



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

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**NJCLES Presents:**

**A Continuing Legal Education  
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**Defending a DWI  
Refusal Case**

# **Defending a Refusal Case**

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# Refusal Statute

N.J.S.A. 39:4-50.4a

→39:4-50.4a. Refusal to submit to chemical test; penalties

a. Except as provided in subsection b. of this section, the municipal court shall revoke the right to operate a motor vehicle of any operator who, after being arrested for a violation of [R.S.39:4-50](#) or section 1 of [P.L.1992, c. 189](#) ([C.39:4-50.14](#)), shall refuse to submit to a test provided for in section 2 of P.L.1966, c. 142 ([C.39:4-50.2](#)) when requested to do so, for not less than seven months or more than one year unless the refusal was in connection with a second offense under this section, in which case the revocation period shall be for two years or unless the refusal was in connection with a third or subsequent offense under this section in which case the revocation shall be for ten years. A conviction or administrative determination of a violation of a law of a substantially similar nature in another jurisdiction, regardless of whether that jurisdiction is a signatory to the Interstate Driver License Compact pursuant to P.L.1966, c. 73 ([C.39:5D-1 et seq.](#)), shall constitute a prior conviction under this section.

The municipal court shall determine by a preponderance of the evidence whether the arresting officer had probable cause to believe that the person had been driving or was in actual physical control of a motor vehicle on the public highways or quasi-public areas of this State while the person was under the influence of intoxicating liquor or a narcotic, hallucinogenic, or habit-producing drug or marijuana; whether the person was placed under arrest,

**if appropriate, and whether he refused to submit to the test upon request of the officer; and if these elements of the violation are not established, no conviction shall issue. In addition to any other requirements provided by law, a person whose operator's license is revoked for refusing to submit to a test shall be referred to an Intoxicated Driver Resource Center established by subsection (f) of [R.S.39:4-50](#) and shall satisfy the same requirements of the center for refusal to submit to a test as provided for in section 2 of P.L.1966, c. 142 ([C.39:4-50.2](#)) in connection with a first, second, third or subsequent offense under this section that must be satisfied by a person convicted of a commensurate violation of this section, or be subject to the same penalties as such a person for failure to do so. For a first offense, the revocation may be concurrent with or consecutive to any revocation imposed for a conviction under the provisions of [R.S.39:4-50](#) arising out of the same incident. For a second or subsequent offense, the revocation shall be consecutive to any revocation imposed for a conviction under the provisions of [R.S.39:4-50](#). In addition to issuing a revocation, except as provided in subsection b. of this section, the municipal court shall fine a person convicted under this section, a fine of not less than \$300 or more than \$500 for a first offense; a fine of not less than \$500 or more than \$1,000 for a second offense; and a fine of \$1,000 for a third or subsequent offense.**

## **School Zone**

**b. For a first offense, the fine imposed upon the convicted person shall be not less than \$600 or more than \$1,000 and the period of license suspension shall be not less than one year or more than two years; for a second offense, a fine of not less than \$1,000 or more than \$2,000 and a license suspension for a period of four years; and for a third or subsequent offense, a fine of \$2,000 and a license suspension for a period of 20 years when a violation of this section occurs while:**

- (1) on any school property used for school purposes which is owned by or leased to any elementary or secondary school or school board, or within 1,000 feet of such school property;**
- (2) driving through a school crossing as defined in [R.S.39:1-1](#) if the municipality, by ordinance or resolution, has designated the school crossing as such; or**
- (3) driving through a school crossing as defined in [R.S.39:1-1](#) knowing that juveniles are present if the municipality has not designated the school crossing as such by ordinance or resolution.**

**A map or true copy of a map depicting the location and boundaries of the area on or within 1,000 feet of any property used for school purposes which is owned by or leased to any elementary or secondary school or school board produced pursuant to section 1 of P.L.1987, c. 101 ([C.2C:35-7](#)) may be used in a prosecution under paragraph (1) of this subsection.**

