Garden State CLE presents:

Where is my discovery?
(and what can I do about it?)

Lesson Plan

Part I

Who is Responsible for Defense Discovery?
Police or Prosecutor?

Rule 7:7-7(a) - "All discovery requests by defendant shall be served on the municipal prosecutor, who shall be responsible for making government discovery available to the defendant."

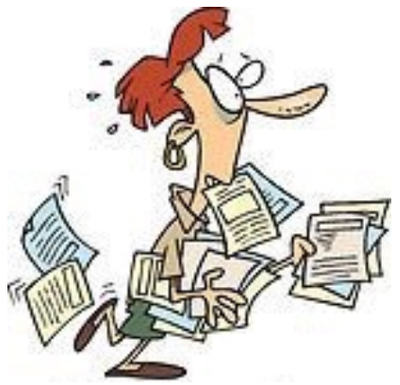
This Rule is intended to conform to the case law:

Discovery demands must be made directly to the municipal prosecutor and not the police or the court - State vs. Polasky, 216 N.J,Super 549(LawDiv.1986); State vs. Prickett, 240 N.J.Super 139(App.Div.1989).

Demand for discovery can be made directly to the prosecutor in care of the municipal court - State vs. Holop, 253 N.J.Super 320, 325(App.Div.1992).

There is no authority for a prosecutor demanding that discovery requests be made directly to the local or State Police.

Part II



The Demand for Discovery

a) Rule 7:7-9 mandates that the attorney for the defendant in an action before the municipal court shall immediately file an appearance with the municipal court administrator of the court having jurisdiction over the matter and shall serve a copy on the appropriate prosecuting attorney or other involved party, as identified by the municipal court administrator.

b) The demand for discovery must be made simultaneously with the entry of appearance. See Rule 7:7-7(g). A demand for discovery must be in writing and directed to the prosecutor - Rule 7:7-7(b).

c) A standard demand for discovery under Rule 7:7-7 (either as part of the letter of "rep" or otherwise) should also include a notice of the following issues:

By copy of this letter entering my appearance, I am placing the municipal prosecutor on notice of my appearance and consistent Rule 7:7-7(g) demanding upon him discovery to which the defendant is otherwise entitled under Rule 7:7-7(b). In addition, I place the prosecutor on notice of our additional discovery demands that:

1) The police to preserve all video and audio recordings made of defendant - State vs. Richardson, __ N.J.Super __(App.Div.2017).

2) Our objection in advance as to school-zone maps being introduced into evidence without witness authentication - State vs. Wilson, 227 N.J. 534(2017).

3) Our notice and demand for the appearance at trial of lab technicians and phlebotomists - State vs. Kent, 391 N.J.Super 352(App.Div.2007)

4) Our demand for the charts and graphs developed in the testing of blood samples taken from the defendant - State vs. Weller, 225 N.J.Super 274 (Law Div. 1986).

5) Affidavits of probable cause.

Part III

What are the limitations on discovery?

a) Rule 7:7-7(b)

Limitation to relevant discovery - "on written notice to the municipal prosecutor or private prosecutor in a cross-complaint case, shall be provided with copies of all relevant material." The Rule lists a wide variety of discovery materials, including.

(1) books, tangible objects, papers or documents obtained from or belonging to the defendant, including, but not limited to, writings, drawings, graphs, charts, photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form;

(2) records of statements or confessions, signed or unsigned, by the defendant or copies thereof, and a summary of any admissions or declarations against penal interest made by the defendant that are known to the prosecution but not recorded;

(3) Grand jury proceedings recorded pursuant to Rule 3:6-6;

(4) Results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies of these results or reports, that are within the possession, custody or control of the prosecuting attorney;

(5) Reports or records of defendant's prior convictions; [should include DMV certified abstract and CCH]

(6) Books, originals or copies of papers and documents, or tangible objects, buildings or places that are within the possession, custody or control of the government, including, but not limited to, writings, drawings, graphs, charts, photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form;

(7) Names, addresses, and birthdates of any persons whom the prosecuting attorney knows to have relevant evidence or information, including a designation by the prosecuting attorney as to which of those persons the prosecuting attorney may call as witnesses; [including experts, chain of custody people, lab techs and others.]

