Garden State CLE
21 Winthrop Road • Lawrenceville, New Jersey 08648
(609) 895-0046 fax- 609-895-1899
Atty2starz@aol.com

Video Course Evaluation Form

Attorney Name____

Atty ID number for Pennsylvania:_________________________

Name of Course You Just Watched________________________

Please Circle the Appropriate Answer

Instructors:	Poor	Satisfactory	Good	Excellent
Materials:	Poor	Satisfactory	Good	Excellent
CLE Rating:	Poor	Satisfactory	Good	Excellent

Required: When you hear the bell sound, write down the secret word that appears on your screen on this form.

Word #1 was: ______________ Word #2 was: ____________________

Word #3 was: ______________ Word #4 was: ____________________

What did you like most about the seminar?

____
____
____

What criticisms, if any, do you have?

____
____

I Certify that I watched, in its entirety, the above-listed CLE Course

Signature ____________________________________ Date _________

New Jersey Continuing Legal Education Services

Presents:

<u>Convicting Intoxicated Drivers in Complex Cases</u>

Lesson Plan

Convicting Intoxicated Drivers in Complex Cases

Table of Contents

1. Introduction

2. Blood Evidence

3. Under the Influence

4. Motions to Suppress Evidence

5. Operation of a Motor Vehicle

6. Issuance of Process

8. Allowing Offense

9. Child Endangerment

10. Homicide and Aggravated Assault

1. Introduction

Complex Cases Defined:

1. Obstacles to obtaining evidence of guilt;

2. Challenges to admissibility of relevant evidence in court;

3. Proof of intoxicated operation as an element of a criminal offense

2. Blood Evidence

a. In General

Schmerber v. California, 384 U.S. 757 (1966)

Similarly, we are satisfied that the test chosen to measure petitioner's blood-alcohol level was a reasonable one. Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol. Such tests are a commonplace in these days of periodic physical examination and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain. Petitioner is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the 'Breathalyzer' test petitioner refused. We need not decide whether such wishes would have to be respected.

Finally, the record shows that the test was performed in a reasonable manner. Petitioner's blood was taken by a physician in a hospital environment according to accepted medical practices. We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment-for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.

b. Resistant Suspect

State v. Ravotto, 169 N.J. 227
Graham v. Connor. 490 U.S. 386 (1989)

With or without a warrant, the police may not use unreasonable force to perform a search or seizure of a person. “[T]he ‘reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.” More specifically, *Graham* instructs courts to employ a balancing test to determine whether the use of force in a given case is reasonable. The Supreme Court explained that the proper application [of the balancing test] requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

In applying those tenets, we conclude that the force used by the police to extract defendant's blood was unreasonable under the totality of the circumstances. Defendant was terrified of needles and voiced his strong objection to the procedures used on him. He shouted and flailed as the nurse drew his blood. Several persons, including the police, and mechanical restraints were needed to hold defendant down. Defendant's fear is relevant to our analysis. A suspect's reaction to law enforcement officials is part of the fact pattern considered by a reviewing court when it determines whether police behavior was objectively reasonable. We also consider the offense that was under investigation as part of the totality of the circumstances. Although the Court does not diminish defendant's suspected offense or in any way condone driving while intoxicated, we note that the charge against defendant is quasi-criminal rather than criminal in nature. Moreover, defendant had been in a one-car accident and was not under suspicion for causing the death of or injury to any other person.

b. Resistant Suspect

State v. Ravotto, 169 N.J. 227
Graham v. Connor. 490 U.S. 386 (1989)

Nor do we suggest that the right to be free of unreasonable searches turns solely on whether a defendant objects to police conduct or resists an otherwise legitimate law enforcement action. To the contrary, the same or even greater level of force than was used here could be reasonable in a different setting. We emphasize that the reasonableness inquiry we employ is fact sensitive and offers no sure outcomes in future cases. As this case demonstrates, the quantum of force used by the police, although significant to the analysis, is not the sole factor to be considered.

