

Garden State CLE Presents:

**New Jersey DWI
Fall Review - 2024**

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Part I

DWI Update

1) Impact of State vs. Zingis, ___ N.J. ___ (2024) 2024 WL 3715910

a) Issue: Burden of Proof at Sentencing - N.J.R.E. 101(a)(3)(C)

(a) Applicability; Exceptions.

(3) Relaxation. Except as provided by subparagraph (a)(2) of this rule, these rules may be relaxed in the following instances to admit relevant and trustworthy evidence in the interest of justice:

(C) proceedings in a criminal or juvenile delinquency action in which information is presented for the court's use in exercising a sentencing or other dispositional discretion, including bail and pretrial intervention and other diversionary proceedings;

Both the Appellate Division ruling in State vs. Zingis, 471 N.J. Super 590(App.Div.2022) and the Supreme Court's Zingis, ___ N.J. ___ (2024) (2024 WL 3715910) holding note that the State must prove the existence of a prior DWI conviction to be used for sentencing enhancement beyond a reasonable doubt. Neither Court cites any authority for this proposition. Moreover, this rule appears to be inconsistent with Apprendi vs. New Jersey, 530 U.S. 466(2000) where the Court held that any fact that enhances a sentence, other than a prior conviction, must be proved beyond a reasonable doubt.

b) Issue: The relevant date range for Zingis convictions is November 5, 2008 through April 9, 2016.

c) Issue: Understanding the Court's ruling in Zingis requires knowledge of new, technical vocabulary that will soon become widely used among the professional DWI practitioners. These include the following:

i) Exhibit S-152 - Refers to an Excel Spreadsheet that sets forth solution changes and calibrations on all Alcotest Instruments in New Jersey from November 5, 2008 through June 30, 2016. It contains 236,664 subject test records and comprises 25,180 pages. The prosecutor must now provide the prior disposition, along with the complete row of data from Exhibit S-152, and the Dennis AIR Summary sheet in discovery, which together will be deemed proof beyond a reasonable doubt of whether a defendant's prior DWI conviction is a Dennis-affected matter.

ii) PCSAM - Person Case Search and Manage - Every municipal court is equipped with access to a defendant's prior court history, including the ability to obtain the summons number for a prior disposition. Upon appointment, municipal prosecutors receive access to the (PCSAM) system, permitting them to search a defendant's prior court history, which would allow them to access the summons number for use in conjunction with Exhibit S-152.

iii) MCCS - Municipal Court Case Search - Defense counsel will also have an independent means of obtaining the same information through the (MCCS), should they find an independent evaluation of the evidence necessary.

iv) Dennis Calibration Repository - The Dennis Calibration Repository is currently a virtual folder containing a portable document format (PDF) file of every AIR in which Dennis was the calibrating officer. There are 1,046 files contained in this virtual folder, each representing one AIR and labeled accordingly. The repository will be made publicly available by placing it on a State website. Additionally, for ease of reference and use in exchanging discovery, the Dennis Calibration Repository shall be summarized in a Dennis AIR

Summary sheet, which shall be created as follows: the State shall compile a document -- in as few pages as possible, preferably in multiple columns, and in a readable font -- that contains a sequential, alphanumeric list of the 1,046 file names, including only the instrument number (for example, "ARWA-0188"). This Dennis AIR Summary document is to be certified as accurate and certified copies will be distributed to each municipality for use by the municipal prosecutor. The prosecutor must now provide the prior disposition, along with the complete row of data from Exhibit S-152, and the Dennis AIR Summary sheet in discovery, which together will be deemed proof beyond a reasonable doubt of whether a defendant's prior DWI conviction is a Dennis-affected matter.

d) Appellate Division's holding - The State failed to prove beyond a reasonable doubt that Zingis's 2012 DWI conviction was not based on an inadmissible Alcohol Influence Report (AIR). In doing so, the court found that the record did not contain evidence with respect to how the Attorney General's list was compiled and whether it definitively includes all DWI convictions tainted by Dennis's malfeasance. Moreover, the court noted that the record lacked support for the prosecutor's assertions and in some instances undermined the State's proffer that all Dennis-affected defendants had been notified. The Appellate Division reasoned that in future cases the State may meet its burden to prove beyond a reasonable doubt that a DWI defendant was not convicted in the first instance based on a faulty AIR with a more robust record. Accordingly, the appellate court remanded to the municipal court to resentence Zingis as a first-time offender. On reconsideration, the State argued that Cassidy imposes an obligation on defendants to seek post-conviction relief (PCR) for any DWI conviction defendants believed to be tainted by an inadmissible AIR, while relieving the State from any burden to prove that a prior DWI conviction was not tainted when seeking a sentencing enhancement.