(8) record of statements, signed or unsigned, by the persons described by subsection (7) of this rule or by co-defendants within the possession, custody or control of the, prosecuting attorney, and any relevant record of prior conviction of those persons;

(9) police reports that are within the possession, custody or control of the prosecuting attorney;

(10) warrants, that have been completely executed, and any papers accompanying them, as described by R. 7:5-1 (a).

(11) the names and addresses of each person whom the prosecuting attorney expects to call to trial as an expert witness, the expert's qualifications, the subject matter on which the expert is expected to testify, a copy of the report, if any, of the expert witness, or if no report was prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. If this information is requested and not furnished, the expert witness may, upon application by the defendant, be barred from testifying at trial.

b) What about other discovery not set forth in the Rule?

The older view of this entitlement was expressed in State vs. Ford, 2450 N.J.Super 44, 49-50(App.Div.1990) "We hold that defendants' discovery in DWI cases is limited to those relevant items, within the limitations of Rule 3:13–3(a), which there is a reasonable basis to believe will assist a defendant's defense. Rule 3:13-3(d) permits a court for good cause shown to limit discovery even if otherwise discoverable under Rule 3:13–3. Determinations regarding the scope of discovery and questions of relevancy are matters best left to the discretion of trial courts where particular facts give rise to a basis for distinguishing the case from the usual or run of the mill DWI case. The task of determining whether a discovery request is relevant or whether it should be limited, or has been properly responded to, may be largely factual and well-suited to the discretion of a trial court."

The modern view track of the NJ Rules of Evidence and was expressed in State vs. Green, 417 N.J.Super 190, 201(App.Div.2010).

> **"Discovery in the municipal courts is governed by Rule 7:7–7. It provides that the municipal prosecutor "shall be responsible for making government discovery available to the defendant." Rule 7:7–7(a). The defendant is permitted to obtain discovery from the State of any relevant "books, originals or copies of papers and documents, or tangible objects, buildings or places that are within the possession, custody or control of the government." Rule 7:7–7(b)(6). The State may also obtain discovery "on written notice to the defendant" of "the names and addresses of each person whom the defense expects to call to trial as an expert witness." Rule 7:7–7(c)(5). Discovery under Rule 7:7–7 is not limited to the material the prosecutor intends to use at trial. Rather, the scope of discovery extends to information and documents that are relevant. 'Relevant evidence' means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401.**

Part IV

Delays Affecting Speedy Trial
State vs. Cahill, 213 N.J. 253(2013)

a) Sixty (60) day target disposition goal set forth in Supreme Court Directive under Directive 1-84 (and 60-day disposition goal on all municipal court cases) may be unrealistic in the age of the Alcotest. As a result of the fact sensitive nature of speedy-trial applications, New Jersey courts are to follow the four (4) part test in Barker vs. Wingo, 407 U.S. 514(1972):

Length of Delay
Reason for Delay
Assertion of Right to speedy trial
Prejudice to Defendant

Part V

Video discovery

a) Video evidence

N.J.S.A. 40A:14-118.1 - Municipal police vehicles; mobile video recording systems. Every new or used municipal police vehicle purchased, leased, or otherwise acquired on or after the effective date of P.L. 2014, c. 54 (C.40A:14-118.1 et al.) which is primarily used for traffic stops shall be equipped with a mobile video recording system.

As used in this section "mobile video recording system" means a device or system installed or used in a police vehicle or worn or otherwise used by an officer that electronically records visual images depicting activities that take place during a motor vehicle stop or other law enforcement action.

N.J.S.A. 39:4-50(i) - In addition to any other fine, fee, or other charge imposed pursuant to law, the court shall assess a person convicted of a violation of the provisions of this section a surcharge of $125, of which amount $50 shall be payable to the municipality in which the conviction was obtained , $50 shall be payable to the Treasurer of the State of New Jersey for deposit into the General Fund, and $25 which shall be payable as follows: in a matter where the summons was issued by a municipality's law enforcement agency, to that municipality to be used for the cost of equipping police vehicles with mobile video recording systems pursuant to the provisions of section 1 of (C.40A:14-118.1); in a matter where the summons was issued by a county's law enforcement agency, to that county; and in a matter where the summons was issued by a State law enforcement agency, to the General Fund.

