**Delaware Defense Guide to DUI Cases**

**Disclaimer: Not all statutes and cases cited herein are verbatim, it is strongly encouraged that each attorney read the statutes and cases themselves for a more complete understanding of the law.**

**Chapter I: The Elements of a DUI Case**

**21 Del.C. § 4177**

1. **No person shall drive a vehicle. . .**
2. **When the person is under the influence of alcohol**
3. **When the person is under the influence of any drug**
4. **When the person is under the influence of a combination of alcohol and any drug**
5. **When the person’s alcohol concentration is .08% or more**
6. **When the person’s alcohol concentration is, within 4 hours after the time of driving .08% or more.**
7. **When the person’s blood contains, within 4 hours of driving, any amount of an illicit or recreational drug**

This is the basic DUI statute defining the necessary elements of a DUI. In order to secure a guilty verdict for a DUI a prosecutor must successfully prove each element. That 1) the defendant in 2) the county of New Castle, State of Delaware, was 3) driving a vehicle, 4) under the influence of alcohol or any drug.

Element 1 is the identity of the defendant and can be established by the officer on the stand testifying that the person in the courtroom is the same person he arrested on the date in question. Element 2 is the standard jurisdictional element present in any case and can be established by an officer testifying that the acts in question took place in New Castle County, State of Delaware. Elements 3 and 4 are more complex and will require longer discussions to fully understand.

1. **Driving a Vehicle – Defined**

**21 Del.C. 4177(c)**

**For purposes of . . . this title and section, the following definitions shall apply:**

**(3) “Drive” shall include driving, operating, or having actual physical control of a vehicle.**

**Definition of Operation**

“The broadest conduct that has been criminalized by the General Assembly is having actual physical control of a vehicle that is capable of being driven or operated on Delaware’s highways by a person who is under the influence of alcohol. Conversely, a person cannot be properly convicted of driving while under the influence of alcohol by having actual physical control of an inoperable motor vehicle.” *Bodner v. State*, 752 A.2d 1169, 1173 (Del. 2000).

The definition of “drive” in the statute as interpreted by the Delaware Supreme Court is broad and encompasses nearly all situations in which the defendant is in a vehicle.

**Inoperability of Vehicle**

Inoperability of a vehicle is the only situation in which the defendant can claim that he is not ‘driving’ as defined by the statute. However, temporary inoperability is not a bar to prosecution if the prosecutor can show that the vehicle could be made operable. “[T]he nature and duration of a motor vehicle’s inoperability is a factor that must be evaluated by the trier of fact . . . .” *Id.*

**Parked Vehicle**

Even a defendant in a parked car satisfies the definition of ‘drive’ under the statute.  *State v. Pritchett*, 173 A.2d 886 (Del. Super. 1961). “The well considered and reasoned cases sustain the view that a person may be convicted of ‘operating’ a motor vehicle . . . without it necessarily being shown that the automobile was actually in motion or even had the engine going . . . .” *Id.*

**Proving Operability**

Usually proving operability is simple since in most cases the arresting officer will have initiated a traffic stop and will testify that the vehicle was moving and being operated by the defendant. However in some instances, proving operability may be more difficult. The defendant may have been found in a parked car with its engine off, or more commonly, found at the scene of an accident where the defendant is standing outside of the vehicle. In these cases prosecutors will use circumstantial evidence to prove operation. *State v. Pritchett*, 173 A.2d 886 (Del. Super. 1961). “There is nothing in the statute, nor are there any reported decisions in our Courts indicating there is any limitation on the use of circumstantial evidence in cases involving charges of operating a motor vehicle while under the influence . . . .” *Id.*

**What is a ‘Vehicle’**

**21 Del.C. § 4177(c)**

**(4) “Vehicle” shall include any vehicle as defined in § 101(80) of this title, any off-highway vehicle as defined in § 101(39) of this title and any moped as defined in § 101(31) of this title.**

§ 101(80) defines a vehicle as “every device in, upon or by which any person or property is or may be transported or drawn upon a public highway, excepting devices moved by human power (Bicycling under the influence is a separate statute) or used exclusively upon stationary rails or tracks and excepting electric trackless trolley coaches, electric personal assistive mobility devices and excepting OHVs.”

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* *Bodner v. State*, 752 A.2d 1169, 1173 (Del. 2000)
* *State v. Pritchett*, 173 A.2d 886 (Del. Super. 1961) – Defendant found guilty when defendant was found asleep in driver’s seat, stopped on a public highway with engine running and lights on, but car was not witnessed moving. Circumstantial evidence can be used to prove operation by defendant.
* *State v. Baker*, 2002 WL 1288728 (Del. Super. 2002) – Defendant found guilty when defendant was in drivers seat, with keys on passengers seat and car was capable of being operated.

1. **Under The Influence - Defined**

There are two types of DUI cases, the chemical DUI and the impairment DUI. The standard DUI case involves entering into evidence the chemical test results which show the defendants blood either contained an alcohol level exceeded .08% or included drugs. The impairment DUI does not involve chemical tests and instead relies on the observations of the officer and the results of the Field Sobriety Tests (see Section III A for Field Sobriety Tests) to indicate that the defendant was not capable of safely operating a motor vehicle.

**Impairment Cases**

**21 Del.C. § 4177(a)**

1. **When the person is under the influence of alcohol**
2. **When the person is under the influence of any drug**
3. **When the person is under the influence of a combination of alcohol and any drug**

**21 Del.C. § 4177(c)**

**(5) “While under the influence” shall mean that the person is, because of alcohol or drugs or a combination of both, less able than the person would ordinarily have been, either mentally or physically, to exercise clear judgment, sufficient physical control, or due care in the driving of a vehicle.**

21 Del.C. § 4177(4) provides that a blood alcohol reading of .08% is a violation of the statute, but (1) – (3) provide that just driving under the influence is also a violation. This is the basis for the impairment case.

Prosecutors will go on Impairment cases when the chemical test does not show drugs or a blood alcohol level of .08% or greater. They are used when there is a problem with entering the chemical test into evidence. The decision about whether or not to proceed with an impairment case is in the hands of the prosecutor and will involve a weighing of the available evidence on a case by case basis. Strong field tests and good observations of the defendant will weigh in favor, while no tests and no observations obviously weigh against.

*Lewis v. State*, 626 A.2d 1350 (Del. 1993) states that while the law provides that any person operating a motor vehicle with a blood alcohol concentration of .08% or greater is guilty of the offense that “does not preclude a conviction based on other evidence.”

“The evidence must show that the person has consumed a sufficient amount of alcohol to cause the driver to be less able to exercise the judgment and control that a reasonably careful person in full possession of his or her faculties would exercise under like circumstances. It is not necessary that the driver be ‘drunk’ or ‘intoxicated.’ Nor is it required that impaired ability to drive be demonstrated by particular acts of unsafe driving. What is required is that person’s ability to drive safely was impaired by alcohol.” *Id.* at 1355.

**Negative Chemical Tests**

However, if the tests come back negative for drugs or alcohol, but the field tests were still failed, an impairment case may be impossible. Due to the fact that 21 Del.C. 4177 forbids intoxicated driving, if the tests show that the defendant was not intoxicated in any form, then the applicability of the statute would seem to be non-existent. Even if the officer testifies to impaired driving (swerving, accident, e.t.c.), and the driver failed field tests, the negative chemical tests would seem to negate the prior testimony and result in a dismissal.

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* *Bennefield v. State*, 2006 WL 528306 (Del. Super. 2006): Defendant ran a red light, admitted having done so and came to a very abrupt stop. He had glassy, bloodshot, watery eyes, and a strong odor of alcohol. He initially denied drinking and then later admitted to drinking more than the legal limit. Failed the counting test, failed the walk and turn test, failed the one leg stand, and failed the P.B.T. but passed the alphabet test. This satisfied the burden of proof for a conviction under 4177(a)(1).
* *State v. Blood*, Del. Com. Pl. 2009, J. Welch: Defendant rear-ended another vehicle at red light, defendant was unable to respond to questions or to produce documents. The defendant was extremely lethargic and could not comprehend anything. She had bloodshot and watery eyes, a strong odor of alcohol, a flushed red face and slurred, mumbly speech. There was an open and cold beer bottle in the vehicle. The defendant could not stand upon exiting the vehicle and she had urinated herself. She refused field tests and the P.B.T. and had drastic mood swings. This satisfied the burden of proof for a conviction under 4177(a)(1).
* *State v. Singleton*, 2008 WL 5160110 (Del. Com. Pl. 2008): Defendant was driving erratically, swerving nearly struck another car. Defendant appeared slumped down over steering wheel, looked asleep. He acted dazed and groggy, was unsure of surroundings. His eyes were bloodshot and glassy, face was flushed and there was an odor of alcohol. There was an open container of beer on the console. Defendant could not stand upon exiting the vehicle, his speech was slurred and his dress was sloppy. Defendant failed the H.G.N. test and refused other tests. This satisfied the burden of proof for a conviction under 4177(a)(1).

**Chemical DUI**

**21 Del.C. § 4177(a)**

**(2) When the person is under the influence of any drug**

1. **When the person’s alcohol concentration is .08% or more**
2. **When the person’s alcohol concentration is, within 4 hours after the time of driving .08% or more.**
3. **When the person’s blood contains, within 4 hours of driving, any amount of an illicit or recreational drug**

The chemical DUI involves a chemical test showing a blood alcohol level of .08% or more or an indication of drugs in the system. 21 Del.C. § 4177 can be either an impairment case or a chemical case depending on the evidence available. A test showing a blood alcohol level over the legal limit or ANY drugs will be a violation of 21 Del. C. § 4177.

Proving a chemical test involves entering into evidence the test results as well as any calibration certificates for intoxilyzer cases or having witnesses in the chain of custody testify in blood test cases. While winning a case is easier for a prosecutor, getting the results into evidence is more difficult.

**The Four-Hour Rule**

21. Del.C. 4177(a)(4) and (5) indicate there is a requirement that chemical tests be administered within four hours of driving. There is no such requirement, “[a]s long as the test, itself, is regular and the driver has not had anything else to drink, it does not matter how long after the driving the blood is drawn.” *State v. Baker*, 2009 WL 1639514 (Del. Super. 2009). “[T]he General Assembly intended to protect the public from drivers who have consumed alcohol before driving, but whose BAC levels have not yet met the proscribed level at the time of a stop. The four-hour window simply accounts for the time it takes alcohol to reach the blood stream.” *Id.*

1. **Statutory Defenses**

**21 Del.C. § 4177**

1. **In a prosecution for a violation of subsection (a) of this section:**
2. **Except as provided in paragraph (b)(3)b. of this section, the fact that any person charges with violating this section is, or has been legally entitled to use alcohol or a drug shall not constitute a defense**
3. **a. No person shall be guilty under subsection (a)(5) of this section when the person has not consumed alcohol prior to or during driving but has only consumed alcohol after the person has ceased driving and only such consumption after driving caused the person to have an alcohol concentration of .08 or more within 4 hours after the time of driving.**

**b. No person shall be guilty under subsection (a)(5) of this section when the person’s alcohol concentration was .08 or more at the time of testing only as a result of the**

**consumption of a sufficient quantity of alcohol that occurred after the person ceased driving and before any sampling which raised the person’s alcohol concentration to .08 or more within 4 hours after the time of driving.**

1. **a. No person shall be guilty under paragraph (a)(6) of this section when the person has not used or consumed an illicit or recreational drug prior to or during driving but has only used or consumed such drug after the person has ceased driving.**

**b. No person shall be guilty under paragraph (a)(6) of this section when the person has used or consumed the drug or drugs detected according to the directions and terms of a lawfully obtained prescription for such drug or drugs.**

**c. Nothing in this subsection nor any other provision of this chapter shall be deemed to preclude prosecution under paragraph (a)(2) or (a)(3) of this section.**

The defenses to a DUI charge are based around two central concepts, time and justification. Time involves a situation where a defendant consumed alcohol or drugs after driving but before being tested. Under this scenario defendant did not technically operate the vehicle while intoxicated, and therefore would not have violated the statute. Justification is used for drug use where a defendant is legally prescribed medication which was revealed in the blood test. It is important to note that this is not a defense for an impairment charge under (a)(2) or (a)(3) (see above).

