

**Garden State CLE Presents:**

# **New Jersey DWI Trial Notebook**



**Robert Ramsey, Ed.D.  
John Menzel, Esquire**

## **Lesson Plan**

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# **Part I**

## **Proof of Facts**

### a) Burdens of Proof and Production

N.J.R.E. 101(b) Definitions. As used in these rules, the following terms shall have the meaning hereafter set forth unless the context otherwise indicates:

(1) “Burden of persuasion” means the obligation of a party to meet the requirements of a rule of law that the fact be proved by a preponderance of the evidence, by clear and convincing evidence, beyond a reasonable doubt, or such other standard as required by law.

(2) “Burden of producing evidence” means the obligation of a party to introduce evidence when necessary to avoid the risk of a judgment or peremptory finding against that party on an issue of fact.

### i) Proof beyond a reasonable doubt

A reasonable doubt is an honest and reasonable uncertainty in your minds about the guilt of the defendant after you have given full and impartial consideration to all of the evidence. A reasonable doubt may arise from the evidence itself or from a lack of evidence. It is a doubt that a reasonable person hearing the same evidence would have.

Proof beyond a reasonable doubt is proof, for example, which leaves you firmly convinced of the defendant's guilt. In this world, we know very few things with absolute certainty. In criminal cases the law does not require proof that overcomes every possible doubt.

If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you are not firmly convinced of defendant's guilt, you must give defendant the benefit of the doubt and find him not guilty.” State vs. Medina, 147 N.J. 43, 61(1996).

ii) When burden is required DWI Trial

Proof in a DWI must satisfy each element beyond a reasonable doubt. State vs. Grant, 196 NJ Super. 470, 477 (App. Div. 1984); State v. Glynn, 20 NJ 20 (1952);

To establish guilt under N.J.S.A. 39:4-50, the State must prove beyond a reasonable doubt that the defendant was driving while under the influence of at least one of the specified types of substances. In particular, the State must prove both the facts of intoxication and the cause of intoxication. In an under the influence of drugs case, the prosecutor must prove that (1) the defendant was intoxicated and (2) the cause of the intoxication was either narcotics, hallucinogens, or habit-producing drugs. State vs. Olenowski, 255 N.J. 529, 549-550(2023).

Miranda Hearings - Also required in a Miranda hearing conducted as a pretrial motion under Rule 7:7-5(b) as specified under N.J.R.E. 104(c). Note that the Rule of Evidence apply in this type of pretrial hearing

Sentencing – The existence of a prior DWI conviction must be proved beyond a reasonable doubt. State vs. Zingis, 259 N.J. 1, 22 (2024).

### iii) Clear and Convincing vs. Preponderance

Clear-and-convincing evidence is “that which ‘produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established,’ evidence ‘so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the precise facts in issue.’ In re Seaman, 133 N.J. 67, 74(1993).

This is the level that is required of admissibility of Alcotest readings. Romano vs. Kimmelman, 96 N.J. 66, 90(1984); State vs. Campbell, 436 N.J.Super 264(App.Div.2014).

A Challenge to a prior out-of-state prior conviction that is not substantially similar to N.J.S.A. 39:4-50(a).

[This is also the standard to be applied in considering the reasonableness of searches where the State seeks to justify it based upon consent,

independent source, attenuation and inevitable discovery]

However, note that the burden in most motions to suppress or PCR is a simple preponderance of the evidence

#### iv) Burden of Production

The burden of going forward with the evidence is on the State. See Romano vs. Kimmelman, 96 N.J. 66, 90(1984); On the defense for affirmative defenses which should then be disproved beyond a reasonable doubt.

#### b) Standard DWI Presumptions & Inferences

i) Refusal to submit to a breath test allows the Court to draw an inference of guilt on the related DWI charge. State vs. Tabisz, 129 N.J.Super 80(App.Div.1974); State vs. Stever, 107 N.J. 543(1987).

ii) Refusal to perform field sobriety tests allows the Court to draw an inference of guilt on the related DWI charge. State vs. Bryant, 328 N.J.Super 379(App.Div.2000).

iii) An unreasonable refusal to cooperate in a blood test allows the Court to draw an inference of guilt on the related DWI charge. State vs. Cryan, 363 N.J.Super 442(App.Div.2003).

iv) Consumption of while operating - An open, partially-consumed container of an alcoholic beverage found in the passenger compartment of a motor vehicle may allow the judge to infer that the beverage was drunk while the vehicle

was being operated if appearance or conduct of the operator of the motor vehicle or a passenger may be associated with the consumption of an alcoholic beverage. N.J.S.A. 39:4-51a(b).

Note - Conclusive presumptions are unconstitutional in a criminal (or quasi-criminal) case. See *State v. Humphreys*, 54 N.J. 406 (1969); See NJRE 303(b). A presumption merely establishes a permissive inference that the fact-finder may draw from the evidence.

