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Garden State CLE Presents:

**New & Successful Defenses to DWI and Refusal
Cases**



Lesson Plan

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Part I – Refusal Defenses

Refusal – Elements of Offense

A careful reading of the two statutes reveals four essential elements to sustain a refusal conviction:

- (1) the arresting officer had probable cause to believe that defendant had been driving or was in actual physical control of a motor vehicle [on the public road, street, highway or quasi-public area of this State] while under the influence of alcohol or drugs;**
- (2) the defendant was arrested for driving while intoxicated;**
- (3) the officer requested defendant to submit to a chemical breath test and informed defendant of the consequences of refusing to do so [in a language the defendant can understand while sober] and**
- (4) the defendant thereafter refused to submit to the test.**

State v. Marquez, 202 NJ 485, 503 (2010) [Modifies elements in State v. Wright, 107 NJ 488, 490 (1987), NJSA 39:4-50.2 and NJSA 39:4-50.4a.

Refusal in Commercial Motor Vehicles – Elements of Offense

[We] conclude that the CDL refusal statute requires proof of these elements: (1) the arresting officer had probable cause to believe that the driver was operating or in physical control of a commercial vehicle [on a public road, street, highway or quasi-public area] while having a BAC of .04% or higher; (2) the driver was arrested for a violation of the CDL DUI statute; (3) the officer requested the driver to submit to a breath test and advised the driver of the legal consequences that are specifically applicable to CDL refusal [in a language the defendant can understand while sober]; and (4) after receiving this advice, the driver refused to take the breath test.

State v. Nunnally, 420 NJ Super. 58, 72-73 (App. Div. 2011)

Paragraph 36

[January 2004 -April 2004 - July 1, 2012]

It is highly doubtful that defendant would have been more likely to feel impelled to give a breath sample if advised that the minimum penalty entailed one additional month's revocation and an additional fifty dollars for a fine and that he faced the possibility of a \$2,000 fine rather than a \$1,000 fine. However, we judge the adequacy of the statement read to him not based upon its likelihood to affect his actions but rather, whether it satisfied the legislative mandate.

In *Marquez, supra*, the Supreme Court stated that “reading the standard statement is an element of a refusal offense.” This conclusion is supported by the plain language of the statute. [N.J.S.A. 39:4–50.4a\(a\)](#) sets forth the elements that must be proven by a preponderance of the evidence to sustain a refusal conviction, which include “whether the defendant refused to submit to the test upon request of the officer[.]” The statute states explicitly, “if these elements of the violation are not established, no conviction shall issue.”

In addressing the question of what “must be read to a defendant in the way of a Standard Statement before a refusal conviction will lie[.]” the Supreme Court stated that the answer “is provided in the refusal statute itself[.]” which “explicitly provides” that the police officer inform the person arrested of the consequences of refusing to submit to the test and requires that a “ ‘standard statement,’ “ now prepared by the Attorney General, “ ‘shall be read by the police officer to the person under arrest.’ The Court concluded that, to satisfy the statutory mandate, the Standard Statement must “clearly delineate[] the penalties for a refusal.”

Here, the fatal flaw in the Standard Statement read to defendant was that it provided inaccurate information about the penalties he faced and therefore, did not clearly delineate the penalties for a refusal. Pursuant to *Schmidt*, the Standard Statement did not satisfy the statutory mandate and, consequently, this essential element of a refusal conviction was not proven.

State v. O’Driscoll, 2012 WL 652636 Certification granted September 25, 2012 (State v. O’Driscoll, 212 NJ 199 (2012))

Paragraph 36- Commercial Vehicles

Because CDL refusal is not a lesser included offense of general refusal, we agree that the State was precluded from amending the complaint to charge CDL refusal after the statute of limitations expired. We also hold that the driver of a commercial vehicle who is arrested and charged only with CDL DUI, [N.J.S.A. 39:3-10.13](#), and who thereafter refuses a breath test, may only be charged under the cognate CDL refusal statute, [N.J.S.A. 39:3-10.24](#), and may not be prosecuted under the general refusal statute, [N.J.S.A. 39:4-50.4a](#). Therefore, we affirm the decision of the Law Division.