In any defense to a DUI it is absolutely necessary to ensure that you are aware of the timeline. From the point of initial contact to the time the test is taken, no alcohol or drugs should be ingested. Any time in which the defendant is not in sight of the officer is time the defendant can claim he was ingesting alcohol or drugs.

Additionally, it is important to note the drugs that are being tested. If they are pharmaceutical drugs, did the defendant have a prescription? If not, then a chemical case based on (a)(6) can proceed. If the defendant did have a prescription, then the prosecutor will have to determine if the case can proceed on an impairment theory under (a)(2) or (a)(3). In other words, while the defendant may have a legal prescription for the drug, their driving may have been so impaired by their use of that drug as to violate 4177(a)(2) or (3).

**Chapter II – The Stop**

The traffic stop is the basis for almost every DUI case. For an officer to initiate a traffic stop he has to have reasonable articulable suspicion. Without it, everything that comes after is suppressed and the case is lost. The next hurdle is probable cause. Probable cause is necessary before an officer can run a chemical test. Without probable cause, the chemical test results are suppressed. The last hurdle is that the case must be proved by the state beyond a reasonable doubt. While it’s not necessary to prove a case with a chemical test, if the chemical test is suppressed for lack of probable cause, then there is no way that the case can be proved beyond a reasonable doubt using the same evidence.

1. **Reasonable Articulable Suspicion**

**11 Del.C. § 1902**

1. **A peace officer may stop any person abroad, or in a public place, who the officer has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand the person’s name, address, business abroad and destination**
2. **Any person questioned who fails to give identification or explain the person’s actions to the satisfaction of the officer may be detained and further questioned and investigated**
3. **The total period of detention provided by this section shall not exceed 2 hours. The detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime.**

Reasonable Articulable Suspicion is an exception to the fourth amendment seizure clause. If an officer has reasonable articulable suspicion to believe a crime has occurred or is occurring, he may effectuate a limited seizure to determine if that is so. In a DUI case, that seizure usually takes the form of a traffic stop. The initial stop must be justified by reasonable articulable suspicion and the subsequent detention of the defendant must be justified by reasonable articulable suspicion that the operator was driving under the influence. Upon establishing reasonable articulable suspicion, the officer may then conduct field sobriety tests to determine probable cause to administer a chemical test.

**How to Determine Reasonable Articulable Suspicion?**

The Superior Court defined reasonable articulable suspicion in *Howard v. Voshell*, 621 A.2d 804 (Del. Super. 1992) as “specific and articulable facts which, taken together with rational inferences” reasonably warrants suspicion of criminal conduct on the part of the operator. *See also Jones v. State*, 745 A.2d 856 (Del. Supr. 1999). Reasonable suspicion is a “less demanding standard than probable cause . . . .” *Woody v. State*, 765 A.2d 1257 (Del. 2001). “In determining whether reasonable suspicion exists, we must examine the totality of the circumstances surrounding the situation ‘as viewed through the eyes of a reasonable, trained police officer in the same circumstances, combining objective facts with such an officer’s subjective interpretation of those facts.” *Woody v. State*, 765 A.2d 1171, 1174 (Del. 1989).

Reasonable suspicion is not “[a]n incoherent and unparticularized suspicion or hunch of experienced police . . . .” *Harris v. State*, 806 A.2d 119 (Del. Supr. 2002). Evidence that officers were located in a high-crime, high-drug area, alone, is insufficient to constitute reasonable articulable suspicion but is a relevant contextual consideration. *State v. Roy*, Del. Super., ID No. 1009013260, Johnston, J. (March 17, 2011). There is no need to eliminate possible innocent explanations to find reasonable, articulable suspicion. *State v. Quinn*, 1995 WL 412355 (Del. Super. 1995).

**Traffic Offenses**

Traffic Offenses are the most common way an officer gains reasonable articulable suspicion. A violation of Title 21 gives the officer reasonable articulable suspicion to initiate a traffic stop. The officer may tail a vehicle for an unlimited amount of time, so long as when they make the stop, objective facts exist that create reasonable suspicion. *United States v. Padron*, 657 F.Supp. 840 (D. Del. 1987). There are a plethora of cases on Reasonable Articulable Suspicion, a few are excerpted below.

In *Warren v. State,* 385 A.2d 137 (Del. 1978) (overturned on other grounds), the Supreme Court found probable cause for an arrest, above the reasonable articulable suspicion standard, when the defendant was driving erratically and without headlights at night.

The court of common pleas has found reasonable articulable suspicion in many situations. In *State v. Bolden*, C.A. 9901017537 (CCP 2000), the court concluded that the sound of squealing tires provided sufficient reasonable articulable suspicion for the officer to believe that a motor vehicle violation had taken place. Similarly in *State v. Petrongolo*, C.A. 9902017468 (CCP 2000), the court concluded that the radar measurement of the defendants speed of 83 m.p.h. in a 55 m.p.h. zone clearly provided officer with reasonable articulable suspicion to stop the vehicle.

Civil traffic offenses (see 4179/4180 parking violations or cell phone violations), may also be the basis for reasonable articulable suspicion to make a stop. *Rickards v. State*, 2011 WL 153643 (Del. Supr. 2011).

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*Warren v. State*, 385 A.2d 137 (Del. 1978) – erratic driving of defendant, almost hit concrete abutments on side of road, provided PC to stop.

*Delaware v. Prouse*, 440 U.S. 648 (1979) – Officer stopped defendants vehicle merely to check license and registration without observing prior traffic or equipment violation. No RAS to make stop unless accompanied by more.

*State v. Godwin*, 2007 WL 2122142 (Del. Supr. 2007) – erratic driving of defendant, swerved over center line then right line while making a turn. This established reasonable articulable suspicion.

*State v. Enos*, 2003 WL 549212 (Del. Super. 2003) – Defendant asleep in vehicle at side of road, community caretaker doctrine established RAS (see below).

*Brown v. State*, 2009 WL 659070 (Del. Super. 2009) – Officer saw vehicle travelling very quickly, had six years of traffic experience, this established RAS to believe that the defendant was speeding.

*State v. Bolden*, C.A. 9901017537, Smalls., C.J. (Del. Com. Pl. 2000) – Officer heard squealing tired, effected a traffic stop. This was good RAS.

*State v. Petrongolo*, C.A. 9902017468, Smalls, C.J. (Del. Com. Pl. 2000) – Officer measured defendant going 83 in a 55, this was RAS.

**Pretextual Stops**

Pretextual stops are not always a basis for reasonable articulable suspicion in Delaware. While the Supreme Court in *Whren v. U.S.*, 517 U.S. 806 (1996) validated pretextual stops, Delaware Courts have disagreed about the applicability of *Whren*. In *State v. Heath*, 929 A.2d 390 (Del. Super. 2006), the Superior Court declined to follow *Whren* and created an analysis to be used to determine when a stop is pretextual. The Superior Court in *State v. Darling*, 2007 WL 1784185 (Del. Super. 2007), declined to follow *Heath* and instead applied *Whren*. This split has not been resolved, although the weight of case law generally supports *Whren*.

Where an officer has “reasonable suspicion or probable cause that a traffic violation has occurred, the ulterior motive of the police officer is irrelevant.” *Cohan v. Simmons*, 2011 WL 379309 (Del. Super. 2011). It’s worth bringing up where applicable to preserve the issue.

**Sobriety Check Points**

Checkpoints are frequently used by police to attempt to cut down on DUI’s in the state, but they present a Fourth Amendment problem. The U.S. Supreme Court has ruled on the constitutionality of sobriety check points and has concluded that “[s]top of automobile as part of highway sobriety checkpoint program constitutes a ‘seizure’ within the meaning of the fourth amendment.” *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990). The checkpoints forego the use of reasonable articulable suspicion when seizing drivers.

The Supreme Court has found an exception for sobriety check points but under certain conditions. “To be valid, a sobriety checkpoint program must pass this balancing test using the following factors: (1) the State’s interest in preventing accidents caused by drunk drivers; (2) the effectiveness of sobriety checkpoints in achieving that goal; and (3) the level of intrusion on an individual’s privacy caused by the checkpoints.” *Id.*

1. State’s Interest: The State has a “grave and legitimate interest in curbing drunk driving.” *Id.* at 449.
2. Effectiveness: The “degree to which the seizure advances the public interest.” *Id.* at 453. Checkpoints are set up by the police using statistics to identify high DUI incident areas. This information should be released during discovery if a checkpoint has been used in order to establish a legitimate exception to reasonable articulable suspicion. (See Discovery below).
3. Level of Intrusion: “The measure of intrusion on motorists stopped briefly at sobriety checkpoints is slight.” *Id.* at 450.

The Delaware Courts have recognized that “[r]oadblocks that do not involve the unconstrained exercise of discretion by peace officers present no per se Fourth Amendment violation.” *Howard v. Voshell*, 621 A.2d 804 (Del. Super. 1992). Furthermore, sobriety checkpoints “remain[] a legitimate tool for the enforcement of laws prohibiting driving while under the influence.” *Id.*

*State v. Stroman*, 1984 WL 547841 (Del. Super. 1984) is useful for setting forth what the requirements are for a sobriety checkpoint in Delaware.

“Pursuant to this order, the Troop Commander or someone acting in his capacity must approve the decision to conduct a roadblock at a given time and place. Selection of the location of the roadblock is based upon a demonstrated problem with drunk drivers in that particular area. Factors to be considered include alcohol related fatal accidents, alcohol related accidents and the number of DUI arrests in the area. Verification that the location chosen is a “problem area” for alcohol related incidents must be obtained from the Traffic Control Section. “

Sobriety checkpoints in Delaware are supposed to be created and operated pursuant to State Police and Office of Highway Safety policy guidelines. Any officer the State puts on the stand to establish that checkpoint requirements were met will have to testify to the State Police and Office of Highway Safety Policy guidelines. Written guidelines act as a substitute for the Fourth Amendment “reasonableness requirement” and require careful compliance. *Id*. *citing Massachusetts v. Anderson*, 406 Mass. 343, 547 N.E.2d 1134 (Mass. 1989); *Bradley v. State*, 858 A.2d 960 (Del. 2004). “These policies describe the objective criteria used to choose the location of a checkpoint, the manner of notifying officials, and the methods for conducting the roadblock. In particular, the policy addresses the visibility of roadblocks, suggested language of the officers, appropriate actions for officers in determining sobriety, and requirements for recording, compiling, and reporting results of the checkpoint. These written guidelines act as a substitute for the Fourth Amendment reasonableness requirement and require careful compliance.” *Id*. *citing Massachusetts v. Anderson*, 406 Mass. 343 (Mass. 1989).

The officer will also have to testify as to the location requirements of the checkpoint. “A sobriety checkpoint must comply with a neutral plan (here the State’s own guidelines) that limits an officer’s discretion to set the location of the checkpoint in order to comply with the Fourth and Fourteenth Amendments.” *State v. Smith,* Del. Super 2014. According to the State’s guidelines, “at least 10% of total DUI arrests must have occurred on the given roadway, or at least 5% of total DUI arrests plus at least one alcohol-related fatal or personal injury crash must have occurred on the given roadway.” Additionally, the location must be “safe” and allow traffic ample time to realize a stop is imminent.

The state will typically introduce an affidavit purporting to show DUI statistics and a newspaper clipping announcing the checkpoint. According to *State v. Smith*, this is insufficient alone to establish that the location is neutral, an officer will have to testify as to why the location was chosen and that proper procedures were followed.

If a defendant makes a U-turn before a roadblock, this alone does not constitute reasonable articulable suspicion. There must be something in addition to making the U-turn. *Howard v. Voshell*, 621 A.2d 804 (Del. Super. 1992) involves a situation in which a defendant made a U-turn 1,000ft before a sobriety checkpoint. The Superior court there found that a U-turn alone did not give rise to reasonable articulable suspicion but that it could be considered an element leading up to reasonable articulable suspicion.

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* *State v. Smith*, Del. Super 2014 – State couldn’t establish that officer was aware of why the checkpoint was located where it was, and couldn’t testify to why the checkpoint location was moved later. Stop was suppressed as a result.

