Garden State CLE presents:

DWI Blood and the Constitution

Lesson Plan

Robert Ramsey, Instructor

Part I. – Historical Review of Supreme Court DWI Blood Evidence Cases

Rochin v. California, 342 US 165, 172 (1952)

Our blood law analysis begins with this case. After analyzing the horrific facts of *Rochin* in conjunction with the then vague contours of the 5th Amendment's due process clause, Justice Frankfurter wrote for the Court:

> **Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.**

Almost a decade later in Mapp v. Ohio, 367 US 643 (1961), the Supreme Court rendered the 4th Amendment applicable to the States and authorized in state courts the suppression of evidence seized as the result of an unreasonable search. [See Weeks v. United States, 232 US 383 (1914)]. The holding in *Mapp* controls DWI cases.

Breithaupt v. Abram, 352 US 452 (1957)

This is another pre-*Mapp* case dealing for the first time with a DWI blood draw.

Petitioner, while driving a pickup truck on the highways of New Mexico, was involved in a collision with a passenger car. Three occupants of the car were killed and petitioner was seriously injured. A pint whiskey bottle, almost empty, was found in the glove compartment of the pickup truck. Petitioner was taken to a hospital and while he was lying unconscious in the emergency room the smell of liquor was detected on his breath. A state patrolman requested that a sample of petitioner's blood be taken. An attending physician, while petitioner was unconscious, withdrew a sample of about 20 cubic centimeters of blood by use of a hypodermic needle. This sample was delivered to the patrolman and subsequent laboratory analysis showed this blood to contain about .17% alcohol.

Petitioner contended that his conviction, based on the result of the involuntary blood test, deprived him of his liberty without that due process of law guaranteed him by the Fourteenth Amendment to the Constitution. The principle argument was that, as in *Rochin*, the conduct of the police should shock the judicial conscience.

Basically the distinction rests on the fact that there is nothing 'brutal' or 'offensive' in the taking of a sample of blood when done, an in this case, under the protective eye of a physician. To be sure, the driver here was unconscious when the blood was taken, but the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right; and certainly the test as administered here would not be considered offensive by even the most delicate. Furthermore, due process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct. It is on this bedrock that this Court has established the concept of due process. The blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses.

Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors. Likewise, we note that a majority of our States have either enacted statutes in some form authorizing tests of this nature or permit findings so obtained to be admitted in evidence. We therefore conclude that a blood test taken by a skilled technician is not such 'conduct that shocks the conscience,' nor such a method of obtaining evidence that it offends a 'sense of justice,' This is not to say that the indiscriminate taking of blood under different conditions or by those not competent to do so may not amount to such 'brutality' as would come under the *Rochin* rule.

[We will discuss this issue in State v. Ravotto, 169 NJ 227 (2001).]

Schmerber v. California, 384 US 757 (1966)

This case implicates the 4th, 5th and the 6th Amendments to the Constitution.

The 5th Amendment issue relates to self-incrimination in being forced to provide incriminating evidence in the form of a a blood sample against the advice of counsel. The right to remain silent under the 5th Amendment applies to the States under the due process clause of the 14th Amendment. Malloy v. Hogan, 378 U.S. 1 (1964). In *Schmerber*, the majority held that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends. Simply put, a blood sample is not testimonial evidence within the meaning of the 5th Amendment.

