGE TROUTMAN: Okay. So name those other
10 allegations.

11 MS. SOUSOU: The recency of the marijuana use,
12 the fact that he had marijuana ash on his pants, smelled of
13 marijuana, and then refused to test also, all indicate the
14 reasonable inference that defendant's eyes were not
15 bloodshot and watery because he was fatigued, but because
16 he was actually impaired by the marijuana he admitted to.

17 CHIEF JUDGE WILSON: Can I ask you about the
18 impairment? Is - - - is the impairment that he can't see
19 well? Or is it the impairment that the bloodshot, watery
20 eyes indicate that his motor control of his legs and arms
21 are impaired?

22 MS. SOUSOU: It's the - - - the bloodshot, watery
23 eyes are an outward manifestation that the marijuana is
24 actually having an effect on the body.

25 CHIEF JUDGE WILSON: What - - - what effect?

1 MS. SOUSOU: That's - - - that vaso - - - that
2 vaso - - -

3 CHIEF JUDGE WILSON: The effect on vision? Or
4 the effect on muscle control necessary to drive a car?

5 MS. SOUSOU: It - - - it - - - the - - - the
6 latter. The - - - the - - - it's the - - - caused by that
7 vasodilation, which is just a scientific word to mean that
8 someone is high. And when you're high, we know that your -
9 - - your reaction time, your perceptions, and - - - and
10 physical and mental abilities, which you all - - -

11 JUDGE CANNATARO: Does the science back you up on
12 what you just said? Where are we in the state of science
13 in terms of the correlation between red, watery eyes and -
14 - - and - - - and impairment?

15 MS. SOUSOU: We cite a few of the studies. I
16 don't have it right now. But that showed that red - - -
17 bloodshot, red - - - bloodshot, watery eyes are a classic
18 sign of a drug impairment exhibited in ninety-four percent
19 of those - - -

20 JUDGE CANNATARO: But those studies have some
21 disclaimers in them, don't they? In terms of how much you
22 can extrapolate from - - - from that in terms of its
23 indicativeness of impairment?

24 MS. SOUSOU: I - - - I don't believe so Your
25 Honor. It's an indication that the - - - the marijuana is

1 actually having an effect on the body where we can make the
2 reasonable inference.

3 JUDGE RIVERA: But the - - - but the officer
4 didn't rely on those studies. The officer says relies on
5 his observations, his training, and the arrests - - - his
6 prior marijuana arrests that he has made. That's - - -
7 that's what allows him, based on what he observes, to draw
8 this conclusion.

9 MS. SOUSOU: Yes. Because it - - - it's not a
10 matter of specialized knowledge that someone that's
11 exhibiting bloodshot, watery eyes after admittedly and
12 evidently consuming marijuana is impaired. So it didn't
13 need that specialized professional training knowledge in
14 order to do that. And - - - and - - -

15 JUDGE HALLIGAN: But - - - but let me press you
16 on that. Your - - - your adversary is arguing that the
17 science, in fact, does not establish that. And so - - -
18 you know, even if that might be a widely held view, perhaps
19 it is as a - - - as a matter of the physiology, incorrect?

20 MS. SOUSOU: That's a defense, though, to be made
21 at trial. The - - - the allegations in the complaint just
22 had to establish a reasonable inference that the defendant
23 was impaired. So - - -

24 JUDGE CANNATARO: So you move forward and then
25 you have some kind of Frye hearing? Is that - - - is that

1 what - - - is that what you could have done?

2 MS. SOUSOU: Yeah. At the next stage of the
3 proceeding. But at the pleading proceeding stage, it just
4 had to establish reasonable - - -

5 JUDGE HALLIGAN: But presumably there would be
6 some assertions of correlation that just don't - - - don't
7 pass muster on their face? So for example, if the officer
8 said, you know, the driver was wearing a blue beanie and
9 therefore I knew she was impaired. We would not think that
10 was - - - was sufficient. Right?

