

**Prosecuting the Drug-  
Impaired Driver  
Legal Considerations**

**1. THE STATE'S EXPERT:  
THE DRE**

## A. Discovery

### The Rules

- Municipal Court: R. 7:7-7
- Superior Court: R. 3:13-3
- R. 7:7-7(b)
  - Unless defendant agrees to more limited discovery, defendant, on written notice to the municipal prosecutor, shall be provided with copies of all relevant material, including but not limited to items listed in the Rule.

Discovery is limited to what is  
RELEVANT

• What is Relevant?:

- Those items which there is a reasonable basis to believe will assist a defendant's defense.

State v. Enright, 416 N.J. Super. 391 (App. Div. 2010),  
certif. denied, 205 N.J. 183 (2011).

• What is Relevant?

- In State v. Stein, 225 N.J. 582 (2016), the Court held:

➤ Evidence is "relevant" if it has "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." State v. Stein, 225 N.J. at 697 (2016) (quoting N.J.R.E. 401); State v. Hernandez, 225 N.J. 451 (2016)

AND

➤ Discovery is appropriate if it will lead to relevant information. Stein

❖ This overrules that part of State v. Carrero that held defendant is not entitled to information which merely leads to other information that is relevant. Carrero, 428 N.J. Super. 495 (App. Div. 2012)

### The Stein Court also held:

- Definition of “relevance” is the same for quasi-criminal and criminal cases.
  - The Stein Court rejected any intimation of the Appellate Division in State v. Carrero and State v. Ford that the definition of “relevance” is different for quasi-criminal cases than it is for criminal cases.
- The liberal approach to discovery in criminal cases is also applicable in municipal court cases. Stein, 225 N.J. at 594.

### The Stein Court also held:

- The “discovery rule requires that the State provide defendant with ‘material evidence affecting [the] credibility’ of a State’s witness whose testimony may be determinative of guilt or innocence.”
  - Stein, 225 N.J. at 596 (quoting Hernandez, 225 N.J. 451)

### So . . . As a Result of Stein . . . .

- Names of police officers from neighboring jurisdictions who responded to the scene MUST be turned over.
- Video Recordings from:
  - Dashboard camera that depicts:
    - Interaction between suspect and police officers
    - Sobriety tests
  - An evidential breath test
  - A defendant's appearance, behavior and motor skills at police headquarters
- MUST be turned over

### So . . . As a Result of Stein . . . .

- The State may move for the redaction of a video recording, and in camera review if necessary, if the State can show that a video recording:
  1. Discloses features or the outlay of HQ that is likely to compromise security,
  2. Captures people not relevant to the proceedings & whose privacy rights may be infringed, or
  3. Is necessary for another justifiable reason.
- THEN: the Court MAY order redaction "consistent with the fair-trial rights of the defendant."
- NOTE:
  - The Court held that although the defense carries the obligation of giving "written notice to the municipal prosecutor to preserve pertinent videotapes pursuant to Rule 7:7-7", the State also has a duty to preserve evidence that it knows is relevant to a DWI prosecution.

Discovery is broad, but not unlimited.

- Trial courts may order discovery beyond that mandated by the Court Rules where doing so will further truth-seeking function or ensure fairness of a trial. BUT – Court Rules do not sanction rummaging through irrelevant evidence. *State v. Hernandez*
- Discovery rules do not open the door to foraging through files of other cases in search of relevant evidence. *Hernandez*
- Defendants must articulate how requested discovery will lead to relevant or admissible evidence, not simply that it may provide some helpful information. *Hernandez*

Discovery is broad, but not unlimited.

- No legal obligation on the State to create or seek out a document not in its possession, custody or control. *State v. Robertson*, 438 N.J. Super. 47 (App. Div. 2014), certif. granted, 221 N.J. 287 (2015).
- Adhere to “one time and one time only” principle. *State v. Ford*, 240 N.J. Super. 44 (App. Div. 1990).

### Motions for Discovery

- Are barred unless movant certifies that prosecutor and defense counsel have conferred and attempted to resolve discovery dispute at issue
  - Rule 7:7-7(h): No motion for discovery shall be made unless the prosecutor and defendant “have conferred and attempted to reach agreement on any discovery issues”
    - Includes any issues pertaining to discovery provided through use of CD, DVD, e-mail, internet or other electronic means
  - Request any order for electronic data/videos to be in the form of a written order with sufficient time to allow for the State to comply or seek appellate review

### Remember:

- Do NOT consent to defense discovery request without having read the order
- Know what you are consenting to turn over and the time frame in which you are agreeing to provide the documents

Defense Remedies for State's Discovery  
Violations:

- State v. Holup, 253 N.J. Super. 320 (App. Div. 1992)
  - In the “situation where discovery has not been provided,” “defense counsel [should] serve a motion, on the papers, with certification similar to R. 1:6-2, upon the municipal prosecutor, filing the original with the municipal court seeking an order limiting the time for production of discovery and upon the municipal prosecutor’s failure to do so, dismissal of the action. Such an application and the ensuing order would alert the municipal prosecutor and enforcement authorities to their discovery responsibilities and avoid the inconvenience to litigants and witnesses[.]”
    - On DWI cases, the motion must be in writing.