### c) Weight and Sufficiency of Evidence

#### i) Late submission of evidence

Typically, in the absence of demonstrable prejudice to the defendant, judges will permit prosecutors to cure discovery defects during trial. State vs. Wolfe, 431 N.J.Super 356(App.Div.2013).

#### ii) At the Close of the Proofs

Defense may question sufficiency of the evidence at any time, especially during summation, after the case is over, all the proofs have been submitted and both sides have rested.

See State vs. Campbell, 436 N.J.Super 264, 271-74 (App.Div.2014)

Defendant presumes that once the trial court decides to admit Alcotest BAC results into evidence, a finding of guilt is automatic and there is nothing that the accused can do to prevent that outcome. This is not so.

A court's decision to admit proof into evidence against a party, even if it is over objection, does not preclude the party from disputing the strength of that evidence at the end of trial. See N.J.R.E. 104(e) (making clear that a court's ruling to admit proof into evidence does not limit the right of a party to contest the “weight or credibility” of such evidence); Before a final judgment of a defendant's guilt can be entered, the evidence must have shown beyond a reasonable doubt that he or she is guilty.

Thus, although Alcotest BAC results are admissible into evidence upon a proffer by the State satisfying the Chun conditions to a clear-and-convincing degree, the State's ultimate burden of proof at the end of trial is more rigorous. After hearing all of the testimony and considering all of the admitted exhibits, the judge ultimately must be persuaded that the elements of the offense, including the defendant's offending BAC level, have been proven beyond a reasonable doubt.

In this hypothetical situation, it is conceivable that the trial judge might conclude, upon further reflection in light of the evidence as a whole, that the defendant's .08 percent BAC level was not sufficiently proven by the State beyond a reasonable doubt. The judge's earlier decision to admit the BAC proof—a ruling that is interlocutory in nature and surely can be reconsidered—does not prevent the court from doubting the strength of that admitted evidence at the end of the case. In fact, the court can even reconsider its previous decision to admit the

evidence, if subsequent developments support such reconsideration.

To be sure, we are mindful that DWI defendants commonly do not “hang back” and save until the defense case at trial their competing witnesses and arguments challenging the prosecution's BAC results. Such a strategy may pose risk, perhaps depriving the defendant of a realistic chance to have the case dismissed at the suppression stage. Even so, regardless of the trial strategies that may bear on the actual flow of evidence, our conceptual point is simple and unassailable: the court's threshold decision to admit Alcotest results by clear-and-convincing evidence does not always dictate how the court ultimately will regard that same proof at the end of trial, when a more rigorous standard of persuasion applies.

### iii. On Appeal

An appeal based upon “against the weight of the evidence” is inappropriate in a bench trial. The Appellate Division will defer the Law Division judge’s findings of fact provided they are supported by substantial credible evidence in the record. See State vs. Locurto, 157 N.J. 463(1999). By contrast, the Law Division on appeal must make de novo findings of fact, giving due, but not necessarily controlling regard to the opportunity of the municipal court to judge the credibility of the witnesses. State vs. Johnson, 42 N.J. 146, 157(1964).

## Part II

# Trial Evidence Check-List

The following list can be used in real time during the course of trial as a method for assuring that all the required documents and proofs have been properly submitted to the Court. Objection to missing or incorrect core foundational documents should be deferred until summation. See State vs. Campbell, 436 N.J.Super 264(App.Div.2014).

a) Alcotest Core Foundational Documents

### **h. - Alcotest Trial Check List**

**Client:** \_\_\_\_\_

#### **Part I - Core Foundational Documents**

[Each of these must be in evidence to support admissibility of test results - State v. Kuropchak, 221 NJ 368 (2015)]

- \_\_\_ **1. Operator's Qualification Card**
  
- \_\_\_ **2. Most recent calibration report from NJSP -**
  - \_\_\_ **Calibration Record - Cover sheet**
  - \_\_\_ **Part I Control**
  - \_\_\_ **Part II Linearity**
  - \_\_\_ **New Standard Solution (if relevant)**
  - \_\_\_ **Trooper's Alcotest Cards**

\_\_\_ **3. Most recent standard solution change report**

\_\_\_ **4. Cert. of analysis used in Def's control tests**

\_\_\_ **5. The Alcohol Influence Report**

\_\_\_ **6. Worksheet A Tolerance Calculations**

b) Alcotest Official Testing Procedures

**Part II - Alcotest Official Testing Procedures**

**Client:** \_\_\_\_\_

\_\_\_ **7. Last solution change card valid?**

\_\_\_ **8. Twenty minute observation period**

\_\_\_ **Began at:** \_\_\_\_\_

\_\_\_ **Ended at:** \_\_\_\_\_

\_\_\_ **No Mouth alcohol detected**

\_\_\_ **Swallow**

\_\_\_ **Regurgitate**

\_\_\_ **Gum (restart)**

\_\_\_ **Tobacco (restart)**

\_\_\_ **Tongue rings & other oral devices**

- 9. Administration of test sequences**
  - Woman over age 60**
  - New mouthpiece for each test**
  - Cell phone/portable electronics**
  - Proper test instruction (language)**
- 10. Two proper samples (1.5 litres/4.5 seconds)**
- 11. Test Administered within a Reasonable Time**
- 12. Copy of Result to Defendant (requested)**

## Part III

# Driving While Intoxicated

a) Motor Vehicle- defined

N.J.S.A. 39:1-1 “Motor vehicle” includes all vehicles propelled otherwise than by muscular power, excepting such vehicles as run only upon rails or tracks and motorized bicycles.