11 MS. SOUSOU: Yeah. Yeah.

12 JUDGE HALLIGAN: And - - - and so I - - - I - - -
13 I take your point about leaving it to trial, but it seems
14 to me that that rests on the assumption that there's enough
15 validity to the correlation to - - - to take it on its face
16 for the complaint. Right?

17 MS. SOUSOU: Yes. I believe we can make that
18 reasonable inference that - - - because, again, going back
19 to what the bloodshot, watery eyes signal, it's that the -
20 - -

21 JUDGE HALLIGAN: That's the question, though, is
22 what it signals. It signals use at least. And the
23 question is whether it also signals impairment?

24 MS. SOUSOU: It doesn't just signal use. It
25 signals that the marijuana is actually having an effect.

1 JUDGE HALLIGAN: Well, right. But that's your
2 view. But that's a contested point of view, I take it?

3 MS. SOUSOU: Yes. But that and as well as all
4 the other allegations in the complaint did establish
5 reasonable - - -

6 JUDGE RIVERA: What - - - what - - - the whole
7 point to smoking the marijuana is to change the way your
8 body is reacting to the environment?

9 MS. SOUSOU: Yes, yes.

10 JUDGE RIVERA: I mean.

11 MS. SOUSOU: Sorry. I don't think I understand
12 the question.

13 JUDGE RIVERA: I don't think that the gentleman
14 is smoking marijuana to be hyper alert on the road.

15 MS. SOUSOU: Yeah. No. It's a widely understood
16 that marijuana does not enhance your driving abilities. It
17 reduces them. So the allegation - - -

18 CHIEF JUDGE WILSON: But you're not - - - but
19 you're not taking the position that you can't smoke
20 marijuana at all and drive, right?

21 MS. SOUSOU: No. And the allegations here don't
22 establish that defendant just consumed marijuana and was
23 showing absolutely no effect of impairment.

24 CHIEF JUDGE WILSON: Right. If there's - - -
25 that is if there's not some actual impairment, there's no

1 crime. Fair?

2 MS. SOUSOU: Yes. That's - - - yes. It's - - -
3 it's not a - - -

4 JUDGE RIVERA: That's the nature of the charge?

5 MS. SOUSOU: Yes. Yeah.

6 CHIEF JUDGE WILSON: So why - - - do - - - do you
7 know whether - - - so just in looking at a bunch of records
8 having to do with cases involving drunk driving, usually
9 the officer pulls the person out and has them do a vertical
10 gaze thing and touch your nose and walk a straight line,
11 and none of that was done here. And that is done in
12 alcohol cases that I've seen even when the person has
13 watery, bloodshot eyes.

14 MS. SOUSOU: There was a field sobriety test that
15 was conducted - - -

16 CHIEF JUDGE WILSON: Yeah.

17 MS. SOUSOU: - - - as evidenced in the report of
18 refusal. But in regards to taking a breathalyzer or
19 something to that equivalent - - -

20 CHIEF JUDGE WILSON: No, I understand. A
21 breathalyzer, I understand. But - - - but so why not
22 include the results of that in the complaint?

23 MS. SOUSOU: And it's our position that the
24 allegations in the report of refusal should be considered
25 as part of the accusatory instrument.

1 JUDGE RIVERA: Well, how - - - how can we do
2 that? They're not referenced. They're not attached.

3 MS. SOUSOU: There's an argument that it is
4 incorporated. The factual - - - it's directly tied to the
5 - - -

6 JUDGE RIVERA: How is that incorporated? Is it
7 referenced somewhere?

8 MS. SOUSOU: It's directly tied to the factual
9 allegation that defendant refused to submit to the drug
10 test. And as a consequence of that refusal - - -

11 JUDGE RIVERA: To the urine test?

12 MS. SOUSOU: Yes, yes. The drug - - - yeah. As
13 a consequence of that refusal, this document was filed at
14 the defendant's arraignment. And it - - - it was required
15 by law to be filed at the defendant's arraignment,
16 including verified allegations from the same arresting
17 officer establishing reasonable cause to believe that the
18 defendant committed - - -

19 JUDGE RIVERA: But it is odd not to - - - to
20 include these observations and not saying, by the way, I
21 also observed the following.