**Community Caretaker Doctrine**

The community caretaker doctrine recognizes that police officers do not always act in an enforcement capacity, but also as public safety officials. “In order to balance this caretaker function with the fundamental protections guaranteed by the Delaware and United States constitution, we must ascertain that the encounter was part of the police officer’s community caretaker function; that the officer’s actions during it remained within the caretaking function; and that once the caretaking function had ceased, either the encounter was terminated or some other jurisdiction existed for its continuance.” *Williams v. State*, 962 A.2d 210, 219 (Del. 2008).

The court in *Williams* put forth a three part test for determining the extent of the doctrine:

1) objective, specific and articulable facts from which an experienced officer would suspect that a citizen is in need of help or is in peril.

2) If the citizen is in need of aid, then the officer may take appropriate action to render aid.

3) Once the officer is assured that the citizen is not in peril, or aid has been rendered, then any actions beyond that constitute a seizure implicating the fourth amendment. The officer may also make a limited request for information such as name, date of birth and drivers license.

In determining whether the community caretaker doctrine applies, consider the facts in *Williams.* There, the officer noticed the defendant walking along a highway at 3:50 A.M. on a cold and windy morning. The officer approached to offer assistance, but the defendant declined and explained that his car had broken down and he was walking to a gas station. The officer did not notice anything about the defendant during or after the encounter to create reasonable articulable suspicion. The officer asked for his name and date of birth and ran it through DELJIS and found an outstanding warrant. The defendant was then arrested. This satisfied the test created by the court.

**Anonymous Tips**

“Information received from an anonymous tip can provide a reasonable and an articulable suspicion necessary to support a motor vehicle stop.” *State v. Orfetel*, 2001 WL 34075418 (Del. Com. Pl. 2001).The court must look at the totality of the circumstances when determining if an anonymous tip provides reasonable suspicion to effect a stop. *Jones v. State*, 745 A.2d 856 (Del. Supr. 1999).

The court should look to the veracity, reliability and basis of knowledge of the tipster in determining if it establishes reasonable suspicion. If the police verify details of the call, with their observations, the call becomes more reliable. *State v. Orfetel*, 2001 WL 34075418 (Del. Com. Pl. 2001). The trial court should consider: “(1) The specificity of the anonymous tip, (2) independent police corroboration of the facts underlying the tip; and (3) the ability of the tipster to predict future behavior by the suspect.” *Id.*

An example of an anonymous tip that satisfied the requirements of *Jones* is found in *Schneider v. State*, 2010 WL 3277434 (Del. Supr. 2010). In *Schneider* the officer received an anonymous tip that defendant was drinking and driving, the tipster described the car, and physically pointed it out. The tipster also casually knew the defendant and told the officer she observed him drinking while in his car. This satisfied both the qualitative and quantitative aspects of *Jones*.

Another relevant case is *Bloomingdale v. State*, 842 A.2d 1212 (Del. 2004). The officer stopped the defendant after receiving a general radio broadcast of a possible drunk driver. The tip described the vehicle type, color, # of doors, make, specific tag and a description of the driver as a white male. The officer stopped the vehicle before observing any erratic driving, but the Court determined that the tip was specific enough and that the ‘public safety’ outweighed the “minimal intrusion imposed by the brief investigative detention” to give rise to RAS. The Court noted that forcing the officer to wait until there was unsafe driving after receiving a tip would have been unreasonable and perhaps too late.

**Investigatory Detentions**

The Fourth Amendment allows investigatory detentions with only reasonable articulable suspicion, but they “must be minimally intrusive and reasonably related in scope to the circumstances justifying the interference.” *Hicks v. State*, 631 A.2d 6 (Del. Supr. 1993). “[O]nly in very limited circumstances may the police transport a suspect from the scene without probable cause as part of an investigatory detention.” *State v. Maxwell*, 1996 WL 658993 (Del. Super. 1996).

In *Williams v. Shahan*, 1993 WL 81264 (Del. Super. 1993), the Superior Court found that removing the defendant from a roadside given the weather conditions and the darkness was necessary and reasonable because the situation presented no suitable or safe means of conducting field tests.

Transporting the defendant for the administration of chemical testing requires a showing of probable cause. *State v. Maxwell*, 624 A.2d 926 (Del. Supr. 1993).

1. **Probable Cause**

Before an arrest can take place, and a chemical test administered, the officer must have probable cause. Probable cause is “measured not be precise standards, but by the totality of the circumstances through a case by a case review of the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” *State v. Maxwell*, 624 A.2d 926 (Del. Supr. 1993). “The possibility that there may be a hypothetically innocent explanation for each of several facts revealed during the course of an investigation does not preclude a determination that probable cause exists for an arrest.” *Id.* “Mixed results in field sobriety tests do not extinguish probable cause if other sufficient factors are present.” *Perrera v. State*, 852 A.2d 908 (Del. 2004).

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*State v. Maxwell*, 624 A.2d 926 (Del. 1993) – Accident, strong odor of alcohol, defendant’s admission of driving and drinking, defendant’s dazed appearance all provided probable cause to test.

*State v. Otto*, 1993 WL 488979 (Del. Super. 1993) – Accident, odor of alcohol, slurred speech, bloodshot eyes, admission of having been to a bar established probable cause. Failure of a P.B.T., even excluding the results of a field test would establish probable cause.

*Jenkins v. State*, 970 A.2d 154 (Del. Supr. 2009) – Defendant smelled strongly or marijuana and immediately exited his vehicle after being pulled over for an inoperative light, this satisfied probable cause.

*Spinks v. State*, 571 A.2d 788 (Del. Supr. 1988) – Accident, defendant’s deliberate and unnatural movements, moderate smell of alcohol, wandering into roadway twice, established probable cause.

*Glass v. State*, 543 A.2d 339 (Del. Supr. 1988) – Accident, odor of alcohol, defendant’s confused and disoriented state sufficient to establish probable cause.

*Higgins v. Shahan*, 1995 WL 108699 (Del. Super. 1995) – Accident, bloodshot, glassy eyes, strong odor of alcohol, defendant’s admission to drinking and refusal of all field tests created probable cause.

*Esham v. Voshell*, 1987 WL 8277 (Del. Super. 1987) – speeding and odor of alcohol alone was not sufficient to establish probable cause. Passed all SFST’s, no unusual speech.

*State v. Ministero*, 2006 WL 3844201 (Del. Super. 2006) – Defendant had moderate odor of alcohol, speeding and erratic driving, defendant admitted to having had a couple of beers, and bloodshot glassy eyes was insufficient to create probable cause. Borderline P.B.T. given little weight, failed physical tests excluded because of defendants back and neck surgery, failed H.G.N. test performed in a shadowy area and given little weight.

**When Does an ‘Arrest’ Take Place?**

An arrest occurs when a reasonable person would “in view of all the circumstances . . . believe that he is not free to leave.” *State v. Rizzo*, 634 A.2d 392 (Del. 1993) (citing *Michigan v. Chesternut*, 486 U.S. 567 (1988)). A forcible detention is not an arrest, a detention is not recorded on police records and is used for questioning, not charging. *Cannon v. State*, 168 A.2d 108 (Del. 1961). However, when a police officer stops a defendant for erratic driving and then brings the defendant to the police station, the defendant was effectively under arrest. *State v. Klinehoffer*, 173 A.2d 478 (Del. Super. 1961). A driver is not immune from detention because the driver is too drunk to understand or answer the statutory questions. *Halko v. State*, 175 A.2d 42 (Del. 1961).

**How To Determine Probable Cause?**

“[i]n order to detain someone to administer field sobriety tests, an officer need only possess a reasonable articulable suspicion of criminal activity.” *State v. Kang*, 2001 WL 1729126 (Del. Super. 2001). Without reasonable articulable suspicion, the field tests may be suppressed. (See Chapter III – Motions).

**NHTSA Field Sobriety Tests**

There are three NHTSA Field Sobriety Tests, the Walk & Turn Test, the One Leg Stand Test and the Horizontal Gaze Nystagmus Test. According to NHTSA, a failure on both the Walk & Turn Test and the H.G.N. Test has an 80% accuracy in identifying subjects with a BAC over 0.10%. Correct decisions to arrest were made 91% of the time at a BAC level of 0.08% or above, with the H.G.N. test being the most reliable test.

These percentages only apply when 1) the tests are administered in the standardized manner, 2) the standardized clues are used to assess the subject’s performance, and 3) the standardized criteria are employed to interpret that performance. If any element is changed, the validity of the tests is compromised.

**Walk & Turn Test**

The Walk & Turn Test is a two part test, the first part is the instruction phase and the second part is the test phase. During the instruction phase the officer provides the defendant with instruction as to how to carry out the test. The defendant is to listen to the instructions, with their arms at their sides and their feet in a heel-to-toe position.

The second phase is the test phase where the defendant carries out the test as instructed. They take nine heel-to-toe steps, turn in a prescribed manner and take nine heel-to-toe steps back while counting all the steps out loud and watching their feet. The walk and turn test is meant to test the defendants balance, small muscle control and short-term memory.

A proper walk and turn test should include an explanation of the test by the officer to the defendant. The test should be performed on a straight line on a hard, dry surface. There should be sufficient room for the test to be conducted and it should be done in a reasonably safe area. The NHTSA standards have recognized that ideal circumstances may not always exist, but that varying environmental conditions have not been shown to affect a subject’s ability to perform the test. If the defendant is wearing shoes with heels over two inches, they should be removed prior to the test. If the defendant has a history of back problems, leg problems, inner ear problems or is over 65, this may impair the usefulness of the test results.

There are eight validated clues:

1. Inability to balance during instructions
2. Starts too soon
3. Stops while walking
4. Does not touch heel-to-toe (1/4 inch or greater)
5. Steps off line
6. Uses arms to balance
7. Loses balance on turn or turns incorrectly
8. Takes wrong number of steps

The officer is looking for two or more clues. According to NHTSA, 68% of the time a defendant who exhibits two or more clues has a BAC of 0.10% or greater.

**One Leg Stand Test**

Like the Walk & Turn Test, the One Leg Stand Test is administered in two phases, the instruction phase and the test phase. During the instruction phase, the defendant stands with their feet together, arms at their side and listens as the officer instructs them on how to perform the test.

The second phase is the test phase where the subject must raise one leg approximately six inches off the ground, toes pointed out while keeping the other leg straight and the arms at their side. While looking at the elevated foot, the subject should count out loud until instructed to stop, usually about 30 seconds. Tests have shown that impaired individuals can usually stand on one leg for up to about 25 seconds, but begin to lose balance after that. This is testing the subject’s balancing ability, small muscle control and the ability to process information.

Like the Walk & Turn Test, this test is ideally performed on a hard, flat, dry surface but once again this may not always be realistic. If the subject is wearing heels, they should be removed. People who are over 65, overweight by 50 or more lbs, or who have back, leg or inner ear problems may not be able to perform the test and the results may be adversely affected.

There are four validated clues:

1. Swaying while balancing
2. Using the arms to balance
3. Hopping
4. Putting one foot down

The officer is looking for two or more clues. Studies have shown that 65% of the time, drivers who exhibit two or more clues, or those who cannot complete the test or put their foot down more than three times during the 30-second test have a BAC of above 0.10%.

**Horizontal Gaze Nystagmus Test (H.G.N.)**

The Horizontal Gaze Nystagmus Test is a NHTSA certified Field Sobriety Test. Nystagmus is the involuntary jerking of the eyes, and it occurs when something is disrupting the central nervous system. Nystagmus can occur when alcohol disrupts the central nervous system, but it is not the only thing that can do so. Certain diseases and head trauma can exacerbate the nystagmus in the eyes. The onset of nystagmus in the eyes is completely involuntary, and can not be trained away.

Before the test is administered the officer requests that the defendant remove their glasses and asks if the defendant is wearing contact lenses. The test should not be administered if the defendant has hard contacts because there may be damage to the eyes as a result of the test. The officer positions the stimulus used in the test (usually a pen or a pointer) about 12-15 inches in front of the person’s face and slightly above eye level. The officer then moves the stimulus smoothly across the person’s entire field of vision. If the eyes don’t track together, it could indicate a possible medical disorder, injury or blindness. If the pupils are not equal in size, this could indicate a head injury.