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b) Operation of a motor vehicle - Statutory

N.J.S.A. 39:1-1 “Operator” means a person who is in actual physical control of a vehicle or streetcar.

N.J.S.A. 39:1-1 “Driver” means the rider or driver of a horse, bicycle or motorcycle or the driver or operator of a motor vehicle, unless otherwise specified.

c) Operation of a motor vehicle - Case Law

[W]hen one enters a car and puts one's self in the driver's seat, that person is in control of the car and an intention to drive the vehicle, combined with physical movements to put the car in motion, constitutes operation, at least sufficient to warrant an arrest for purposes of submission to the sobriety test required by N.J.S.A. 39:4-50.4a. State vs. Mulcahy, 107 N.J. 467, 479(1987).

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Elements of Operation - A person operates a motor vehicle under the influence of intoxicating liquor, within the meaning of N.J.S.A. 39:4-50 when, in that condition, he or she “enters a stationary vehicle, on a public highway or in a place devoted to public use, turns on the ignition, starts and maintains the motor in operation and remains in the driver's

seat behind the steering wheel, with the intent to move the vehicle.”  
State vs. Sweeney, 40 N.J. 359, 360, 192 A.2d 573(1963).

Attempted Operation - Defendant's attempt to start the engine of his car, which was thwarted when a police officer grabbed the keys from his hand, demonstrated an intent to operate a vehicle. The possibility of vehicle being put in motion, coupled with the defendant's intent to start the engine was sufficient evidence to constitute operation within the meaning of N.J.S.A. 39:4-50(a). State vs. Morris, 262 N.J.Super 413(App.Div.1993).

Intention to operate is a required element - State vs. Daly, 64 N.J. 122(1973).

d) Proving operation beyond a reasonable doubt

Proof may come in the form of:

Direct evidence  
Circumstantial evidence  
Admission  
[Stipulation]

See State vs. Prociuk, 145 N.J.Super 570(App.Div.1976).

e) Under the influence drugs/alcohol

In a DWI trial, judges are required to make independent findings of fact on both driving while under the influence and the *per se* violation. State vs. Sisti, 209 N.J.Super148(App.Div.1986)

The concept of driving while under the influence of alcohol or drugs is not defined with in the N.J.S.A. 39:4-50 statutes. Rather, the definitions come from the case law and must be proved as an element of the offense beyond a reasonable doubt.

Intoxication by alcohol has long been recognized as an area appropriate for lay opinion.

1) Rule 701. Opinion Testimony by Lay Witnesses.

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences may be admitted if it (a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining a fact in issue.

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i) For alcohol, use the following definitions:

“Generally speaking, it means 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.” State vs. Tamburro, 68 N.J. 414, 420(1975).

“The expression, ‘under the influence of intoxicating liquor,’ covers not only all the well known and easily recognized conditions and degrees of intoxication, but any abnormal mental Or physical condition which is the result of indulging in any degree in intoxicating liquors, and which tends to deprive him of that clearness of intellect and control of himself which he would otherwise possess.” State vs. Rodgers, 91 N.J.L. 212, 215(E&A1917).

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[N.J.S.A. 39:4-50] “Penalizes a person who drives ‘while under the influence of intoxicating liquor.’ Although prosecutions pursuant to its provisions are commonly and colloquially termed ‘drunken driving cases,’ it is settled that the statute does not require as a prerequisite to

conviction that the accused be absolutely 'drunk,' in the sense of being sodden with alcohol. It is sufficient if the presumed offender has imbibed to the extent that his physical coordination or mental faculties are deleteriously affected." State vs. Emery, 27 N.J. 348, 355(1958).

At the one pole, since 'intoxication' is not the expression used, it is not requisite that the accused be absolutely 'drunk,' in the sense of being sodden with alcohol. [Citation omitted] At the other extreme, the described condition means something more than having partaken of a single drink even though, physiologically, the smallest amount of alcohol has some slight effect or influence on an individual. The obvious intention of the Legislature was to prescribe a general condition, short of intoxication, as a result of which every motor vehicle operator has to be said to be so affected in judgment or control as to make it improper for him to drive on the highways. State vs. Johnson, 42 N.J. 146, 165(1964)

ii) Under the influence of drugs subsumes narcotics, hallucinogenic or habit-producing drugs and chemical inhalants. The definition of being under the influence of drugs is found in the case law:

“[A]n operator of a motor vehicle [is] under the influence of a narcotic drug within the meaning of N.J.S.A. 39:4--50(a) if the drug [produces] 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.'” State v. DiCarlo, 67 N.J. 321(1975).

iii) No particular substance need be identified.