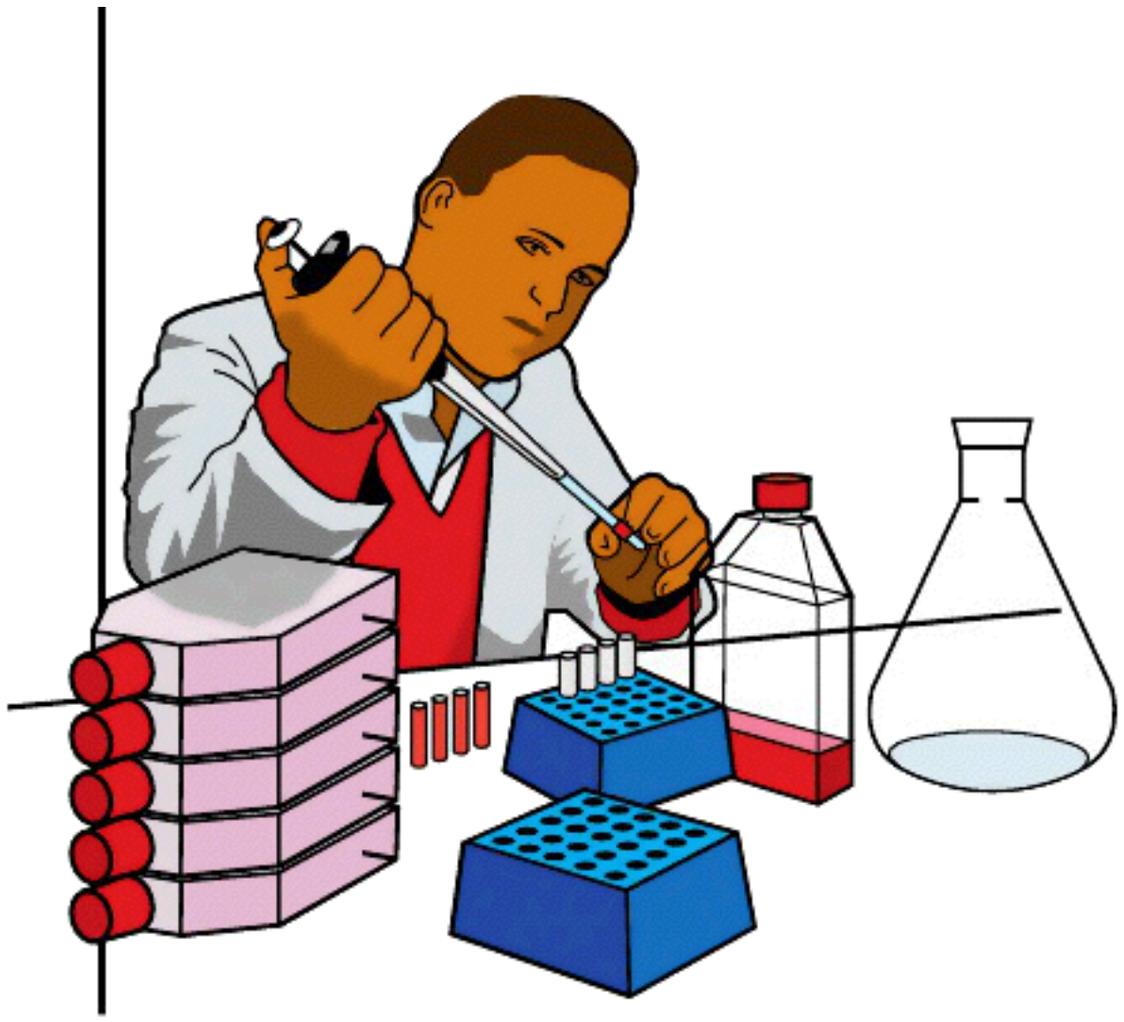
The 6th Amendment issue on deprivation of counsel is also rejected for the same reason. Although counsel advised the defendant to refuse to provide a sample, there was no denial of right to counsel since the evidence was not compelled testimony.

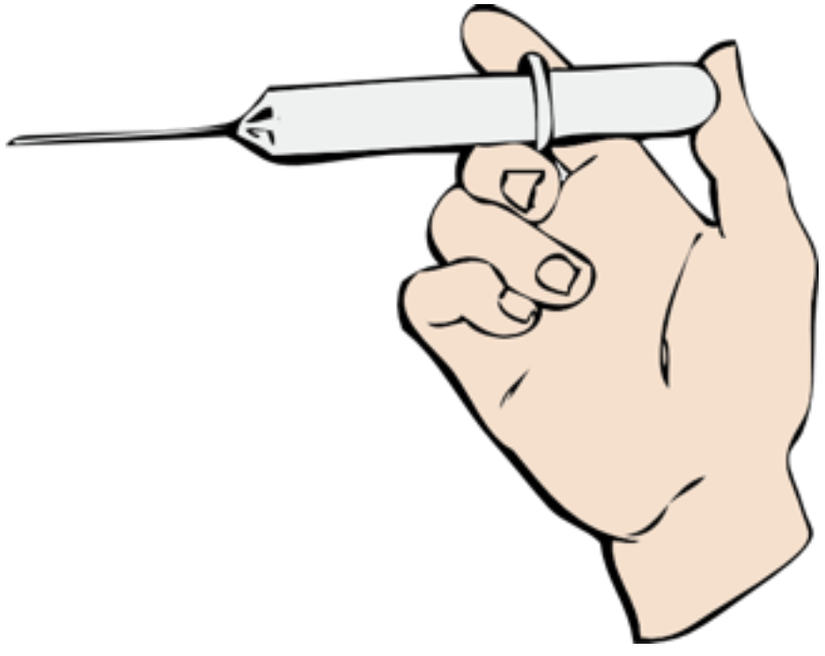
The 4th Amendment analysis begins with the proposition that a blood draw is a search of a person within the meaning of the 4th Amendment.