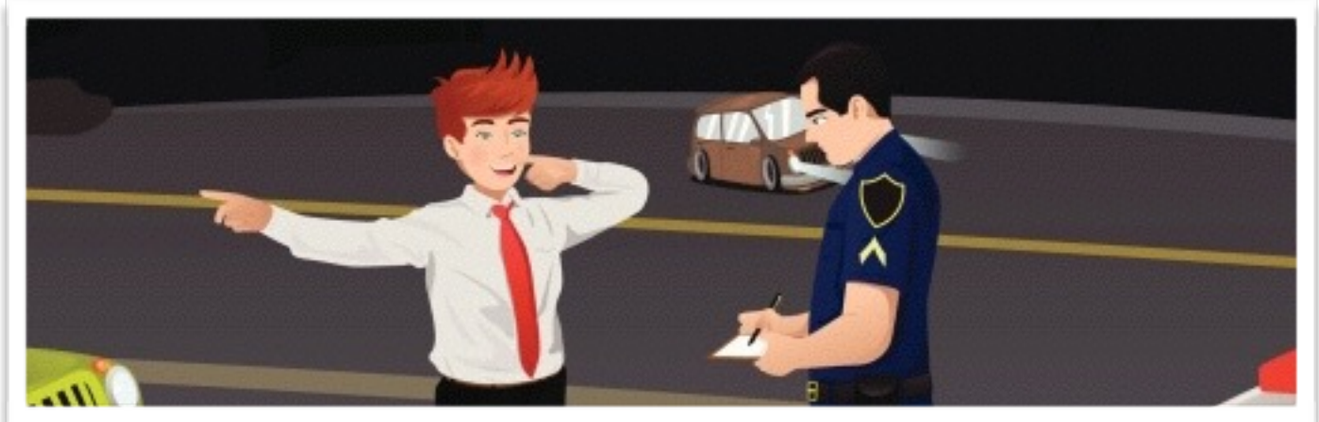
b) Relevance in DWI Cases

Police patrol vehicle videotape - "The recordings from a patrol car's dashboard camera that depict the interactions between a DWI suspect and police officers or the sobriety tests performed by the suspect are clearly relevant, and if the recordings contradict an officer's testimony, such evidence has vital impeachment value to the defense. A video recording of a Breathalyzer test or a defendant's appearance, behavior, and motor skills at police headquarters is also relevant because it may have 'a tendency in reason to prove or disprove' that the defendant was under the influence. To ensure the availability of such relevant evidence, a defendant should give written notice to the municipal prosecutor to preserve pertinent videotapes pursuant to Rule 7:7–7. Although the defense carries this obligation, the State also has a

duty to preserve evidence that it knows is relevant to a DWI prosecution." State vs. Stein, 225 N.J. 582, 596-97, 107(2016).

c) Demand and adverse inference following destruction

Just as the State may not routinely destroy officers' notes before they must be disclosed under Rule 3:13-3(b)(1), we conclude the State may not destroy law enforcement's video-recording of an offense, particularly when a defendant has made a timely request to preserve it. The same confrontation right at play in W.B. applies to the destruction of a video-recording of an officer searching a defendant. The recording enables a defendant to test the officer's version of what transpired. The evidential value of the recordings may be substantial, and even more reliable than an officer's notes. State vs. Richardson, ___ N.J.Super ___ (App.Div.2017).



Part VI

State Police Forensic Laboratory Delays

a) The Judge grant memo of October 10, 2017

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MEMORANDUM

To: **Municipal Court Presiding Judges**
Municipal Court Judges
Municipal Division Managers
Municipal Court Directors and Administrators

From: **Glenn A. Grant, J.A.D.**

Subj: **State Police Labs – Steps Being Taken to Reduce Delays in Reports**

Date: **October 10, 2017**

Delays in receiving State Police drug lab reports have a direct impact on municipal court backlog. I am pleased to report that the Office of the Attorney General has advised me of several steps the New Jersey State Police are taking to help address the growing backlog issue at their State Police labs.

The State Police Office of Forensic Science intends to hire 30 additional laboratory scientists by the end of this year to support the work of the State Police Drug Unit. Scientists hired for these positions will undergo a rigorous four to six week training program. That same office is also in the final stages of procurement to outsource 5000 municipal court drug cases to private labs for analysis. That outsourcing is expected to occur later this year or early in 2018.