The officer looks for a total of 6 clues during the test, 3 in each eye.

1. Lack of Smooth Pursuit – the officer moves the stimulus to the right, smoothly at a speed that requires approximately 2 seconds to bring the eye as far as it can go. The officer then moves the stimulus all the way back to the left and checks the right eye. As the eyes move side to side, the officer checks to see if they move smoothly or if they jerk noticeably.
2. Distinct Nystagmus at Maximum Deviation – the officer moves the stimulus to the right until the left eye has gone as far to the side as possible. The officer will hold this position for a minimum of 4-6 seconds and observe the eye. The officer then moves the stimulus all the way across the person’s face to check the right eye. When the eye moves as far to the side as possible and is kept at that position for 4-6 seconds, the officer is looking to see whether it jerks distinctly.
3. Onset of Nystagmus Prior to 45-degrees – the officer moves the stimulus towards the right, taking about 4 seconds for the stimulus to reach the head of the subject’s shoulder. The officer carefully watches the left eye for any sign of jerking. If the officer notices jerking of the eye, the officer should stop and verify that the jerking continues. The officer then checks the right eye. The officer moves the stimulus to the left, taking 4 seconds to reach an approximate 45-degree angle. As the eye moves toward the side, the officer is looking to see whether it starts to jerk before it has moved through a 45-degree angle.

There are 6 total clues, and if four or more clues are evident, then the central nervous system has been impaired. With four or more clues present, the H.G.N. test is 77% accurate that the defendant’s blood alcohol level is above 0.10%.

Admitting the results of an H.G.N. test at trial requires expert testimony by the officer. *State v. Ruthardt*, 680 A.2d 349 (Del. 1996) (See Discovery Chapter III below). However, for the purposes of a probable cause hearing, expert testimony is not required. *Mooney v. Shahan*, 2001 WL 1079040 (Del. Super. 2001). In order for an officer to testify as to the results at trial however, the officer must be able to lay foundation testimony. (See Appendix IV). The officer must testify as to their training and certification to administer H.G.N. tests, how an H.G.N. test is administered, and the underlying principles behind the H.G.N. test. *State v. Ruthardt*, 680 A.2d 349 (Del. 1996).

It is not necessary for the officer to testify that the test is reasonably relied upon by experts in the field as the Delaware Supreme Court has previously ruled that it is reliable so long as foundational testimony is laid. *Id.* The H.G.N. is not admissible for the purpose of quantifying a defendant’s blood alcohol level, but rather for the purpose of showing intoxication generally. *Zimmerman v. State*, 683 A.2d 311 (Del. 1997).

**Non-NHTSA Field Sobriety Tests**

In addition to the NHTSA Field Tests, officers will often conduct non-standardized tests to determine a subject’s sobriety. Some of the more common tests are the alphabet test, the counting backwards test, the finger count and the finger to nose test. The alphabet test involves reciting a portion of the alphabet, for example, D-M, without singing. The counting backwards test involves counting between a set of numbers, for example from 95-75. The finger count test has the defendant touch the top of the thumb to the tip of each finger in turn while counting down. The finger to nose test has the subject touch the tip of his nose with his forefinger.

None of these tests are certified by NHTSA, however the Courts have ruled that officers are permitted to testify about the tests and the performance of the defendant, “not as a scientifically reliable result that would definitively establish intoxication or impairment, but as part of his general overall observation of the Defendant that he used to assess whether the Defendant was driving in an impaired state . . . .” *State v. Ministero*, 2006 WL 3844201 (Del. Super. 2006). The officer can only testify as a lay person would, and can not testify as to the scientific accuracy of any tests unless proper foundation is first laid.

**Portable Breathalyzer Test (P.B.T.)**

**21 Del.C. § 4177(g)**

1. **Evidence obtained through a preliminary screening test of a person’s breath in order to estimate the alcohol concentration of the person at the scene of a stop or other initial encounter . . . shall be admissible in any proceeding to determine whether probable cause existed to believe that a violation of this Code has occurred. However, such evidence may only be admissible in proceedings for the determination of guilt when evidence or argument by the defendant is admitted or made relating to the alcohol concentration of the person at the time of driving.**

P.B.T.s are useful for determining if a person’s blood alcohol level was in excess of the legal limit. However, the results of that test have limited admissibility and can only be admitted to show that probable cause existed to test the defendant’s blood, breath or urine. P.B.T.s can be used to show guilt only if the defendant makes an argument about the blood alcohol level he had at the time of driving. In order to use a P.B.T. result in trial, the prosecutor needs to enter the calibration logs into evidence. (See Chapter III - Discovery below).

**Refusal to Take Field Sobriety Tests (FSTs)**

Defendants may refuse to take field tests, but the Prosecutor may use that refusal to show consciousness of guilt. Field testing is not mandatory, an officer may request a defendant to take field tests, a defendant may refuse. If an officer compels the defendant to take the field tests, either by instructing him do so after a refusal or informing a defendant of the consequences of a refusal, then the results of those field tests may be suppressed. *State v. Laphen*, Cr. No. 96-05-007101 (Del. Com. Pl. Dec. 23, 1996) (DiSabatino, J.); *State v. Little*, 2002 WL 31999229 (Del. Com. Pl. May 22, 2002) (Welch, J.). Refusal to take field sobriety tests can be used to support Probable Cause. *Zern v. Division of Motor Vehicles*, 1994 WL 380995, Del Pesco, J. (Del. Super. 1994). In *Zern* Probable Cause was found where 1) Defendant was speeding; 2) Defendant had an odor of alcohol; 3) Defendant had blood shot eyes; 4) Defendant talked in a ‘mush-mouthed’ manner; 4) Defendant had an open container of alcohol in vehicle; 5) Defendant acted in a belligerent manner and refused to cooperate by taking FSTs.

**When do Miranda Warnings Have to be Given? Admissions?**

Miranda warnings are required whenever there is a custodial interrogation, or arrest. Where the initial detention is for a traffic stop, the initial on-the-street questioning is not considered custodial and no Miranda warnings are required. *State v. Coyle*, 567 A.2d 870 (Del. Super. 1989). In determining whether there is a custodial interrogation the court looks to “whether an objective, reasonable person under the totality of the circumstances surrounding the interrogation would conclude that he was not free to leave.” *Marine v. State,* 607 A.2d 1185 (Del. 1992). Miranda warnings are not required when a defendant is pulled over on highway. However, in *Coyle* the court granted the defendant’s motion to suppress because the case involved an accident, not an ordinary traffic stop. The officer instructed the defendant to wait in the vehicle for 15 minutes, more time than would elapse during a brief traffic stop. The Miranda warnings should have been given.

The results of Field Sobriety Tests, Portable Breathalyzer Tests and any other chemical tests are non-testimonial in nature and therefore will not be suppressed because of a lack of Miranda warnings. *State ex rel. James C.F.*, 488 A.2d 118 (Del. Fam. Ct. 1984). Similarly, observations of the defendant, defendant’s conduct and even a refusal to take any Field Sobriety Tests or chemical tests are also non-testimonial and do not require Miranda warnings to have been given. *State v. Durrant*, 188 A.2d 526 (Del. 1963).

**Does Probable Cause Established by one Officer Transfer to Another Officer?**

Yes, if one officer observes the grounds for reasonable suspicion or probable cause, and then ‘hands off’ the case to another officer to administer the field tests or chemical tests, the probable cause or reasonable suspicion transfers. *Thomas v. State,* 2010 WL 4772155 (Del. 2010). However, it will be necessary for the State to call both officers at trial in order to establish probable cause or reasonable suspicion.

1. **Chemical Tests**

Once Probable Cause has been established an officer can administer chemical tests, either breath based (intoxilyzer), or blood based. The Defendant must consent to the administration of these tests, refusal to submit will result in a loss of license.

**Blood Cases**

**Who May Take Blood?**

21 Del.C. § 2746 limits who may draw blood to physicians, registered nurses, licensed practical nurses or other persons trained in medically accepted procedures for the drawing of blood and employed by a hospital or other health facility, acting at the request of the police officer.

**Consent?**

Consent of the defendant to take blood is required. If the defendant refuses to grant consent, then a warrant must be obtained. *Missouri v. McNeely*, 133 S.Ct. 832 (2013). The State must provide either written consent, or a warrant to draw blood prior to trial. **(See Chapter III – Pretrial Discovery)**

However, the Supreme Court did not overrule *Schmerber v. California*, 384 U.S. 757 (1966). *Schmerber* created an exigent circumstances exception to the new warrant requirement. If the Officer felt there were exigent circumstances requiring a blood draw without consent or a warrant, the Court may still admit the evidence.

**Reasonableness of Blood Draw**

Under 21 Del.C. § 2742(a) the procedures used to take blood must be ‘reasonable’. *State v. Cardona*, 2008 WL 5206771, Slights, J. (Del.Super. 2008). In determining the reasonableness of the force used, the court should consider, “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.” *Graham v. Connor*, 490 U.S. 386 (1989). In *Crespo,* the Defendant was a 5’ 3” female who was charged with a misdemeanor DUI, refused tests, and was subsequently held down by a male police officer while a phlebotomist drew blood; that was not considered unreasonable force.

**State Chemist Authentication?**

21 Del.C. § 4177(h)(1) allows for the State to admit into evidence the BAC results without the need for the State Chemist to personally testify. Only if there is a written demand by the defense for the appearance of the State Chemist will they be required to testify. Absent such a demand, made 15 days before trial, the State is under no obligation to produce the State Chemist and may admit the test results. *State v. Grenier*, 2002 WL 31111771 (Del. Super. 2002). If the defense makes a written demand for the State Chemist to testify at trial, the State Chemist’s testimony goes to chain of custody only and they may not be cross examined on other matters. *Id.* The presence of the state chemist may be requested at Case Review and as a matter of course should always be requested.

If the State Chemist is called to testify, the blood alcohol test results are admissible if they testify that they are 1) a qualified expert in testing blood by reason of experience, training and education and 2) that the machine and/or test used is one that is commonly relied upon by forensic scientists throughout the country. *Santiago v. State*, 510 A.2d 488 (Del. Supr. 1986).

The State Chemist is also presumed competent. In the absence of evidence to the contrary those responsible for services to the public will carry out their duties in a proper, careful, and prudent manner. *Judah v. State*, 234 A.2d 910 (Del. 1967).

**Intoxilyzer (Breath) Cases**

**Introducing the Results at Trial**

The only prerequisite to admission of the intoxilyzer results at trial is a certification from the State Chemist that the intoxilyzer machine was properly calibrated and operating accurately before and after the test. *Best v. State*, 328 A.2d 141 (Del. Supr. 1974). The officer who administered the test must also testify if that officer is different than the one who initiated the stop. *Morris v. Shanahan*, 1993 WL 141861 (Del. Super. 1993).

**State Chemist Authentication?**

It is unnecessary for the State chemist to testify as to the results or calibration of the intoxilyzer machine. *State v. Munden*, 891 A.2d 193 (Del. Super. 2005). “There is sound reason for this distinction between blood test and intoxilyzer tests. It has been law in the State for years that, with proper foundation, the results of an intoxilyzer test are admissible at trial without the State Chemist being present to testify about his or her calibration tests. The intoxilyzer (5000) used in the case is scientifically acceptable as a means of measuring BAC. The State Chemist does not perform the test on the driver but certifies the machine as working properly before and after the test. And there is no requirement that the chemist personally verify its accuracy at trial.” *Id.* The State will introduce intoxilyzer results at trial by using the testimony of an other qualified witness under D.R.E. 803(6).

**Other Qualified Witness’?**

In order to admit intoxilyzer results into evidence, the State must first show that the intoxilyzer was functioning properly before and after the test by admitting the intoxilyzer calibration records. The calibration records can be admitted under the business records exception to hearsay. D.R.E. 803(6). The State Chemist who performed the calibrations does not need to testify in order to admit intoxilyzer records so long as the State can produce an ‘other qualified witness’.

