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State vs _____ Defendant	MUNICIPAL COURT of _____

POINT I

The Court Should Dismiss Complaints Against Defendant When the State is Not Ready to Proceed or Discovery Not Provided.

Preparation of the State's case is clearly a prosecutorial function and is a responsibility that cannot be shifted to others. Any attempt by the prosecutor to place this function upon the clerk, who is an impartial judicial officer, is improper. *State v. Perkins,* 219 *N.J. Super.* 121, 125, 529 A.2d 1056 (Law Div. 1987). In *State v. Polasky*, 216 *N.J. Super.* 549 (Law Div 1986) Judge Haines discussed the municipal prosecutor's role in connection with discovery, and added:

There is further reason for requiring the prosecutor to be responsible. In our court system, the prosecutor, contrary to an ordinary advocate, has a duty to see that justice is done. *State v. D'Ippolito*, 19 N.J. 450, 549-550 [117 A.2d 592] (1955). He is not to prosecute, for example, when the evidence does not support the State's charges. Consequently, the prosecutor has an obligation to defendants as well as the State and the public. Our discovery rules implicate that obligation, an obligation which can be discharged by no one else. [216 *N.J. Super.* at 555, 524 A.2d 474]

As set forth in State v Prickett; 240 NJ Super 139, 146 (App. Div 1990), it is the municipal prosecutor who selects the State's witnesses, requests postponements for the State, complies with discovery rules, requests dismissal if the State cannot make out a case, and does all else necessary to prepare and present the State's cases in the

municipal court. *See also* Position 3.11, "The Role of the Prosecutor, *Report of the Supreme Court Task Force on the Improvement of Municipal Courts* (1985)".

R. 1:2-4(a) provides for payment of costs to an adverse party as a condition of adjournment even where the State is the offending party in a criminal action. *State v. Audette,* 201 *N.J. Super.* 410, 493 A. 2d 540 (App. Div. 1985).

In Prickett, supra the Appellate Division agreed with the Law Division judge that the case should be remanded to the municipal court for determination and imposition of appropriate costs and for trial within 45 days of the date of this opinion.

A party has failed to comply with this Rule [a discovery request] or with an order issued pursuant to this Rule, it may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems appropriate. State v Prickett 240 NJ Super 139, 145 App. Div (1990)

We have the problem of a part-time municipal prosecutor responsible for preparing cases for trial who abandons a prosecutorial function to the municipal court clerk who assumes it. R. 1:9-1 indicates that the court clerk may issue a subpoena, but makes no provision for service by the court clerk nor does it give the clerk the authority to excuse any witness absent instructions from the municipal court judge. The municipal court clerk should not become involved in the preparation of the State's case. See *N.J. Municipal Court Clerks' Manual,* §2.3, pp. 69-70 (A.O.C. 1985) which states:

"The municipal prosecutor has the responsibility for determining what witnesses he wants and of preparing his own subpoenas. However, if the municipal prosecutor lacks secretarial help, court personnel may *assist* in typing the subpoenas." State v Prickett 240 NJ Super at 145. However, the court should not ever act as the prosecutor's assistant. The court must be neutral.

If the state is not prepared, the charges should be dismissed or state sanctioned. Because the State is the municipal prosecutor's client, a failure to discharge the obligations of his office is a violation of a prosecutor's professional responsibility to represent the client diligently. When a prosecutor has available

relevant evidence bearing on a prosecution, and the prosecutor's failure to present that evidence in the course of trial results in acquittal, that prosecutor has not diligently discharged his or her duty to prepare and present the State's case. Furthermore, when the failure to prepare for trial and present relevant evidence prejudices the State's case, the prosecutor's deviation from that duty may be so severe as to constitute gross negligence. Matter of Segal 130 NJ 468 (1992)

Furthermore, "delay occasioned by the courts must be charged against the State, not the defendant." *State v Perkins*, 219 *NJ Super*. 121, 127 (Law Div 1987). "The court is one part of our tripartite system of government. Its failures cannot be permitted to injure a defendant who had nothing to do with them and no control over them." *Id.* at 127.