Defense Remedies for State's Discovery  
Violations:

- State v. Stein, 225 N.J.582 (2016)
  - Enforcement Mechanism = Rule 7:7-7(j)
    - Defendant must bring discovery violation to court’s attention
    - Defendant must raise/preserve the issue in the municipal court proceedings
    - “Defendant may not remain silent on a discovery violation known to him in municipal court and strategically calculate that he can bring it to life in a trial de novo before the Law Division.” Stein, 225 N.J. at 28-29

### Discovery: Rolling Logs

- **Rolling Logs**
  - Discoverable with personal identifiers redacted
  - BUT . . . Not Discoverable:
    - The toxicology reports for each person evaluated & listed on rolling logs
    - The face sheets for every evaluation listed on rolling logs

### Discovery: Progress Logs

- **Progress Logs** (test scores, toxicology reports)
  - Should not be routinely turned over in discovery
  - Failure to produce should not be fatal
    - Irrelevant
    - DRE will not be certified unless satisfies requirements. Certification is proof that DRE satisfied all requirements.
    - Not entitled to documentation of testing underlying a discoverable document. See State v. Holland, 423 N.J. Super. 309, 318 (App. Div. 2011); State v. Maure, 240 N.J. Super. 269, 283 (App. Div. 1990) , aff'd, 123 N.J. 457 (1991)

### Discovery: Rolling Logs v. Progress Logs

- Analogize to State v. Hernandez, 225 N.J. 451 (2016)?
  - Issue: Whether defendants have a right to discovery of prosecutor's files in unrelated cases involving same cooperating witness?
  - Held: Although our discovery rule generally requires the State provide all evidence relevant to the defense of criminal charges, it does not open the door to foraging through files of other cases in search of relevant evidence.
  - Analogy: allowing underlying tax reports & face sheets to rolling logs would allow foraging through other cases in search of relevant evidence

## **B. Common Defense Attacks on the DRE**

## 1. DRE Program Not Scientifically Reliable

- **3 Defense Arguments:**

- The DRE protocol lacks a proper scientific basis and is not accepted in the relevant scientific community; usually coupled with a request for a Frye hearing.
- Because State v. Doriguzzi, 334 N.J. Super. 530 (App. Div. 2000), found HGN not scientifically reliable and DREs use HGN in their evaluation, the DRE protocol therefore also lacks scientific reliability.
- A Maryland court has excluded the DRE protocol/testimony on the grounds that it is not scientifically reliable. See State v. Brightful, No. K-10-40259, 2012 Md. Cir. Ct. LEXIS 1 (Carroll County Md. March 5, 2012).

## Response to Frye Hearing Challenge

- DRE is not a new or novel scientific discovery or technique
  - Persuasive judicial decisions establishing that the “field of inquiry is generally accepted” can establish that the proffered expert testimony is “sufficiently reliable,” see State v. Torres, 183 N.J. 554, 568 (2005).
  - Oppose a testimonial Frye hearing.
  - See Sample Block Law

## Response to Frye Hearing Challenge: Case Law

### New Jersey Cases

- State v. Bealor, 187 N.J. 574, 592-93 (2006): Court opined that officers who have successfully completed the Basic Course for Police Officers, which includes training in detecting drug-induced intoxication, may be qualified as experts on [drug] intoxication under N.J.R.E. 702."
- State v. Sorrentino, 2012 N.J. Super. Unpub. LEXIS 698 (App. Div. 2012): rejected defendant's assertion of a lack of general acceptance in the scientific community
- State v. Plummer, 2012 N.J. Super. Unpub. LEXIS 2742 (App. Div. 2012): accepted DRE testimony as expert testimony, finding that combination of lay testimony from officer who made MV stop and expert testimony of DRE was sufficient to sustain the State's burden
- State v. Grigoni, 2009 N.J. Super. Unpub. LEXIS 2825 (App. Div. 2009), certif. denied, 201 N.J. 274 (2010): rejected defendant's argument that DRE protocol lacked a proper scientific basis

## Response to Frye Hearing Challenge: Case Law

- State v. Reiter, 2007 N.J. Super. Unpub. LEXIS 2613 (App. Div. 2007), certif. denied, 200 N.J. 370 (2009): found the State's proofs sufficient because DRE, who had extensive training and was certified in drug recognition, opined that defendant's appearance and demeanor indicated impairment
- State v. Vazquez, 2015 N.J. Super. Unpub. LEXIS 2487 (App. Div. 2015): accepting testimony of DRE as expert testimony
- State v. Autore, 2016 N.J. Super. Unpub. LEXIS 1442 (App. Div. 2016): accepting testimony of DRE as expert testimony
- Out of State Cases
  - State v. Daly, 775 N.W.2d 47, 58-59 n.7 (Neb. 2009): "Every court to have considered the issue has concluded that testimony based upon the DRE protocol is admissible into evidence."