**It shall not be relevant to the imposition of sentence pursuant to paragraph (1) or (2) of this subsection that the defendant was unaware that the prohibited conduct took place while on or within 1,000 feet of any school property or while driving through a school crossing. Nor shall it be relevant to the imposition of sentence that no juveniles were present on the school property or crossing zone at the time of the offense or that the school was not in session.**

## **Part I – Prosecution**

### **a. Burden of Proof**

**State v. Cummings, 184 N.J. 84, 95-96 (2005)**

**That analysis leads us inescapably to the conclusion that, despite the clear legislative election as well as prior acceptance of the preponderance of the evidence standard as the appropriate standard for breathalyzer refusal cases, the proper standard of proof here is proof beyond a reasonable doubt. That conclusion is compelled by the application of simple logic. If an acquittal under the Refusal Statute is to have the benefit of the double jeopardy bar, thereby prohibiting the State's appeal therefrom, then it stands to reason that the State's burden of proof must mirror the burden required of all other prosecutions that similarly are subject to double jeopardy considerations. That standard is proof beyond a reasonable doubt. Hence, we hold that, for prosecutions under [N.J.S.A. 39:4-50.4a](#), the State must prove the statutory elements of a defendant's refusal to submit to a breathalyzer test beyond a reasonable doubt.**

**Related cases:**

**[State v. Widmaier, 157 N.J. 475 \(1999\)](#)**

**State v. Breslin, 392 N.J.Super. 584 (2007)**



## **b. Elements of Offense**

**State v. Wright, 107 N.J. 488, 490 (1987)**

**The issue in this case is whether a defendant may be convicted under [N.J.S.A. 39:4-50.4a](#) for refusing to submit to a breathalyzer test without proof that he actually was operating a motor vehicle at the time of his arrest. We hold that proof of actual operation is not required. To secure a conviction under [N.J.S.A. 39:4-50.4a](#), the State must prove only that (1) the arresting officer had probable cause to believe that defendant had been operating a vehicle while under the influence of alcohol; (2) defendant was arrested for driving while intoxicated; and (3) defendant refused to submit to a breathalyzer test.**

**Attempted Operation – State v. Mulcahy, 107 N.J. 467 (1987)**

### **c. Territorial Jurisdiction**

**State v. Potts, 186 N.J. Super. 616, 620-621 (Law Div. 1982)**

**In the present case defendant was driving on a public highway in Wrightstown Borough and is alleged to have been intoxicated while doing so. He was placed under arrest in Wrightstown Borough. Thus, the first two elements of the required finding **\*\*303** involved actions which took place in Wrightstown. The remaining required element, the refusal, occurred in North Hanover. The offense was therefore a continuing one, which commenced in one municipality and ended in another. In [State v. Halleran, supra at 547-548, 438 A.2d 577](#), the court, dealing with harassing telephone calls placed in one municipality and received in another, said: “In such circumstances, the offense is of a continuing nature, which can be prosecuted either in the municipality from which the proscribed call was made or in the municipality in which it is received.” The same rule applies here. Defendant could be prosecuted for the breathalyzer offense in Wrightstown Borough Municipal Court or in North Hanover Municipal Court.**

**An analysis of legislative intent also supports this conclusion. A person cannot be charged with refusal to take a breathalyzer test until after he has been arrested for drunk driving so that two offenses are involved. The predecessor to our present statute, [N.J.S.A. 39:4-50.4](#), provided the Director of Motor Vehicles with jurisdiction over breathalyzer refusal cases. Thus, drunk driving cases were tried in municipal courts while refusal offenses arising from the same incident were tried in Trenton before a hearing officer in the Division of Motor Vehicles. [N.J.S.A. 39:4-50.4a](#) abolished that procedure, giving jurisdiction over both offenses to the municipal courts. The Legislature, having eliminated the expense and inconvenience of these separate proceedings, cannot have intended to replace them with two other separate proceedings. A contrary interpretation would result in the duplicative use of judicial resources, affronting well-recognized principles of judicial economy.**