Collectively, the hiring of these 30 new scientists and the anticipated outsourcing of 5000 cases should have a positive impact on the productivity and timeliness of the State Police labs in analyzing drug samples from municipal court cases and other cases. I must emphasize that these changes are still in the process of being implemented and will not be fully in place until sometime next year. If all goes as planned, by next spring we should expect to see reductions in the time it takes to receive reports from the State Police labs.

cc. Chief Justice Stuart Rabner
Assignment Judges
Steven D. Bonville, Chief of Staff
AOC Directors and Assistant Directors
Trial Court Administrators
Ann Marie Fleury, Special Assistant
Melaney S. Payne, Special Assistant
Tina LaLena, Chief
Julie Higgs, Chief

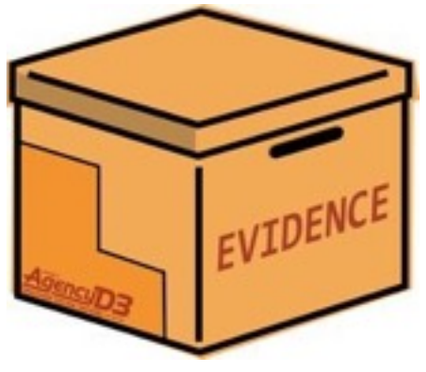
b) Nature of Delay

The delay in receipt of evidence from the State Police appears to be much longer in drug analysis cases as it is in blood and urine cases. At this point, six (6) months delays are not unusual in drug-testing cases.

In order to address the backlog, some county prosecutors have taken the steps of extending favorable plea offers conditioned upon no demand for laboratory testing (and motion to suppress) or summarily amending all drug possession cases to Loitering under N.J.S.A. 2C:33-2.1. (This downgrade is what allowed the Supreme Court to rule as it did in State vs. Miles, supra)

c) Demand Notice Requirement

Laboratory reports are testimonial documents within the meaning of Crawford v. Washington, 541 US 36 (2004). Accordingly, every request for lab results should place the prosecutor on notice that you demand the lab technician to appear at trial and offer live testimony. State v. Kent, 391 NJ Super. 352, 380-81 (App. Div. 2007)



"[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."

See also procedure in N.J.S.A. 2C:35-19(c). Defense specific grounds for objection no longer required. State vs. Miller, 170 N.J. 417, 432–36(2002). The statute provides in pertinent part:

> **"Whenever a party intends to proffer in a criminal or quasi-criminal proceeding, a certificate executed pursuant to this section, notice of an intent to proffer that certificate and all reports relating to the analysis in question, including a copy of the certificate, shall be conveyed to the opposing party or parties at least 20 days before the proceeding begins. An opposing party who intends to object to the admission into evidence of a certificate shall give notice of objection and the grounds for the objection within 10 days upon receiving the adversary's notice of intent to proffer the certificate."**

But see State vs. Heisler, 422 N.J.Super 399, 422(App.Div.2011):

> **"To harmonize the two deadlines included in section 19c, we conclude that the ten days within which a defendant must object or waive begins to run only after the State has disclosed the supporting data as well as the NOI. Thus, if the State fails to waiver of the right to confront the report's author. If the author does not appear as a witness at trial, admission of the lab certificate violates defendant's confrontation rights."**

d) Bifurcated Trial

The New Jersey Supreme Court has now abolished the "same-evidence" test for double-jeopardy, effective May 16, 2017. State vs. Miles, 229 N.J. 83(2017). The only test for double-jeopardy in New Jersey for cases that occurred after May 16th is the so-called Blockerburger (same elements) test. Blockburger vs. United States, 284 U.S. 299(1932). Moreover, there is no Mandatory Joinder Rule in municipal court. Rule 3:15-1(b) does not apply to municipal courts. or drug driving tickets.

Accordingly, there is no double-jeopardy bar to bifurcating a DWI ticket and a related drug or assault complaint (except for perhaps N.J.S.A. 2C:35-10(b))

e) Lab Fees in Drug Cases

Remember that in all drug cases, your client is required to pay for the testing of the drugs taken from him, regardless of whether they are used in evidence. See N.J.S.A. 2C:35-20(a). This statutory requirement should be included in your affidavit or brief in drug cases.

Part VII

Holup Motion and Order

a) A Holup motion can be brought at any time under Rule 7:7-7(j) seeking to bar the introduction at trial of the missing or delayed discovery.