## Using Unpublished Opinions

### – Rule 1:36-3

- Cannot cite an unpublished opinion to a court unless you first serve the court and your adversary with a copy of the opinion and all contrary unpublished opinions known to you
- Unpublished opinions are not precedential
- Unpublished opinions are not binding upon any court
- With limited exceptions, unpublished opinions should not be cited by any court
- See State v. Robertson, 438 N.J. Super. 47, 60-61 n.8 (App. Div. 2014) (recognizing that although citation to unpublished opinions is generally prohibited, unpublished opinions may be cited for evidential, not precedential, value)

## Response to Doriguzzi Argument

- Defendant is misreading Doriguzzi
  - Doriguzzi did not find that HGN is not scientifically reliable, but that the State had failed to present foundational evidence regarding the scientific reliability of HGN
  - Doriguzzi Court would not take judicial notice of the scientific reliability of HGN

### Defendant is misreading Doriguzzi

- Doriguzzi allows police officers to use HGN to establish probable cause to arrest
  
- Even if the court doesn't consider the HGN part of the DRE protocol, HGN is only one of a compendium of tests performed by the DRE
  - No one factor is conclusive

### Response to Doriguzzi Argument

- Cases rejecting Doriguzzi argument:
  - State v. Ferreira, 2011 N.J. Super. Unpub. LEXIS 310 (App. Div. 2011), certif. denied, 210 N.J. 263 (2012): trial judge rejected probative value of HGN test in reaching determination; there was ample evidence to prove impairment without the HGN
  
  - State v. Grigoni, 2009 N.J. Super. Unpub. LEXIS 2825 (App. Div. 2009), certif. denied, 201 N.J. 274 (2010): court rejected defendant's HGN argument, noting that Doriguzzi dealt with only one feature of the DRE protocol – HGN – which wasn't relied upon and any reliance thereon would have been harmless based upon other evidence of guilt

## Response to Brightful Argument

- Brightful was issued by a trial court, not an appellate court and, therefore, is not binding in Maryland.
- Subsequent trial-level courts in Maryland have concluded that the DRE protocol/expert testimony is not new or novel scientific evidence, that DRE is scientifically reliable, and have accepted DRE testimony.
  - State v. Crampton, No. 121222-C (Montgomery County Cir. Ct., Md., March 19, 2013)
  - State v. Wood, No. 04JXOA59 (Calvert County Cir. Ct., Md., May 21, 2013)

## If you receive a Frye hearing challenge

- Notify your County Liaison:
  - Liaisons are aware of similar motions being raised, or that have been raised and decided, in other counties and briefs are available
  - Motions for Frye hearing have been denied by courts in Burlington, Cape May, Monmouth, Morris and Ocean Counties
  - Municipal Prosecutor Liaison will notify DCJ
- See Sample Block Law
- Transcripts of oral decisions and written orders of Municipal and Law Division Judges denying motions for Frye hearings are available for use
- If the judge grants a N.J.R.E. 104 hearing/Frye hearing, contact your County Liaison immediately

## 2. Miranda Challenge to DRE

- Defendant requests suppression/exclusion of DRE because:
  - Defendant was in custody and Miranda not given prior to evaluation
  - Defendant was not told the evaluation would be used against him
  - Confusion doctrine
    - State v. Leavitt, 107 N.J. 534 (1987)
    - State v. Sherwin, 236 N.J. Super. 510 (App. Div. 1989)

## Response to Miranda Challenge

- Miranda warnings are part of the 12-step protocol
  - Miranda is Step 3
    - DRE should confirm with arresting officer to verify if Miranda warnings were previously given
  - Interrogation is Step 10

## Response to Miranda Challenge

- Non-testimonial
  - Standardized Field Sobriety Tests have been found to be non-testimonial and therefore Miranda warnings are not required.
    - State v. Macuk, 57 N.J. 1 (1970)
    - State v. Green, 209 N.J. Super. 347 (App. Div. 1986)
    - State v. Ebert, 377 N.J. Super. 1 (App. Div. 2005)
    - State v. Gusette, 2015 N.J. Super. Unpub. LEXIS 2572 (App. Div. 2015)
    - State v. Hwang, 2015 N.J. Super. Unpub. LEXIS 1701 (App. Div. 2015)

## Response to Miranda Challenge

- Non-testimonial
  - Physical observations (e.g., blood pressure; pulse; temperature; skin, eye and mouth exam) would be similarly non-testimonial.
    - State v. Green, 209 N.J. Super. 347 (App. Div. 1986)
    - State v. Bodtmann, 239 N.J. Super. 33 (App. Div. 1990)

## C. Other Common Challenges

### Medical Diagnosis

#### Δ CLAIM

- DREs are improperly rendering a medical diagnosis on an individual when performing the protocol.

#### STATE'S RESPONSE

- Doctors perform diagnoses for purpose of treatment; DREs do not engage in treatment of any kind.
- DREs are making observations & using the protocol to form an opinion regarding impairment and its likely causes.
- By ruling out or finding the presence of a medical condition as the cause of impairment, the DRE is not performing a differential diagnosis for the purpose of medical treatment, but rather is conducting a police investigation for the purpose of finding/eliminating innocent explanations for the observed criminal conduct.

## Medical Condition

### Δ CLAIM

- What DRE interpreted as a sign of intoxication was really caused by a medical condition.

### STATE'S RESPONSE

- The 12-step protocol has built-in protections to rule out medical conditions.
- Step 3: Preliminary Examination
  - DRE
    - Physical Injuries?
    - Medical Conditions?
      - Chronic
      - Acute
        - Medical
        - Crash-related
- DRE rules out signs or symptoms that may not be related to drugs.