The statute does not require that the particular narcotic be identified. It is enough if, from the subject's conduct, physical and mental condition

and the symptoms displayed, a qualified expert can determine that he or she is ‘under the influence’ of a narcotic. This, of course, would include a drug which produces a narcotic effect. State vs. Tamburro, 68 N.J. 414, 421(1975).

#### iv) Proof of Intoxication By Drugs – Expert Testimony

Proof of intoxication by drugs may be introduced through the testimony of a qualified expert (DRE). See State v. Olenowski, 255 N.J. 529 (2023) for a discussion of the 12-step process used by licensed drug-recognition evaluators.

#### Rule 702. Testimony by Experts. [S.K.E.E.T.]

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

#### f) Field Sobriety Testing

i) Failure to voluntarily perform may be considered as consciousness of guilt: State vs. Bryant, 328 N.J.Super 379, 383(2000).

ii) There is no right to refuse to perform field sobriety tests. State vs. Macuk, 57 N.J. 1(1970);

iii) Are considered to be non-testimonial – State vs. Macuk, 57 N.J. 1(1970); State vs. Green, 09 N.J.Super 347(App.Div.1986).

iv) Have Long Considered as reliable evidence of intoxication

“Our courts have long accepted the results of **field sobriety tests** as reliable evidence of intoxication.”

State vs. Morton, 39 N.J. 512, 514-15 (1963);  
State vs. Higgins, 132 N.J.Super 67, 70-71(App.Div.975);  
State vs. Pichadou, 34 N.J.Super 177, 180(App.Div.1955).

v) Admissible as lay testimony

It is entirely proper for [lay police officers] to describe the tests or maneuvers they had the defendant perform and then testify as to what his physical reaction was when he undertook to execute them. The reaction should be described in terms of what they observed when the tests were undertaken by defendant. Of course, the ultimate determination of defendant's intoxication within the meaning of the statute rests with the trial court on all the evidence in the case. State vs. Morton, 39 N.J. 512, 514-515(1963).

vi) HGN evidence is generally inadmissible as substantive evidence of guilt, although it may be used to establish other proofs in the case such as probable cause to arrest. State vs. Doriguzzi, 334 N.J.Super 530(App.Div.2000).

vii.) Field sobriety testing - Issues for direct & cross-examination at trial

- a) Effects of alcohol on the human body
- b) Relation between test and alcohol's effects
- c) Instructions to subject
- d) Demonstration of test & understanding
- e) Environment, Weather and Lighting
- f) Reporting Observed Results in Reports
- g) Reporting Observed Results at Trial

g) *Per se* Violations – Alcotest 7110 MKIIC Breath evidence

1) Burden is on the State to establish blood alcohol evidence conditions of admissibility. - Romano vs. Kimmelman, 96 N.J. 66(1984).

2) Burden of Proof is by Clear and Convincing Evidence - Romano vs. Kimmelman, 96 N.J. 66, 90-91(1984).

Clear-and-convincing evidence is that which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact-finder to come to a clear conviction, without hesitancy, of the precise facts in issue. In re Seaman, 133 N.J. 67, 74(1993).

3) Evidence that the conditions of admissibility have been satisfied is accomplished during an N.J.R.E. 104(a) hearing. Rules of Evidence are relaxed except for N.J.R.E. 403 and a valid claim of privilege.

N.J.R.E. 104(a) Questions of admissibility generally. When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is subject to a condition, and the fulfillment of the condition is in issue, that issue is to be determined by the judge. In making that determination the judge shall not apply the rules of evidence except for Rule 403 or a valid claim of privilege. The judge may hear and determine such matters out of the presence or hearing of the jury.

Rule 611. Mode and Order of Interrogation and Presentation.

(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

4) To be considered as supporting admissibility, the proffered information need only appear to be relevant and trustworthy. NJRE 101(1)(2)(E).

See N.J.R.E. 101(a)(2) - (2) Court proceedings; Relaxation. These rules of evidence shall apply in all proceedings, civil or criminal, conducted by or under the supervision of a court. Except as provided by paragraph (a) (1) of this rule, these rules may be relaxed in the following instances to admit *relevant and trustworthy* evidence in the interest of justice:

5) Although the burden of proof for admissibility is clear and convincing evidence, at the end of the trial, the judge must find the test results to be true and accurate beyond a reasonable doubt in order to support a guilty finding on the

per se violation. State vs. Campbell, 436 N.J.Super 264(App.Div.2014).