22 MS. SOUSOU: Yes, it certainly would have been
23 better if the - - - the officer included the additional
24 allegations in the complaint. Every complaint would
25 benefit from more allegations.

1 JUDGE HALLIGAN: So - - - so if we - - - if we
2 take a different view about whether the report of refusal
3 is properly before us, then - - - then aren't we
4 essentially saying that if we agree with you that a
5 reference to watery and bloodshot eyes alone - - - nothing
6 else - - - is - - - is sufficient to show impairment?

7 I don't see any other allegations of impairment
8 in the complaint. I understand you're - - - you're arguing
9 that the refusal for the urine test is a consciousness of
10 guilt, but I don't think it goes to impairment.

11 So if the report of refusal and the response to
12 the test - - - to - - - to the coordination test, I forget
13 what it's called, is not in front of us, then it's just the
14 eyes. And so we'd be saying that alone, nothing more is
15 sufficient on a complaint to infer impairment?

16 MS. SOUSOU: It is, of course, as you said, our
17 position that the other allegations - - -

18 JUDGE HALLIGAN: I understand. But if - - - if
19 we were to disagree, then it's just the - - - the eyes.
20 Yes?

21 MS. SOUSOU: Yes, yes. And those are the biggest
22 indication that the defendant was exhibiting a - - - a sign
23 of impairment going to the reasonable inference that
24 defendant was driving while impaired.

25 JUDGE RIVERA: Does - - - does the existence of

1 ash on the pants, other than suggesting recency and that
2 he's actually driving while he was smoking - - - put that
3 all to the side to one moment. Does it suggest anything
4 about the amount?

5 MS. SOUSOU: Yes. It certainly adds to the
6 inference that defendant took more than just two puffs of
7 smoke. And the fact that he was also - - - the odor, that
8 he smelled of marijuana adds to that, which further just
9 adds to the inference that the defendant was driving
10 impaired.

11 JUDGE TROUTMAN: But when people use marijuana,
12 the smell can linger for - - - it's a - - - some people
13 smell like it every day, whether they last used it the
14 night before. So how are you definitively determining
15 timing that - - - so that it impairs driving, recent - - -
16 the adding to your recency argument?

17 MS. SOUSOU: Added with the other allegations
18 that he admitted to smoking before the officer stopped him,
19 and then also the marijuana ash on his pants. I think
20 those allegations together show that this was a recent
21 consumption as opposed to being days before or - - - or - -
22 - or hours before even.

23 And these allegations were more than sufficient
24 to put defendant on notice of what he was being accused of,
25 where, when, and how he allegedly did it in order for him

1 to prepare a defense, as evidenced in his brief of coming
2 up with the reasons for his demeanor and - - - and prevent
3 double jeopardy. No other allegations relating to the
4 manner of how he was driving or so forth were necessary.

5 If there are no further questions we ask that you
6 affirm.

7 Thank you.

8 CHIEF JUDGE WILSON: Thank you.

9 MR. HAUSMAN: All right. Your Honors, I would
10 like to just jump right in and - - - and - - - and say a
11 few more words about the studies and about this issue of
12 whether or not bloodshot eyes correlate with impairment.
13 Because I think it's - - -

14 JUDGE RIVERA: Well, I - - - I don't know how we
15 can even take them into consideration. I mean, yeah,
16 they're in the public domain, sure. But the officer is not
17 relying on any studies.

18 MR. HAUSMAN: I - - - I think that's right. And
19 I think that's the determinative fact, which is that this
20 officer, although he talks about his expertise in
21 identifying marijuana and is able to identify the mash - -
22 - the ash. Isn't speaking at all about an expertise and
23 ability to correlate bloodshot eyes, which we say are
24 evidence of use, with impairment.

25 But since the People - - - and so I think you're

1 right, Your Honor, that we - - - the - - - the People
 2 shouldn't be relying on these studies because they're not
 3 within the four corners. It's just like in People v.
 4 Afilal, I think the prosecutor attempted to rely on, like
 5 Google Maps to establish that it was a public place. This
 6 is even, I think, a step way beyond that.

