

**Garden State CLE Presents:**

**Immunity**  
**The Overdose Protection Act**



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**Lesson Plan**

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## Part I

### Qualified and Complete Immunity – In General

As a legal concept, immunity is understood to provide a complete shield to prosecution for a criminal (or civil) offense. It differs from an affirmative defense in the sense that a defense typically has to be raised by the defendant at trial and is subject to being disproved by the prosecution beyond a reasonable doubt. Common examples include self-defense, insanity, the statute of limitations, territorial or subject-matter jurisdiction and others.

#### a) Absolute Immunity

Absolute immunity exists through the common law in certain limited instances. The immunity is absolute in that the defendant need not prove any elements to be subject to immunity. A common example relates to judges who are completely immune from liability for damages based upon acts committed within their judicial jurisdiction. Stump vs. Sparkman, 435 U.S. 349(1983). (Same immunity applies for witnesses and prosecutors in a civil rights 42 USCA 1983 action.)

#### b) Qualified Immunity – In general

Typically, most measures of immunity are qualified in the sense that the defendant has the burden of establishing the elements of the immunity. Unlike an affirmative defense, a qualified immunity claim can (and should) be raised on a pretrial basis. If the defendant is successful in establishing the elements of the qualified immunity, the case must be dismissed. However, in the event the immunity application is denied pretrial, it can be raised as an affirmative defense at trial and decided by the jury. State vs. C.C.W., \_\_\_ N.J.Super \_\_\_ (App.Div.2025).

#### c) Examples of statutory qualified immunity in quasi-criminal cases:

- 1) Shoplifting – N.J.S.A. 2C:20-11(e) - A law enforcement officer, or a special officer, or a merchant, who has probable

cause for believing that a person has willfully concealed unpurchased merchandise and that he can recover the merchandise by taking the person into custody, may, for the purpose of attempting to effect recovery thereof, take the person into custody and detain him in a reasonable manner for not more than a reasonable time, and the taking into custody by a law enforcement officer or special officer or merchant shall not render such person criminally or civilly liable in any manner or to any extent whatsoever.

2) Domestic Violence – N.J.S.A. 2C:25-21(c)(3) - No victim shall be denied relief or arrested or charged under this act with an offense because the victim used reasonable force in self-defense against domestic violence by an attacker.

3) Drunk Driving Blood Extractions – N.J.S.A. 2A:62A-10(a) - When acting in response to a request of a law enforcement officer, any physician, nurse or medical technician who withdraws or otherwise obtains, in a medically accepted manner, a specimen of breath, blood, urine or other bodily substance and delivers it to a law enforcement officer, shall be immune from civil or criminal liability for so acting, provided the skill and care exercised is that ordinarily required and exercised by others in the profession.

4) Qualified Immunity For Police in Civil Rights Cases - Whether a police officer is entitled to qualified immunity is determined by application of a two-prong test. The first inquiry asks whether the facts alleged, taken in the light most favorable to the party asserting the injury, show that the challenged conduct violated a statutory or constitutional right. Second, the court must determine whether the right had been clearly established. Saucier vs. Katz, 533 U.S. 194(2001).

**Part II**  
**The Overdose Protection Act (OPA)**  
**N.J.S.A. 2C:35-30 and 31**

a) Public policy

The public policy behind the OPA is to save lives by encouraging people who witness or experience a suspected drug overdose to seek medical assistance. The Legislature recognized that a person might be discouraged from reporting a suspected drug overdose if he believed that calling for medical assistance would lead to arrest and prosecution for unlawfully using or possessing a controlled dangerous substance (CDS). To ameliorate that concern, the OPA guarantees immunity for certain offenders whose offenses were discovered because police responded to an emergency call for medical assistance. In furtherance of its ultimate objective to save lives, the Act provides unequivocally that persons who can establish their eligibility for immunity shall not be arrested, charged, prosecuted, or convicted of a covered offense. In this regard, the OPA affords immunity only for use/simple possession CDS offenses. It does not provide immunity for a CDS offense involving distribution or possession with intent to distribute. Nor does it afford immunity for any non-CDS offense.

b) Elements of Immunity

The OPA statutes confer immunity on two categories of qualifying persons:

- (1) Those persons who, in good faith, seek medical assistance for someone experiencing a drug overdose; and/or
- (2) Those who experience a drug overdose and who seek medical assistance or are the subject of a good faith request for medical assistance.