803(6) requires that the documents were 1) prepared in the regular course of business; 2) made at or near the time of the event; 3) the information and circumstances of recordation are trustworthy; and 4) testified to by custodian of the record or other qualified witness.

An other qualified witness may testify to the records if that witness, 1) has knowledge that the declarant had knowledge to make accurate statement; 2) that the declarant’s recording of the statements were contemporaneous with his or her actions; 3) that the declarant made the record in the regular course of business activity; and 4) that such records were regularly kept. The witness must also be able to provide foundational testimony.

In a DUI case, such foundational testimony includes testimony that the officer has had training on the administration of an intoxilyzer test from a State Chemist, has witnessed a calibration test, and is familiar with the calibration certification sheets and the State Chemist’s signature. It is not necessary that the officer have witnessed the particular State Chemist perform a calibration, merely that he has witnessed one. *Clinger v. State*, (Del. Super. 2011).

**Calibrations**

Intoxilyzers must be calibrated within a reasonable amount of time in order to be admissible. *Anderson v. State*, 675 A.2d 943 (Del. Supr. 1996). Typically intoxilyzer machines are tested once a month, but this is not always the case. The trial court may consider the frequency of calibration as a factor bearing on admissibility of intoxilyzer results only if the offer of proof is found to be unreliable because the temporal proximity of the calibration is too remote to be reasonable under the circumstances of the case. *Id.*

When confronted with an argument that the intoxilyzer calibrations are unreasonably remote, the argument is one which goes to the weight of the results, and not to admissibility. In *State v. Mitchell*, CRA Nos. S97-11-0506/0507 (Del. Super. 1998) found that a calibration testing occurring within 56 days of the previous test, in which both calibrations were good, is not unreasonable enough to suppress the test results. If either of the calibrations is bad though, then they will be suppressed and the results will be inadmissible.

**Margin of Error**

In any chemical test there is a margin for error. Occasionally it may be prudent to argue that the chemical test is insufficient to sustain a conviction because the test is outside the margin of error. *DiSabatino v. State*, 808 A.2d 1216 (Del. Super. 2002). 21 Del.C. § 4177(g) says that “the resulting alcohol or drug concentration reported when a test . . . is performed shall be deemed to be the actual alcohol or drug concentration in the person’s blood, breath or urine without regard to any margin of error or tolerance factor inherent in such tests.”

**Insufficient Sample**

Intoxilyzer tests require a certain sample size of breath to be accurate. Sometimes, the defendant will not produce enough breath and the sample size will be insufficient. The case of *State v. Dukes*, 2002 WL 31999218, Clark, J. (Del. Com. Pl. 2002) is informative because in that case the intoxilyzer reading of .146 indicated “insufficient sample-value printed was highest obtained.” The State chemist testified that the insufficient sample reading did not invalidate the reading, and that the actual reading would have been higher. The court ruled that the State provided sufficient evidence for guilt, but did not rule on the admissibility of insufficient tests, so the precedential value of the case is questionable at best. Therefore in most cases where there is an insufficient sample, the evidence will be suppressed.

**Observation Period**

For an intoxilyzer test result to be admissible, the defendant must have been observed for a full 20 minutes prior to the giving of the test to ensure that he does not belch, vomit, ingest alcohol, or do anything else that may compromise the test. *Clawson v. State*, 867 A.2d 187 (Del. Supr. 2005). Testing begins when the officer inserts the intoxilyzer card into the machine. *Id.*  Failure to constantly observe the defendant for a full 20 minutes may result in a suppression of the chemical test. *Id.* The burden for admitting the test is on the State and the defense may raise an objection to its admissibility at trial. *Id.*

**Refusal to Take Chemical Tests**

Drivers in Delaware are deemed to have given constructive consent to submit to testing for alcohol or other drugs. *Seth v. State*, 592 A.2d 436 (Del. 1991). Defendants may refuse to submit to a chemical test, but by doing so they consent to a revocation of license for at least a year. If the Defendant refuses a breath test the officer may obtain a warrant to draw blood (assuming he has probable cause) and the results will be admissible at trial. 21 Del.C. § 2740(a); *State v. Crespo*, 2009 WL 1037732, Slights, J. (Del. Super. 2009).

Refusal to take chemical tests is admissible at trial to show a consciousness of guilt. *State v. Durrant*, 188 A.2d 526 (Del. Supr. 1963). 21 Del.C. § 2749 reads: “the court may admit evidence of the refusal of a person charged with a 4177 violation to submit to a chemical test of breath, blood or urine.”

**Informed of Consequences of Refusal?**

If the driver is informed of the consequences of refusing to take a chemical test (loss of license), and then chooses to consent to that test, the results of the test are inadmissible for having been coerced. *State v. Betts*, 2009 WL 388952, Herlihy, J. (Del. Super. 2009). Additionally, if the officer informs the defendant of the consequences of refusing to take the test, and the defendant continues to resist, then the test may not be given at all, not even forcibly. 21 Del.C. § 2742(a). To summarize, the defendant should never be informed of the consequences of refusing a chemical test, doing so makes any subsequent test inadmissible at trial.

**Impairment Cases**

If the chemical tests are suppressed, the State may still proceed on an impairment theory. “The evidence must show that the person has consumed a sufficient amount of alcohol to cause the driver to be less able to exercise the judgment and control that a reasonably careful person in full possession of his or her faculties would exercise under like circumstance. It is not necessary that the driver be ‘drunk’ or ‘intoxicated’. Nor is it required that impaired ability to drive be demonstrated by particular acts of unsafe driving. What is required is that the person’s ability to drive safely was impaired by alcohol.” *Lewis v. State*, 626 A.2d 1350 (Del. 1993). **(See Chapter I – Impairment).**

**Chapter III – Pre-Trial**

1. **Jurisdiction**

**21 Del.C. § 4177(d)**

**(12) The Court of Common Pleas and Justice of the Peace Courts shall not have jurisdiction over offenses which must be sentenced pursuant to paragraph (d)(3), (4) or (9) of this section.**

DUI cases can be brought in the Justice of the Peace Court or Court of Common Pleads, and can be appealed or waived by the defense from the Justice of the Peace Court to the Court of Common Pleas. A prosecutor will have to determine if the case is a misdemeanor or a felony. A misdemeanor case is brought in the Justice of the Peace court while a felony case is brought in Court of Common Pleas before being bound over to the Superior Court. If the defendant chooses to go to trial in the Justice of the Peace Court, and loses, they have the right to appeal the decision to the Court of Common Pleas for a trial de novo.

By default, all DUI cases are Justice of the Peace court cases unless they fall under 4177(d)(3) or above. While 4177(d)(12) only lists (d)(3), (4) and (9), this has been interpreted as a typo, and naturally would include all offenses from (d)(3) up. For ease of reference, if the DUI charged is a third offense or greater, then it is a felony and should be brought in the Court of Common Pleas for a Preliminary Hearing. A first or second offense under (d)(1) and (d)(2) are misdemeanors and are therefore brought in the Justice of the Peace Court. It is not necessary for the State to include in the indictment whether the DUI charged is a misdemeanor or felony, or whether it is a first, second, third, e.t.c, offense. *Talley v. State*, 841 A.2d 308 (Del. Supr. 2003).

Occasionally a case will be brought in the Justice of the Peace Court that is actually a felony and should be brought in the Court of Common Pleas. Cases can only be nolle prosequied and recharged when there are compelling circumstances. *State v. Pruitt*, 805 A.2d 177 (Del. Supr. 2002). In the event that a case should have originally been brought as a felony charge, this constitutes compelling circumstances. If this occurs the prosecutor should dismiss the case below and reindict the case as a felony in the Court of Common Pleas.

**Amending the Indictment/Information**

Occasionally it may be necessary for the State to amend the information or indictment based on new information. Rule 7(e) permits amendment of the information or indictment at any time before verdict so long as no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced. For example in *Morris v. State*, 798 A.2d 1042 (Del. Supr. 2002), the defendant claimed he had been under the influence of prescription medication, not alcohol. The State requested and was granted leave to amend the indictment to include “under the influence of alcohol, drugs, or a combination of both.” This was deemed proper because it did not change the elements of the crime because the impairing substance is immaterial under § 4177.

**Previous Convictions**

**21. Del.C. 4177B(e)**

**(1) Prior or previous conviction or offense – For purposes of . . . §§ 4177 and 4177B of this title . . . the following shall constitute a prior or previous conviction or offense:**

**a. A conviction or other adjudication of guilt or delinquency pursuant to § 4175(b) or § 4177 of this title, or a similar statute of any state or local jurisdiction . . . .**

**c. Participation in a course of instruction or program of rehabilitation or education pursuant to § 4175(b), § 4177 or § 4177B . . . .**

21 Del.C. § 4177B(e)(1) lists three predicate offenses, a conviction under § 4175(b) (Reckless Alcohol Related), a conviction under § 4177 (DUI 1st, 2nd, 3rd, e.t.c.), or a conviction under § 4177B (First Offenders Program). Juvenile DUI’s under § 4177L are not considered predicate offenses for the purposes of § 4177. However, if a juvenile is found guilty of a DUI under § 4177 or admitted to the First Offenders Program under § 4177B, those adjudications may be considered as predicate offenses. *Lyons v. State*, 805 A.2d 902 (Del. Supr. 2002).

An occurrence of a DUI out of state also necessitates a showing that the offense in that state is similar to the offense in Delaware. 21 Del.C. 4177B(e)(1)(a). *State v. Stewart*, 2004 WL 1965986, (Del. Super. 2004) dealt with the issue directly and concluded that Florida’s DUI statute which required a blood level of .08 was similar to Delaware’s DUI statute which required a BAC of .10 or greater. The statutes need not be identical, but must be similar enough that any difference becomes unimportant. *Id.* In comparing statutes the inquiry is into the prohibited behavior, not the evidentiary standards by which the act is proven, that is relevant. *State v. Rogers*, 2001 WL 1398583 (Del. Super. 2001).

**Time Limitations on Previous Convictions**

**21 Del.C. § 4177B(e)**

**(2) Time Limitations –For the purpose of determining the applicability of enhanced penalties pursuant to § 4177 . . . the time limitations on use of prior or previous convictions or offenses . . . shall be:**

**a. . . . the second offense occurring at any time within 10 years of a prior offense**

**b. . . . the third offense occurring at any time after 2 prior offenses**

**c. For sentencing pursuant to § 4177(d)(4) of this title there shall be no time limitation and all prior or previous convictions or offenses . . . shall be considered for sentencing**

**(3) Computation of time limitations – For the purpose of computing the periods of time set out in § 4177 or § 4177B . . . the period shall run from the date of the commission of the prior or previous offense to the date of the commission of the charged offense.**

The time limits as set forth by 4177B(e)(2) are measured from the date of the first offense to the date of the newest offense. *State v. Grace*, 2001 WL 1221661 (Del. Super. 2001). This is opposed to most other statutes which measure time from the date of conviction. A defendant can only be sentenced as a subsequent offender after conviction however. So if a defendant were to be arrested and three DUI’s before a conviction on any DUI, then they would all be considered first offenses. *See Zimmerman v. State*, 693 A.2d 311 (Del. 1997). A defendant can be convicted as a subsequent offender under the DUI statute, even if the sentence for the previous offense has not yet begun. The operative event is the defendant’s prior conviction. *Baldwin v. State*, 746 A.2d 275 (Del. Supr. 2000).

1. **Plea Offers**

**First Offender’s Program (FOP)**

**21 Del.C. § 4177B**

1. **Any Person Who:**
2. **Has never had a previous or prior conviction or offense as defined in paragraph (e)(1) of this section;**
3. **Had not accumulated 3 or more moving violations within 2 years of the date of the offense in question on the person’s driving record according to the records of the Division of Motor Vehicles of the person’s state of residence**
4. **Was not, with respect to the offense in question, involved in an accident resulting in injury to any person other than the person’s own self; and**
5. **Did not have an alleged alcohol concentration of .15 or more at the time of driving or within 4 hours of driving;**
6. **Was not driving without a valid license or under a suspended or revoked license at the time of the offense in question; and**
7. **Is not subject to the enhanced penalties of § 4177(d)(10) of this title for carrying a child on or within that person’s vehicle while driving under the influence.**

**May qualify for the first offense election . . .**

Any person charged with a DUI in Delaware qualifies for the First Offender Program provided they are not disqualified by any of the above. Having a child in the vehicle, driving without a valid license, an accident involving injury, a high BAC, or a previous DUI will all disqualify a person for the First Offenders Program. However, a prosecutor may waive those disqualifiers under certain conditions and permit the person to enter into the First Offenders Program.