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order that party to provide the discovery of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed or enter such other order as it deems appropriate.

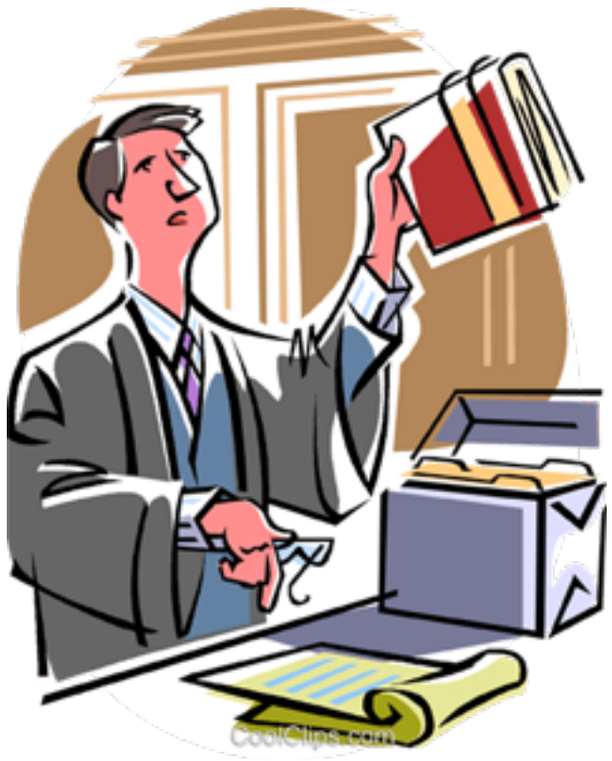
b) Although most motions in municipal court must be argued orally and informally, Holup motions must be in writing.

c) The motion should be filed pursuant to Rule 1:6-2.

By way of clarification of the situation where discovery has not been provided, we would also recommend that defense counsel serve a motion, on the papers, with certification similar to Rule 1:6–2, upon the municipal prosecutor, filing the original with the municipal court seeking an order limiting time for the 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 that occurs with such frequency when all parties appear in court for trial. Another salutary affect of such a practice is to expedite the processing of cases by assuring both sides of the certainty of the trial date and eliminating the unnecessary work, expense and delay resulting from the continuance of a case because the discovery process has not been completed. State vs. Holup, 253 N.J.Super 320, 325(App.Div.1992).

Rule 1:6-2(a) Generally. An application to the court for an order shall be by motion, or in special cases, by order to show cause. A motion, other than one made during a trial or hearing, shall be by notice of motion in writing unless the court permits it to be made orally. Every motion shall state the time and place when it is to be presented to the court, the grounds upon which it is made and the nature of the relief sought, and, as to motions filed in the Law Division-Civil Part only, the discovery end date or a statement that no such date has been assigned. The motion shall be accompanied by a proposed form of order in accordance with Rule 3:1-4(a) or Rule 4:42-1(e), as applicable. The

form of order shall note whether the motion was opposed or unopposed. If the motion or response thereto relies on facts not of record or not subject of judicial notice, it shall be supported by affidavit made in compliance with Rule 1:6-6. The motion shall be deemed uncontested and there shall be no right to argue orally in opposition unless responsive papers are timely filed and served stating with particularity the basis of the opposition to the relief sought. If the motion is withdrawn or the matter settled, counsel shall forthwith inform the court.



d) Sample motion will read as follows:

LAW OFFICE OF ROBERT RAMSEY
2000 HAMILTON AVENUE
HAMILTON, NEW JERSEY 08619
(609) 396-7979
ATTORNEY FOR DEFENDANT

STATE OF NEW JERSEY	**:**	**BASIN CITY MUNICIPAL COURT BURLINGTON COUNTY**
Plaintiff	**:**	
		SUMMONS NOS. E17-123456
vs.	**:**	
		QUASI-CRIMINAL ACTION
SCOTT BROWN	**:**	
		NOTICE OF MOTION PURSUANT
Defendant	**:**	**TO RULE 1:6-2 AND RULE 7:7-7(j)**

PLEASE TAKE NOTICE that on October 19, 2017, the undersigned counsel will move before this Court for an order barring the introduction in evidence at trial of the results of laboratory testing of a blood sample purportedly taken from his body on the date of his arrest.