> **We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest. Similarly, we are satisfied that the test chosen to measure petitioner's blood-alcohol level was a reasonable one. Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol. Such tests are a commonplace in these days of periodic physical examination and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain. Petitioner is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the 'Breathalyzer' test petitioner refused. We need not decide whether such wishes would have to be respected.**
>
> **Finally, the record shows that the test was performed in a reasonable manner. Petitioner's blood was taken by a physician in a hospital environment according to accepted medical practices. We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment—for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.**

Skinner v. Railway Labor Executives' Association, 489 US 602 (1989)

This case expands the concept of testing for intoxicants in several ways. First, the Court ruled that the taking of breath, blood and urine samples from a living human being constitutes a search within the meaning of the 4th Amendment. Secondly, such searches can be undertaken under the so-called "special needs" exception to the warrant requirement when a governmental regulation geared toward promoting public safety mandates such testing in a reasonable manner. In this case, blood, urine and breath-testing were required following an accident or safety violation by Federal railway Administration.





Missouri v. McNeeley, 569 US 141 (2013)

One well-recognized exception, [to the warrant requirement] and the one at issue in this case, applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." Kentucky v. King, 131 S.Ct. 1849, 1856 (2011).

The question presented here is whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases. We conclude that it does not, and we hold, consistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based on the totality of the circumstances.

To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of circumstances. Our decision in *Schmerber* applied this totality of the circumstances approach. In that case, the petitioner had suffered injuries in an automobile accident and was taken to the hospital. While he was there receiving treatment, a police officer arrested the petitioner for driving while under the influence of alcohol and ordered a blood test over his objection. After explaining that the warrant requirement applied generally to searches that intrude into the human body, we concluded that the warrantless blood test "in the present case" was nonetheless permissible because the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'

But it does not follow that we should depart from careful case-by-case assessment of exigency and adopt the [per se], categorical rule proposed by the State and its *amici*. In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.

In short, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber,* it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.

Analysis – New Jersey up to this case stood for the proposition that a person who was arrested for drunk-driving had no right to refuse to provide a blood sample. Moreover, neither consent nor a search warrant was necessary. Presumably this rule of law was based upon either a *per se* exigency in DWI cases or the search incident to arrest rationale. The Courts were never clear on the justification, apart from the general philosophy of aggressive drunk-driving law enforcement in that era.

> **A drunken driver arrested by police with probable cause to believe he is intoxicated has no federal constitutional right to prevent the involuntary taking of a blood sample. Of course, the sample should be taken in a medically acceptable manner at a hospital or other suitable health care facility. State v. Dyal, 97 NJ 229, 238 (1984).**

The decision in McNeeley overrules several other New Jersey holdings to the contrary. See State v. Woomer, 196 N.J.Super. 583 (App. Div. 1984) and State v. Burns, 159 NJ Super. 539 (App. Div. 1978).

This Supreme Court holding was afforded pipeline retroactivity in State v. Adkins, 221 N.J. 300, 303 (2015).

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016)

The search incident to a lawful arrest exception to the warrant requirement is categorical and serves a number of critical law enforcement needs and objectives. However, like any other search under the 4th Amendment, such searches must also be reasonable. The taking of a blood sample as a search incident to arrest is nit reasonable.

Because the impact of breath tests on privacy is slight, and the need for BAC testing is great, the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. Blood tests, however, are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test. Respondents have offered no satisfactory justification for demanding the more intrusive alternative without a warrant. In instances where blood tests might be preferable—*e.g.*, where substances other than alcohol impair the driver's ability to operate a car safely, or where the subject is unconscious—nothing prevents the police from seeking a warrant or from relying on the exigent circumstances exception if it applies. Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving. No warrant is needed in this situation.