**21 Del.C. § 4177B**

**(f) The Attorney General may move the sentencing court to apply this section to any person who would otherwise be disqualified from consideration under this section because of the applicability of:**

**(1) Paragraph (a)(1) of this section, if any prior offense as defined in subsection (e) of this section is not within 10 years of the offense for which the person is being sentenced; or**

**(2) Paragraphs (a)(2), (a)(3), (a)(5) and (a)(6) of this section.**

**(3) Paragraph (a)(4) of this section – However, if a person has a blood alcohol concentration of .15 or greater, § 4177C(c) of this title shall apply . A person with a blood alcohol concentration of .15 or greater shall not be permitted to participate in the FOP-IID program pursuant to § 4177B(g) of this title.**

Waiver of disqualifying elements is within the discretion of the prosecutor. 4177B(f)(3) includes a waiver into the FOP-IID program if the defendant’s BAC is above .15. (See IID program below).

**Reckless – Alcohol Related (RAR)**

**21 Del.C. § 4175(b)**

**Whoever violates subsection (a) of this section shall for the first offense be fined not less than $100 nor more than $300, or be imprisoned not less than 10 nor more than 30 days, or both. . . . Whoever is convicted of violating subsection (a) of this section and who had had the charge reduced from the violation of § 4177(a) of this title shall, in addition to the above, be ordered to complete a course of instruction or program of rehabilitation established under § 4177D of this title and to pay all fees in connection therewith.**

A Reckless Driving – Alcohol Related plea is typically offered by a prosecutor when there are extraordinary circumstances such as lack of evidence, suppression of the stop or of key evidence or ‘missing witness’. An RAR is preferable to a DUI charge because there is no loss of license, however it is considered a predicate offense for the purposes of § 4177B(e). In the event the prosecutor’s case is very impaired, such as a reasonable articulable suspicion suppression, the prosecutor may offer a plea to the defendant under § 4175(a) Reckless Driving straight, instead of the alcohol related. This will not be considered a predicate offense for the purposes of § 4177B(e), but other penalties remain the same.

**Ignition Interlock Device (IID)**

**21 Del.C. § 4177F**

1. **An offender who has taken a chemical test required pursuant to § 2741 of this title and has accepted the first offense election pursuant to § 4177B of this title, or who has no prior offense who refuses a chemical test pursuant to § 2741 of this title, shall be eligible to receive an IID pursuant to this section if the offender meets the following conditions:**
2. **The offender must have had a Delaware driver’s license at the time of the offense in question;**
3. **Following revocation, the offender must complete an alcohol evaluation . . .**
4. **The offense in question may not involve death or serious physical injury to any person;**
5. **The offender’s driving privileges or license must not be currently suspended, revoked, denied or unavailable for any other violations of the law of any jurisdiction;**
6. **The offender’s driving privileges or license must not be revoked pursuant to § 1009 of Title 10 or a like provision of another jurisdiction;**
7. **The offender must either own the motor vehicle to be installed with the IID . . .**
8. **The offender must not have participated in an IID program within the immediate past 5 years or a like program in any other jurisdictions;**
9. **The offender must provide proof of insurance for any vehicle on which the IID will be installed.**
10. **The court, whether upon motion by the Attorney General or otherwise, shall not have designated the offender ineligible to be a participant; and**

**(10) The offender shall meet any other eligibility criteria established by regulations of the Division of Motor Vehicles.**

A defendant who is waived into the First Offender’s Program may also be eligible for the IID program. An IID will be issued if the prosecutor waives the defendant into the FOP program and the defendant’s BAC was above .15%. The defendant will be ineligible for an IID if the defendant does not have a Delaware driver’s license, does not own the vehicle, does not have insurance, or has participated in an IID program within the last 5 years in any other jurisdiction, among other things.

**Juvenile DUI < 21**

**21 Del.C. § 4177L**

1. **Whoever, being under the age of 21 years, drives, operates or has actual physical control of a vehicle, an off-highway vehicle or a moped while consuming or after having consumed alcoholic liquor shall have that person’s driver’s license and/or privileges revoked for a period of 2 months for the first offense and not less than 6 months nor more than 12 months for each subsequent offense. If the underage person does not have a driver’s license and/or privileges, the person shall be fined $200 for the first offense and not less than $400 nor more than $1,000 for each subsequent offense.**

A juvenile DUI is not a predicate offense for the purposes of § 4177B(e), and has lesser fines and penalties than a regular DUI. A DUI can be issued to a driver who is under 21, and a conviction of a DUI under § 4177(a), even when the defendant is under 21, will be a predicate offense. *Lyons v. State*, 805 A.2d 902 (Del. Supr. 2002). Defendants who are under 21 may request that their charge be reduced to a juvenile DUI to avoid having a predicate offense.

1. **Discovery**

Discovery for a DUI case involves considering the DUI statute itself, 4177(h), as well as Rule 16 of the Superior Court and Court of Common Pleas. The first thing to consider is, is this a blood case, a breath (intoxilyzer) case, or an impairment case? If it is a blood case, there are more specific discovery requirements the State must meet. Additionally, every DUI case will involve a standard set of discovery. This section will first go over what the standard discovery is, before going into the more specific discovery required in a blood or breath case.

**Standard Discovery**

**Rule 16**

1. **Disclosure of evidence by the State.**
2. **Information subject to disclosure.**
3. **Statements of Defendant – Upon request of defendant, the State shall make available, any relevant written or recorded statements made by the defendant or a co-defendant, within the possession, custody, or control of the State, the existence of which is known, or by the exercise of due diligence may become known to the Attorney General.**
4. **Defendant’s Prior Record – Upon request of defendant, the State shall furnish to the defendant such copy of the defendant’s prior criminal record, if any.**
5. **Documents and Tangible Objects – Upon request of defendant the State shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the State, and which are material to the preparation of the defendant’s defense or are intended for use by the State as evidence in chief at the trial, or were obtained from or belong to the defendant.**
6. **Reports of Examinations and Tests – Upon request of defendant, the State shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known to the State, and which are material to the preparation of the defense or are intended for use by the State as evidence in chief at the trial.**

Rule 16 puts forth a list of required discovery that the State must comply with. It is important to note that the obligations under Rule 16 only arise after a defendant has requested the documents. If no request is made, there is no obligation on the State to furnish the discovery except that discovery that is Constitutionally compelled.

*Jencks v. United States*, 353 U.S. 657 (1957), later adopted by the Delaware Courts in *Hooks v. State*, 416 A.2d 189 (Del. 1980), requires the State to furnish witness statements to the defense no later than after the witness has testified at trial. Requests for witness statements pre-trial can be denied, and provided at trial. Typically, it is good to request witness statement pre-trial and make a judicial efficiency claim for why they should be provided pre-trial.

*Brady v. Maryland*, 373 U.S. 83 (1963) states that any evidence that tends to be exculpatory or would impeach a State witness must be disclosed to the defendant as soon as the State receives it or else it is a violation of due process. If the evidence would change the outcome of the proceedings, it is likely to be material and exculpatory within the meaning of *Brady*. Examples of *Brady* material would be a confession of someone other than the defendant, misidentifications, grossly incorrect descriptions of defendant, material inconsistencies in witness’ statements, witness’ record of impeachable offenses and anything else that could give rise to reasonable doubt. Obviously the inquiry in *Brady* is more detailed than can be afforded here, so it is advisable that if an issue arises in which evidence may be exculpatory, that additional research into *Brady* and its progeny be conducted.

Once a defendant has been arraigned, you technically have 10 days to file a discovery request unless otherwise ordered by the court. The Court has not typically held defendants to that hard rule. Rule 16 requires that the request “shall set forth the items sought with reasonable particularity . . . .” A discovery request can not request all documents in the State’s possession because that would be too broad.

Once a request for discovery has been received, the State has 10 days to respond unless otherwise ordered by the court. Once again, the Court has not typically held the State to that hard rule. The response must either comply with the request or specify an objection to it. Additionally, “[w]hen the defense makes specific authorized discovery demands, the State should make specific and accurate replies.” *Johnson v. State*, 550 A.2d 903 (Del. 1988).

Any failure to comply with a request may result in a motion to compel, if the party requesting discovery fails to make the motion to compel, they may not later rely on the lack of discovery as a reason to dismiss. If the State informs the defense that the State has fulfilled its discovery obligation, the State cannot then claim that it was the defense’s burden to file a motion to compel when they rely on this representation. *Johnson v. State*, 550 A.2d 903 (Del. 1988). If there is a motion to compel however, and the State still fails to supply discovery, the case may be dismissed if the discovery requested is evidence necessary to the prosecution of the case. The Court may also order the evidence or testimony suppressed for lack of discovery.

Public Defender requests in DUI cases generally follow a pattern. Always request the police report of the incident, known as the AIIR. The AIIR should always be provided to the defendant. In a DUI case resulting from an accident, there should be a police report describing the events which should be provided. If a victim was injured, those medical records should be produced. Every discovery request should also include a request for the defendant’s criminal record. A copy of the defendant’s criminal record, driving history and NCIC (federal) criminal record should be provided.

Discovery requests also should include a blanket request for documents related to the case. This will include sobriety checkpoint information. **(see above, Chapter II Sobriety Checkpoints**). Failure to reply with this information could mean that at trial the checkpoint could be suppressed and the case will fail for a lack of reasonable articulable suspicion. If the checkpoint information can not be found, the prosecutor should locate the officer in charge of setting up the checkpoint and get that information as soon as possible.

The documents should also include the expert report and calibrations of any machine used. **(See Expert Reports below)**. These documents are typically not be produced, but rather are made available for inspection.

Lastly, any other violations that are included with the DUI, including speeding charges or driving while suspended or revoked, should have discovery as well. In a speeding case, the calibration logs used by the officer should be made available for inspection. **(See Expert Reports below)**. In a driving while suspended or revoked case, the defendant’s certified driving record and notice of suspension should be produced in advance of trial. It is unlikely they will be provided before trial, and there may be a discovery objection that can be made, or a continuance requested if it’s in the best interest of the client.

**Undiscoverable Information**

**Rule 16**

1. **Information not subject to disclosure – This rule does not authorize the discovery or inspection of reports, memoranda, or other internal state documents made by the Attorney General or other state agents in connection with the investigation or prosecution of the case, or of statements by state witnesses or prospective state witnesses.**

Rule 16(2) is the codification of the *Jencks* decision. Witness statements are not discoverable pre-trial and are instead given to the defense after the direct examination of the witness. Additionally, any work product of Deputy Attorney Generals is similarly undiscoverable by the defense.

Officers field notes are not discoverable in pre-trial, but instead are considered *Jencks* material and are given to the defendant after the officer’s direct examination. If the officer’s notes contain statements made by the defendant however, they must be disclosed. *Johnson v. State*, 550 A.2d 903 (Del. 1988). If the field notes are destroyed and are the basis of the A.I.I.R. that the officer makes, then those notes do not later have to be produced at all because the A.I.I.R. is considered to be representative of the notes. *State v. Noonan*, 2007 WL 1218032 (Del. Com. Pl. 2007) Welch, J. See also *Owens v. State*, 2001 WL 789647 (Del. Super. 2001).