The Appellate Division considered and rejected both arguments. In its order and statement of reasons, the appellate court found that a defendant's failure to seek PCR should not insulate a prior conviction

from scrutiny if the State later aims to rely on it. The court found that the State's position had no support under Cassidy, particularly its argument that it had no obligation to prove whether a prior DWI conviction was premised upon tainted evidence. The court also held that the State's argument that defendants could easily search the publicly available Alcotest Inquiry System (AIS) contradicted its representation to the Law Division court that proving a prior conviction was not tainted by Dennis would be almost impossible.

e) Questions posed to the Special Adjudicator by the Supreme Court:

(1) Which counties were affected by Dennis's conduct?

(2) What notification was provided to defendants affected by Dennis's conduct?

f) Findings by the Zingis Special Adjudicator –

(1) The State did not identify all individuals who were requested to provide breath samples on Alcotest instruments calibrated by Dennis during the relevant time period;

(2) The classification of those defendants entitled to notification of the Court's decision in Cassidy is limited to those who were requested to provide breath samples on an Alcotest instrument calibrated by Dennis that resulted in the reporting of an evidential blood alcohol content (BAC) reading;

(3) The State did not fully provide the ordered notification to all defendants affected by the Court's decision in Cassidy;

(4) There are solutions available that should be implemented to better assure the proper identification of those individuals who have provided breath samples on Alcotest instruments calibrated by Dennis and to provide those individuals with additional notification:

(a) The use of the proposed “Dennis Calibration Repository,” in conjunction with Exhibit S-152, is the best available method of determining whether an individual was requested to provide breath samples on an Alcotest instrument calibrated by Dennis and an evidential BAC was obtained;

(b) Where an enhanced sentence is sought for a DWI conviction on the basis of a prior DWI conviction, the State should be required to provide discovery to defendant and counsel regarding the applicability of a Dennis-affected matter;

(c) Where a defendant files an application seeking PCR based on the Court's ruling in Cassidy contending he is a Dennis-affected defendant, discovery should be provided from Exhibit-152 and Exhibit-28, under a protective order, regarding that original conviction;

(d) The State's recommendations regarding additional notification to those individuals identified as Dennis-affected defendants, who have been omitted from several of the spreadsheets produced, are persuasive and should be accomplished.

g) Remaining two areas of disagreement among the Zingis parties

(1) What will be the proper procedure for challenging a prior Dennis-affected DWI conviction when facing enhanced sentencing on a subsequent DWI?

(2) What should be the appropriate availability of Exhibit S-152?

h) Court's Zingis holding:

We order that in any case in which the State seeks an enhanced sentence based on a prior DWI conviction with an arrest date between November 5, 2008 and April 9, 2016, the State must inform the court, defendant, and defense counsel whether defendant's prior DWI conviction involved a Dennis-calibrated Alcotest. The State shall rely upon a combination of the publicly accessible Exhibit S-152 and the Dennis Calibration Repository. As discussed more thoroughly below, the State must provide all defendants with a prior DWI during the effective dates the row of Exhibit S-152 that corresponds to that defendant's prior arrest. Given the fallibility of the notification procedures post - Cassidy, the parties will now be entitled to discovery, which is already readily available and capable of unearthing the procedural irregularities caused by Dennis's misfeasance. Such transparency and safeguards will both (1) allow the State to prove beyond a reasonable doubt whether a defendant is an affected defendant, permitting them to confidently discharge their duty in seeking sentencing enhancements when permitted by law, and (2) enable defendants to defend against such claims.

i) New municipal court DWI pretrial procedures

1) During the initial conference for a DWI matter, the court shall inquire whether the pending matter represents the first or subsequent DWI for a defendant. If the record reflects that the defendant has a prior conviction for DWI, the prosecutor must inform the court, defendant, and defense counsel whether it occurred between the critical dates of November 5, 2008 and April 2016, information readily available to the State in the defendant's abstract. If so, we now order that the court must then schedule a discovery conference for the State to fulfill its obligation and provide to the defendant and counsel, as well as the court, discovery indicating whether the defendant is a Dennis-affected defendant.