Motorists may not be criminally punished for refusing to submit to a blood test based on legally implied consent to submit to them. It is one thing to approve implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply, but quite another for a State to insist upon an intrusive blood test and then to impose criminal penalties on refusal to submit. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads

Part II. – Securing blood evidence – current options available to police

The touchstone of the 4th Amendment is objective reasonableness. In order to be deemed to be objectively reasonable, police conduct when performing an activity that constitutes a search or seizure within the meaning of the 4th Amendment must be based upon either judicial authority in the form of a warrant or rely upon one of the well-delineated exceptions to the warrant requirement. In addition, with or without a warrant, the police must conduct the search or seizure in a reasonable manner.

The following are the generally available procedures in New Jersey for securing blood evidence in a drunk-driving case.

a.) Consent. The consent of the subject must be obtained in a voluntary and knowing manner. New Jersey law further requires that the State prove by clear and convincing evidence that subject knew he had the right to refuse consent or withdraw consent at any time. State v. Johnson, 68 NJ 349 (1975). The current consent to provide a blood sample forms generally tracks the *Johnson* criteria.

b.) Search Warrant – Police may obtain a telephonic search warrant when they can demonstrate probable cause to believe an arrestee operated a motor vehicle while under the influence of alcohol or drugs. Procedures are set forth in Rule 3:5-3(b). Police procedures require that the arresting officer consult with a local prosecutor before contacting the relevant judge. Typically, both the prosecutor and officer will be placed under oath to provide the data necessary to support the search warrant.

c.) Exigent circumstances. On occasion, following the establishment of probable cause, the police may encounter investigative delays in obtaining a blood sample. Under these so-called "exigent circumstances", the police may secure a blood sample without first obtaining a warrant. Although not a categorical exception, the natural dissipation of blood alcohol in living human beings creates time pressures for the police. When the time necessary to obtain a warrant threatens the integrity of the blood alcohol evidence, the police may seize the blood sample without a search warrant. State v. Jones, 441 NJ Super. 317 (App. Div. 2015); State v. Zalcberg, ___ NJ ___ (2018).

However, to the extent that an exigency exists, it cannot be "police created" as a result of bungling or purposeful delay. Kentucky v. King, 563 US 452 (2011).

d.) Subpoena *Duces Tecum* – When a blood sample has been taken by medical personnel for the purposes of diagnosis and treatment, the police may secure the results of the testing of the blood sample for alcohol content when there is a reasonable basis to believe the operator was intoxicated while driving. State.v Bodtmann, 239 NJ Super. 33 (App. Div. 1990); State v. Dyal, 97 NJ 229 (1984). Note that there is an argument that blood testing results are not testimonial in nature because they were not obtained for the purpose of a criminal prosecution.

Rule 7:7-8(d) Investigative Subpoenas in Operating While Under the Influence Cases.

When the State demonstrates to the court through sworn testimony and/or supporting documentation that there is a reasonable basis to believe that a person has operated a motor vehicle in violation of N.J.S.A. 39:4-50 or N.J.S.A. 39:3-10.13, a vessel in violation of N.J.S.A. 12:7-46, or an aircraft in violation of N.J.S.A. 6:1-18, a municipal court judge with jurisdiction over the municipality where the alleged offense occurred may issue an investigative subpoena directing an authorized agent of a medical facility located in New Jersey to produce medical records related to the presence of alcohol, narcotics, hallucinogens, habit-producing drugs or chemical inhalants in the operator's body. If no case is pending, the subpoena may be captioned "In the Matter" under investigation.

e.) Use of force. The level of force the police utilize to secure a blood sample is dependent upon the seriousness of the underlying offense. In cases involving homicide or aggravated assault by auto, a significant level of force may be reasonable in obtaining blood samples against the will of the subject. By contrast, a routine drunk-driving case without injuries or criminal charges would not permit any significant level of force to be used. See generally, State v, Ravotto, 169 NJ 227 (2001).