Refusal to Provide a Sample – State v. Cryan, 363 N.J. Super. 442 (App. Div. 2003)

There is also strong support in the record for the Law Division's finding that defendant's refusal to consent to the taking of his blood for BAC analysis was an intentional and calculated act designed to prevent law enforcement authorities from obtaining conclusive evidence of his intoxication. His proffered explanation for his refusal, his alleged fear of needles, is patently specious in light of the medical treatment he received without objection at the emergency room. In this context, defendant's refusal to consent to the blood test was properly considered by the trial court as evidence of a consciousness of guilt. That is, that defendant believed himself to be intoxicated and that an analysis of his blood would have confirmed this.

c. Testimonial Privileges

Physician/Patient – State v. Schreiber, 122 N.J. 579 (1991)

Hospital Blood Test Results – State v. Dyal, 97 N.J. 229 (1984)

Quantum of Proof – State v. Bodtmann, 239 N.J. Super. 33 (App. Div. 1990)

We believe the *Dyal* court also intended that a subpoena *duces tecum* for the records of a blood alcohol test may be issued on less than probable cause since the *Dyal* court requires the investigating police to establish a "reasonable basis to believe that the operator was intoxicated." This appears to be even less than the "reasonable and well grounded basis to believe" requirement in *Hall* by the absence of the words "well grounded."

Our conclusion that less than probable cause is required for the issuance of a *Dyal* subpoena is fortified by the settled law that a driver arrested with probable cause to believe he or she is intoxicated has no constitutional right to prevent the involuntary taking of a blood sample, provided the sample is taken in a medically acceptable manner, at a hospital or other suitable health care facility

d. Testimonial Evidence

In General - Crawford v. Washington, 541 U.S. 36 (2004)

New Jersey Procedure

Chemist/Lab Reports – State v. Berezansky, 386 N.J. Super. 84 (App. Div. 2006)

Phlebotomist – State v. Renshaw, 390 N.J. 456 (App. Div. 2007)

Procedure & Waiver – State v. Kent, 391 N.J. Super. 352 (App. Div. 2007)

Melendez-Diaz v. Massachusetts – Argued November 10, 2008

3. Under the Influence

a. Defined

Narcotic
Hallucinogenic
Habit-producing Drug
Chemical Inhalant

State v. Bealor, 187 N.J. 574 (2006)

We have described generally the term "under the influence" as "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." We also have explained that the term "under the influence" means "a condition which so affects the judgment or control of a motor vehicle operator as to make it improper for him to drive on the highway."In the specific context of narcotic, hallucinogenic or habit-producing drug intoxication, we have held that a driver is "under the influence of a narcotic drug ... if the drug produced 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.

See generally: State v. Tamburro, 68 N.J. 414 (1975)
State v. DiCarlo, 67 N.J. 321 (1975)
State v. Johnson, 42 N.J. 146 (1964)

b. Proofs

State v. Bealor, 187 N.J. 574 (2006)

We hold that, although evidentially competent lay observations of the fact of intoxication are always admissible, lay opinion in respect of the cause of intoxication other than from alcohol consumption is not admissible because, unlike alcohol intoxication, "[n]o such general awareness exists as yet with regard to the signs and symptoms of the condition described as being 'high' on marihuana." However, we further hold that competent lay observations of the fact of intoxication, coupled with additional independent proofs tending to demonstrate defendant's consumption of narcotic, hallucinogenic or habit-producing drugs as of the time of the defendant's arrest, constitute proofs sufficient to allow the fact-finder to conclude, without more, that the defendant was intoxicated beyond a reasonable doubt and, thereby, to sustain a conviction under *N.J.S.A.* 39:4-50.

[T]he driving while intoxicated statute "does not require that the particular narcotic[, hallucinogen or habit-producing drug] be identified The statute also does not define the quantum of narcotics, hallucinogens or habit-producing drugs required in order to violate its prohibition. Instead, as with alcohol intoxication, the issue is simple: was the defendant "under the influence" of a narcotic, hallucinogen or habit-producing drug while he operated a motor vehicle.

b. Proofs

State v. Bealor, 187 N.J. 574 (2006)

As in the context of driving while under the influence of alcohol cases, we reject the Appellate Division's restriction on the logical and inferential ability of the fact-finder to connect the objective facts of intoxication with the proven presence of a cause of intoxication in order to conclude that defendant drove while intoxicated. We also reject the notion that a conviction for driving under the influence of a narcotic, hallucinogen or habit-producing drug must be based *exclusively* on proofs of "the subject's conduct, physical and mental condition and the symptoms displayed" together with "a qualified expert ... determin[ing] that he or she is 'under the influence' of a narcotic." On the contrary, we acknowledge that

[t]he thrust of the Motor Vehicle Act is safety on the highway. The particular section is addressed to the evil of operating a motor vehicle while one's physical coordination or mental faculties are substantially diminished by "intoxicating liquor, narcotic, hallucinogenic or habit-producing drug." Competency to operate a motor vehicle safely is the critical question.