6) General Conditions of Admissibility to be established by clear and convincing evidence during the NJRE 104(a) hearing, as per State vs. Chun, 194 N.J. 54, 134(2008) are:

i) Device was in proper working order – Prove by Documents:

Alcohol Influence Report  
Six-month calibration documents from NJSP  
Simulator Solution Certificate of Analysis

ii) Operator was certified – Prove by Documents & Testimony:

Operator card of officer who conducted the test  
Operator card of trooper who performed six-month calibration  
Operator card of officer who last changed simulator solution

iii) Tests were administered according to official procedure – Prove by Testimony

Operators must wait twenty minutes before collecting a sample to avoid overestimated readings due to residual effects of mouth alcohol. The software is programmed to prohibit operation of the device before the passage of twenty minutes from the time entered as the time of the arrest. Moreover, the operator must observe the test subject for the required twenty-minute period of time to ensure that no alcohol has entered the person's mouth while he or she is awaiting the start of the testing sequence. In addition, if the

arrestee swallows anything or regurgitates, or if the operator notices chewing gum or tobacco in the person's mouth, the operator is required to begin counting the twenty-minute period anew. State v. Chun, 194 NJ 54, 79 (2008) [See State v. Filson, 409 NJ Super. 246, 249 (Law Div. 2009) (State could not prove 20 minutes of continuous observation.); State vs. Ugorvics, 410 N.J. Super 482(App.Div.2009) (Observation may be made by any police officer)]

Assuming that the results of the control test are within the established parameters, the instrument prompts the operator through a message on the LED screen to collect a breath sample. The operator then attaches a new, disposable mouthpiece and removes cell phones and portable electronic devices from the testing area. The operator is required to read the following instruction to the test subject: "I want you to take a deep breath and blow into the mouthpiece with one long, continuous breath. Continue to blow until I tell you to stop. Do you understand these instructions?" The arrestee then provides the first breath sample, which is measured in the IR and EC chambers. State v. Chun, 194 N.J. 54, 80-81(2008).

Test was administered within a reasonable period of time. [T]he statute prescribes an offense that is demonstrated solely by a reliable breathalyzer test administered within a reasonable period of time after the defendant is stopped for drunk driving, which test results in the proscribed blood-alcohol level. State vs. Tischio, 107 N.J. 504, 522(1987).

No proof on reasonable time - The State presented no testimony on that issue and therefore failed to carry the burden of proof, making the breathalyzer test results inadmissible. State vs. DiFrancisco, 232 N.J.Super 317, 321(LawDiv.1988).

7) Core foundational documents - All are required to be properly admitted and considered in evidence as a condition of admissibility.

The foundational documents that we conclude need to be entered into evidence therefore are few. They are: (1) the most recent calibration report prior to a defendant's test, with part I—control tests, part II—linearity tests, and the credentials of the coordinator who performed the calibration; (2) the most recent new standard solution report prior to a defendant's test; and (3) the certificate of analysis of the 0.10 simulator solution used in a defendant's control tests. Absent a pre-trial challenge to the admissibility of the AIR based on one of the other foundational documents produced in discovery, we perceive of no reason to require that they be made a part of the record routinely. State vs. Chun, 194 N.J. 54, 145(2008).

i) Operator's Qualification Card (additionally, operator must testify at the trial. Chun at 134)

[Good for the year granted + 2 calendar years];  
(see N.J.A.C. 13:51-1.8(d))

ii) Most recent calibration report from NJSP - (Chun at 145);

iii) Most recent standard solution change report prior to defendant's test (Chun at 145) (Note – this document may sometimes be included as part of #2 above);

iv) Certificate of analysis used in defendant's control tests - (Chun 145);

v) The Alcohol Influence Report; (Chun at 134)

vi) Worksheet A Tolerance Calculations (Chun 150-151).

Note - Any attempt to introduce other foundational documents during the evidence Rule 104(a) hearing should be subject to objection as irrelevant and a waste of time under N.J.R.E. 403.

8) Any missing, incomplete, or inaccurate core foundational documents render the Alcotest results inadmissible. State vs. Kuropchak, 221 N.J. 368, 385(2015).

9) Responsibility for tracking discovery -

"What discovery are you missing?" See Rule 7:7-7(g) "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."

10) Defendant may testify during the NJRE 104(a) hearing.

His testimony is not admissible substantively and the scope of cross-examination is limited to scope of direct and credibility issues. Testimony may be used for impeachment purposes if defendant testifies during the defense case, but the evidence is never admissible to establish guilt. Harris vs. New York, 91 S.Ct. 643(1971). See State vs. Petrovich, 125 N.J.Super 147(LawDiv.1973)

N.J.R.E. (d) Testimony by accused. By testifying upon a preliminary matter, the accused does not become subject to cross-examination as to other issues in the case.

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h) *Per se* violations - Blood Evidence

i) Samples may be obtained by:

Voluntary consent. See State vs. Johnson, State vs. Johnson, 68 N.J. 349(1975) (State has duty to demonstrate voluntary consent and know of right to refuse. Proof by clear and convincing evidence required.)

Search warrant Missouri vs. McNeely, 133 S.Ct. 1552(2013);

Exigent circumstances - State vs. Jones, 437 N.J.Super 68(App.Div.2014).

ii) Required Notice to prosecutor

"That being stated, we 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 State vs. Kent, 391 N.J.Super 352, 380-81(App.Div.2007).