The OPA's plain language does not foreclose the possibility that a defendant might qualify for immunity based on his chronic use of CDS, i.e., an addiction, provided the acute condition requiring medical assistance is the result of such prior CDS use.

c) Burden of Persuasion

A person claiming immunity shoulders the burden of proof by a preponderance of the evidence. State vs. W.S.B., 453 N.J.Super 206, 232-33(App.Div.2018).

d) Drug Overdose Defined

An acute condition including, but not limited to, physical illness, coma, mania, hysteria, diminished consciousness, respiratory depression, or death resulting from the consumption or use of CDS or another substance with which CDS was combined and that a layperson would reasonably believe to require medical assistance. The key to gauging acuteness is a level of symptomatic severity.

e) Elements of establishing a drug overdose:

The definition of drug overdose is comprised of three elements, each of which must be established to qualify for immunity:

(1) Severity - the person must exhibit an acute condition including, but not limited to, physical illness, coma, mania, hysteria, diminished consciousness, respiratory depression, or death resulting from the consumption or use of CDS or another substance with which CDS was combined and that a layperson would reasonably believe to require medical assistance. The key is a level of symptomatic severity.

(2) Causation - A defendant's entitlement to immunity turns on whether he can carry the burden of proving a causal relationship between his acute condition and prior CDS use.

Thus, the proofs must demonstrate that the acute condition must have occurred as a result of the consumption or use of CDS such that a layman would reasonably believe required medical assistance.

(3) Resulting need for medical assistance - The OPA defines medical assistance to include professional medical services that are provided to a person experiencing a drug overdose by a health care practitioner, acting within the practitioner's scope of professional practice, including professional medical services that are mobilized through telephone contact with the 911 telephone emergency service. See N.J.S.A. 24:6J-3.

f) Leading interpretive cases:

State vs. C.C.W., \_\_\_ N.J.Super \_\_\_ (App.Div.2025)

State vs. W.S.B., 453 N.J.Super 206(App.Div.2018)

### **Part III** **Text of Relevant Statutes**

a) N.J.S.A. 2C:35-30

a. A person who, in good faith, seeks medical assistance for someone experiencing a drug overdose shall not be:

(1) arrested, charged, prosecuted, or convicted for obtaining, possessing, using, being under the influence of, or failing to make lawful disposition of, a controlled dangerous substance or controlled substance analog pursuant to subsection a., b., or c. of N.J.S.A. 2C:35-10;

(2) arrested, charged, prosecuted, or convicted for inhaling the fumes of or possessing any toxic chemical pursuant to subsection b. of section 7 of P. L.1999, c. 90 (C.2C:35-10.4);

(3) arrested, charged, prosecuted, or convicted for using, obtaining, attempting to obtain, or possessing any prescription legend drug or stramonium preparation pursuant to subsection b., d., or e. of section 8 of P.L.1999, c. 90 (C.2C:35-10.5);

(4) arrested, charged, prosecuted, or convicted for acquiring or obtaining possession of a controlled dangerous substance or controlled substance analog by fraud pursuant to N.J.S.2C:35-13;

(5) arrested, charged, prosecuted, or convicted for unlawfully possessing a controlled dangerous substance that was lawfully prescribed or dispensed pursuant to P.L.1998, c. 90 (C.2C:35-24);

(6) arrested, charged, prosecuted, or convicted for using or possessing with intent to use drug paraphernalia pursuant to N.J.S.2C:36-2 or for having under his control or possessing a hypodermic syringe, hypodermic needle, or any other instrument adapted for the use of a controlled dangerous substance or a controlled substance analog pursuant to subsection a. of N.J.S.A. 2C:36-6;

(7) subject to revocation of parole or probation based only upon a violation of offenses described in subsection a. (1) through (6) of this section,

provided, however, this circumstance may be considered in establishing or modifying the conditions of parole or probation supervision.

b. The provisions of subsection a. of this section shall only apply if:

(1) the person seeks medical assistance for another person who is experiencing a drug overdose and is in need of medical assistance; and

(2) the evidence for an arrest, charge, prosecution, conviction, or revocation was obtained as a result of the seeking of medical assistance.

c. Nothing in this section shall be construed to limit the admissibility of any evidence in connection with the investigation or prosecution of a crime with regard to a defendant who does not qualify for the protections of this act or with regard to other crimes committed by a person who otherwise qualifies for protection pursuant to this act. Nothing in this section shall be construed to limit any seizure of evidence or contraband otherwise permitted by law.