#### **d. Quasi-public areas**

##### **State v. Bertrand, 408 N.J. Super. 584 (App. Div. 2009)**

We focus, rather, on the nature of the structure itself and its uses and defendant's relationship to it. There is some indication that [N.J.S.A. 39:4-50.2](#) was drafted to include the concept of a “quasi-public area” because of concerns expressed at the time of its enactment that it might run afoul of constitutional principles if the operator of a vehicle on wholly private property were deemed \*589 to have consented to provide breath samples. This reflects the principle that one of the hallmarks of wholly private property is the ability of the owner to control who may have access to it and use of it.

Here, defendant did not own the garage and had no power to control who had access to it. The most that defendant had was the right to park his car in a designated slot. He had no ability to determine the terms under which other residents of this complex used the garage or where they parked their vehicles. He had no ability to reserve any portion of the structure for his own use or that of his guests; nor could he bar the guests of other residents from parking in accordance with the governing regulations. Although the parking garage was not available to the general public, it was available for all of the residents of Troy Towers to use on an equal basis in accordance with the governing regulations. This garage may have been private vis-à-vis the public at large; it was not private, however, vis-à-vis defendant and the other tenants of Troy Towers, all of whom had the right to share in its use. In light of this shared use, we conclude it is appropriately characterized as quasi-public for purposes of the refusal statute. We thus affirm defendant's conviction under [N.J.S.A. 39:4-50.2](#).

#### **Related Cases**

##### **State v. Garbin, 325 N.J. Super. 521, 530-531 (App. Div. 1999)**

e. Adverse Inferences

State v. Stever, 107 N.J. 543, 559 (1987)

**In [State v. Tabisz, 129 N.J. Super. 80, 322 A.2d 453 \(App. Div. 1974\)](#), the court held that the introduction into evidence of a suspect's refusal to take a breathalyzer test is not barred by New Jersey's common-law privilege against self-incrimination. The court felt this conclusion to be compelled by our earlier decision in [State v. Cary, supra, 49 N.J. 343, 230 A.2d 384](#), stating that since “there is no ... right to refuse to take the [breathalyzer] test, the failure of one accused to submit to the test is properly admitted into evidence.” In sum, we conclude that the admissibility in evidence of a defendant's refusal to take a breathalyzer test does not offend constitutional or common law strictures.**

**Related Case – State v. Cryan, 363 N.J. Super. 442 (App. Div. 2003)**

## **f. Acts Constituting a Refusal**

**State v. Bernhardt, 245 N.J. Super. 210 (App. Div. 1991)**

**Since one of the remedial purposes of the implied consent law is the removal of drunk drivers from our highways, “anything substantially short of an unqualified, unequivocal assent to an officer's request that the arrested motorist take the test constitutes a refusal to do so. The occasion is not one for debate, maneuver or negotiation, but rather for a simple ‘yes’ or ‘no’ to the officer's request.”. Once the defendant says anything except an unequivocal “yes” to the officer's request after the officer has informed the defendant of the consequences of a refusal, the defendant cannot legally cure the refusal.**

**Conditional – State v. Widmaier, 157 N.J. 475, 497-498 (1999)**

**“Sir, I would like you to call Francis Xavier Moore, my attorney,” Walker read the second part of the standard statement. By doing so, Walker again informed defendant that he had no right to consult with an attorney before giving breath samples, that he had no right to refuse to take a breathalyzer test, and that he would be charged with refusing to submit to taking samples if he told the officer that he would not submit breath samples because he first wished to consult with an attorney. Defendant failed to heed the officer's warning. Instead, he responded by saying, “I agree to the samples of my breath, but I would like my attorney present for calibration purposes.” We deem such a response to be conditional, not rising to the level of the unequivocal consent needed to proceed with a breathalyzer test.**