2) The prosecutor will accomplish this by using the summons number from the earlier offense to search Exhibit S-152. As described below, that document will be redacted to include only non-personal identifying information. Once the corresponding entry is located within Exhibit S-152, the prosecutor is to “copy and paste” that row of data into a new document. The AIR number from that entry must then be compared against the Dennis Calibration Repository. The Dennis Calibration Repository is currently a virtual folder containing a portable document format (PDF) file of every AIR in which Dennis was the calibrating officer. There are 1,046 files contained in this virtual folder, each representing one AIR and labeled accordingly. The repository shall be made publicly available by placing it on a State website.

3) Additionally, for ease of reference and use in exchanging discovery, the Dennis Calibration Repository shall be summarized in a Dennis AIR Summary sheet, which shall be created as follows: the State shall compile a document -- in as few pages as possible, preferably in multiple columns, and in a readable font -- that contains a sequential, alphanumeric list of the 1,046 file names, including only the instrument number (for example, “ARWA-0188”). This Dennis AIR Summary document is to be certified as accurate and certified copies will be distributed to each municipality for use by the municipal prosecutor.

4) Once the cross-reference has been completed, the State can identify whether an AIR from Exhibit S-152 is a match with an AIR from the Dennis AIR Summary sheet or not. The State must also provide a copy of the Dennis AIR Summary sheet for the defendant and defense counsel to verify whether the number is or is not listed. If it is determined that the defendant's prior DWI conviction did not involve a Dennis-calibrated Alcotest, the defendant and defense counsel are still provided their copy of the one row of complete data from Exhibit S-152, along with the Dennis

AIR Summary sheets, and the confirming prior disposition revealing the summons number for the defendant's prior DWI conviction. The matter then proceeds in the normal course and the defendant may face enhanced sentencing based on the prior DWI.

5) If the State determines that the defendant's prior offense involved a Dennis-affected Alcotest Instrument that produced an evidential BAC reading, corroborated by Exhibit S-152 and the Dennis AIR Summary sheet, judges should afford the defendant a reasonable amount of time to decide whether to challenge the prior conviction. If the defendant wishes to challenge that earlier conviction, the defendant shall do so by filing for PCR in the jurisdiction of the previous conviction. A copy of the motion must be provided to the court for the subsequent DWI. Upon receiving the copy of the motion for PCR, the court for the subsequent DWI matter shall stay the disposition of the matter, unless the defendant elects to enter a guilty or both parties consent to a trial, irrespective of the filing of the PCR. All pretrial procedures in the subsequent DWI matter, including timely production of discovery and participation in case management conferences as directed by the court shall continue during the pendency of the PCR. The goal is to have the subsequent case trial ready when the PCR is resolved.

6) If the defendant, after being made aware of the existence of a Dennis-affected matter, chooses to proceed without challenging the earlier conviction, the court will inquire on the record that the defendant's decision is knowing and voluntary, and the matter may proceed in the usual course.

7) Because of the serious public safety concerns that DWI charges present, we call on judges to resolve PCRs and related new matters as expeditiously as possible.

j) Protecting the privacy of previously convicted DWI defendants

1) Exhibit S-152 contains the following columns of information: arrest date, time, and location, Alcotest serial number and calibration date, as well as the Alcotest test result, case number, and summons. The document as presently constituted also contains the following un-redacted personal identifying information: the subject's first name, middle initial, age, gender, weight, height, and driver's license issuing state. The State seeks a protective order and access granted only to certain stakeholders, including all municipal courts and superior courts, municipal liaisons, and an assistant prosecutor in each county who will coordinate with municipalities in order to provide defendants and counsel with the relevant discovery. The following process balances the State's concerns for privacy with defendants' due process need for notification.

2) Municipal prosecutors must review a defendant's driving abstract in every case. Armed with the date of the offense and the defendant's name, the prosecutor -- with the assistance of the municipal court -- can then locate the summons number for any prior DWI.

3) Once a summons number is identified, the disposition for that offense must be preserved; once it is cross-referenced in Exhibit S-152, it shall be provided to the defendant and defense counsel in discovery. Through that process, the defendant and counsel can see the date and location of offense, summons number, and the defendant's name. The prosecutor must then use the summons number to search Exhibit S-152.

4) Exhibit S-152 in its newly redacted form, excluding all personal identifiers, must be publicly released on the State's website. By itself, without personal identifying information, the data in Exhibit S-152 is ineffective; in combination with other pieces of information possessed by the municipal prosecutor and defense counsel, however, the document

becomes serviceable. Using Exhibit S-152 in this way retains the subjects' privacy while serving as a valuable tool.