For future guidance, we note that a commercial vehicle driver whose conduct violates both the general and CDL DUI statutes may be arrested and charged under both statutes. If the driver then refuses a breath test after being advised of the consequences of refusal pertaining to both statutes, the driver may also be charged under both refusal statutes. Finally, if law enforcement perceives potential difficulties in enforcing the CDL DUI statute, because it prohibits driving with a BAC of .04% or higher but does not specifically prohibit “driving under the influence of intoxicating liquor,” those concerns should be directed to the Legislature.

State v. Nunnally, 420 NJ Super. 58, 62-63 (App. Div. 2011)

Refusal - Foreign Language Issues

It is no defense to a refusal charge for drivers to claim that they were too drunk to understand the standard statement.. In other words, it is not necessary for the State to prove that a driver actually understood the warnings on a subjective level. [D]efendant's subjective intent is irrelevant in determining whether the defendant's responses to the officer constitute a refusal to take the test. If properly informed in a language they speak or understand while sober, drivers can be convicted under the implied consent and refusal statutes. Voluntary, excessive drinking cannot and does not void the statutes. Indeed, that type of voluntary behavior is fundamentally distinct from a person's utter lack of ability to understand a foreign language.

To that end, warnings given in English will presumably be competent. Police, though, may choose to ask if a suspect speaks English.

Whether there is sufficient evidence to sustain a conviction will depend on the facts of a particular case. Once again, the State is required to prove the four elements of refusal beyond a reasonable doubt. Thus, if a person established that she spoke only Italian, and was not informed of the consequences of refusal in that language, she could not be convicted under the refusal statute. Nonetheless, she could be convicted of the independent offense of DWI based on the observations of the officer and any other relevant evidence-as occurred in this case.

State v. Marquez, 202 NJ 485, 513-514 (2010)

Language Defense – Procedure & Burdens

Defendants who claim that they do not speak or understand English must bear the burden of production and persuasion on that issue.. That information is peculiarly within the possession of the defendant, not the State. In addition, this approach will help separate feigned claims from real ones.

Defendant testified that he spoke little English. He had recently arrived from a Spanish-speaking country and works with Spanish-speaking supervisors. He immediately informed the arresting officer that he spoke little English, and the officers attempted to assist communication by using a lay interpreter, hand signals and a few words of Spanish. Understanding the breathalyzer instructions requires greater language fluency than acknowledging a home address or supplying a phone number. In Judge Fisher's concurrence in [*State v. Kim*](#), he endorsed the rule of law subsequently announced by the Court in [*Marquez*](#), stating:

Many persons may be able to speak or understand a few rudimentary phrases in languages other than their own. But, just because a person may be able to express greetings or order a cup of coffee in an unfamiliar language does not necessarily mean that the person may be able to understand legal rights and obligations expressed in a less than familiar language.

We find under these circumstances that defendant has met the burden of production and persuasion as to his limited knowledge of English. Although the Law Division and the municipal court found that defendant had some knowledge of English, neither found that he knew sufficient English to understand the breathalyzer instructions. The first portion of the instructions on the standard statement form, which must always be read prior to administering a breathalyzer test, is lengthy and requires English fluency to be understood.

State v. Rodriguez-Alejo, 419 NJ Super. 33, 40-41 (App. Div. 2011)

[Note – this is a pre-Schmidt case]

Available Languages for Para 36

<http://njpdresources.com/dui/index.htm>

**NJ Motor Vehicle Commission Standard Statement
for Operators of a Motor Vehicle
N.J.S.A. 39:4-50.2(e) - Effective July 1, 2012**

Below are written and spoken versions of the DUI statement made available in the ten languages in which the NJ Motor Vehicle Commission provides the driver's license test.

Language		Written Text (pdf)	Spoken Audio (mp3)
Arabic	عربي	Arabic Text	1. Standard Statement 2. Additional Statement
Chinese	中文普通话	Chinese Text	1. Standard Statement 2. Additional Statement
English	<i>ENGLISH</i>	English Text	1. Standard Statement 2. Additional Statement
French	FRANÇAIS	French Text	1. Standard Statement 2. Additional Statement
Japanese	日本人	Japanese Text	1. Standard Statement 2. Additional Statement
Korean	한국인	Korean Text	1. Standard Statement 2. Additional Statement
Polish	POLSKI	Polish Text	1. Standard Statement 2. Additional Statement