7 But I think that - - - I - - - I do want to make
 8 a point about those studies because I think since the
 9 People are relying on them, I think it's helpful to make
 10 this point that the study in footnote 10 of their brief
 11 that they rely on most heavily from Mostafa Bondok, says
 12 that the most sensitive sign of cannabis use is the red eye
 13 phenomenon.

14 And what that means is the most sensitive sign of
 15 cannabis use - - - that means that a little bit of cannabis
 16 use and your eyes turn red. What does that also mean?
 17 What's the corollary of that? Which is that you can have
 18 red eyes and that can demonstrate that the - - - the THC is
 19 dilating your eyes, but that's going to happen first before
 20 you take more marijuana and actually have impairment.

21 JUDGE CANNATARO: Counsel, why are we - - -

22 JUDGE SINGAS: Yeah. But why are those arguments
 23 - - -

24 JUDGE CANNATARO: - - - not having this
 25 discussion with respect to the sufficiency of the evidence,

1 as opposed to - - -

2 MR. HAUSMAN: Right.

3 JUDGE CANNATARO: - - - the accusatory
4 instrument?

5 MR. HAUSMAN: Well, absolutely, Your Honor. But
6 - - - but I - - - but I just wanted to respond to the
7 notion, the prosecution's notion, that this is like somehow
8 settled. But - - - but I think the problem is that without
9 allegations in the accusatory instrument speaking, tying
10 red eyes to impairment, which I don't think is a valid
11 causal connection, and it's not a causal connection that's
12 made in the accusatory - - -

13 JUDGE SINGAS: But we don't do that on the - - -
14 on the drunk driving complaints, right? We don't say - - -
15 we've said that complaints are sufficient, even though they
16 don't tie in somebody who's unsteady on their feet with any
17 science indicating impairment.

18 So why should there be a different standard here
19 when we're just looking at - - -

20 MR. HAUSMAN: Yeah. I - - - I - - -

21 JUDGE SINGAS: - - - you know, does the defense
22 have enough information to mount a defense. Like, do they
23 have notice of the charges? That's what we're talking - -
24 -

25 MR. HAUSMAN: I think it's - - -

1 JUDGE SINGAS: - - - about fundamentally.

2 MR. HAUSMAN: - - - but I - - - but I - - - I - -
3 - I mean, I think it's - - - I think it's a great question
4 because I think that allegations of unsteady on your feet
5 self-evidently bespeak motor skill impairment.

6 JUDGE SINGAS: Right.

7 MR. HAUSMAN: That's a reasonable inference.

8 JUDGE SINGAS: Might be that someone has some
9 kind of neurological disease. The same way you're saying
10 someone suffering from asthma or it's late at night, like -
11 - -

12 MR. HAUSMAN: Well, right.

13 JUDGE SINGAS: - - - at this stage of the game -
14 - -

15 MR. HAUSMAN: Well, right. But at the reasonable
16 cause standard, I - - - I - - - I want to agree that some
17 allegation of impairment of motor skills does suggest
18 impairment together with use. But when all you have is use
19 and red eyes on this record, on - - - on this accusatory
20 instrument don't establish impairment. I think that's - -
21 - I think that's not enough.

22 JUDGE SINGAS: I think maybe I would agree with
23 you if you had said if - - - that it was - - - he smoked
24 two puffs and there was ash on him. That to me is use. I
25 think once the red eyes enter it in conjunction with that,

1 it raises it to impairment because now it's having a
2 physical manifestation.

3 MR. HAUSMAN: Your Honor, if it's a physical
4 manifestation - - -

5 JUDGE SINGAS: So I think maybe it's our - - -
6 our use - - -

7 MR. HAUSMAN: I guess, yeah.

8 JUDGE SINGAS: - - - definitions are different.

9 MR. HAUSMAN: I - - - I - - - I think this is - -
10 - and I think this is the problem. I think applying that
11 logic, you turn this into a zero tolerance statute.
12 Because I think that if red eyes manifest ingestion but
13 don't have any correlation with impairment, then it's just
14 another form of allegation of use.