### iii) Converting serum to BAC

Blood alcohol level that are tested in a hospital laboratory will be presented in the form of blood serum. This reported BAC must be converted to whole blood as follows:

Serum is derived when the tube containing whole blood is spun so that the solid and fluid portions separate. The fluid portion is then analyzed providing a “serum alcohol value.” Serum contains more water than blood does, so that the resulting alcohol reading is sixteen percent higher in serum than it would be in blood. A serum alcohol value is therefore converted to blood alcohol by dividing the serum value by 1.16. See State vs. Lutz, 309 N.J.Super 317, 322(App.Div.1998) [footnote 2]

[Note - As part of a published Appellate Division decision, this calculation may be subject to judicial notice per N.J.R.E. 201]

### iv) Chain of custody

A defect in the chain of custody goes to the weight to the evidence and not to its admissibility. Moreover, the sufficiency of the chain of custody evidence is a matter of judicial discretion that will not be disturbed on appeal unless clear a mistaken exercise thereof. State vs. Morton, 155 N.J. 383(1998).

Rule 901. Requirement of Authentication or Identification.

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims.

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v) Entitlement to charts and graphs of testing process. State vs. Weller, 225 N.J.Super 274(LawDiv.1986)

vi) Entitlement to appearance of technicians and phlebotomists at trial. State vs. Berezansky, 386 N.J.Super 84(App.Div.2006); State vs. Renshaw, 390 N.J.Super 456(App.Div.2007).

vii) Laboratory technician must testify, not a surrogate witness. State vs. Rehmann, 419 N.J.Super 451(App.Div.2011).

**Part II**  
**Refusal to Submit to Breath Test**  
**N.J.S.A. 39:4-50.4a**

a) Four Elements of offense

[State vs. Marquez, 202 N.J. 485, 503(2010)]

1) Operation - the arresting officer had probable cause to believe that defendant had been driving or was in actual physical control of a motor vehicle while under the influence of alcohol or drugs;

a) Operation under N.J.S.A. 39:4-50.4a - Operation of a motor vehicle must occur on the public highways or quasi-public areas of this State.

b) Under the implied consent statute, N.J.S.A. 39:4-50.2, operation must occur on a public road, street or highway or quasi-public area.

[See State vs. Garbin, 325 N.J.Super 521(App.Div.1999); State vs. Bertrand, 408 N.J.Super 584, 589(App.Div.2009) Shared use of the driving area implies quasi-public nature.]

2) Defendant was arrested for driving while intoxicated;

3) The officer requested defendant to submit to a chemical breath test and informed defendant of the consequences of refusing to do so; and

4) Defendant thereafter refused to submit to the test.

b) Burden of proof is beyond a reasonable doubt.

[State vs. Cummings, 184 N.J. 475, 500(2010)]

[Note- the legislature has not updated this burden in the statute NJSA 39:4-50.4a(a) were it indicates that the burden of proof is by a preponderance of the evidence.]

c) No curing of a refusal permitted.

[State vs. Bernhardt, 245 N.J.Super 210(App.Div.1991)]

d) Affirmative defenses

1) Medical incapacity - At the outset, it is telling that defendant never has asserted that he was somehow unable to provide the volume and length of breath required for a valid reading; he claims no limitation, whether by physical condition, disease, or some other verifiable cause, that somehow prevented him from providing the breath samples as required. State vs. Schmidt, 206 NJ 71, 85 (2011).

ii) Grudging consent - State vs. Duffy, 348 N.J.Super 609(App.Div.2002).

iii) Errors in Reading paragraph 36 - State vs. O'Driscoll, 215 N.J. 461(2013); State vs. Peralta, 437 N.J.Super 570(App.Div.2014).

iv) Foreign languages - State vs. Marquez, 202 N.J. 485(2010).

v) Woman over age 60 - State vs. Chun, 194 N.J. 54, 104-05(2008).

vi) Confusion doctrine - State vs. Leavitt, 107 N.J. 534, 542(1987) “We recognize that despite the best of efforts some confusion may remain. Without resolving whether any defendant may validly assert the defense, we agree with the view expressed in the Attorney General's brief that the ‘exclusive, narrow exception to the general rule that refusals cannot be validly justified,’ would have to be premised on a record developed by a defendant to show that he had indeed been confused. We also agree that it is entirely appropriate that a defendant bear the burden of persuasion if he wishes to establish a confusion claim.”