Portugese	PORTUGUÊS	Portugese Text	1. Standard Statement 2. Additional Statement
Russian	РУССКИЙ ЯЗЫК	Russian Text	1. Standard Statement 2. Additional Statement
Spanish	ESPAÑOL	Spanish Text	1. Standard Statement 2. Additional Statement

Refusal - Affirmative Defenses

Compromised Pulmonary Function

At the outset, it is telling that defendant never has asserted that he was somehow unable to provide the volume and length of breath required for a valid reading; he claims no limitation, whether by physical condition, disease, or some other verifiable cause, that somehow prevented him from providing the breath samples as required. Therefore, the question is whether defendant's failure to provide proper breath samples despite repeated warnings, standing alone, was sufficiently "ambiguous or conditional" to require the reading of the Additional Statement. Because defendant unequivocally consented to the breath test, his later failures to provide the necessary volume and length of breath samples did not render his earlier consent ambiguous or conditional.

State v. Schmidt, 206 NJ 71, 85 (2011)

Female over the age of 60

Based on this data and the expert opinions offered during the hearing, the Special Master recommended that the minimum *99 breath sample be fixed at 1.5 liters for all test subjects except for women over the age of sixty. He suggested that the device be reprogrammed to require women over the age of sixty to provide a 1.2 liter minimum sample for a valid test result. [There is substantial credible evidence in the record to support the Special Master's findings and recommendations concerning the required minimum breath sample volume.]

State v. Chun, 194 NJ 54, 99 (2008)

Part II – Allowing Defenses – In General

1. Under the Influence:

Permits another person who is under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle owned by him or in his custody or control;

2. *Per Se* Violation:

Permits another to operate a motor vehicle with a blood alcohol concentration of 0.08% or more [but less than 0.10%] by weight of alcohol in the defendant's blood;

NJSA 39:4-50(a)(1)(i)

1. Under the Influence:

Permits another person who is under the influence of narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle owned by him or in his custody or control;

2. *Per Se* Violation:

Permits another person with a blood alcohol concentration of 0.10% or more to operate a motor vehicle;

Culpability – Statute appears to be strict liability, but requires “knowledge” as an element for both the *per se* violation as well being under the influence.

The elements of the allowing offense have been defined by the Appellate Division as follows. “Accordingly, we hold that before a person may be convicted of permitting another person to operate a motor vehicle under the influence of intoxicating liquor or drugs, or in violation of the statutory standard for blood alcohol level, the State must produce evidence from which the trier of fact may reasonably infer, beyond a reasonable doubt, that such owner or custodian knew or reasonably should have known, of the permittee’s impaired condition to drive.” [State v. Skillman, 226 N.J. Super. 193, 199-200, 543 A.2d 1016 \(App. Div. 1988\)](#).

Culpability – The level of knowledge must be objective – not subjective.

The allowing offense under [N.J.S.A. 39:4-50\(a\)](#) requires a showing of knowledge in an objective sense, not subjective. Thus the test is what a reasonable person knew or should have known from the attendant circumstances, not what the defendant actually knew regarding the intoxicated state of the person whom he permitted to drive. [State v. Zanger, 370 N.J. Super. 360, 851 A.2d 134 \(Law Div. 2004\)](#).

Culpability – Note that a defendant charged under the school zone allowing offense (NJSA 39:4-50(g)) is subject to vicarious liability.

a. State v. Stas, 212 NJ 37, 57-58 (2012)

From this federal and state authority, we distill the principles that govern this case. Under federal law, the use for any purpose at trial of a defendant's silence after his arrest and the administration of *Miranda* warnings violates his or her privilege against self-incrimination and his or her right to due process. Under this Court's jurisprudence, even silence that precedes the administration of *Miranda* warnings—if it is “at or near” the time of a defendant's arrest—cannot be used for any purpose at trial. However, our case law teaches that pre-arrest silence that is not “at or near” the time of arrest, when there is no government compulsion and the objective circumstances demonstrate that a reasonable person in a defendant's position would have acted differently, can be used to impeach that defendant's credibility with an appropriate limiting instruction. It cannot, however, be used as substantive evidence of a defendant's guilt.