5) The prosecutor must now provide the prior disposition, along with the complete row of data from Exhibit S-152, and the Dennis AIR Summary sheet in discovery, which together will be deemed proof beyond a reasonable doubt of whether a defendant's prior DWI conviction is a Dennis-affected matter.

2) Alcotest 9510 - October 24, 2023, the Supreme Court issued an order in State vs. Cunningham, 255 N.J. 450(2023) which removed any further obstacles to the expansion of the Alcotest 9510 to other counties in New Jersey beyond Monmouth. This authority was granted prior to a ruling by the Court as to the scientific reliability of the Alcotest 9510's hardware and software. That determination will occur many months from now following a study and report from a special master, oral argument from numerous parties and a formal opinion from the Court.

3) Early installation of an Ignition Interlock Device—Sentencing Credits

a) On December 23, 2023, the governor signed into law a series of amendments to New Jersey's drunk-driving laws. These changes were primarily intended to encourage people who have been charged with driving while intoxicated by alcohol to install ignition interlock devices on the vehicles they lease, own or principally operate. Once the interlock has been installed, the defendant may apply for a restricted driver's license from the New Jersey Motor Vehicle Commission. The issuance of a restricted license based upon early interlock installation will entitle the defendant to significant sentencing benefits in municipal court following a conviction. These may include the elimination of fines as well as a credit against the term of any license suspension.

b) Restrictions and limitations – In order to qualify for sentence reductions, the defendant must have possessed a valid New Jersey driver's license on the date of his offense. That license must also be valid on the date of sentencing. In

addition, the option for sentencing credits does not apply in a case where the defendant's DWI charge is based upon driving while under the influence of drugs. Nor does it apply in those instances where the defendant's drunk-driving case involved an accident wherein serious bodily injury was sustained by another person.

c) Five procedural steps – A defendant who wishes to receive sentencing credits based upon an early interlock device installation and the issuance of a restricted license must take the following 5 steps prior to his conviction:

- 1) The triggering events for early interlock installation begin upon arrest but prior to any conviction.

- 2) An interlock vendor may, without a court order, install an ignition interlock device in a vehicle that a person owns, leases, or principally operates if requested by a person who has been arrested for a violation of Rule 39:4-50. (See N.J.S.A. 39:4-50.18(a)).

- 3) The interlock installation must be made upon a vehicle that the defendant owns, leases or principally operates.

- 4) The defendant will next take proof of installation from the vendor to the New Jersey Motor Vehicle Commission, along with documents that show the pending DWI and related charges and submit the forms no later than seven days after receipt of the documentation.

- 5) The upon presentation of the charge documentation and installation proofs, the MVC will issue a restricted license to the defendant with a notation imprinted on it restricting the defendant

to operating motor vehicles equipped with an interlock device.

d) Benefits of early installation and issuance of a restricted license - The many benefits and certain restrictions to early interlock installation and issuance of a restricted license are a function of both prior offenses and the defendant's blood alcohol level as follows:

First Offenders Under N.J.S.A. 39:4-50(a)(1)

1) **BAC of .08% but less than .10% or U/I alcohol (e.g., refusals, 20-minute issues, etc.)** – NO FINE if the person possessed a valid New Jersey driver's license in good standing at the time of the offense and maintained a license in good standing until the date of conviction

2) **BAC of .10% or greater** - NO FINE if the person possessed a valid New Jersey driver's license in good standing at the time of the offense and maintained a license in good standing until the date of conviction

3) **BAC of .15% or greater** - NO FINE and a THREE-MONTH suspension coupled with a one-day credit against the suspension term for every two days the person has had the ignition interlock device installed. The license loss credits only apply if the defendant possessed a valid New Jersey driver's license in good standing at the time of the offense and maintained a license in good standing until the date of conviction. The defendant will not be entitled to the credits if the drunk-driving case resulted in serious bodily injury as defined in N.J.S.2C:11-1 to another person. Note that following a conviction, a first offender whose blood alcohol concentration is 0.15% or higher must install and maintain an interlock device for not less than 12 months or more than 15 months.

Second Offenders Under N.J.S.A. 39:4-50(a)(2)

Defendants are not subject to paying a fine and are entitled to a one-day credit against the suspension term for every two days the person has had the ignition interlock device installed. These two benefits (fine and license-loss credits) only apply if the defendant possessed a valid New Jersey driver's license in good standing at the time of the offense and maintained a license in good standing until the date of conviction. The defendant will not be entitled to the license-loss credits if the drunk-driving case resulted in serious bodily injury as defined in N.J.S.A. 2C:11-1 to another person.