15 JUDGE SINGAS: Right. I guess I'm going back to
16 what's the correlation of impairment in the drunk driving
17 context, in the intox context when we're looking at
18 complaints?

19 MR. HAUSMAN: Well, because I think that - - -

20 JUDGE SINGAS: That it's just so well settled?

21 MR. HAUSMAN: Well, I - - - no. Because I think
22 that in that context, if - - - I think if you're talking
23 about evidence of impairment together with use. So if you
24 - - - motor skill impairment. So if you can't walk a line
25 and you've taken alcohol, I think it's reasonable to draw

1 an inference that your - - - that your motor skills and
2 your - - - and your ability to operate a vehicle are
3 somewhat impacted.

4 Whereas I think the red eyes sort of speculating
5 that that also means some other kind of impairment, I think
6 is - - - is really nothing more than speculation. And so
7 that's why I think all the allegations in this complaint
8 amount to use.

9 JUDGE RIVERA: Given the - - - given the nature
10 of the drug involved?

11 MR. HAUSMAN: Yeah.

12 JUDGE RIVERA: I mean, the - - - the drug
13 involved does affect. I get your argument that perhaps
14 here the - - - it's facially insufficient because it
15 doesn't really reflect anything or suggest impairment. But
16 that is the nature of the drug.

17 MR. HAUSMAN: Well, I - - -

18 JUDGE RIVERA: Again - - -

19 MR. HAUSMAN: Yeah.

20 JUDGE RIVERA: - - - nobody's smoking marijuana
21 to be sharper behind the steering wheel.

22 MR. HAUSMAN: But I think because this is not a
23 zero tolerance state, I think there's a - - -

24 JUDGE RIVERA: Yes. The - - - the - - -

25 MR. HAUSMAN: - - - recognition legislatively

1 that - - -

2 JUDGE RIVERA: - - - problem is that it is a very
3 low threshold for impairment. And your rule seems to
4 suggest a higher threshold than Cruz.

5 MR. HAUSMAN: I respectfully disagree because - -
6 - but I - - - because I think the problem is that you need
7 something more than lots of evidence of use.

8 And I know my time is way up, but could I really
9 briefly discuss the record of why the record of refusal is
10 not part of the - - -

11 CHIEF JUDGE WILSON: Yes. Go ahead.

12 MR. HAUSMAN: - - - four corners?

13 I think I just have four quick points on that.
14 You know, one, I think as, Judge Rivera, you mentioned the
15 prosecution never attached, incorporated, or in any way
16 linked that record of refusal with the misdemeanor
17 complaint. And so it's clearly under Hardy and Slade, not
18 within the four corners.

19 And - - - and - - - and as the prosecutor, like,
20 stated, this record of refusal was filed in arraignment for
21 - - - it was for a separate - - - to meet a separate
22 statutory requirement. And so if it was also serving a
23 second purpose of being part of the accusatory instrument,
24 prosecution had to let someone know that. They had to let
25 the court know. They had to let defense counsel know.

1 Because it was being filed for a separate reason. And it
2 was also filed with a stack of other papers, which were
3 also being filed for reasons other than being part of the
4 accusatory instrument.

5 And so I think the People's position on the
6 record of refusal is really suggesting an unworkable rule
7 that the court and defense counsel, you know, have to
8 basically look at a stack of papers and try to guess which
9 of these papers are somehow connected to the accusatory
10 instrument.

11 And finally, there was no verification on this
12 record of refusal. The People speculate that, oh, well,
13 maybe it was cut off after it was verified. But the - - -
14 the simple reality is that in this record, this record of
15 refusal was not verified, meaning it wasn't sworn. And
16 that's simply a required jurisdictional statutory
17 requirement for something to be considered part of the
18 accusatory instrument.

19 CHIEF JUDGE WILSON: Thank you.

20 MR. HAUSMAN: Thank you, Your Honor.

21 (Court is adjourned)

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C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Morel (Agustin), No. 3 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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