## Part IV Sentencing

Introduction - Generally speaking, the order and sequence of DWI convictions does not affect sentencing:

State vs. Guiendon, 113 N.J.Super 361(App.Div.1971)  
State vs. Petrello, 251 N.J.Super 476(App.Div.1991)

### a) Sentencing Table

#### License suspension/Interlock/Fines Table

BAC	Offense number	d/l loss	Interlock	Fines & Costs
NONE	1	NONE	90 days	\$250 to \$400 + \$390
.08-.099	1	NONE	90 days	\$250 to \$400 + \$390
.10 -.149	1	NONE	7 mo. – 1 yr	\$300 to \$500 + \$390
.15 +	1	3 mo.	12 – 15 mo.	\$300 to \$500 + \$390
N/A	2*	1 – 2 yrs	2 - 4 yrs	\$500 to \$1000 + \$390
N/A	3 **	8 yrs	2 – 4 yrs	\$1000 + \$390

See N.J.S.A. 39:4-50 and N.J.S.A. 39:4-50.17

\*Second offenders must perform 30-days of community service + minimum 2-days in jail which can be satisfied thru detainment at the IDRC

\*\*Third offense requires 180-days in jail

License suspension credits for u/i alcohol sentences

Under N.J.S.A. 39:4-50(a)(3), any person who is required to forfeit the right to operate a motor vehicle over the highways of this State pursuant to this section may, in lieu of forfeiting the right to operate a motor vehicle, install an ignition interlock device and receive a one day credit against the period that the person is required to forfeit the right to

operate a motor vehicle over the highways of this State pursuant to this section for every two days that the person has the ignition interlock device installed. A person shall not be entitled to this credit if the violation of this section resulted in serious bodily injury as defined in N.J.S.A. 2C:11-1 to another person. In addition, a person who has been arrested or convicted of operating a motor vehicle while under the influence of a narcotic, hallucinogenic, or habit-producing drug or permitting another person who is under the influence of a narcotic, hallucinogenic, or habit-producing drug to operate a motor vehicle owned by the person or under the person's custody or control pursuant to the provisions of this section or a person who has been convicted of operating a commercial motor vehicle under the influence of a controlled substance pursuant to section 5 of P.L.1990, c.103 (C.39:3-10.13) shall not be eligible for this credit.

Additional Assessments = \$390 in every case

- 1) \$50 Victims of Crime Compensation Assessment - N.J.S.A. 2C:43-3.1(c)
- 2) \$75 Safe Neighborhoods Services Fund - N.J.S.A. 2C:43-3.2(a)(1)
- 3) \$33 Court Costs - N.J.S.A. 22A:3-4
- 4) \$1 Body Armor Replacement Fund - N.J.S.A. 39:5-41(d)
- 5) \$1 New Jersey Spinal Cord Research Fund - N.J.S.A. 39:5-41(e)
- 6) \$100 Drunk Driving Enforcement Fund - N.J.S.A. 39:4-50.8
- 7) \$1 Autism Fund - N.J.S.A. 39:5-41(f)
- 8) \$3 DNA Fund - N.J.S.A. 39:5-41(g)
- 9) \$1 Brain Injury Research Fund - N.J.S.A. 39:5-41(h)
- 10) \$125 Mobile Video Recording Systems Fund - N.J.S.A. 39:4-50(i)

## b) Technical Issues

i) NJ Rules of Evidence – N.J.R.E. 101(a)(2)(C); State vs. Carey, 232 N.J.Super 553(App.Div.1989); However, proof of a prior conviction must be proved beyond a reasonable doubt. State vs. Zingis, 259 N.J. 1, 22(2024).

ii) Abstract review required by sentencing judge – N.J.S.A. 2B:25-5.1; Directive #10-04.

iii) Plea with a Civil Reservation – Rule 7:6-2(a)(1) - State vs. LaResca, 267 N.J.Super 411(App.Div.1993) (Superior Court Rule 3:9-2 – State vs. Tsilimidos, 364 N.J.Super 454(App.Div.2003); Maida vs. Kuskin, 221 N.J. 112(2015).

iv) Restitution made out-of-Court - In re Friedland, 59 N.J. 209, 220(1971). Can be ordered as a condition of probation. N.J.S.A. 39:5-7.

“In the future, should an attorney wish to have complaints dismissed by his client he must first go before the prosecutor and a judge and make a full and open disclosure of the nature of the charges and the terms, if any, under which the dismissal is sought. The dismissal should not be consented to unless both the judge and the prosecutor are satisfied that the public interest as well as the private interests of the complainant will be protected.”

v) Stay of Sentence – Rule 7:13-2 (N.J.S.A. 39:5-22) (See also Rule 3:23-5) State vs. Robertson, 228 N.J. 138(2017).

Notwithstanding Rule 3:23-5, a sentence or a portion of a sentence may be stayed by the court in which the conviction was had or to which the appeal is taken on such terms as the court deems appropriate.

vi) Defendant entitled to bail on appeal – Rule 3:23-5(a).

vi) Limitations on Weekend Jail – N.J.S.A. 2B:12-22

A court may order that a sentence of imprisonment be served periodically on particular days, rather than consecutively. The person imprisoned shall be given credit for each day or fraction of a day to the nearest hour actually served.