When a Prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable. United States v Agurs 427 US 97, 106, 98 S. Ct. 2392, 2399, 49 L Ed 2d 342 (1976)

POINT II

CHARGES SHOULD BE DISMISSED IF SPEEDY TRIAL VIOLATED

In a DWI case, State v. Farrell _NJ Super _ (App. Div 1999) a DWI conviction was reversed and case dismissed based on speedy trial violation. The court held: "Excessive delay in completing a prosecution can potentially violate a defendant's constitutional right to a speedy trial as a matter of fundamental fairness, apart from whether double jeopardy standards have been contravened. Id. at 354-55. In cases arising from municipal court DWI prosecutions, just as with criminal prosecutions, consideration whether the right to a speedy trial has been violated is guided by the four factors announced in Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed.2d 101, 117-18 (1972). Gallegan, supra, [117 NJ 345, 1989] 117 N.J. at 355; State v. Prickett, 240 N.J. Super. 139, 143 (App. Div. 1990)." Farrell, supra.

Specifically, the court must engage in a multi-element balancing process of the four factors: the length of the delay, the reasons for the delay, whether the defendant asserted his right to speedy trial, and any prejudice to the defendant occasioned by the delay. Gallegan, supra, 117 N.J. at 355; State v. Marcus, 294 N.J. Super. 267, 293 (App. Div. 1996), certif. denied, 157 N.J. 543 (1997). State v Farrell NJ supra.

Delay caused or requested by the defendant is not considered to weigh in favor of finding a speedy trial violation. Gallegan, supra, 117 N.J. at 355; Marcus, supra, 294 N.J. Super. at 293. Further, because the evaluative process involves a balancing of considerations, if the other factors weigh heavily enough, a speedy trial violation can be established without an affirmative showing of prejudice to the defendant. See State v. Smith, 131 N.J. Super. 354, 368 n.2 (App. Div. 1974), aff'd o.b., 70 N.J. 213 (1976).

In a related vein, the defendant's demonstration of prejudice is not strictly limited to a "lessened ability to defend on the merits." Ibid. Rather, prejudice can be found from a variety of factors including "employment interruptions, public obloquy, anxieties concerning the continued and unresolved prosecution, the drain on finances, and the like." Ibid. (citing Moore v. Arizona, 414 U.S. 25, 94 S. Ct. 188, 38 L. Ed.2d 183 (1973)), cited by State v Farrell, supra.

The New Jersey judiciary is, as a matter of policy, committed to the quick and thorough resolution of DWI cases. In 1984, Chief Justice Wilentz issued a directive, later echoed in Municipal Court Bulletin letters from the Administrative Office of the Courts, that municipal courts should attempt to dispose of DWI cases within sixty days. See State v. Fox, 249 N.J. Super. 521, 523 & n.1 (Law Div. 1991); State v. Perkins, 219 N.J. Super. 121, 124 (Law Div. 1987).

In Perkins, supra, defendant was charged with DWI on October 10, 1986, following a car accident in which only he was injured. 219 N.J. Super. at 122. Defendant first appeared in municipal court on December 4, 1986, but the State was not prepared to proceed and sought a continuance. Id. at 123. The trial was reset for January 8, 1987, and the municipal court judge stated that defendant would be entitled to a dismissal if the State was not ready to prosecute. Ibid. Nevertheless, even though the State was not prepared on January 8 due to a change of prosecutor and subpoena problems, the municipal court denied defendant's motion to dismiss. Perkins at 123-24.

On appeal, in Perkins the Law Division dismissed the complaint against defendant. Id. at 124. After first noting the Supreme Court's sixty-day directive, the judge stressed that the municipal court had promised that the case would be tried or dismissed on that date. Id. at 124-25. He stated that "[a] court's promise is sacrosanct" and must be honored. Id. at 125. Accordingly, the municipal court's denial of defendant's motion to dismiss was evaluated as "an arbitrary, and therefore improper" exercise of discretion. Ibid. The municipal court's promises aside, the Law Division judge added, a substitution of prosecutor and failure to subpoena witnesses and otherwise prepare the State's case could not justify the second adjournment. Ibid.

As a general rule in applying the evaluative features of the four-part test of Barker in fundamental fairness terms, delays of scheduling and other failures of the process for which the trial court itself was responsible are attributable to the State and not to the defendant. 407 U.S. at 531, 92 S. Ct. at 2192, 33 L. Ed. 2d at 117

Moreover, prejudice to a defendant resulting from delay is no longer confined to inability or lessened ability to defend on the merits. Prejudice can also be found from

employment interruptions, public obloquy, anxieties concerning the continued and unresolved prosecution, the drain on finances, and the like. Moore v. Arizona, supra. [Smith, supra, 131 N.J. Super. at 368 n. 2.]

"A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process. Moreover ...society has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest." *State v Perkins, supra* at 127, quoting *Barker v Wingo, supra,* 497 *U.S.* at 527.

POINT III

The state's charges for discovery is in violation of State v Green 327 NJ Super 334 (App. Div 2000)