

APPENDIX S

SAMPLE QUESTIONS UPON DWI DISMISSAL

MEMORANDUM

TO: MUNICIPAL COURT JUDGES

FROM: PHILIP S. CARCHMAN, J.A.D.

**SUBJECT: SAMPLE QUESTIONS FOR USE IN DRUNK DRIVING DATE:
DECEMBER 2, 2004**

Attached is a series of sample questions that a judge should ask on the record when a prosecutor has moved to dismiss or amend a drunk driving charge (N.J.S.A. 39:4-50, driving while intoxicated). The Conference of Presiding Judges-Municipal Courts developed these questions, which are designed to establish a record and thereby prevent an improper dismissal or amendment of a N.J.S.A. 39:4-50 charge. These questions are intended as a guide, so you need not ask the prosecutor the questions exactly as written. You are expected, however, to ask these or similar questions and any additional questions necessary to establish, on the record, the prosecutor's detailed reasons for requesting a dismissal or amendment.

If you have any questions about this memorandum, please contact your Vicinage Municipal Court Presiding Judge or Municipal Division Manager.

SAMPLE QUESTIONS ON MOTIONS BY PROSECUTOR TO DISMISS OR AMEND A DRUNK DRIVING CASE

The following are sample questions that Municipal Court Judges should consider in questioning the municipal prosecutor when the prosecutor seeks to dismiss or amend a drunk driving offense.

1) Why do you wish to dismiss or amend the charges?

A general statement by the prosecutor that asserts only a conclusion that the State cannot prove the charge beyond a reasonable doubt is insufficient. The prosecutor must state on the record the specific reasons why the case cannot be proven beyond a reasonable doubt. The prosecutor should provide the Court with a detailed explanation of the reasons the case cannot be proven. For example, the prosecutor saying, "I cannot prove operation," is insufficient. The prosecutor needs to set forth, on the record, specific reasons why operation cannot be proven. The Court should be prepared to question the prosecutor in detail on any assertion made by the prosecutor.

2) Did you review the police reports and any videotape and discuss the case with the arresting police officer?

If the prosecutor indicates that the police reports were not reviewed or that the police officer had not been consulted, the Court should refuse to entertain the motion to dismiss or amend, until the prosecutor has indicated, on the record, that the police report was reviewed and the arresting officer was consulted.

3) The Court should be provided with specific facts to support the prosecutor's position that the charges cannot be established beyond a reasonable doubt. In exploring these facts, the Court should consider asking the following questions:

a) If the operation cannot be proven, why not? Did the officer observe operation? Are there any witnesses who observed operation? Did the defendant make any admissions as to operation? Can the State seek to prove operation through any circumstantial evidence?

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b) Is there a blood alcohol reading? If yes, why does the prosecutor believe it cannot be introduced in evidence? The prosecutor should place on the record the specific facts as to why the reading cannot be introduced into evidence. For example, a conclusion by the prosecutor that the machine is defective or there was a problem with the before or after test is insufficient. The prosecutor must state specific facts as to why the test is defective.

c) If the prosecutor indicates that the reading is defective, then the Court should closely examine the prosecutor as to whether the charges can be proven without a blood alcohol reading. In examining the prosecutor in this regard, the Court should ask about the facts of the stop (i.e. the observations of operation observed by the officer, the defendant's conduct on the stop, [i.e. physical appearance and demeanor], the defendant's ability to perform psychophysical tests at the scene and at the police department, the defendant's admissions as to consumption of alcohol).

4) If the prosecutor seeks to dismiss or amend based on a defense experts report, the Court should closely question the prosecutor as to whether the State will be able to produce an expert to counter the defense expert. The Court should also be informed of the conclusions reached in the defense expert's report.

5) Is the application to dismiss or amend the case the result of a plea bargain where the defendant has agreed to plea to some other charge in return for the prosecutor dismissing or amending the charges?

Pursuant to Rule 7:6-2, any plea agreement must be in accordance with Guidelines for Operation of Plea Agreements in the Municipal Courts of New Jersey. These Guidelines specifically prohibit a plea agreement in cases under N.J.S.A. 39:4-50.