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lieutenant Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CRIMINAL JUSTICE
PO BOX 085
TRENTON, NJ 08625-0085
TELEPHONE: (609) 984-6500

JOHN J. HOFFMAN
Acting Attorney General

ELIE HONIG
Director

TO: All County Prosecutors

FROM: Elie Honig EH
Director, Division of Criminal Justice

DATE: October 30, 2015

RE: Universal "Consent Form for Use by Law Enforcement Officers When Requesting Consent to Draw and Test Blood" and "Consent Form for Use by Law Enforcement Officers When Requesting Consent to Obtain and Test Urine"

Effective December 1, 2015, the attached "Consent Form for Use by Law Enforcement Officers When Requesting Consent to Draw and Test Blood" and "Consent Form for Use by Law Enforcement Officers When Requesting Consent to Obtain and Test Urine" should be used by all law enforcement officers in all of New Jersey's counties that authorize the use of the consent exception to the warrant requirement to obtain and test urine and/or blood in DWI prosecutions. These forms replace and supersede any consent form drafted by each individual county.

c: AAG Michael Williams, Counsel to the Director
AAG Philip S. Aronow, Chief, Prosecutors Supervision & Training Bureau

CONSENT FORM FOR USE BY LAW ENFORCEMENT OFFICERS WHEN REQUESTING CONSENT TO DRAW AND TEST BLOOD

I, _____, hereby voluntarily consent to allow
(Name of consenting party)

_____, a member of _____,
(Name of person drawing blood) (Name of agency)

and any other representative designated to assist, to take blood sample(s) from me, and I voluntarily consent to the testing of my blood sample(s).

I have been advised by _____and fully understand that
(Officer and badge number)

I have the right to refuse giving my consent to the taking and testing of my blood sample(s). I have been further advised that I may withdraw my consent at any time and for any reason up until the commencement of the taking of my blood sample(s).

I have knowingly and voluntarily given my written consent to the taking and testing of my blood sample(s).

_____ _____ _____
(Signature of Consenting Party) (Date) (Time)

Witness: _____

Part III. – 6th Amendment Confrontation Issues

a.) Introduction – Traditionally, American jurisprudence admitted out-of-court testimonial evidence by witnesses if it was deemed to be reliable under state evidence law. However, in Crawford v. Washington, 541 US 36 (2004), the Supreme Court held that such evidence is barred unless the defendant has had the opportunity to cross-examine the witness. Witness statements or documentary evidence is testimonial when the circumstances objectively indicate that the primary purpose of the evidence is to establish or prove past events potentially relevant to later criminal prosecution. Davis v. Washington, 547 US 813 (2006).

With blood testing, the testimonial nature of the evidence arises in the context of laboratory reports. The United States Supreme Court has addressed this issue twice.

First, in Melendez-Diaz v. Massachusetts, 557 US 305 (2009), the Court ruled that laboratory reports (cocaine) and the findings of the technicians who made them are testimonial within the meaning of Crawford. Accordingly, defendants have a 6th Amendment to confront the makers of these laboratory reports.

In Bullcoming v. New Mexico, 564 US 647 (2011), a DWI blood case, the Justices ruled that a defendant's right is to be confronted with the specific analyst who made the certification of his blood alcohol results, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist. Moreover, a substitute witness who had no personal knowledge of the testing of the defendant's sample is not permitted.

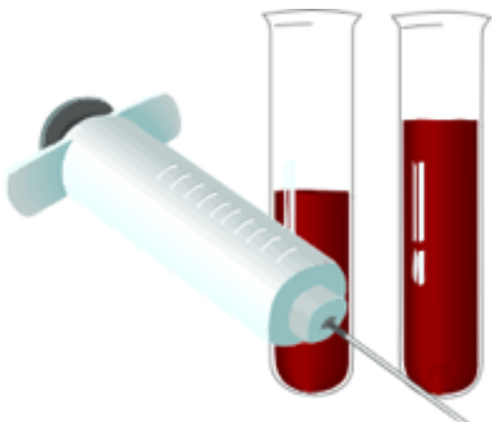
New Jersey Courts have addressed the issue of laboratory reports and technicians in DWI blood cases in three cases, all of them prior to *Melendez-Diaz* and *Bullcoming*.

In State v. Berezansky, 386 NJ Super. 84 (2006), relying on *Crawford*, the Court anticipated the subsequent holdings of the United States Supreme Court. The panel held that laboratory reports related to blood analysis are testimonial documents, thus requiring an opportunity for cross-examination of the technician who test the blood sample and prepared the report.

In State v. Renshaw, 390 NJ Super. 456 (App. Div. 2007), the Court extended the *Crawford* and *Berezansky* analysis to the activities of a phlebotomist, whose testimony would normally be excused by way of an affidavit. See NJSA 2A:62A-10. The Court held that such evidence is testimonial and a defendant has a right to confront and cross examine such a witness.