State vs. Grabowski, 388 N.J.Super 431(LawDiv.2006)); But see State vs. Kotsev, 396 N.J.Super 389(App.Div.2007)

vii) Cap on jail terms (180-days in the absence of a jury trial offer.) – State vs. Owens, 54 N.J. 153(1969)

viii) Probation – N.J.S.A. 39:5-7 - In any proceeding instituted pursuant to the provisions of this subtitle, except where a mandatory penalty is fixed herein, the magistrate may suspend the imposition or execution of sentence and may also place the defendant on probation under the supervision of the chief probation officer of the county for a period of not less than six months nor more than one year. The probation shall be effected and administered pursuant to the provisions of sections N.J.S.A. 2A:168-1 to 2A:168-13 of the New Jersey Statutes.

c) Moran Sentencing factors for d/l and jail

1) the nature and circumstances of the defendant's conduct, including whether the conduct posed a high risk of danger to the public or caused physical harm or property damage;

2) the defendant's driving record, including the defendant's age and length of time as a licensed driver;

- 3) the number, seriousness, and frequency of prior infractions;
- 4) whether the defendant was infraction-free for a substantial period before the most recent violation;
- 5) whether the nature and extent of the defendant's driving record indicates that there is a substantial risk that he or she will commit another violation;
- 6) whether the character and attitude of the defendant indicate that he or she is likely or unlikely to commit another violation;
- 7) whether the defendant's conduct was the result of circumstances unlikely to recur;
- 8) whether a license suspension would cause excessive hardship to the defendant and/or dependants;
- 9) the need for personal deterrence;
- 10) Any other relevant factor clearly identified by the court may be considered as well.

It is not necessarily the number of factors that apply but the weight to be attributed to a factor or factors. State vs. Moran, 202 N.J. 311(2010) (d/l loss); State vs. Palma, 219 N.J. 584(2014) (jail term)

d) Collateral consequences List for DWI

Defendant Name: \_\_\_\_\_

Summons Numbers: \_\_\_\_\_ Municipal Court: \_\_\_\_\_

- 1) Motor Vehicle Surcharges - \$1000 per Year for Three Years;
- 2) Motor Vehicle Points on Companion Moving Violations;
- 3) Insurance Eligibility Points - Nine Point Assessment;
- 4) Restriction on Vanity & Courtesy License Plates;
- 5) No Cause of Action of Economic & Non-Economic Damages;
- 6) Loss of Ability to Purchase Liability Insurance;
- 7) Reporting requirements to state agencies for professionals;
- 8) No Expungement of Motor Vehicle Record;
- 9) Sentence Enhancement for Future Violations (DWI & Revoked list)
- 10) Civil Consequences of Guilty Plea or providing testimony under Oath;
- 11) Obligations and costs related to ignition interlock devices;
- 12) Potential immigration consequences; and
- 13) Suspension of commercial driver's license – N.J.S.A. 39:3-10.20(j)(1).

e) Step-downs [N.J.S.A. 39:4-50(a)(3)]

i) A person who has been convicted of a previous violation of this section need not be charged as a second or subsequent offender in the complaint made against him in order to render him liable to the punishment imposed by this section on a second or subsequent offender, but if the second offense occurs more than 10 years after the first offense, the court shall treat the second conviction as a first offense for sentencing purposes and if a third offense occurs more than 10 years after the second offense, the court shall treat the third conviction as a second offense for sentencing purposes.

See generally State vs. Burroughs, 349 N.J.Super 225(App.Div.2002). State vs. Revie, 220 N.J. 126(2014).

Controlling Dates (Violation Date) for Sentencing Purposes – State vs. Bischoff, 232 N.J.Super 515(App.Div.1989)

ii) This section also applies to refusals.

State vs. Fielding, 290 N.J.Super 191(App.Div.1996); State vs. Taylor, 440 N.J.Super 387(App.Div.2015).

iii) Laurick relief [State vs. Laurick, 120 N.J. 1(1990); State vs. Revie, 220 N.J. 126(2014)] eliminates the prior conviction for step-down purposes. See also State vs. Patel, 239 N.J. 424(2019) for presentation of proofs.

iv) Out-of-state violations - May be attacked as not substantially similar to New Jersey law. [N.J.S.A. 39:4-50(a)(3)]

A conviction of a violation of a law of a substantially similar nature in another jurisdiction, regardless of whether that jurisdiction is a signatory to the Interstate Driver License

Compact pursuant to P.L.1966, c. 73 (C.39:5D-1 et seq.), shall constitute a prior conviction under this subsection unless the defendant can demonstrate by clear and convincing evidence that the conviction in the other jurisdiction was based exclusively upon a violation of a proscribed blood alcohol concentration of less than 0.08%.

See State vs. Ripley, 364 N.J.Super 343(App.Div.2003) (not substantially similar)

State vs. Zeikel, 423 N.J.Super 34(App.Div.2011) (NY driving while abilities impaired substantially similar)

#### f) Merger of offenses

Generally, it is a major mistake to seek a merger of offenses following a plea or finding guilt. Merger can only occur following a conviction on the underlying offense. Although the underlying offense is dismissed, the mandatory penalties (including points) survive the merger.

State vs. Baumann, 340 N.J.Super 553, 556-57(App.Div.2001).

State vs. Wallace, 313 N.J.Super 435, 439(App.Div.1998),

State vs. Price (unreported) 2007 WL 3287844 (Motor vehicle penalty points imposed for merged tickets.)

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