**Because a police officer has no duty to bring a defendant to the breathalyzer machine, instruct him to blow into it, and wait for defendant to protest in order to determine that the defendant has refused we conclude that Walker provided defendant with adequate opportunities to take the breathalyzer test. Defendant's conditional and ambiguous response appropriately was understood by the officer to be a refusal**

**g. Other Acts Constituting a Refusal**

**Request for An Attorney/Remain Silent – State v. Leavitt, 107 N.J. 534 (1987) (Accord *Pandoli* and State v. Green, 209 N.J. Super. 247 (App. Div. 1986); State v. Macuk, 57 N.J. 1(1970)**

**Silence – State v. Sherwin, 236 N.J. Super. 510 (App. Div. 1989)**

**Debate, Maneuver & Negotiation – State v. Pandoli, 109 N.J. Super. 1 (App. Div. 1970)**

**Short Samples – State v. Geller, 348 N.J. Super. 359 (Law Div. 2001)**

**Not Enough Samples – State v. White, 253 N.J. Super. 490 (Law Div. 1991)**

**Unconscious – DMV v. Massuk, 2 NJAR 408 (NJ Admin. Ct. 1977)**

**Too Drunk – DMV v. Festa, 6 NJAR 173 (NJ Admin Ct. 1982)**

#### **h. Just like AIDS (There is no Cure)**

**State v. Bernhardt, 245 N.J. Super. 210, 217-218 (App. Div. 1991)**

**Left unanswered by our appellate courts thus far is whether a refusal may be “cured.” *Corrado* strongly suggested that it should not be. We are persuaded that a bright line rule should be adopted, consistent with a growing majority of other jurisdictions with a similar implied consent law, which precludes a defendant from curing a refusal. Such a rule clearly effectuates the Legislature’s regulatory aims embodied in the implied consent law. We recognized as much when we adopted the bright line rule holding that a defendant’s silence when requested to take a breathalyzer test is legally equivalent to a refusal. To hold otherwise, would unduly burden police officers by requiring them to wait for an indefinite period in an attempt to be able to refute a defendant’s assertion that although he or she changed his or her mind and consented within a reasonable time, the police improperly disallowed a cure.**

**Further, permitting a cure hampers the State in the administration of its public policy of requiring the courts to work in tandem with the Legislature “to streamline the implementation” of laws designed to rid the highways of drunken drivers. A bright line rule removes, rather than creates “obstacles impeding the efficient and successful prosecution of those who drink and drive.” Beyond that, permitting a cure flies in the face of good sense and established legal notions. Ordinarily, a violation is complete when the proscribed act or omission has come to pass. Once the violation has been committed, the accused cannot “undo” the violation except when permitted by the Legislature. A compelling parallel to this case, if a cure were permitted, can be found in a case where a defendant is found in an intoxicated state while sitting in the driver’s seat of the car, holding the ignition key in his or her hand.**

i. **No Severance or Merger**

**State v. Grant, 196 N.J. Super. 470 (App. Div. 1984)**

**State v. Eckert, \_\_\_ N.J. Super. \_\_\_ (App. Div. 2009)**



## **Part II – Defenses**

### **a. Confusion Doctrine**

#### **State v. Leavitt, 107 N.J. 534, 542 (1987)**

**We recognize that despite the best of efforts some confusion may remain. Without resolving whether any defendant may validly assert the defense, we agree with the view expressed in the Attorney General's brief that the “exclusive, narrow exception to the general rule that refusals cannot be validly justified,” would have to be premised on a record developed by a defendant to show that he had indeed been confused. We also agree that it is entirely appropriate that a defendant bear the burden of persuasion if he wishes to establish a confusion claim. We suspect that in most cases the defendant makes a more practical rather than legal judgment about exercising the statutory right to refuse a blood-alcohol test in light of the generally known consequences.**