Finally, in State v. Kent, 391 NJ Super. 352, 380-81 (App. Div. 2007), the Court created a notice requirement for defendants who seek to cross examine laboratory technicians at trial:

> **[W]e deem it appropriate prospectively to require, as a condition of our treatment of lab reports and blood sample certificates as "testimonial" documents, that defense counsel provide reasonable advance notice to prosecutors that they wish to cross-examine the authors of those documents at trial. In the absence of such reasonable notice, a defendant shall be deemed to have waived his or her right to confrontation.**



b.) Who must testify at trial? State v. Michaels, 219 NJ 1, 5-6 (2014).

At trial, the State introduced testimony from Edward Barbieri, Ph.D., an assistant supervisor and toxicology technical leader from the private laboratory that had performed the testing on defendant's blood sample and issued a report certifying the test results. Dr. Barbieri was responsible for supervising the technicians and analysts who were involved in the gas chromatography/mass spectrometry testing. He also was responsible for their adherence to the laboratory's policies and protocols for the testing procedures. He had reviewed the test results and satisfied himself that the test data accurately identified and quantified the substances found in defendant's blood, and he had signed and certified the laboratory results set forth in the report. Over defendant's objection, the report was admitted into evidence without the testimony of the fourteen individuals who had performed various tasks associated with the testing procedures. A jury convicted defendant on all counts, and the Appellate Division affirmed defendant's conviction.

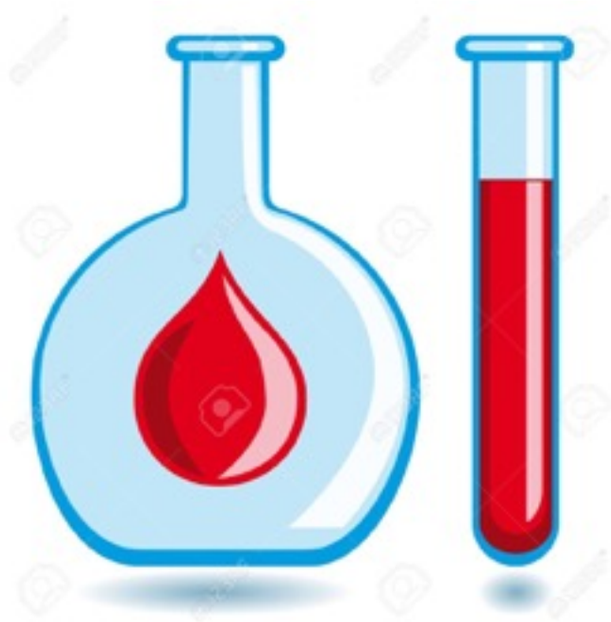
We granted certification in this matter to consider defendant's argument that her Sixth Amendment confrontation rights were violated because the laboratory report was admitted, although defendant had not had the opportunity to confront each laboratory employee who participated in the testing that generated the results contained in the report. We now hold that the admission of the laboratory report did not violate defendant's confrontation rights. The laboratory supervisor—who testified and was available for cross-examination—was knowledgeable about the testing process that he was responsible for supervising. He had reviewed the machine-generated data from the testing, had determined that the results demonstrated that defendant had certain drugs present in her system, and had certified the results in a report that he had prepared and signed.

We recognize that the forensic report in issue is "testimonial" and that it is the type of document subject to the Confrontation Clause. However, in this matter we join the many courts that have concluded that a defendant's confrontation rights are not violated if a forensic report is admitted at trial and only the supervisor/reviewer testifies and is available for cross-examination, when the supervisor is knowledgeable about the testing process, reviews scientific testing data produced, concludes that the data indicates the presence of drugs, and prepares, certifies, and signs a report setting forth the results of the testing. In examining the testimony and documentary evidence challenged in this matter, we do not find it to be equivalent to the "surrogate testimony" that the United States Supreme Court found problematic in the *Bullcoming* decision.

Finally, please note that our Supreme Court was unable to discern the state of the law on this issue as set forth in Williams v. Illinois, 567 US 50 (2012), a DNA case. The Williams case is a fractured, plurality opinion in which no single, coherent rule is expressed by the Justices.

Williams v. Illinois, 132 S. Ct. 2221 (2012)

Michaels, 219 NJ 1 (2014)



Garden State CLE presents:

DWI Blood and the Constitution

Lesson Plan

Robert Ramsey, Instructor