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We find that the Law Division's reliance on defendant's silence at the scene of the accident prejudiced a substantial constitutional right and was clearly capable of producing an unjust result. The Law Division could not convict defendant of the “allowing” offense under *N.J.S.A. 39:4-50* unless it concluded beyond a reasonable doubt that Putz had been the driver, in contravention of both defendants' trial testimony. *N.J.S.A. 39:4-50*. The State's evidence on that issue, presented at the municipal court and relied upon in the de novo trial before the Law Division, consisted of two components: Putz's statement to police, recanted at trial, and defendant's silence as he observed the testing, interrogation and arrest of Putz. The Law Division prominently featured defendant's silence in its explanation of the basis for its decision, not only as it affected defendant's credibility but as substantive evidence of his guilt. Defendant's silence, improperly relied upon by the Law Division, cannot be isolated from the remaining evidence considered by the court. Because the improper evidence of silence was a significant factor in defendant's conviction, we reverse and remand to the municipal court for a new trial.

b. Non-testimonial Evidence

Refusals – State v. Stever, 107 NJ 543, 558 (1987)

Voice Identification – State v. Carey, 49 NJ 343 (1967)

Breath Samples – State v. DeLorenzo, 210 NJ Super. 100 (App. Div. 1986)

Field Sobriety - State v. Taylor, 199 NJ Super. 339 (Law Div. 1984)

Part III – DWI Defenses

1. Chun overview – Defenses based upon Core Foundational Documents

State v. Chun, 194 NJ 54, 134 (2008)

Our analysis of the general scientific reliability of the Alcotest is grounded, in part, on our expectation that there will be proof that the particular device that has generated an AIR being offered into evidence was in good working order and that the operator of the device was appropriately qualified to administer the test. This requirement that the test results be supported by foundational proofs for admissibility has been part of our jurisprudence since we decided [*Romano*](#). There we demanded that, as a precondition for admissibility of the results of a breathalyzer, the State was required to establish that:

- (1) the device was in working order**
- [2] the device had been inspected according to procedure;**
- [3] the operator was certified; and**
- [4] the test was administered according to official procedure**

As per Roman v. Kimmelman, 96 NJ 66, 90 (1984), each of these elements must be proved by clear and convincing evidence. (Defined in In re Seaman, 133 NJ 67, 74 (1993))

2. Required Core Foundational Documents

State v. Chun, 194 NJ 54, 145 (2008)

The foundational documents that we conclude need to be entered into evidence therefore are few. They are: (1) the most recent calibration report prior to a defendant's test, with part I-control tests, part II-linearity tests, and the credentials of the coordinator who performed the calibration; (2) the most recent new standard solution report prior to a defendant's test; and (3) the certificate of analysis of the 0.10 simulator solution used in a defendant's control tests. Absent a pre-trial challenge to the admissibility of the AIR based on one of the other foundational documents produced in discovery, we perceive of no reason to require that they be made a part of the record routinely.

List of Core Foundational Documents

- 1. Operator's Qualification Card (*Chun* at 134) [Good for the year granted + 2 calendar years];**
- 2. Most recent calibration report from NJSP - (*Chun* at 145);**
- 3. Most recent standard solution change report prior to defendant's test (*Chun* at 145) (Note – this document may sometimes be included as part of #2 above);**
- 4. Certificate of analysis used in defendant's control tests - (*Chun* 145);**
- 5. The Alcohol Influence Report; (*Chun* at 134)**
- 6. Worksheet A Tolerance Calculations (*Chun* 150-151).**

3. Foundational proofs supported by documents and testimony.

Thus, through the use of testimony & core foundational documents, each of the following 4 elements must be proved by clear & convincing evidence.

a. Proof that device was in working order:

Supported by Core Foundational Documents:

[T]he most recent calibration report prior to a defendant's test, with part I-control tests, part II-linearity tests, and the credentials of the coordinator who performed the calibration (*Chun* at 145)

(Note that there will always be a “NJSP cover sheet” and new standard solution change report as well)

Most recent standard solution change report prior to defendant’s test (Note – this document may sometimes be the change from the 6-month calibration report) (*Chun* at 145)

The Alcohol Influence Report (*Chun* at 134)

b. Proof the device had been inspected according to procedure:

Supported by Core Foundational Documents:

Certificate of analysis used in defendant's control tests - (*Chun* at 145)

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[T]he most recent calibration report prior to a defendant's test, with part I-control tests, part II-linearity tests, and the credentials of the coordinator who performed the calibration – (*Chun* at 145)

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Most recent standard solution change report prior to defendant's test (Note – this document may sometimes be included as part calibration report) *Chun* at 145

Note – It may be argued that the standard solution change report made at the time of the 6-month calibration is always a required core foundational document since it demonstrates that the final step in the 6-month inspection had been conducted according to official procedure.