## "Just a Cop"

### Δ CLAIM

- The officer has no medical expertise or training.

### STATE'S RESPONSE

- DRE Program Success
  - Designed in 1970s, validated by Johns Hopkins studies
  - Recognized by NHTSA since 1984
- DRE's Training
  - Regular Police Academy
  - DRE School – classroom
  - Field Certifications

## “Just a Cop”

### Δ CLAIM

- The officer has no medical expertise or training.

### STATE'S RESPONSE

- DRE's Experience
  - Years as police officer
  - Any related life experience (EMT, Medic, pharmacy, etc.)
- Toxicology Confirms the DRE's Opinion

## DRE Doesn't Know Defendant's "Normal" Vital Signs

### Δ CLAIM

- DRE doesn't know defendant's normal pulse, blood pressure, etc.

### STATE'S RESPONSE

- Medical community relies on "normal ranges" in treatment
- Variations are merely 1 factor in totality of circumstances

## DRE Doesn't Know Defendant's "Normal" Vital Signs

### Δ CLAIM

- DRE doesn't know defendant's normal pulse, blood pressure, etc.

### STATE'S RESPONSE

- DRE questions defendant about what is "normal"
  - Many otherwise "normal" people may have a medical anomaly, but they generally know
  - "normal" = "average"
- Defendant exhibits signs of impairment

## "Real" Experts Know How & Why Drugs Cause Certain Effects

### Δ CLAIM

- DRE not a real expert because he/she cannot explain how a particular drug works in the body.

### STATE'S RESPONSE

- Human physiology & drug interactions/reactions differ.
  - Even doctors may not know
  - Pharmacists often good sources/experts

## DRE Didn't Trust Arresting Officer's SFSTs

### Δ CLAIM

- DRE duplicated SFSTs because the arresting officer did them incorrectly.

### STATE'S RESPONSE

- Part of the Standardized Protocol
  - DRE performs several additional tests
- Controlled Environment
  - DRE evaluations done in police stations
- DRE Wants Independent Tests
- Observations
  - Time has elapsed
  - May observe different signs and symptoms than at time of stop/crash
  - DRE's training permits him/her to recognize signs of poly-drug use and more subtle signs & symptoms of drug impairment

## Missing Signs & Symptoms

### Δ CLAIM

- Defendant doesn't exhibit all signs & symptoms.

### STATE'S RESPONSE

- List covers ALL possible signs & symptoms.
- Everyone's homeostasis is unique.
- Effects differ by tolerance, dose, type of drug, ingestion method, context.
- Poly-drug use

## Missing Signs & Symptoms

### Δ CLAIM

- Some actions mitigated defendant's signs and symptoms of impairment.

### STATE'S RESPONSE

- Do you display all signs and symptoms noted on Tylenol bottle?
- Tolerance
- Concession isn't the end of the world

## Alternative Explanations

### Δ CLAIM

- Signs interpreted by DRE as impairment were from other cause(s).

### STATE'S RESPONSE

- Challenge goes to the cause, not the observations.
- The full 12 step process is designed to eliminate other explanations.
- Other cause(s) may explain some but not all of signs observed.

## Drug Is Not a “Narcotic”

### Δ CLAIM

- Drug found is not a “narcotic;” therefore, that statutory element has not been proven.

### STATE’S RESPONSE

- “Under the influence”
  - “a substantial deterioration or diminution of the mental faculties or physical capabilities of a person whether it be due to intoxicating liquor, narcotic, hallucinogenic or habit-producing drugs.”

## Drug Is Not a “Narcotic”

### Δ CLAIM

- Drug found is not a “narcotic;” therefore, that statutory element has not been proven.

### STATE’S RESPONSE

- “Under the influence”
  - The drug “produced a narcotic effect so altering his or her normal physical coordination and mental faculties as to render such person a danger to himself as well as to other persons on the highway.”
  - Includes a drug which produces a narcotic effect.
  - State v. Bealor, 187 N.J. 574, 589-90 (2006)
  - State v. DiCarlo, 67 N.J. 321 (1975)
  - State v. Tamburro, 68 N.J. 414 (1975), 2016
  - State v. Beyer, 2016 N.J. Super. Unpub. LEXIS 950 (App. Div. 2016)
  - State v. Vazquez, 2015 N.J. Super. Unpub. LEXIS 2487 (App. Div. 2015)

## Quantification

### Δ CLAIM

- The laboratory doesn't quantify the amount of drug(s) present so fails to establish guilt of DWI.

### STATE'S RESPONSE

- Quantification not required by DWI statute. Only need:
  - Proof of fact of intoxication
    - Demeanor and physical appearance, etc.
  - Coupled with proof of cause of intoxication
    - Don't need to identify particular drug
    - Don't need an expert

## Quantification

### Δ CLAIM

- The laboratory doesn't quantify the amount of drug(s) present so fails to establish guilt of DWI.