This motion is authorized under Rule 7:7-7(j) and through the case law as established by State vs. Holup, 253 N.J.Super 320(App.Div.1992).

In support of this application, Defendant will rely upon the annexed affidavit and oral argument.

RAMSEY LAW OFFICE

ROBERT RAMSEY

Dated: October 16, 2017

e) The affidavit of counsel should trace the procedural history in the case.

LAW OFFICE OF ROBERT RAMSEY
2000 HAMILTON AVENUE
HAMILTON, NEW JERSEY 08619
(609) 396-7979
ATTORNEY FOR DEFENDANT

STATE OF NEW JERSEY	**:**	**BASIN CITY MUNICIPAL COURT BURLINGTON COUNTY**
Plaintiff	**:**	
		SUMMONS NOS. E17-123456
vs.	**:**	
		QUASI-CRIMINAL ACTION
SCOTT BROWN	**:**	
		CERTIFICATION
Defendant	**:**	**OF COUNSEL**

I, Robert Ramsey, of full age, do certify the following to be true.

1) I am counsel of record in the above captioned case now pending in the Basin City Municipal Court.

2) I entered my appearance on or about January 26, 2017.

3) Consistent with Rule 7:7-7(g), upon entry of my appearance with the Court, I sent a written demand for discovery to the municipal prosecutor, demanding all discovery to which Defendant is entitled pursuant to Rule 7:7-7(b). A copy of this demand is annexed hereto as Exhibit A.

4) I also demanded production of the charts and graphs associated with the testing of a blood sample purportedly taken from the body of my client on the date of his arrest. Defendant is entitled to this discovery. State vs. Weller, 225 N.J.Super 274(LawDiv.1986).

5) Although I have received partial discovery from the prosecutor in the form of the results of laboratory results of the blood test, I have yet to receive the charts and graphs.

6) I have made applications for the receipt of this particular piece of discovery on three separate occasions, including by writing on April 7, 2017 (annexed hereto as Exhibit B) and twice on the record before this Court (on March 31, 2017 and April 28, 2017).

7) Despite these requests, the required discovery has not been provided.

8) Accordingly, by way of the attached Form of Order, pursuant to the Court's authority under State vs. Holup, 253 N.J.Super 320, 325(App.Div.1992) and Rule 7:7-7(j), Defendant will seek to bar the results of the laboratory report related to his blood-tests if the results have not been provided by November 1, 2017.

9) Consistent with Rule 7:7-7(h) I have conferred with the prosecutor and attempted to reach an agreement on this discovery issue without success.

Pursuant to Rule 1:4-4(b), I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

_____

Robert Ramsey

Dated: October 16, 2017

f) Contents of Holup Order

LAW OFFICE OF ROBERT RAMSEY
2000 HAMILTON AVENUE
HAMILTON, NEW JERSEY 08619
(609) 396-7979
ATTORNEY FOR DEFENDANT

STATE OF NEW JERSEY	**:**	**BASIN CITY MUNICIPAL COURT** **BURLINGTON COUNTY**
Plaintiff	**:**	
		SUMMONS NOS. E17-123456
vs.	**:**	
		QUASI-CRIMINAL ACTION
SCOTT BROWN	**:**	
Defendant	**:**	**ORDER**

THIS MATTER having been opened to the Court upon the application of Robert Ramsey, Esquire, and the Court having considered the associated moving papers and good cause having been shown;

IT IS ON THIS _____ DAY OF _____, 2017;

ORDERED that if the charts and graphs associated with the testing of Defendant's blood have not provided to Defendant by November 1, 2017, the results of such blood tests will be barred from introduction in evidence at trial.

_____

Joseph P. Dredd, J.M.C.

Part VIII

The Discovery Rule in Municipal Court

Rule 7:7-7 - Discovery and Inspection

(a) Scope. If the government is represented by the municipal prosecutor or a private prosecutor in a cross-complaint case, discovery shall be available to the parties only as provided by this rule, unless the court otherwise orders. All discovery requests by defendant shall be served on the municipal prosecutor, who shall be responsible for making government discovery available to the defendant. If the matter is, however, not being prosecuted by the municipal prosecutor, the municipal prosecutor shall transmit defendant's discovery requests to the private prosecutor in a cross complaint case, pursuant to Rule 7:8-7(b).