The rule adopted by the panel-that the nexus between the facts of intoxication and the cause of intoxication can only be proved by expert opinion-impermissibly impinges on the traditional role of the fact-finder and is explicitly disavowed.

That said, expert testimony remains the preferred method of proof of marijuana intoxication. We arrive at that conclusion in the knowledge that it is not too difficult a burden for the State to offer an expert opinion as to marijuana intoxication. Prosecutors in municipal courts throughout the State routinely qualify local and state police officers to testify as experts on the subject of marijuana intoxication. Expert testimony only requires that a witness be qualified "by knowledge, skill, experience, training, or education."

b. Proofs

State v. Jackson, 124 N.J. Super. 1 (App. Div. 1973) (Specialized lay witness' (narcotics detective) opinion for u/i opiates)

State v. Franchetta, 394 N.J. Super. 200 (App. Div. 2007) - Rebound effect of cocaine (DRE and Doctor)

State v. Glynn, 20 N.J. Super 20 (App. Div. 1952) – Synergistic Effects (Alcohol and Benadryl)

4. Motions to Suppress Evidence

a. Community Caretaking Exception

State v. Goetaski, 209 N.J. Super. 362 (App. Div. 1986) (Shoulder rider at 4:00 am)

In the case before us, the facts were unusual enough for the time and place to warrant the closer scrutiny of a momentary investigative stop and inquiry. In this case, we will not substitute our judicial hindsight for what appears to us as a sound, nonpretextual [sic] exercise of curbstone judgment by the officer. But we do not hesitate to add that this stop is about as close to the constitutional line as we can condone.

Sate v. Martinez, 260 N.J. Super. 75 (App. Div. 1992) (Snail's pace at 2:00 am – common law right of inquiry based upon founded suspicion of criminal activity)

State v. Washington, 296 N.J. Super. 569 (App. Div. 1997) (Weaving and 9 miles below speed limit)

State v. DiLoreto, 180 N.J. 264 (2004)

The community caretaker doctrine remains a narrow exception to the warrant requirement. Consistent with that view, all future cases decided under that doctrine will turn strictly on their individual facts and will be subject, as always, to meticulous judicial review.

b. Motor Vehicle Stop

Delaware v. Prouse, 440 U.S. 648 (1979) – (Reasonable Suspicion)

State v. Woodruff, 403 N.J. Super. 620 (Law Div. 2008) - (Weaving in a Lane)

State v. Cohen, 347 N.J. Super. 375 (App. Div. 2002) (Tinted Windows)

State v. Pitcher, 379 N.J. Super. 308 (App. Div. 2005) - Mistake of Fact

State v. Puzio, 379 N.J. Super. 378 (App. Div. 2005) - Mistake of Law

b. Motor Vehicle Stop

State v. Donis, 157 N.J. 44 (1998) (MTD Search)

Finally, we observe that in both of these appeals, petitioners' convictions were based on license plate identification, and that additional evidence linked each petitioner to the offense. The police officers in their initial use of MDT learned that the vehicles' owners had suspended licenses. That information itself gave rise to the reasonable suspicion that the vehicle was driven in violation of the motor vehicle laws and was in itself sufficient to justify a stop. However, in addition to that information, the officers also had determined through a "match-up" that the drivers were the registered owners. On the descriptive information provided by the MDT and the "general match" of petitioners, the officers therefore had reasonable suspicion to believe that the drivers were violating the law.

Contrast - State v. Parks, 288 N.J. Super. 407 (App. Div. 1996)

The State urges us to hold that once the officer learns from the mobile data terminal that the vehicle's owner does not have a valid driver's license, the officer is authorized to stop and detain *412 any person driving that vehicle in order to check that person's identification. The information alone, then, would provide a police officer with an "articulable and reasonable suspicion" that the driver is unlicensed as soon as the computer search reveals the owner is unlicensed. We reject this broad brush approach in favor of further articulation of the facts supporting a reasonable suspicion. When there is additional evidence of defendant's identity as the driver of his vehicle at a particular time, it may be inferred that the owner was the driver. We hold that when the officer's observation of the driver indicates that the driver could reasonably be the person described in the DMV records, then the dictates of *Delaware v. Prouse* are satisfied.

c. Motor Vehicle Search

State v. Irelan, 375 N.J. Super 100 (App. Div. 2005) – (Automobile Exception)

We are satisfied that the exigent circumstances prong has also been established. The troopers had no advance information about defendant; they encountered him by chance while on patrol. Indeed, it was not until after the stop and the subsequent roadside investigation that they acquired probable cause that the vehicle contained items of evidence they had the right to seize. Therefore, the events that gave rise to probable cause were unforeseen, spontaneous, and developed swiftly.. Considering the early-morning hour, the requirement that the troopers promptly transport defendant to the stationhouse to administer a Breathalyzer test, and the pressing need for assistance because of the accident on the Expressway, it was "impracticable for the police to procure a search warrant and immediate action was necessary."