**In this case it is clear that the “confusion doctrine” cannot be asserted by the defendant. Both trial courts benefited from review of the videotape of defendant's breath testing proceedings, together with all other exhibits and evidence, to sustain their conclusion that defendant had been apprised of the relevant legal principles and was not confused with respect to the exercise of his rights.**

#### **Related Cases**

**State v. Sherwin, 236 N.J. Super. 510 (App. Div. 1989)**

**State v. Bernhardt, 245 N.J. Super. 210 (App. Div. 1991)**

**Rawlings v. Police Dept. of Jersey City, 133 N.J. 182 (1993)**

## **b. Failure to Fully Read Paragraph 36**

**State v. Duffy, 348 N.J. Super. 609, 612-613 (App. Div. 2002)**

**At the trial *de novo*, the Law Division judge expressed reservation whether, standing alone, defendant's response that he would take the test, but under duress, would be considered a refusal. However, the judge concluded that this response along with the other circumstances, which included defendant's statement that he was sick and could not take the test, followed by his consent to take the test, his subsequent placing of his fingers in his mouth, and then his agreement to take the test but under duress, demonstrated that defendant did not unequivocally consent to take the test.**

**We have considerable reservation about whether defendant's comment that he would “take the test but it's under duress,” placed a condition on taking the test. More importantly, Trooper Lanno testified that if a person refuses to take the breathalyzer test, he is required to read an addendum to the person. Unfortunately, Trooper Lanno also testified that once he interpreted defendant's response as a refusal, he did not read the additional required statement.**

**Unlike in *Widmaier*, defendant was not informed that his response was unacceptable, and that unless he responded “yes,” a summons alleging violation of the breathalyzer statute would issue. We find the failure to inform defendant that his response was considered a refusal, and that unless he replied yes he would be cited for a refusal, to be a fatal defect in the State's case.**

### **Related Case:**

**State v. Spell, 196 N.J. 537 (2008)**

**c. Language Barriers**

**State v. Nunez, 139 N.J. Super. 28 (Cty Ct. 1976)**

**State v. Marquez, 408 N.J. Super. 273 (App. Div. 2009)**

**(Certification Granted 10/14/09)**

**State v. Chun, 194 N.J. 54, 80-81 (2008)**

**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.**

**d. Women over 60 (Lung dysfunction)**

**State v. Chun, 194 N.J. 54, 98-99 (2008)**

**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. Although defendants and the State agreed with these recommendations, the NJSBA suggests that this Court should instead require that the minimum required sample volume for all subjects be reduced from 1.5 to 1.2 liters in order to avoid a future potential equal protection challenge.**

**There is substantial credible evidence in the record to support the Special Master's findings and recommendations concerning the required minimum breath sample volume. The assertion by the NJSBA that adopting a different standard for women over the age of sixty than we apply to all other test subjects might give rise to an equal protection challenge, however, requires our careful consideration.**

**e. Motor Vehicle Stop Suppressed**

**State v. Badessa, 185 N.J. 303 (2005)**

**e. Other Defenses (Advocacy)**

**Use of PBTU**

**Transfer among Jurisdictions**

**Ad lib of Para 36 by Officer**

**No qualified Officer present (See Matter of Ferris, 177 N.J. 161 (App. Div. 1981))**

**Part III – Sentencing**

## **a. Plea Bargaining Guidelines – Strategy & Benefits**

### **GUIDELINE 4. LIMITATION.**

**No plea agreements whatsoever will be allowed in drunken driving or certain drug offenses. Those offenses are:**

**A. Driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50) and**

**B. Possession of marijuana or hashish (N.J.S.A. 2C:35-10a(4)), being under the influence of a controlled dangerous substance or its analog (N.J.S.A. 2C:35-10b), and use, possession or intent to use or possess drug paraphernalia, etc. (N.J.S.A. 2C:36-2).**