(b) Discovery by Defendant. Unless the defendant agrees to more limited discovery, in all cases the defendant, on written notice to the municipal prosecutor or private prosecutor in a cross-complaint case, shall be provided with copies of all relevant material, including but not limited to the following:

(1) books, tangible objects, papers or documents obtained from or belonging to the defendant, including, but not limited to, writings, drawings, graphs, charts, photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form;

(2) records of statements or confessions, signed or unsigned, by the defendant or copies thereof, and a summary of any admissions or declarations against penal interest made by the defendant that are known to the prosecution but not recorded;

(3) grand jury proceedings recorded pursuant to Rule 3:6-6;

(4) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies of these results or reports, that are within the possession, custody or control of the prosecuting attorney;

(5) reports or records of defendant's prior convictions;

(6) books, originals or copies of papers and documents, or tangible objects, buildings or places that are within the possession, custody or control of the government, including, but not limited to, writings, drawings, graphs, charts, photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form;

(7) names, addresses, and birthdates of any persons whom the prosecuting attorney knows to have relevant evidence or information, including a designation by the prosecuting attorney as to which of those persons the prosecuting attorney may call as witnesses;

(8) record of statements, signed or unsigned, by the persons described by subsection (7) of this rule or by co-defendants within the possession, custody or control of the, prosecuting attorney, and any relevant record of prior conviction of those persons;
(9) police reports that are within the possession, custody or control of the prosecuting attorney;

(10) warrants, that have been completely executed, and any papers accompanying them, as described by Rule 7:5-1 (a).

(11) the names and addresses of each person whom the prosecuting attorney expects to call to trial as an expert witness, the expert's qualifications, the subject matter on which the expert is expected to testify, a copy of the report, if any, of the expert witness, or if no report was prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. If this information is requested and not furnished, the expert witness may, upon application by the defendant, be barred from testifying at trial.

(c) Discovery by the State

In all cases the municipal prosecutor or the private prosecutor in a cross-complaint case, on written notice to the defendant, shall be provided with copies of all relevant material, including; but not limited to, the following:

(1) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter

or copies of these results or reports within the possession, custody or control of the defendant or defense counsel;

(2) any relevant books, originals or copies of papers and other documents or tangible objects, buildings or places within the possession, custody or control of the defendant or defense counsel, including, but not limited to, writings, drawings, graphs, charts, photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form;

(3) the names, addresses, and birthdates of those persons known to defendant who may be called as witnesses at trial and their written statements, if any, including memoranda reporting or summarizing their oral statements;

(4) written statements, if any, including any memoranda reporting or summarizing the oral statements, made by any witnesses whom the government may call as a witness at trial; and

(5) the names and addresses of each person whom the defense expects to call to trial as an expert witness, the expert's qualifications, the subject matter on which the expert is expected to testify, and a copy of the report, if any, of such expert witness, or if no report is prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the 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.

(d) Documents Not Subject to Discovery

This rule does not require discovery of a party's work product, consisting of internal reports, memoranda or documents made by that party or by that party's attorney or agents, in connection with the investigation, prosecution or defense of the matter. Nor does it require discovery by the government of records or statements, signed or unsigned, by defendant made to defendant's attorney or agents.

(e) Reasonableness of Cost

Upon motion of any party, the court may consider the reasonableness of the cost of discovery ordered by the court to be disseminated to the parties. If the court finds that the cost charged for discovery is unreasonable, the court may order the cost reduced or make such other order as is appropriate.

(f) Protective Orders

(1) Grounds. Upon motion and for good cause shown, the court may at any time order that the discovery sought pursuant to this rule be denied, restricted, or deferred or make such other order as is appropriate. In determining the motion, the court may consider the following: protection of witnesses and others from physical harm, threats of harm, bribes, economic reprisals and other intimidation; maintenance of such secrecy regarding informants as is required for effective investigation of criminal activity; confidential information recognized by law, including protection of confidential relationships and privileges recognized by law; and any other relevant considerations.

(2) Procedures. The court may permit the showing of good cause to be made, in whole or in part, in the form of a written statement to be inspected by the court alone. If the court enters a protective order, the entire text of the statement shall be sealed and preserved in the court's records, to be made available only to the appellate court in the event of an appeal.