State v. Judge, 275 N.J. Super. 194 (App. Div. 1994) (Plain Smell)

5. Operation of a Motor Vehicle

a. Modes of Proof

State v. Prociuk, 145 N.J. Super. 570 (Cty. Ct. 1976)

Direct Evidence
Circumstantial Evidence
Admission
(Stipulation)

b. Operation Defined

State v. Mulcahy, 107 N.J. 467, 479 (1987) "We therefore believe that when 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 v. Daly, 64 N.J. 122, 125 (1973) "[T]he State argues that intent to move the vehicle should not be a required element of the offense of operating a motor vehicle while intoxicated. The State's position is that an intoxicated person who enters a motor vehicle and starts the engine is a threat to himself and to the public because of the hazard that either he may try to drive the vehicle, or accidentally cause it to be moved.

We recognize that there is a risk involved. However, the statutory sanction is against 'operating' a motor vehicle while intoxicated. We conclude, as we did in Sweeney, that in addition to starting the engine, evidence of intent to drive or move the vehicle at the time must appear."

c. Asleep behind the wheel

State v. Grant, 196 N.J. Super. 470 (App. Div. 1984) (engine off)
State v. Dickens, 130 N.J. Super. 73 (App. Div. 1974) (engine running)
State v. Sweeney, 77 N.J. Super. 512 (App. Div. 1962) (engine running)
State v. Baumgartner, 21 N.J. Super. 348 (App. Div. 1952) (engine off)
State v. Damoorgian, 53 N.J. Super. 108 (Cty. Ct. 1958) (engine running)
State v. Elliott, 13 N.J. Super. 432 (App. Div. 1951) (engine running)

d. Parked

State v. Ebert, 377 N.J. Super. 1 (App. Div. 2005) (Too stupid to drive)
State v. George, 257 N.J. Super. 493 (App. Div. 1992) (engine running)
State v. Mulcahy, 107 N.J. 467, 479 (1987) (cop grabbed keys)
State v. Morris, 262 N.J. Super. 413 (App. Div. 1993) (cop grabbed keys)
State v. Stiene, 203 N.J. Super. 275 (App. Div. 1985) (out of gas)
State v. Dannemiller, 229 N.J. Super. 187 (App. Div. 1988) (out of gas)
State v. Morris, 262 N.J. Super. 413 (App. Div. 1993) (immobilized on a log)

6. Issuance of Process

a. General 90-day Statute of Limitations – N.J.S.A. 39:5-3(b)

b. Personal Service within 90-days – State v. Buczkowski, 395 N.J. Super. 40 (App. Div. 2007)

c. Cases involving Serious Bodily Injury or Death – N.J.S.A. 2B:12-17.2

a. In any matter concerning Title 39 of the Revised Statutes where death or serious bodily injury has occurred, regardless of whether the death or serious bodily injury is an element of the offense or violation, the Superior Court shall have exclusive jurisdiction over the offense or violation until such time that the Superior Court transfers the matter to the municipal court. For the purposes of this section, the term "serious bodily injury" shall have the meaning set forth in subsection b. of N.J.S.2C:11-1.

("Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ)

7. School Zone Offenses

a. Elements of Offense ("Whenever a violations of this section occurs while") i.e. Intoxicated operation (or allowing) of a motor vehicle coupled with:

(1) on any school property used for school purposes which is owned by or leased to any elementary or secondary school or school board, or

(2) within 1,000 feet of such school property;or

(3) driving through a school crossing as defined in R.S.39:1-1 if the municipality, by ordinance or resolution, has designated the school crossing as such; or

(4) driving through a school crossing as defined in R.S.39:1-1 knowing that juveniles are present if the municipality has not designated the school crossing as such by ordinance or resolution,

b. Force Multiplier for

Refusal to submit to breath test - N.J.S.A. 39:4-50.4a(b)
Driving on the Revoked List - N.J.S.A. 39:3-40(f)(3)
Assault by Auto/DWI – N.J.S.A. 2C:12-1(c)(3) (SBI = 2nd) or (BI =3rd)
Vehicular homicide/DWI – N.J.S.A. 2C:11-5(b)(3) (1st degree)

c. Strict liability offense for DWI
Vicarious Liability for Allowing

d. State v. Reiner, 180 N.J. 307 (2004) (Due process considerations)