**What About Expert Reports?**

**21 Del.C. § 4177(h)**

1. **For the purpose of introducing evidence of a person’s alcohol concentration . . . a report signed by the Forensic Toxicologist, Forensic Chemist or State Police Forensic Analytical Chemist who performed the test or tests as to its nature is prima facie evidence, without the necessity of [their] appearing in court:**
   1. **That the blood was delivered by the officer or persons state in the report; and,**
   2. **That those procedures are legally reliable;**
   3. **That the blood was delivered by the officer or persons stated in the report; and,**
   4. **That the blood contained the alcohol therein stated**
2. **Any report introduced under paragraph (1) must:**
   1. **Identify the Forensic Toxicologist, Forensic Chemist or State Police Forensic Analytical Chemist as an individual certified by the Forensic Sciences Laboratory, Office of the Chief Medical Examiner, the Delaware State Police crime Laboratory or any county or municipal police department employing scientific analysis of blood, as qualified under standards approved by the Forensic Sciences Laboratory, Office of the Chief Medical Examiner or the Delaware State Police Crime Laboratory to analyze the blood;**
   2. **State that the person made an analysis of the blood under the procedures approved by the Forensic Sciences Laboratory, Office of the Chief Medical Examiner or the Delaware State Police Crime Laboratory; and,**
   3. **State that the blood, in that person’s opinion, contains the resulting alcohol concentration within the meaning of this section.**

**Rule 16**

**(E) Expert Witnesses – Upon request of defendant the State shall disclose to the defendant any evidence which the State may present at trial under Rule 702, 703, or 705 of the Delaware Uniform Rules of Evidence. This disclosure shall be in the form of a written response that includes the identity of the witness and the substance of the opinions to be expressed.**

The defendant should also request the test results in the case. Rule 16(d) says that “[u]pon request of defendant, the State shall permit the defendant to inspect and copy or photograph any results . . . .” Test results do not have to be provided pre-trial but the defendant must be given the opportunity to inspect and copy those results.

Test results will usually include the certification sheet given by the State Chemists office that the test was done correctly, the results of the test, and in drug cases, the specific drugs found. Test results do not include the calibration records of the machine used to test the breath or blood. Therefore, calibration logs of the instrument used to test the breath or blood need not be provided in advance of trial. In the case of a P.B.T., the certification of the officer and the calibration records of the P.B.T. do not have to be made available until trial.

**What About The Chain of Custody?**

**21 Del.C. § 4177(h)**

1. **For purposes of establishing the chain of physical custody or control of evidence defined in this section which is necessary to admit such evidence in any proceeding, a statement signed by each successive person in the chain of custody that the person delivered it to the other person indicated on or about the date stated is prima facie evidence that the person had custody and made the delivery stated, without the necessity of a personal appearance in court by the person signing the statement . . . .**

Absent a showing to the contrary by the defense, the phlebotomist who drew blood is not a ‘necessary witness’ under 21 Del.C. § 4177(h)(4). *State v. Watkins*, 2006 WL 2666227, Smalls, C.J. (Del.Com.Pl. 2006). “[I]t shall not be necessary to present the testimony of, or certification by, a person who has withdrawn blood from a person pursuant to this section in order to establish chain of physical custody of such evidence.” 21 Del.C. § 2746. The burden is on the defense to show that the phlebotomist is a necessary witness. The defense may claim that the blood sample has been tampered with or is inaccurate. The State need only show by a reasonable probability that the evidence has not been tampered with. *Whitfield v. State*, 524 A.2d 13 (Del. Supr. 1987).

Where there are discrepancies in the trial testimony, the Court may sometimes find that the chain of custody has not been established. In *State v. Watkins*, 2006 WL 2666227, Smalls, C.J. (Del. Com. Pl. 2006), the court found that where the officer could not remember the taking of the blood independently, and neither the officer nor the State chemist could identify the signature on the blood sample or the documents, that the chain of custody was not established and the blood results were suppressed.

**What About Expert Witness/State Chemist?**

**21 Del.C. § 4177(h)**

1. **In a criminal proceeding the prosecution shall, upon written demand of a defendant filed in the proceedings at least 15 days prior to the trial, require the presence of the Forensic Toxicologist, Forensic Chemist, State Police Forensic Analytical Chemist, or any person necessary to establish the chain of custody as a witness in the proceeding. The chain of custody or control of evidence defined in this section is established when there is evidence sufficient to eliminate any reasonable probability that such evidence has been tampered with, altered or misidentified.**

There should be a request made to know about any expert witnesses who will be testifying at trial. 21 Del.C. 4177(h)(4) first requires a defense attorney to submit a written request at least 15 days prior to trial, requesting the presence of the Forensic Toxicologist, Forensic Chemist, State Police Forensic Analytical Chemist or any person necessary to establish the chain of custody as a witness in the proceeding. (See Chain of Custody Discussion below ). Upon receipt of that request, the State must then produce that person at trial, or file a motion contesting that request.

It is not necessary that the State produce the State Chemist in intoxilyzer cases. *State v. Munden*, 891 A.2d 193 (Del. Super. 2005). Therefore, if you request the State Chemist to testify in an intoxilyzer case, the prosecutor will object and request a proffer as to the necessity of the State Chemist.

Additionally, the officer who initiated the DUI must often testify at trial as to his training in DUI enforcement and NHTSA Field Sobriety Tests. If the officer is not listed as an expert witness in the discovery response, then his testimony as to the accuracy of the NHTSA tests may be suppressed and the weight of those tests effected by this lack of testimony.

**What if There is Lost Evidence?**

Law enforcement agencies have no duty to preserve breath samples of suspected drunk drivers in order for breath-test results to be admissible as long as those officials were acting in good faith and in accord with normal practices. *California v. Trombetta,* 467 U.S. 479 (1984).

Intoxilyzer results cards are occasionally lost, but depending on how they are lost it may not affect the outcome of the case. The State has a duty to disclose evidence within its possession, part of that includes a duty to preserve evidence. *State v. Cathcart*, 2001 WL 1482867 (Del. Super. 2001).

*State v. Deberry*, 457 A.2d 744 (Del. Supr. 1983) put forth a 3 part analysis to determine the States duty to preserve evidence. (1) Would the requested material, if in the possession of the State at the time of the defense request, have been subject to disclosure under Brady? (2) If so, did the State have a duty to preserve the material? (3) If there was a duty to preserve and the duty was breached, what consequences should flow from a breach?

If the third prong of *Deberry* is satisfied, there is another 3-prong test, (1) The degree of negligence or bad faith involve. (2) The importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available. (3) The sufficiency of other evidence produced at trial to sustain the conviction.

Where the intoxilyzer card is not lost or destroyed in bad faith, other evidence of the intoxilyzer’s card’s contents may be considered. *State v. Grivas*, 1997 WL 127005 (Del. Super. 1997).

**Discovery Violation Sanctions**

**Rule 16**

**(d)(2) Failure to Comply With a Request – If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.**

In the event discovery is improperly provided or not provided to the defense and the defense raises the issue at trial, the court has numerous remedies. Rule 16 provides “four alternative sanctions: 1) order prompt compliance with the discovery rule; 2) grant a continuance; 3) prohibit the party from introducing in evidence material not disclosed; or 4) such other order the Court deems just under the circumstances.” *Doran v. State*, 606 A.2d 743 (Del. Supr. 1992). The court will weigh all relevant factors in determining the proper sanction for a discovery violation. *Id.*  If there is late discovery, the Court may order a continuance to try and cure any prejudice to the defendant. The defense should request a dismissal as the proper remedy.

1. **Case Review**

DUI case review sets up the schedule for the case to proceed. Generally, motions are due one month before trial, and discovery is due two months for trial. (For example: Trial is June 28th, Motions Due May 28th, Discovery Due April 28th). Outstanding discovery should be requested, and the presence of the State Chemist should be noted regardless of whether the case is breath or blood.

1. **Motions**

**Rule 12**

1. **Pretrial Motions – Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:**
2. **Defenses and objections based on defects in the institution of the prosecution; or**
3. **Defenses and objections based on defects in the information (other than that it fails to show jurisdiction in the Court or to charge an offense, which objections shall be noticed by the Court at any time during the pendency of the proceedings); or**
4. **Motions to suppress evidence; or**
5. **Motions to compel discovery under Rule 16; or**
6. **Motions for severance of charges or defendants under Rule 14.**
7. **Motion Date – The motion shall be made not later than 10 days after arraignment or the Court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing.**

**(f) Effect of Failure to Raise Defenses or Objections – Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.**

In many DUI cases, it will be necessary to file pre-trial motions to suppress evidence, compel discovery or to dismiss a case. Motions must be raised pre-trial on the following matters, defenses or objections to the institution of the prosecution, defects in the information or indictment, motions to suppress evidence, motions to compel discovery and motions to sever charges. The motion is required to be filed within the motions deadline established at Case Review, but the court may entertain late filed motions. Failing to file a timely motion constitutes a waiver under Rule 12(f). In cases where the motion is made at a later date, the Court, in its discretion, may allow the motion for “cause shown” that “exceptional circumstances” existed. *Barnett v. State*, 691 A.2d 614 (Del. Super. 1997).

Exceptional circumstances may exist where the defendant later hired a defense attorney, outside of the 10 day limit. *Id.* If the defense does not have notice that suppression is an issue will also constitute exceptional circumstances. *Id.* Where the defendant had received the Alcohol Influence Report describing the location and condition of the violation, he is presumed to have sufficient notice. *Id.*

It is not unusual to have a suppression motion before the trial where reasonable articulable suspicion, probable cause and the basis for the chemical test are all admitted and decided upon. If the motion is raised during trial, the prosecutor will object based on a Rule 12 violation. *Darst v. State*, 2001 WL 312456 (Del. Super. 2001).

**Hearsay Evidence**

Suppression hearings do not follow the rules of evidence and as a result, hearsay testimony may be admitted. Although expert testimony is required for the admission of H.G.N. test results at trial, such testimony is not necessary to establish probable cause. *Mooney v. Shahan*, 2001 WL 1079040 (Del. Super. 2001).

**Chapter IV - Trial**

1. **Common Trial Issues**

**Witness (Lay Person) Opinion of Intoxication**

The trial court may admit evidence of opinion testimony of a witness and of the investigating police officer as to whether the accused was under the influence of intoxicating liquor and, therefore, unfit to operate a motor vehicle. *State v. Durrant*, 188 A.2d 526 (Del. Super. 1963). Testimony as to the NHTSA tests requires expert testimony from the officer. **(See Chapter III - Expert Witness).** However, the officer may testify as to both NHTSA tests and non-NHTSA tests, “not as a scientifically reliable result that would definitively establish intoxication or impairment, but as part of his general overall observation of the Defendant that he used to assess whether the Defendant was driving in an impaired state . . . .” *State v. Ministero*, 2006 WL 3844201 (Del. Super. 2006).

**Challenges to Previous Convictions**

**21 Del.C. § 4177B(e)**

**(5) Challenges to use of prior offenses – in any proceeding under § 2742, § 4177 or § 4177B of this title, a person may not challenge the validity of any prior or previous conviction, unless that person first successfully challenges the prior or previous conviction in the court in which the conviction arose and provides written notice of the specific nature of the challenge in the present proceeding to the prosecution at least 20 days before trial.**

In a case where the defendant has committed previous DUI’s it is not necessary for the State to admit into evidence a certified driving record for the defendant showing that prior conviction. *State v. Rogers*, CA. No. 0804005406, Welch, J. (Del.Com. Pl. 2010). Even if the prior offense occurred out of state, it is still not necessary for the State to produce a certified driving record where the conviction occurred due to reciprocal and compact agreements Delaware has with other States. *State v. Wise*, 2006 WL 2405810, Smalls, C.J. (Del.Com.Pl. 2006).

If the defendant challenges his previous DUI, the prosecutor will admit a certified driving record to prove the offense and that it occurred within the statutorily defined 10 year limit from the date of offense. *Id.*

**Confrontation Clause**

The 6th amendment of the U.S. Constitution affords to every defendant the right “to be confronted with the witness[es] against him.” *Crawford v. Washington*, 541 U.S. 36 (2004). The threshold question in a confrontation clause issue is whether the evidence or testimony being given is testimonial. *U.S. v. Hinton*, 423 F.3d 355 (3d Cir. 2005).

In a DUI case this most often appears as an issue when admitting chemical tests or testimony related to the defendant’s performance of field sobriety tests. The drawing of blood by the phlebotomist is not testimonial in nature. *State v. Watkins*, 2006 WL 2666227, Smalls, C.J. (Del. Com. Pl. 2006). Hospital records showing a defendants BAC are admissible as a business record and do not violate the confrontation clause. *State v. Osorto*, 2010 WL 3528901 (Del. Super. 2010) *reaffirming McLean v. State*, 482 A.2d 101 (Del. 1984). While Field Sobriety Test results are also non-testimonial and do not violate the confrontation clause, the officer who administered them will often be present at trial for cross-examination. *State ex rel. James C.F.*, 488 A.2d 118 (Del. Fam. Ct. 1984).