(g) Time and Procedure

A defense request for discovery shall be made contemporaneously with the entry of appearance by the defendant's attorney, who shall submit a copy of the appearance and demand for discovery directly to the municipal prosecutor. If the defendant is not represented, any requests for discovery shall be made in writing and submitted by the defendant directly to the municipal prosecutor. The municipal prosecutor shall respond to the discovery request in accordance with paragraph (b) of this rule within 10 days after receiving the request. Unless otherwise ordered by the judge, the defendant shall provide the prosecutor with discovery, as provided by paragraph (c) of this rule, within 20 days of the prosecuting attorney's compliance with the defendant's discovery request. If any discoverable materials known to a party have not been supplied, the party obligated with providing that discovery shall also provide the opposing party with a listing of the materials that are missing and explain why they have not been supplied.

Unless otherwise ordered by the judge, the parties may provide discovery pursuant to paragraphs (a), (b), (c), and (h) of this rule through the use of CD, DVD, e-mail, internet or other electronic means. Documents provided through electronic means shall be in PDF format. All other discovery shall be provided in an open, publicly available (non-proprietary) format that is compatible with any standard operating computer. If discovery is not provided in a PDF or open, publicly available format, the transmitting party shall include a self-extracting computer program that will enable the recipient to access and view the files that have been provided. Upon motion of the recipient, and for good cause shown, the court shall order that discovery be provided in the format in which the transmitting party originally received it. In all cases in which an Alcotest device is used, any Alcotest data shall, upon request, be provided for any Alcotest 7110 relevant to a defendant's case in a readable digital database format generally available to consumers in the open market. In all cases in which discovery is provided through electronic means, the transmitting party shall also include a list of the materials that were provided and, in the case of multiple disks, the specific disk on which they can be located.

(h) Motions for Discovery

No motion for discovery shall be made unless the prosecutor and defendant have conferred and attempted to reach agreement on any discovery issues, including any issues pertaining to discovery provided through the use of CD, DVD, e-mail, internet or other electronic means.

(i) Discovery Fees

(1) Standard Fees. The municipal prosecutor, or a private prosecutor in a cross-complaint case, may charge a fee for a copy or copies of discovery. The fee assessed for discovery embodied in the form of printed matter shall be $0.05 per letter size page or smaller, and $0.07 per legal size page or larger. From time to time, as necessary, these rates may be revised pursuant to a schedule promulgated by the Administrative Director of the Courts. If the prosecutor can demonstrate that the actual costs for copying discovery exceed the foregoing rates, the prosecutor shall be permitted to charge a reasonable amount equal to the actual costs of copying. The actual copying costs shall be the costs of materials and supplies used to copy the discovery, but shall not include the costs of labor or other overhead expenses associated with making the copies, except as provided for in paragraph (i)(2) of this rule. Electronic records and non-printed materials shall be provided free of charge, but the prosecutor may charge for the actual costs of any needed supplies such as computer discs.

(2) Special Service Charge for Printed Copies. Whenever the nature, format, manner of collation, or volume of discovery embodied in the form of printed matter to be copied is such that the discovery cannot be reproduced by ordinary document copying equipment in ordinary business size, or is such that it would involve an extraordinary expenditure of time and effort to copy, the prosecutor may charge, in addition to the actual copying costs, a special service charge that shall be reasonable and shall be based upon the actual direct costs of providing the copy or copies. Pursuant to Rule 7:7-1, the defendant shall have the opportunity to review and object to the charge prior to it being incurred.

(3) Special Service Charge for Electronic Records. If the defendant requests an electronic record: (1) in a medium or format not routinely used by the prosecutor: (2) not routinely developed or maintained by the prosecutor: or (3) requiring a substantial amount of manipulation or programming of information technology, the prosecutor may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on (1) the cost for any extensive use of information technology, or (2) the labor cost of personnel providing the service that is actually incurred by the prosecutor or attributable to the prosecutor for the programming, clerical, and supervisory assistance required, or (3) both. Pursuant to Rule 7:7-1, the defendant shall have the opportunity to review and object to the charge prior to it being incurred.

(j) Continuing Duty to Disclose; Failure to Comply

There shall be a continuing duty to provide discovery pursuant to this Rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order that party to provide the discovery of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed or enter such other order as it deems appropriate.

Garden State CLE presents:

Where is my discovery?
(and what can I do about it?)

Lesson Plan