### STATE'S RESPONSE

- Cases where only need proof of fact of intoxication coupled with proof of cause of intoxication; do not need quantification:
  - State v. Bealor, 187 N.J. 574 (2006)
  - State v. Tamburro, 68 N.J. 414, 421 (1975)
  - State v. Francetta, 394 N.J. Super. 200 (App. Div. 2007)
  - State v. Verpent, 2012 N.J. Super. Unpub. LEXIS 1557, \*21 (App. Div. 2012)(marijuana metabolite)

## No Lab/Toxicology Report

### • Δ CLAIM

- Defendant did not provide a blood or urine sample.
- There is no lab report.
- Because there is no lab report, the State cannot prove what the impairing substance was.
- Because the State cannot prove the exact impairing substance, the State cannot prove defendant was DUID.

### • STATE'S RESPONSE

- The statute does not impose any requirement that the particular narcotic be identified.
- The statute does not define the quantum of narcotics required in order to violate its prohibition.
- The statute only requires the State to prove beyond a reasonable doubt that a defendant was under the influence of an illicit drug while operating a motor vehicle.

## No Lab/Toxicology Report

### • Δ CLAIM

- Defendant did not provide a blood or urine sample.
- There is no lab report.
- Because there is no lab report, the State cannot prove what the impairing substance was.
- Because the State cannot prove the exact impairing substance, the State cannot prove defendant was DUID.

### • STATE'S RESPONSE

- A DWI conviction may be based upon physical evidence, such as symptoms observed by the arresting police officers or failure of the defendant to perform adequately on balance and coordination tests.
- A defendant's demeanor, physical appearance, slurred speech, and bloodshot eyes, together with poor performance on field sobriety tests, are sufficient to sustain a DWI conviction.

## No Lab/Toxicology Report

### Δ CLAIM

- Defendant did not provide a blood or urine sample.
- There is no lab report.
- Because there is no lab report, the State cannot prove what the impairing substance was.
- Because the State cannot prove the exact impairing substance, the State cannot prove defendant was DUID.

### STATE'S RESPONSE

- The lack of a lab report is not fatal and does not necessarily constitute a breach of DRE protocol which would bar the DRE testimony.
- Just as alcohol-impairment can be proven without a BAC but on observations alone, so too can DUID.
  - *State v. Autore*, 2016 N.J. Super. Unpub. LEXIS 1442 (App. Div. 2016) (No lab report because deft refused to provide a urine sample. Deft found guilty of DUI based on DRE and arresting officer's testimony)

## Prescription Drug Defense

### Δ CLAIM

- Defendant was taking a validly prescribed medication.

### STATE'S RESPONSE

- "Prescribed" does not mean can't affect ability to drive
  - E.g., Ambien, Percocet, Oxycodone
  - Legal to drink alcohol if over 21 but can affect ability to drive
- Prescribed dose v. actual dose
  - Warning labels
  - Was 30-day supply taken in 1 day?
- Mixing of alcohol & drugs
  - Mixing of drugs and < .08% BAC
  - Additive effect

## Medical Marijuana Defense

### Δ CLAIM

- Defendant was taking prescribed medical marijuana pursuant to the Compassionate Use of Medical Marijuana Act ("CUMMA").
- Defendant is a medical marijuana cardholder in another state.

### STATE'S RESPONSE

- Medical Marijuana not a defense to DWI under CUMMA.
- NJ does not have reciprocity with other states for medical marijuana cardholders.

## Prescription Drug Resources

- MedLine Plus
  - <http://www.nlm.nih.gov/medlinplus/druginformation.html>
- Drug Interaction Checker
  - <http://reference.medscape.com/drug-interactionchecker>
- Toxicologist
- Local Pharmacist
- Physician's Desk Reference (PDR)
- DRE
- NHTSA publications/research articles

## **D. Direct Examination of a DRE**

### **1. Qualify as Expert**

- Experience as a police officer.
  - Number of DUI arrests that were not DRE-related.
  - Special training of police officer.
  
- How selected to become a DRE.
  
- Number of DREs in NJ v. total number of police officers in NJ.

## 1. Qualify as Expert

- Training to become a DRE
  - Go into detail
  - Describe DRE Protocol
- Certification
- Number of people examined in role as DRE
- Previous testimony as DRE, if any

## 1. Qualify as Expert

- IF defense stipulates that DRE is an expert, you should still go through the DRE's qualifications and C.V.
- IF the DRE has testified before, admit his/her C.V. into evidence
- Preserve this for appeal

## 2. Defendant's Evaluation

- Start before the evaluation
  - Was the DRE at the scene of the stop/collision?
  - Did the DRE have an opportunity to observe defendant prior to the evaluation?
  
- Go through defendant's performance on the 12-step evaluation
  - Use Face Sheet to refresh recollection
  - Any admissions by defendant?
  - Drug symptomology
  
- Expert Opinion Regarding Impairment

## 3. Toxicology

- Was urine or blood seized?
  - Chain of custody
  
- Do you want to introduce the lab report into evidence?
  - Is lab report certified and notarized? If not, contact lab to obtain a certified and notarized lab report.
  