**Speedy Trial Clause**

The 6th amendment also grants defendants the right to a speedy and public trial. The United States Supreme Court has established four factors for determining if there has been a violation of this constitutional right: (1) the length of the delay, (2) the reason for the delay, (3) the defendant’s assertion of the right to a speedy trial, and (4) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514 (1972). The speedy trial clock begins ticking once a defendant is arrested or indicted. *Id.* No specific amount of time automatically violates the right to a speedy trial, but if the elapsed time has been long enough, it is presumptively prejudicial. *Dabney v. State*, 953 A.2d 159 (Del. 2008).

The Delaware Supreme Court has found that a delay of 234 days between arrest and trial was presumptively prejudicial. *Id.* However, the Superior Court has found that a delay of 7 months between indictment and trial was not presumptively prejudicial. *Baker v. State*, ID No. 0803038600 (Del. Super. 2009). The court placed heavy emphasis on the fact that the defendant was not incarcerated during this time and therefore it was less prejudicial. In many DUI cases, the defendant will not be incarcerated pending trial. Also, a major component of speedy trial decisions is the actual prejudiced suffered by the defendant. *Barker v. Wingo*, 407 U.S. 514 (1972). If the defendant can not point to some defect in his case as a result of the delay, then any prejudice that results from the length of time would be minimal. Usually actual prejudice will take the form of lost evidence or witnesses.

**Chapter V – Post-Trial**

1. **Sentencing**

**Reckless – Alcohol Related (RAR)**

**21 Del.C. § 4175(b)**

**Whoever violates subsection (a) of this section shall for the first offense be fined not less than $100 nor more than $300, or be imprisoned not less than 10 nor more than 30 days, or both. For each subsequent like offense occurring within 3 years of a former offense, the person shall be fined not less than $300 nor more than $1,000, or be imprisoned not less than 30 nor more than 60 days, or both. No person who violates subsection (a) of this section shall receive a suspended sentence. However, for the first offense, the period of imprisonment may be suspended. Whoever is convicted of violating subsection (a) of this section and who has had the charge reduced from the violation of § 4177(a) of this title shall, in addition to the above, be ordered to complete a course of instruction or program of rehabilitation established under § 4177D . . .**

Reckless Alcohol Related can be found under § 4175(b) which indicates the fines, $100 – $300 for a first offense, $300 – $1,000 for a subsequent offense within 3 years. Additionally, because the charge is reduced from a DUI under § 4177(a), the defendant must take a DUI rehabilitation course. **(See Chapter III – RAR)**.

**First Offender’s Program (FOP)**

**21 Del.C. § 4177B**

1. **The court, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place the accused on probation upon terms and conditions, including enrollment in a course of instruction or program of rehabilitation established pursuant to § 4177D of this title. If the accused elects to apply, the application shall constitute a waiver of the right to a speedy trial. . . . If a person applies for or accepts the first offense election . . .such act shall constitute agreement to pay the costs of prosecution . . . and the court shall assess such costs and impose them as a condition of probation.**
2. **The driver’s license and/or driving privileges of a person applying for enrollment in an education or rehabilitation program pursuant to subsection (a) of this section shall forthwith be revoked by the Secretary for period of 1 year.**

The First Offender’s Program is offered to all drivers who meet the criteria established by § 4177B. **(See Chapter III – FOP**). There is no jail time or fines, but there is a cost of prosecution, $250 that must be paid in addition to court costs. The defendant will also have to pay for the DUI rehabilitation course they must take. A defendant’s license will also be revoked under § 4177B(d) for a year, but the defendant can receive the license back after 6 months so long as the rehabilitation course is completed and can receive a conditional license after 3 months under § 4177E. If one is adjudicated delinquent for a DUI-FOP as a juvenile, this is still considered a predicate offense. *Lyons v. State*, 805 A.2d 902 (Del. Supr. 2002).

**Ignition Interlock Device (IID)**

**21 Del.C. § 4177F**

**(e) The initial payment shall include the installation cost and 2 months’ lease for a minimum charge and a minimum down payment of $180. The participant shall thereafter make payments every 2 months for the lease of the equipment in the amount of $110 until the balance is paid.**

**(f) A participant’s license revocation imposed by law shall automatically be suspended upon the participant’s entry into the IID Program and shall be suspended for the duration thereof.**

**(1) If the revocation period suspended is 12 months, and the participant has elected the FOP-IID Diversion . . . the participant’s voluntary revocation period is 12 months and the participant may receive an IID license after 1 month.**

**(2) If the revocation period suspended is 12 months, and the participant has no prior offense but has refused a chemical test required pursuant to § 2741 of this title, the participant’s voluntary revocation period is 14 months, and the participant may receive an IID license after 2 months.**

The IID is attached to a defendant’s car and requires the defendant to blow into a breathalyzer before the car can be started. Under an IID program, the defendant can receive a license at an earlier time, but in exchange will have to pay a higher fee in order for the IID to be installed.

**DUI 1st**

**21 Del.C. § 4177(d)**

1. **For the first offense, be fined not less than $500 nor more than $1,500 or imprisoned not more than 6 months or both, and shall be required to complete an alcohol evaluation and a course of instruction . . . [a]ny period of imprisonment imposed under this paragraph may be suspended**

**21 Del.C. § 4177A(a)**

**The secretary shall forthwith revoke the driver’s license and/or driving privileges of any person convicted of a violation of § 4177 of this title . . .**

1. **First offense – 12 months, except that if the offender’s BAC was between .15 - .19% the revocation period shall be 18 months, or if the offender’s BAC was .20% or greater or the offender refused a chemical test, the period of revocation shall be 24 months.**

**DUI 2nd**

**21 Del.C. § 4177(d)**

1. **For a second offense, be fined not less than $750 nor more than $2,500 and imprisoned not less than 60 days nor more than 18 months. The minimum sentence for a person sentenced under this paragraph may not be suspended.**

**21 Del.C. § 4177A(a)**

1. **Second offense – 24 months, except that if the offender’s BAC was between .15 - .19% the revocation period shall be 24 months, or if the offender’s BAC was .20 or greater, or the offender has refused a chemical test, the revocation period shall be 30 months.**

**DUI 3rd**

**21 Del.C. § 4177(d)**

1. **For a third offense, be guilty of a class G felony, be fined not less than $1,500 nor more than $5,000 and imprisoned not less than 1 year nor more than 2 years. . . . [T]he first 3 months of the sentence shall not be suspended, but shall be served at Level V and shall not be subject to any early release . . .**

**21 Del.C. § 4177A(a)**

**(3) Third Offense – 24 months, except that if the offender’s BAC was between .15 - .19% the revocation period shall be 30 months, or if the offender’s BAC was .20 or greater, or the offender has refused a chemical test, the revocation period shall be 36 months.**

**DUI 4th**

**21 Del.C. § 4177(d)**

1. **For a fourth offense occurring any time after 3 prior offenses, be guilty of a class E felony, be fined not less than $3,000 nor more than $7,000 and imprisoned not less than 2 years nor more than 5 years.**

**21 Del.C. § 4177A(a)**

**(4) Fourth or further subsequent offenses – 60 months regardless of the BAC.**

**DUI 5th**

**21 Del.C. § 4177(d)**

1. **For a fifth offense occurring any time after 4 prior offenses, be guilty of a class E felony, be fined not less than $3,500 nor more than $10,000 and imprisoned not less than 3 years nor more than 5 years.**

**21 Del.C. § 4177A(a)**

**(4) Fourth or further subsequent offenses – 60 months regardless of the BAC.**

**DUI 6th**

**21 Del.C. § 4177(d)**

1. **For a sixth offense occurring any time after 5 prior offenses, be guilty of a class D felony, be fined not less than $5,000 nor more than $10,000 and imprisoned not less than 5 years nor more than 8 years.**

**21 Del.C. § 4177A(a)**

**(4) Fourth or further subsequent offenses – 60 months regardless of the BAC.**

**DUI 7th**

**21 Del.C. § 4177(d)**

1. **For a seventh offense occurring any time after 6 prior offenses, or for any subsequent offense, be guilty of a class C felony, be fined not less than $10,000 nor more than $15,000 and imprisoned not less than 10 years nor more than 15 years.**

**21 Del.C. § 4177A(a)**

**(4) Fourth or further subsequent offenses – 60 months regardless of the BAC.**

**Juvenile DUI < 21**

**21 Del.C. § 4177L**

1. **Whoever, being under the age of 21 years, drives, operates or has actual physical control of a vehicle, an off-highway vehicle or a moped while consuming or after having consumed alcoholic liquor shall have that person’s driver’s license and/or privileges revoked for a period of 2 months for the first offense and not less than 6 months nor more than 12 months for each subsequent offense. If the underage person does not have a driver’s license and/or privileges, the person shall be fined $200 for the first offense and not less than $400 nor more than $1,000 for each subsequent offense.**

A Juvenile DUI is not a predicate offense for the purposes of § 4177B(e), and the fines are less than would be paid under a DUI 1st. A Juvenile DUI is not eligible for the First Offender’s Program. A DUI can be given to a driver who is under 21, and it can be amended down to a juvenile DUI if the prosecutor feels it is warranted. **(See Chapter III – Juvenile DUI)**.

1. **Appeals**

**10 Del.C. § 9902**

1. **The State shall have an absolute right to appeal to an appellate court a final order of a lower court where the order constitutes a dismissal of an indictment or information or any count thereof . . .**
2. **When any order is entered before trial in any court suppressing or excluding substantial and material evidence, the court, upon certification by the Attorney General that the evidence is essential to the prosecution of the case, shall dismiss the complaint, indictment or information or any count thereof to the proof of which the evidence suppressed or excluded is essential.**
3. **The State shall have an absolute right of appeal to an appellate court from an order entered pursuant to subsection (b) of this section and if the appellate court upon review of the order suppressing evidence shall reverse the dismissal, the defendant may be subjected to trial.**

The State does not have a right to appeal an acquittal, but the State does have the right to appeal a dismissal of the lower court. When evidence is suppressed, the State must certify that the suppressed evidence is necessary or essential to the prosecution of the case and the Court will then dismiss, creating an issue for appeal. *State v. Cooley*, 430 A.2d 789 (Del. 1981). If the State does not certify the suppression as necessary the Appellate Court will have to determine if the suppressed evidence was necessary, if it was not then the order to suppress is not appealable. *State v. Munden*, 883 A.2d 881 (Del. Super. 2005). The certification of the suppressed evidence need not be written and can be made by an oral motion. *Id.*  Additionally the certification need not be made at the time of the ruling, but must be made within 30 days of the entry of the order. Rule 12(e).

If the lower court dismisses the action, but calls the dismissal an acquittal, the Appellate Court will have to determine which it is. “To properly determine what ‘constitutes a dismissal’ under Section 9902(a), an appellate court is required to make a two-step inquiry. ‘First, had jeopardy attached and second, [if jeopardy had attached], what was the basis for the [trial court’s] decision?” *State v. Pusey*, 600 A.2d 32 (Del. 1991). Jeopardy alone does not invalidate an appeal, because the State may still prosecute the case because the termination of the prosecution was improper. 21 Del.C. § 207(4). If the dismissal is a substantive judgment of acquittal, then the State does not have a right to appeal. *Pusey*, 600 A.2d 32.

If there is a suppression of evidence and if that evidence is necessary to continue prosecution of then the prosecutor should certify that the evidence is essential to the prosecution of the case, the Court will then dismiss the case and the appeal is perfected under 10 Del.C. § 9902.

**Appendices**

**Appendix I – 21 Del.C. § 4177**

**Appendix II – Rule 12 & Rule 16**

**Appendix III – Discovery Checklist**

**Appendix IV – Sample AIIR**

**Appendix V – DUI Trial Questions**

**Appendix VI – Library of Cases**