Third Offenders Under N.J.S.A. 39:4-50(a)(3)

Defendants are not subject to paying a fine and are entitled to a one-day credit against the suspension term for every two days the person has had the ignition interlock device installed. These two benefits (fine and license-loss credits) only apply if the defendant possessed a valid New Jersey driver's license in good standing at the time of the offense and maintained a license in good standing until the date of conviction. The defendant will not be entitled to the license-loss credits if the drunk-driving case resulted in serious bodily injury as defined in N.J.S.A. 2C:11-1 to another person.

4) Unrestricted plea-bargaining in municipal court

Prior to 2024, the judiciary had long taken the position that the Supreme Court may exercise plenary authority over the plea-bargaining process.¹ As a result, plea bargaining in drunk-driving cases in municipal court

¹“Plea bargaining is not a right of a defendant or the prosecution. It is an accommodation which the judiciary system is free to institute or reject. Therefore, [the judiciary] can modify the plea-bargaining structure at any time.” State vs. Brimage, 271 N.J.Super 369, 379(App.Div.1994).

had been prohibited since 1990.² However, in December 2023, the Legislature sought to supersede the plea bargaining in drunk-driving matters by authorizing the practice in an unrestricted manner statutorily. As amended, N.J.S.A. 39:4-50(a)(3) and N.J.S.A. 39:4-50.4a(a)(3) now provide:

Notwithstanding any judicial directive to the contrary, upon recommendation by the prosecutor, a plea agreement under this section is authorized under the appropriate factual basis consistent with any other violation of Title 39 of the Revised Statutes or offense under Title 2C of the New Jersey Statutes; provided, however, that if a person is 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 Rule 39:4-50 or a person is 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), the person shall forfeit the right to operate a motor vehicle over the highways of this State for a period of not less than six months.

As a result of this statutory amendment and in the interests of comity, the Supreme Court issued an order on February 23, 2024 that withdrew Guideline 4 and with all its restrictions.

The only remaining limitations on plea bargains in municipal court are set forth in Rule 7:6-2(d) and Guideline 3; that is to say that every plea agreement must call for a legal sentence and be in the interests of justice.

5) DRE evidence at trial – State vs. Olenowski, 255 N.J. 529(2023) (Olenowski II)

²The prohibition was set forth in Guideline 4 to the plea-bargaining guidelines in the Appendix to the Part VII Rules of Court. The Guidelines became binding in June of 1990. See the discussion in State vs. Hessen, 145 N.J. 441, 678 A.2d 1082(1996).

It is vitally important in the trial of a DWI case that will include DRE evidence that the judge and (especially) the municipal prosecutor be thoroughly familiar with the rules and limitations on this evidence as expressed in Olenowski (II)

a) In general - Proof that a defendant operated a motor vehicle while under the influence of a narcotic, hallucinogenic or habit-producing drug is a vital element in establishing the recklessness required to secure a conviction in a vehicular homicide, aggravated manslaughter or assault by auto case. The New Jersey drug driving statute does not define what it means to be under the influence of these substances. Rather, the definitions come from the case law. Typically, being under the influence of drugs 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. An operator of a motor vehicle is under the influence of a narcotic drug within the meaning of New Jersey's drunk-driving statute if the drug produced a narcotic effect so altering his normal physical coordination and mental faculties as to render him a danger to himself as well as to other persons on the highway.³

More significantly, 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 was under the influence of drugs at the time the operation of the vehicle resulted in death or serious bodily injury to the victim. This definition includes a drug which produces a narcotic effect.⁴

There are five critical questions that a jury must decide affirmatively beyond a reasonable doubt in a driving under the influence of drugs case.

1) Was the defendant intoxicated at the time of the criminal act?

2) Did that intoxication result from the ingestion of drugs?

³State vs. Tamburro, 68 N.J. 414, 421, 346 A.2d 401(1975).

⁴State vs. DiCarlo, 67 N.J. 321, 328, 338 A.2d 809(1975).

3) Did the defendant operate a motor vehicle while under the influence of drugs at the time of the death or injury?

4) Was the drug-induced intoxicated operation of a motor vehicle by the defendant reckless?