- See "Common Challenges to Blood Test Results/Medical Records"

### 3. Toxicology

- What if toxicology report differs from DRE's call?
  - Strategic Decision for Prosecutor - Lab is not required
    - Ignore & do not enter it into evidence but be prepared to deal with it on re-direct
    - If you use it, be prepared to address the discrepancy:
      - Doesn't matter because not quantifiable & below level
      - Ingestion could be fresh & not in urine yet
      - Drug category called more prevalent in blood or urine
      - Talk to toxicologist who did analysis
- See "Common Challenges to Blood Test Results/Medical Records"

## E. Common Themes of Cross-Examination

### **1. Missing Signs or Symptoms**

- Attempts to elicit fact that defendant did not have all of expected signs or symptoms of the drug(s) in question
  - It is rare for an individual to display all of classic effects of a drug.
  - The DRE's opinion is based on the totality of the observed signs and symptoms as elicited by the DRE evaluation

### **2. Point Out What Is Normal**

- Focuses on signs/symptoms that were normal and therefore not consistent with being under the influence of the drug category called by the DRE

### **3. Percentage of Incorrect Calls Obtained From Rolling Logs**

- If DRE got it wrong in those cases, he could have gotten it wrong in this case

## To Re-direct or Not to Re-direct?

- Pay attention to cross-exam.
  - Cross-exam may help you more than it hurts you.
  - If it hasn't hurt you, don't re-direct.
- Re-direct is limited to what is brought out on cross.
  - BUT, you can cover all information that is within the scope of information brought out on cross examination.
- Use to rehabilitate the DRE if necessary.

## F. No DRE

### What if you have no DRE?

- Can your arresting officer be qualified as an expert based upon training and experience?
  - State v. Bealor, 187 N.J. 574 (2006) – average officer can qualify as marijuana expert
  - State v. Beyer, 2016 N.J. Super. Unpub. LEXIS 950 (App. Div. 2016)(citing to Bealor, Court noted competent lay observations of “fact” of intoxication + add’l proofs demonstrating deft’s consumption of drugs as of time of operation = proofs sufficient to allow fact-finder to conclude, without more, that defendant was under the influence of cocaine)
  - Does your officer have additional but non-DRE drug training or experience?
    - ARIDE (Advanced Roadside Impaired Driving Enforcement)
    - Medical
    - Worked in Narcotics
    - Familiar with specific drug (e.g., prescription drugs)
- Do you have a lab report?
  - Testimony from toxicologist?

### What if you have no DRE?

- Were drugs seized during stop?
- Do you have admissions by defendant?
  - State v. Beyer, 2016 N.J. Super. Unpub. LEXIS 950 (App. Div. 2016)(no DRE; State's trial testimony = deft admitted snorting cocaine earlier in day + officer's observations + NJSP forensic toxicologist testimony regarding evidence of cocaine in urine & 3 phases of cocaine ingestion; relied on Bealor)
  - State v. Belmar, 2013 N.J. Super. Unpub. LEXIS 1060 (App. Div. 2013)(noting arresting officer's observations + Δ's admission to taking oxycodone sufficient to prove that Δ was DWI)
  - State v. Ferreira, 2011 N.J. Super. Unpub. LEXIS 3110 (App. Div. 2011)(no DRE and no lab report; State's trial testimony = officer's observations + expert testimony that officer's observations consistent with drugs Δ admitted taking)

## **2. THE DEFENSE EXPERT**

## A. Discovery

### This is YOUR Chance to Demand Stuff

- “In all cases the municipal prosecutor . . . on written notice to the defendant, shall be provided with copies of all relevant material, including, but not limited to,” items listed in R. 7:7-7(c)(1) – (5).

#### **SO, MAKE THE WRITTEN REQUEST FOR RECIPROCAL DISCOVERY!**

- R. 7:7-7(c)(5) includes the names & addresses of every person defense expects to call as expert witness, including expert’s qualifications, subject matter on which expert is expected to testify, & copy of expert report or statement of fact & opinions to which expert will testify & summary of grounds for each opinion.
  - “If this information is requested and not furnished, the expert may, upon application by the prosecuting attorney, be barred from testifying at trial.” R. 7:7-7(c)

### Reciprocal Discovery

- Results/reports of physical/mental examinations & of scientific tests/experiments made in connection with the matter, or copies of these results/reports within the possession, custody or control of defendant/defense counsel.
- Any relevant books, originals or copies of papers, and other documents/tangible objects, buildings or places within the possession, custody or control of defendant/defense counsel.

### Reciprocal Discovery

- Names, addresses & birthdates of those people known to defendant who may be called as witnesses at trial, and their written statements.
- Written statements, if any, made by any witnesses whom the gov't may call as a witness at trial.

## Defense DRE Experts

- Rolling logs
  - How many evaluations has the expert done?
  - How many calls in this drug category has the expert made?
- Progress Logs (if provided by the State)
- Training
- Certification
- Request any other document that defendant has requested from your DRE
- Other information noted in R. 7:7-7(c)

## Non-DRE Experts

- Expert's qualifications
- Subject matter on which expert will testify
- Copy of expert's report
- If no report, statement of facts and opinions to which expert is expected to testify & summary of grounds for each opinion
- Materials relied upon to reach opinion

## B. Voir Dire

### Defense Expert Witnesses

- Do NOT assume proffered “expert” is an expert just because defense counsel says so
  
- Voir Dire Defense Expert Witnesses
  - Qualifications
  - Where qualified? On what issue?
  - Demand data and all publications relied on by expert
  - Does proffered expert have sufficient expertise?
  