Nothing herein shall be construed to limit or abridge the authority of a law enforcement officer to detain or take into custody a person in the course of an investigation or to effectuate an arrest for any offense except as provided in subsection a. of this section. Nothing in this section shall be construed to limit, modify or remove any immunity from liability currently available to public entities or public employees by law.

b) N.J.S.A. 2C:35-31

Persons experiencing a drug overdose and seeking immediate medical attention; immunity from criminal liability; admissibility of evidence.

a. A person who experiences a drug overdose and who seeks medical assistance or is the subject of a good faith request for medical assistance pursuant to section 4 of this act shall not be:

(1) arrested, charged, prosecuted, or convicted for obtaining, possessing, using, being under the influence of, or failing to make lawful disposition of, a controlled dangerous substance or controlled substance analog pursuant to subsection a., b., or c. of N.J.S.A. 2C:35-10;

(2) arrested, charged, prosecuted, or convicted for inhaling the fumes of or possessing any toxic chemical pursuant to subsection b. of section 7 of P. L.1999, c. 90 (C.2C:35-10.4);

(3) arrested, charged, prosecuted, or convicted for using, obtaining, attempting to obtain, or possessing any prescription legend drug or stramonium preparation pursuant to subsection b., d., or e. of section 8 of P.L.1999, c. 90 (C.2C:35-10.5);

(4) arrested, charged, prosecuted, or convicted for acquiring or obtaining possession of a controlled dangerous substance or controlled substance analog by fraud pursuant to N.J.S.A. 2C:35-13;

(5) arrested, charged, prosecuted, or convicted for unlawfully possessing a controlled dangerous

substance that was lawfully prescribed or dispensed pursuant to P.L.1998, c. 90 (C.2C:35-24);

(6) arrested, charged, prosecuted, or convicted for using or possessing with intent to use drug paraphernalia pursuant to N.J.S.A. 2C:36-2 or for having under his control or possessing a hypodermic syringe, hypodermic needle, or any other instrument adapted for the use of a controlled dangerous substance or a controlled substance analog pursuant to subsection a. of N.J.S.A. 2C:36-6;

(7) subject to revocation of parole or probation based only upon a violation of offenses described in subsection a. (1) through (6) of this section, provided, however, that this circumstance may be considered in establishing or modifying the conditions of parole or probation supervision.

b. The provisions of subsection a. of this section shall only apply if the evidence for an arrest, charge, prosecution, conviction or revocation was obtained as a result of the seeking of medical assistance.

c. Nothing in this section shall be construed to limit the admissibility of any evidence in connection with the investigation or prosecution of a crime with regard to a defendant who does not qualify for the protections of this act or with regard to other crimes committed by a person who otherwise qualifies for protection pursuant to this act. Nothing in this section shall be construed to limit any seizure of evidence or contraband otherwise permitted by law. Nothing herein shall be construed to limit or abridge the authority of a law enforcement officer to detain or take into

custody a person in the course of an investigation or to effectuate an arrest for any offense except as provided in subsection a. of this section. Nothing in this section shall be construed to limit, modify or remove any immunity from liability currently available to public entities or public employees by law.

c) 24:6J-3. Definitions

“Drug overdose” means an acute condition including, but not limited to, physical illness, coma, mania, hysteria, diminished consciousness, respiratory depression, or death resulting from the consumption or use of a controlled dangerous substance or another substance with which a controlled dangerous substance was combined and that a layperson would reasonably believe to require medical assistance.

“Law enforcement officer” means a person whose public duties include the power to act as an officer for the detection, apprehension, arrest and conviction of offenders against the laws of this State.

“Medical assistance” means professional medical services that are provided to a person experiencing a drug overdose by a health care practitioner, acting within the practitioner's scope of professional practice, including professional medical services that are mobilized through telephone contact with the 911 telephone emergency service.