5) Did the reckless operation of a motor vehicle result in the victim's injury or death?

b) Evidence of drug-intoxication - An opinion related to whether a defendant was under the influence of drugs at the relevant time is usually a matter of expert, as opposed to lay opinion. Indeed, the use of expert opinion is the preferred method.⁵ However, it is not the only method. The prosecution may properly rely upon lay testimony related to objective observations of intoxicated-type behavior by the defendant. The prosecution may also introduce circumstantial proof of recent consumption of drugs by way of drug paraphernalia in the defendant direct or constructive possession, signs of recent injection on the defendant's body or an observable inability of the defendant to walk, talk or act in a manner consistent with drug intoxication. Forensic proofs in the form of blood or urine tests from samples taken from the defendant's body at or near the time of the vehicle's operation can also provide powerful circumstantial proof of recent drug ingestion. Direct evidence can take the form of the defendant's admissions, a confession or statements from witnesses. Under New Jersey law, juries are permitted to consider these types of direct or circumstantial evidence and deduce whether the consumption of drugs rendered the defendant under the influence within the meaning of the law.

c) DRE procedures: The 12-step protocol - The prosecution's use of expert testimony as to drug-intoxication is commonly accomplished through the testimony of a trained and certified drug recognition expert (DRE). These experts are invariably police officers. They employ a twelve-step protocol to determine if the driver of a motor vehicle is (or was at the time of operation) under the influence of certain categories of

⁵State vs. Bealor, 187 N.J. 574, 902 A.2d 226(2006).

drugs. This accomplished by comparing the DRE's observations during the twelve-step process to a matrix that indicates the probable drug that the driver has ingested.

As explained by the Supreme Court in State vs. Olenowski, ___ N.J. ___ (2023) (Olenowski II), the twelve-step protocol involves the following discrete steps:

Step 1: The breath alcohol test determines the driver's blood alcohol concentration. The test is used to determine whether alcohol may be the sole or contributing cause of any observed signs of the driver's impairment. The DRE training materials emphasize that many drivers who are under the influence of drugs also have alcohol in their systems.

Step 2: The specially trained DRE's interview with the arresting officer occurs because the specially trained DRE examining the driver usually will not be the same officer who stopped or arrested that person. During this step, the DRE can obtain information from the arresting officer that might be indicative of the drug or drugs the driver has ingested. The information from the arresting officer may include any observations of the driver's behavior and of the scene of the arrest, any statements offered by the driver during any questioning, and any relevant physical evidence, such as drugs or drug paraphernalia seized at the scene.

Step 3: The preliminary examination is the first opportunity for the DRE to observe the driver closely. DRE training materials emphasize that a primary purpose of this preliminary examination is to determine whether the driver has an injury or other medical condition that may be related to drug use or observed impairment. During the examination, the DRE takes the first of three pulse measurements. As noted in the training materials, the DREs at this step can also perform some preliminary eye-related assessments and initial estimations preceding the eye tests to be performed fully later in Steps 4 and 7. This step is intended to help the DRE decide whether to continue with the evaluation, to proceed instead with a drunk driving charge, or to refer the driver for medical treatment. Drivers have the right to refuse to proceed with the DRE process.

Step 4: The eye examinations in this step are conducted because some drugs produce observable effects on the eyes. The examinations conducted are designed to assess equal tracking by the eyes and equal pupil size in both eyes. Three tests are involved. First, there is the horizontal gaze nystagmus (HGN) exam, which checks for the lack of the smooth eye pursuit, sustained eye jerking at maximum deviation (where the eye is turned as far to the side as possible), and the angle of onset at which the eyes first begin to jerk, all while tracking the eyes in a horizontal path following a stimulus. Second is the vertical gaze nystagmus (VGN) exam, which tests the same factors as above, but by tracking the eyes in a vertical path. Third, there is the lack of convergence (LOC) exam, which checks how the driver's eyes move together by tracking their coordinated convergence when the DRE moves a finger or penlight towards the driver's nose (a point of convergence) until one or both eyes drift outward toward the side instead. Several of the State's testifying experts asserted that the eye examinations can reveal whether the driver has ingested drugs that may detrimentally affect such things as the driver's visual acuity, contrast sensitivity, glare sensitivity, ability to track objects, coordination, and other driving-related skills.