- Information has been compiled about many defense experts, including whether disqualified
  - Give name, CV & any report for expert to County Liaison and/or NJ’s DEC Coordinator

**3. MOTIONS TO  
SUPPRESS**

**A. Warrant Exceptions**

## Applicable Warrant Exceptions

- Exception will depend on what defendant is seeking to suppress: Blood or Urine
- 3 Applicable Exceptions:
  - Consent
  - Exigent Circumstances
  - Search Incident to Arrest

## Consent to Search: Blood or Urine

- Burden on State to establish that consent was knowing and voluntary
- Defendant must know he/she has the right to refuse consent
- Cannot be the product of police coercion
  - Law recognizes difference between natural compulsion felt when police make a request, the difficulty of the situation, or a fair prediction of consequences of refusal and police misconduct involving the violation of Constitutional rights

## Consent to Search: Blood or Urine

- Ability to seize blood/urine based upon consent varies by county due to Prosecutor's Office policy.
- Following Supreme Court's decision in State v. Verpent, 221 N.J. 494 (2015):
  - DREs were instructed to advise the suspect of their right to refuse consent and document the answer in his/her report
  - Statewide urine consent form issued by AG's Office – Effective Dec. 1, 2015

## Exigent Circumstances

- No "magic formula" – totality of the objective circumstances
  - Dissipation of alcohol/drugs from the blood/urine due to passage of time
  - Whether delay to obtain a warrant will negatively affect the probative value of the test results even with the availability of "expeditious processing of warrant applications," e.g. telephonic warrants
  - Recognizes that many factors relevant to determining dissipation are unlikely to be know to the officer
    - Time of ingestion, circumstances of last use, tolerance, etc.

### Exigent Circumstances

- Other factors recognized in State v. Jones, 437 N.J. Super. 68 (App. Div.), aff'd, 441 N.J. Super. 317 (App. Div. 2014)
  - Motor vehicle accident
  - Injuries requiring transportation to hospital
  - Time spent by police investigating accident
  - See also: State v. Thomas, 2016 N.J. Super. Unpub. LEXIS 1188 (App. Div. 2016)  
State v. Lipert, 2015 N.J. Super. Unpub. LEXIS 1970 (App. Div.), certif. denied, 223 N.J. 557 (2015)
  - But see: State v. Zalcborg, 2016 N.J. Super. Unpub. LEXIS (App. Div. 2016)(no exigency found)

### Exigent Circumstances

- For cases that pre-date Missouri v. McNeely, \_\_\_ U.S. \_\_\_, 133 S.Ct. 1552 (2013), courts can ascribe “substantial weight” to officer’s perception of dissipation.
  - See State v. Adkins, 221 N.J. 300 (2015)

### Testimony to Elicit Regarding Exigent Circumstances

- All relevant circumstances confronting the officers, in addition to the officers' perception concerning the natural dissipation of alcohol in the blood.
- Case-specific factual circumstances that diverted or occupied police attention & resources, making it more difficult for police to obtain warrant.
- How long the police officers believed it would have taken to obtain a warrant.
  - **See AG Memo of May 8, 2015**

### Exigent Circumstances and Urine

- In State v. Verpent, 221 N.J. 494 (2015), the New Jersey Supreme Court remanded the case back to the trial court for “[a] new suppression hearing ... in order that exigency may be assessed on a newly developed and fuller record in light of this Court’s holding in Adkins.”
- The remand hearing was held.
- On August 5, 2016, the Law Division judge upheld the seizure of urine without a warrant based on exigent circumstances.

### Search Incident to Arrest and Urine

- In State v. Malik, 221 N.J. Super. 114 (App. Div. 1987), the Appellate Division authorized the seizure of urine under the search incident to arrest warrant exception.
- Search incident to arrest under Malik was argued by the State in Verpent.
- In Verpent, the Supreme Court's remand order did not address the continued viability of Malik/search incident to arrest for urine.
- In Verpent, the Supreme Court refused to clarify its order on the Malik issue.

### Search Incident to Arrest and Urine

- After the Verpent remand hearing, the Law Division decided the case based on exigent circumstances and did not reach the Malik issue.
- Search incident to arrest exception for obtaining urine without consent and without a warrant has been upheld in Law Division.
- SCOTUS left this argument open in the Birchfield v. North Dakota, Beylund v. Minnesota and Bernard v. North Dakota opinions issued on June 23, 2016
- See Sample Block Law.

## B. Search Warrants

### Telephonic Search Warrants

- **Blood**
  - Follow procedure set up by each county.
  - Issues may arise where hospital is located out of county or out of state.
    - Where suspect is DWI but hospital is out of county, the warrant must be issued by a Superior Court judge who has statewide jurisdiction.
    - Municipal Court judge can only issue this warrant if that judge has been cross-assigned to the municipality, county or vicinage where the hospital is located.
  - Is the hospital out of state? Talk to your county liaison.

## Telephonic Search Warrants

- Urine

- Use of warrant is questionable because law enforcement cannot take urine by force (catheterization).

## Traditional Search Warrants

- Traditional search warrant can be obtained to seize for testing a blood sample taken by the hospital for medical purposes and retained by the hospital.
  - Police will need to provide the hospital with a preservation letter ASAP if a traditional search warrant is being considered.