**No plea agreements will be allowed in which a defendant charged for a violation of N.J.S.A. 39:4-50 with a blood alcohol concentration of 0.10% or higher seeks to plead guilty and be sentenced under section a(1)(i) of that statute (blood alcohol concentration of .08% or higher, but less than 0.10%).**

**If a defendant is charged with a second or subsequent offense of driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50) and refusal to provide a breath sample (N.J.S.A. 39:4-50.2) arising out of the same factual transaction, and the defendant pleads guilty to the N.J.S.A. 39:4-50 offense, the judge, on recommendation of the prosecutor, may dismiss the refusal charge. A refusal charge in connection with a first offense N.J.S.A. 39:4-50 charge shall not be dismissed by a plea agreement, although a plea to a concurrent sentence for such charges is permissible.**

**Except in cases involving an accident or those that occur when school properties are being utilized, if a defendant is charged with driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50(a)) and a school zone or school crossing violation under N.J.S.A. 39:4-50(g), arising out of the same factual transaction, and the defendant pleads guilty to the N.J.S.A. 39:4-50(a) offense, the judge, on the recommendation of the prosecutor, may dismiss the N.J.S.A. 39:4-50(g) charge.**



**b. We're Living in a Ciancaglini World!**

**State v. Ciancaglini, \_\_\_ N.J. Super. \_\_\_ (App. Div. 2010).**

**Because the two statutes contain parallel provisions establishing fines and periods of license revocation, it is unlikely that the Legislature intended to impose a lesser fine or period of license revocation on one convicted of DWI after an earlier refusal conviction than one convicted of refusal after an earlier DWI conviction. Cf. [State v. Eckert, 410 N.J. Super. 389, 399, 982 A.2d 469 \(App. Div. 2009\)](#) (declining to read the statutes to permit an "anomalous" or "irrational result").**

**In sum, the reasons we found in *DiSomma* for treating DWI and refusal offenses as distinct prior violations have been rejected in our decisions and the Supreme Court's earlier decision in *Bergwald*. We now conclude that a prior conviction for refusing a breathalyzer test is a prior "violation" or "offense" for purposes of the DWI statute.**

**Therefore, in this case, defendant's 2008 conviction should have been deemed her third, not her first, violation or offense.**

**Prior Law....now abrogated**

**Matter of Bergwall, 85 N.J. 382 (1981) (reversed on dissent, 173 N.J. Super. 431, 436 (App. Div. 1980).**

**Accord State v. Wilhalme, 206 N.J. Super. 359 (App. Div. 1985)**

**Accord State v. Tekel, 281 N.J. Super. 502 (App. Div. 1995)**

**State v. DiSomma, 262 N.J. Super. 375 (App. Div. 1993)**

**c. Step-Down**

**State v. Fielding, 290 N.J. Super. 191 (App. Div. 1996)**

**State v. Lucci, 310 N.J. Super. 58 (App. Div. 1998)**

**See also State v. Eckert, \_\_\_ N.J. Super. \_\_\_ (App. Div. 2009)**

**Relationship between Plea Bargain Guidelines and Step-downs**

#### **d. Refusals that Enhance Other Refusals**

**State v. Fahrer, 212 N.J. Super. 571 (App. Div. 1986)**

**(Note – Includes “out-of-state” as per statute)**

**e. Collateral Consequences**

**Surcharges – NJSA 17:29A-35 (Sorry - Only 1 surcharge per customer: NJSA 17:29A-35(b)(2)(b))**

**Nine Insurance Eligibility Points – NJAC 11:3-34.5 and NJAC 11:3-34 Appendix**

**No Purchase of Insurance during Suspension – NJAC 11:3.2-8(d)**

**No Cause of Action for Related Injuries or Property Damage – NJSA 39:6A-4.5(b)**

**Enhanced Sanctions for NJSA 39:3-40 Violation**

## **f. School Zone Offenses**

**Notice to Defendant**

**Location of School Zone and Commission of Offense**

**Step-Down Issues**

**Prior School Zone Offenses**