Step 5: The divided attention tests in Step 5 are comprised of four psychophysical tests, including two of the three standard field sobriety tests (SFSTs) developed to detect drunk driving. Tests in this step consist of (1) the modified Romberg balance test, which tests balance by requiring the driver to stand feet together, head tilted back, with eyes closed and asked to estimate when thirty seconds has passed; (2) the walk-and-turn test, which tests a driver's ability to balance while standing heel-to-toe with the driver's arms at the side and while the driver takes heel-to-toe steps along a straight line pivoting to turn back to the starting point; (3) the one-leg-stand test, which tests the driver's balance on one leg with the other leg raised and arms at the side, all while the driver counts out loud while looking at the raised foot (done twice, once standing on each foot); and (4) the finger-to-nose test, which involves the driver putting a fingertip to the tip of the nose, while the driver's eyes are closed and head is tilted back. DREs are familiar with the components of Step 5 from prerequisite training. The rationale for performing the tests in drugged driving cases is that any drug that

impairs driving ability will also impair the driver's ability to perform divided attention tests, which help evaluate a driver's "psychomotor" skills. Among other things, divided attention deficits may impair a driver's ability to maintain lane position on a roadway while monitoring the surrounding environment.

Step 6: In this step, a second examination and vital signs check adds another data point to the DRE's evaluation. Although repetitive of Step 3, Step 6 is undertaken because the effects of drugs on the body may arise at any time during the overall DRE protocol. The training materials emphasize that blood pressure, pulse, and internal body temperature are "reliable indicators of drug influence" that DREs should measure.

Step 7: This step entails a dark room examination. While in the dark room, the DRE will measure the dilation of the driver's pupil in response to a light stimulus in three different lighting conditions. The examination at this step involves changing the amount of light entering the driver's eyes using a penlight so that the DRE can observe the pupil's appearance and reaction to the light. The training materials note that some drugs (such as marijuana) may cause the pupils to widen, or dilate, and others (such as opioids) may cause the pupils to narrow or constrict. The DRE will also examine areas of the body where drugs are commonly ingested (nasal area and oral cavity) for signs of drug use using a penlight.

Step 8: In this step, muscle tone examinations measure whether the muscles in the driver's arms are tense or, conversely, flaccid. The training materials highlight that certain drugs tend to cause rigidity in the muscle, while others are known to cause a "rubbery-like" flaccidity in the muscle. Although this examination is sequenced at Step 8, the training materials also inform DREs that muscle tone can be observed at many points of the examination, including when taking the driver's vital signs in Steps 3, 6, or 9, when checking for injection sites in Step 9, or during the Step 5 divided attention tests.

Step 9: The examination for injection sites in Step 9 enables the DREs to observe any indications that the driver has injected drugs through hypodermic needles, most commonly associated with heroin use. Injection of certain drugs can cause lengthy scars, called "tracks," and

produce observable sores or bruising. The injection sites typically examined appear on the driver's neck, forearms, wrists, and backs of the hands.

Step 10: At this step, the DRE interviews the driver as a means to confirm or dispel any reasonable suspicions or opinions the DRE may have about the driver's impairment being caused by drug use, and any category of drug that the indicators point towards. The training materials reflect that the interview “can proceed only in conformance with formal admonition and strict observance of the driver's Constitutional rights.” The materials also note that the interview procedures vary with the DRE's suspicions and opinions about the potential drug categories involved. Throughout the examination, including this step, the DRE has been recording the information gathered on a drug influence evaluation form, known as a face-sheet. DREs are also trained to record all spontaneous statements and any responses by the driver, and to ask follow-up questions, as appropriate, at any step.

Step 11: After conducting the first ten steps of the protocol, the DRE reaches an opinion about whether the driver is under the influence of a drug or drugs, and if so, the probable category or categories of drugs that are causing the impairment. The opinion is “[b]ased on all of the evidence and observations gleaned from the preceding steps.” The DRE consults with a printed and standardized matrix that provides a reference tool for matching the symptoms and indicators observed to seven categories of drugs: CNS depressants, CNS stimulants, hallucinogens, narcotic analgesics, dissociative anesthetics, inhalants, and cannabis. For each category, there is a grid with a list of indicators and measurements that can be observed.