## C. Dyal Subpoena

### State v. Dyal, 97 N.J. 229 (1984)

- When a blood sample is taken by medical personnel for medical purposes, the State can obtain those medical records upon application to municipal court judge for a Dyal subpoena.
- Request must be supported by an affidavit from the officer setting forth a reasonable basis for believing defendant was under the influence based on the objective facts known at the time of the event or a reasonable time thereafter.
- Submitted to municipal court judge with jurisdiction over municipality where offense occurred. R. 7:7-8(d)

State v. Dyal, 97 N.J. 229 (1984)

- If no case is pending, subpoena is captioned "In the Matter" under investigation.
- Check your counties' Dyal procedures.
- See Sample Dyal Subpoena

**D. Common Challenges to  
Blood Test Results/  
Medical Records**

## Discovery Requests

### Δ CLAIM

- Entitled to all records related to instruments used by hospital to conduct analysis on blood.

### STATE'S RESPONSE

- Not in custody or control of State.
- How are all records relevant?

## Confrontation Clause

### Δ CLAIM

- Admission of hospital results without calling the analyst violates the Confrontation Clause.

### STATE'S RESPONSE

- Non-testimonial because they are made for medical and not law enforcement or prosecution purposes.
- Admissible under business records hearsay exception.

## Chain of Custody

### Δ CLAIM

- Phlebotomist is required to testify.
- Everyone involved in the chain of custody must testify.

### STATE'S RESPONSE

- A defect in the chain of custody goes to weight, not admissibility.
- Everyone in chain not required to testify – evidence will be admitted if court finds in its discretion a reasonable probability that the evidence has not been changed in important respects or is in substantially the same condition as when offense committed.
  - State v. Brown, 99 N.J. Super. 22 (App. Div. 1968);
  - State v. Rosyhowski, 129 N.J. Super. 315 (App. Div.), certif. denied, 66 N.J. 325 (1974);
  - State v. Morton, 155 N.J. 383 (1998);
  - State v. Mosner, 407 N.J. Super. 40 (App. Div. 2009).
  - State v. Majao, 2015 N.J. Super. Unpub. LEXIS 1553 (App. Div. June 26, 2015)

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- Relevant cases:
  - State v. Brown, 99 N.J. Super. 22 (App. Div. 1968)
  - State v. Rosyhowski, 129 N.J. Super. 315 (App. Div.), cert. denied, 66 N.J. 325 (1974)
  - State v. Morton, 155 N.J. 383 (1998)
  - State v. Mosner, 407 N.J. Super. 40 (App. Div. 2009)
  - v. Majao, 2015 N.J. Super. Unpub. LEXIS 1553 (App. Div. June 26, 2015)

## Was Blood Drawn in a Medically Acceptable Manner?

### Δ CLAIM

- State must admit certificate signed by phlebotomist who drew defendant's blood to prove blood drawn in medically accepted manner.
- As per State v. Renshaw, 390 N.J. Super. 456 (App. Div. 2007), phlebotomist must be called to admit certificate into evidence.
- Thus, blood test results cannot be admitted into evidence if phlebotomist not called to testify.

### STATE'S RESPONSE

- Certificate not needed to prove blood drawn in medically accepted manner.
  - Officer can testify to observations of blood draw.

## Was Blood Drawn in a Medically Acceptable Manner?

<u>Δ CLAIM</u>	<u>STATE'S RESPONSE</u>
<ul style="list-style-type: none"> <li>• State must admit certificate signed by phlebotomist who drew defendant's blood to prove blood drawn in medically accepted manner.</li> <li>• As per <u>State v. Renshaw</u>, 390 N.J. Super. 456 (App. Div. 2007), phlebotomist must be called to admit certificate into evidence.</li> <li>• Thus, blood test results cannot be admitted into evidence if phlebotomist not called to testify.</li> </ul>	<ul style="list-style-type: none"> <li>• Phlebotomist not necessarily needed to prove blood was drawn in medically accepted manner, if:               <ul style="list-style-type: none"> <li>➤ Certificate not entered into evidence without phlebotomist's testimony.</li> <li>➤ Blood is drawn by a nurse/doctor/phlebotomist in a hospital.</li> <li>➤ Officer witnessed and testifies about blood being drawn.</li> <li>➤ Scientist who tested blood testifies about results.                   <ul style="list-style-type: none"> <li>• Can scientist testify about effects, if any, of alcohol swab on blood test if officer doesn't know if betadine swab used?</li> </ul> </li> <li>➤ Does deft challenge procedures used?                   <ul style="list-style-type: none"> <li>• Deft can testify at a Rule 104 hearing</li> </ul> </li> </ul> </li> </ul>

## Was Blood Drawn in a Medically Acceptable Manner?

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## **E. What to Do if a Motion to Suppress is Granted?**

### Do Not Automatically Dismiss the Case!!

- File interlocutory appeal?
  - Ask judge for a stay.
  - Contact Municipal Prosecutor Liaison immediately to discuss whether to appeal.
  - The time limit to file interlocutory appeal is 30 days after entry of suppression order. R. 3:24(c).

## Do Not Automatically Dismiss the Case!!

- Try case on Observations.
  - No different than an alcohol observation case
    - Officer who stopped vehicle
    - DRE
    - Defendant's admissions
    - Drugs/paraphernalia found in car
    - Odor of marijuana
  
  - See State v. Autore