8. Allowing Offense

a. Elements of Offense

*** N.J.S.A. 39:4-50(a)**

[P]ermits another person who is under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle owned by him or in his custody or control or permits another to operate a motor vehicle with a blood alcohol concentration of 0.08% or more by weight of alcohol in the defendant's blood;

*** N.J.S.A. 39:4-50(a)(1)(i)**

[T]he person permits another person who is under the influence of intoxicating liquor to operate a motor vehicle owned by him or in his custody or control or permits another person with a blood alcohol concentration of 0.08% or higher but less than 0.10% to operate a motor vehicle;

*** N.J.S.A. 39:4-50(a)(1)(ii)**

[T]he person permits another person who is under the influence of narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle owned by him or in his custody or control, or permits another person with a blood alcohol concentration of 0.10% or more to operate a motor vehicle;

b. Requirement of Knowledge

Accordingly, we hold that before a person may be convicted of permitting another person to operate a motor vehicle under the influence of intoxicating liquor or drugs, or in violation of the statutory standard for blood alcohol level, the State must produce evidence from which the trier of fact may reasonably infer, beyond a reasonable doubt, that such owner or custodian knew or reasonably should have known, of the permittee's impaired condition to drive. State v. Skillman, 226 N.J. Super. 193, 199-200 (App. Div. 1988)

Test of Knowledge is Objective – State v. Zanger, 370 N.J. 360 (Law Div. 2004)

9. Child Endangerment

N.J.S.A. 39:4-50-15

a. As used in this act:

"Minor" means a person who is 17 years of age or younger.

"Parent or guardian" means any natural parent, adoptive parent, resource family parent, stepparent, or any person temporarily responsible for the care, custody or control of a minor or upon whom there is a legal duty for such care, custody or control.

b. A parent or guardian who is convicted of a violation of R.S.39:4-50 and who, at the time of the violation, has a minor as a passenger in the motor vehicle is guilty of a disorderly persons offense.

c. In addition to the penalties otherwise prescribed by law, a person who is convicted under subsection b. of this section shall forfeit the right to operate a motor vehicle over the highways of this State for a period of not more than six months and shall be ordered to perform community service for a period of not more than five days.

10. Homicide and Aggravated Assault

a. Recklessness – In General

N.J.S.A. 2c:2-2(b)(3)

Recklessly. **A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. "Recklessness," "with recklessness" or equivalent terms have the same meaning.**

b. Possibility vs. Probability of death or SBI

Manifesting Extreme indifference to human life

c. Degrees of Recklessness Necessary for

Vehicular homicide

Manslaughter

Aggravated manslaughter

2C:11-5. Death by vehicular homicide

a. Criminal homicide constitutes vehicular homicide when it is caused by driving a vehicle or vessel recklessly.

Proof that the defendant fell asleep while driving or was driving after having been without sleep for a period in excess of 24 consecutive hours may give rise to an inference that the defendant was driving recklessly. Proof that the defendant was driving while intoxicated in violation of R.S.39:4-50 or was operating a vessel under the influence of alcohol or drugs in violation of section 3 of P.L.1952, c. 157 (C.12:7-46) shall give rise to an inference that the defendant was driving recklessly. Nothing in this section shall be construed to in any way limit the conduct or conditions that may be found to constitute driving a vehicle or vessel recklessly.

2C:11-4. Manslaughter
a. Criminal homicide constitutes aggravated manslaughter when :

(1) The actor recklessly causes death under circumstances manifesting extreme indifference to human life; or

(2) The actor causes the death of another person while fleeing or attempting to elude a law enforcement officer in violation of subsection b. of N.J.S.2C:29-2. Notwithstanding the provision of any other law to the contrary, the actor shall be strictly liable for a violation of this paragraph upon proof of a violation of subsection b. of N.J.S.2C:29-2 which resulted in the death of another person. As used in this paragraph, "actor" shall not include a passenger in a motor vehicle.

b. Criminal homicide constitutes manslaughter when:

(1) It is committed recklessly;

d. Intoxication as evidence of recklessness

Proof of BAC

Jury Questions
Sentencing Issues
Merger of Offenses

;