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c. Proof that the operator was certified;

Supported by Core Foundational Documents:

Operator's Qualification Card (*Chun* at 134)

[Good for the year granted + 2 calendar years];

See NJAC 13:51-1.7(e)

Certification of an operator with a valid certification for an instrument approved at [N.J.A.C. 13:51-3.5\(a\)](#), other than the instrument upon which the operator was previously trained and certified, shall be valid upon satisfactory completion of training, as described at [N.J.A.C. 13:51-1.6\(b\)](#), from the date of the completion of the training for the remainder of that calendar year and for the next two calendar years.

See NJAC 13:51-1.8(d)

Any test conducted to analyze a person's breath, pursuant to procedures and methods contained in this chapter, by an operator whose certification is suspended, revoked, or invalid at the time such test is conducted, shall be considered invalid for presentation in evidence or testimony in a court of law or administrative hearing.

Note: Always check the expiration date of the card for the local police officer who performed the periodic solution change.

d. The test was administered according to official procedure. (As defined in the case)

Supported by Core Foundational Documents

The Alcohol Influence Report (*Chun* at 134)

Official procedure defined in the case law:

Twenty minute deprivation period:

Operators must wait twenty minutes before collecting a sample to avoid overestimated readings due to residual effects of mouth alcohol. The software is programmed to prohibit operation of the device before the passage of twenty minutes from the time entered as the time of the arrest. Moreover, the operator must observe the test subject for the required twenty-minute period of time to ensure that no alcohol has entered the person's mouth while he or she is awaiting the start of the testing sequence. In addition, if the arrestee swallows anything or regurgitates, or if the operator notices chewing gum or tobacco in the person's mouth, the operator is required to begin counting the twenty-minute period anew. *State v. Chun*, 194 NJ 54, 79 (2008)

***State v. Filson*, 409 NJ Super. 246 (Law Div. 2009) is the key “twenty minute” defense case**

Practice pointer: discovery review and time notation list for cross examination

Other official procedures:

Assuming that the results of the control test are within the established parameters, the instrument prompts the operator through a message on the LED screen to collect a breath sample. The operator then attaches a new, disposable mouthpiece and removes cell phones and portable electronic devices from the testing area. The operator is required to read the following instruction to the test subject: “I want you to take a deep breath and blow into the mouthpiece with one long, continuous breath. Continue to blow until I tell you to stop. Do you understand these instructions?” The arrestee then provides the first breath sample, which is measured in the IR and EC chambers. State v. Chun, 194 NJ 54, 80-81 (2008).

Relate instructional language issues back to State v. Rodriguez-Alejo, 419 NJ Super. 33, 40-41 (App. Div. 2011) and State v. Schmidt, 206 NJ 71, 85 (2011)

Speedy Trial

The four *Barker* factors—“[l]ength of delay, the reasons for the delay, ... defendant's assertion of his right, and prejudice to ... defendant[,]” have been adopted by our Supreme Court. These factors apply to municipal court prosecutions. “Courts must consider and balance” these factors. This “multi-element balancing process [,]” requires the judge to accord appropriate weight to each factor; no single factor will be dispositive.

We are satisfied that the judge properly balanced, analyzed and applied the *Barker* factors to the facts of this case. The municipal court and prosecutor fail[ed] to prepare ... to try the[se] matter[s] exped[it]iously.... As a matter of logic and decency, given that the four factors of *Barker* call for a balancing of considerations, when the delay in concluding a trial is excessively long by any measure, as here, the burden upon defendant to satisfy the other factors is correspondingly diminished. When there is no reasonable explanation or justification for the excessive delay, speedy trial principles have been violated.

State v. Cahill, 2011 WL 2535111

Argued before Supreme Court on October 9, 2012

Pathological Intoxication (Ambien Cases)

See attached unpublished Law Division opinion.