Step 12: At this stage, after the DRE reaches an opinion, a toxicological sample is requested from the driver, if the driver did not already provide a specimen prior to the DRE's arrival or during the examination (e.g., if a bathroom break was necessary). Drivers have the right to refuse to provide a specimen, and the training materials instruct DREs to not allow that refusal to affect the evaluation or opinion reached. The materials also note that DREs should follow the departmental policies on

sample collection. Often the arresting officer is the person who collects and retains the sample to be sent for toxicological testing.

d) Restrictions and limitations on DRE opinion evidence - In *Olenowski II*, the Court's majority ruled that the DRE 12-step protocol does not conclusively establish that a driver is actually impaired, or that the drug categories identified by the DRE are definitively the cause of any such impairment. A toxicology report, particularly one based on a blood sample instead of a urine sample, can help corroborate the presence of such drugs in the driver's system. But even that toxicology cannot prove that the driver was actually impaired by drugs while behind the wheel because there are no *per se* driving while under the influence of drugs violations in our statutes. Further, no studies in this record identify a drug level that establishes impairment *per se*. Thus, although DRE testimony does not, in and of itself, establish impairment, such testimony is sufficiently reliable to be admitted for a less ambitious purpose, and with critical safeguards. These include the following:

1) In the words of the Court's majority, the DRE's opinion "should not be allowed to prove too much." The DRE's testimony must be confined to an opinion that the evaluation is "consistent with" the driver's ingestion or usage of one or more of the identified drug categories. The DRE may not present opinions as to whether the driver's observed impairment was actually caused by such drugs and, if so, to what extent.

2) If feasible, the State must make a reasonable attempt to obtain a toxicology report based on a blood or urine sample from the driver. If the State fails to make such a reasonable attempt without a persuasive justification, the DRE opinion testimony must be excluded.

3) The defense must be afforded a fair opportunity to impeach the DRE and present competing proofs.

4) Model instructions to guide juries about DRE evidence should be considered.

5) Given the importance of toxicological testing, especially of the subject's blood, if the court finds no reasonable attempt was made to

secure and test a blood sample despite its feasibility, the DRE evidence shall be excluded. However, if the State establishes a reasonable justification for the lack of a toxicology report, then the DRE evidence is admissible, subject to defense impeachment and counterproofs.

e) Defense challenges to DRE opinion evidence – In Olenowski II, the Court dedicated a significant portion of its opinion to the range of defenses that can be raised by the defendant in challenging DRE evidence. Of particular importance is the notion of confirmation bias by the DRE examiner. That is to say that the information he received prior to and during the testing of the subject may have skewed his objectivity and resulted in an incorrect conclusion. The majority went on to note that the defense must be afforded a fair opportunity to impeach or rebut the prosecution's case through cross-examination of the DRE and with counterproofs. The adversarial process can then explore the probative strengths and weaknesses of the DRE evidence. For example, the majority suggested that defense attorneys can explore any doubts and inconsistencies within the DRE findings, such as discrete indicators that the DRE found or did not find and whether they could be consistent or inconsistent with several categories about which the DRE did or did not opine. The defense could also show that there are benign medical or other reasons why a driver may appear impaired. Additionally, the defense may call qualified experts who can opine about flaws within the DRE process and urge that the jury ascribe little or no weight to the DRE's testimony. At trial, the defense is free to cross-examine and impeach DREs about their limited medical knowledge. In addition, where applicable, the defense may present a medical expert witness to show that the defendant's behavior and condition have a benign medical explanation, such as the prescribed use of medication or an underlying medical condition. defense attorneys can explore any doubts and inconsistencies within the DRE findings, such as discrete indicators that the DRE found or did not find and whether they could be consistent or inconsistent with several categories about which the DRE did or did not opine. Finally, the majority stressed that these possible impeachment techniques are not exclusive; counsel may pursue other avenues to undermine the DRE's opinion within the usual boundaries of the rules of evidence.

f) Unresolved issues – The majority opinion on Olenowski II left open a number of issues that will have to be raised argued and resolved in future published decisions. Among them are the issues related to the reliability of a DRE opinion based upon fewer than 12 of the required steps. Also, may a fact-finder draw and adverse inference from the subject’s outright refusal to participate in some or all of the steps in the testing process? Finally, does the exclusion of blood-testing results based upon a motion to suppress evidence or a discovery violation constitute sufficient grounds of unreasonable conduct by the prosecution to exclude the DRE testimony in its entirety?

6) Body-worn video camera (BWC) evidence – Rebuttable presumption

In general, New Jersey police are required to wear body cameras and use them to record interactions with members of the public. Evidence from this so-called BWC (body-worn camera) footage can be enormously valuable to both the prosecution and the defense. For that reason, when BWC footage is unavailable or missing without justification or excuse, New Jersey statutory law under N.J.S.A. 40A:14-118.5(q) establishes a rebuttable presumption that missing or destroyed police body-worn camera footage would be exculpatory.⁶

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⁶State vs. Jones, 475 N.J.Super 520, 295 A.3d 222(App.Div.2023)