APPENDIX M
ATTORNEY GENERAL GUIDELINES FOR DWI AND REFUSAL PROSECUTIONS

TO: ALL COUNTY PROSECUTORS
ALL MUNICIPAL PROSECUTORS
FROM: PETER C. HARVEY, ATTORNEY GENERAL
SUBJECT: ATTORNEY GENERAL GUIDELINE: PROSECUTION OF DWI & REFUSAL VIOLATIONS
DATE: January 24, 2005

Section 3 of P.L.2004, chapter 8, [Note 1] included a provision that the Attorney General shall promulgate guidelines concerning the prosecution of DWI and DWI refusal violations. The Legislative purpose for these Guidelines is "to promote the uniform enforcement of [the DWI and refusal statutes.]"

Therefore, pursuant to P.L.2004, c.8, §3, and the authority granted to the Attorney General of the State of New Jersey by the Criminal Justice Act of 1970, N.J.S.A. 52:17B-97 et seq., and N.J.S.A. 2B:12-27, the following Guidelines are issued to All County and Municipal Prosecutors for the Prosecution of DWI and Refusal Violations.

These Guidelines replace all previously issued memoranda from the Division of Criminal Justice or the Attorney General, regarding the Standard (Refusal) Statements for DWI refusal, CDL/DWI refusal and OVWI refusal. Please inform all of the police departments and law enforcement agencies in your county.

These Guidelines do not, however, replace or rescind any Attorney General Law Enforcement Directives issued regarding DWI or DWI related subjects. E.g., Attorney General Directive No. 2004-1, pertaining to "John's Law." [Note 2]

In the event of future Legislative changes or case law developments, these Guidelines may be amended or modified to reflect those changes or developments.

In addition, these Guidelines are not intended to supercede or conflict with the Attorney General Directive, issued Nov. 18, 1998, To: All Municipal Prosecutors, Re: Plea Agreements in Municipal Courts, or the "Guidelines for Operation of Plea Agreements [R. 7:6-2(d)]," as set forth by the New Jersey Supreme Court, in the Appendix to Part VII "Practice in the Municipal Courts," effective Sept. 1, 2004, of the Rules Governing the Courts of the State of New Jersey, or with the recently enacted amendment at N.J.S.A. 2B:25-5.1, requiring Municipal Prosecutors to review motor vehicle abstracts of DWI offenders and present that information to the Court.

Purpose of Guidelines

Consistent with the Legislative mandate these Guidelines have been developed to assist county and municipal prosecutors in the performance of their prosecutorial duties, pertaining to individuals charged with violations of the DWI and/or DWI refusal statutes such that these statutes are enforced in a uniform manner.

Questions by Municipal Prosecutors, regarding these Guidelines are to be directed to the Municipal Prosecutor Supervisor in the County Prosecutor's Office. If necessary, the Municipal Prosecutor Supervisor can then contact the Prosecutors Supervision & Coordination Bureau in the Division of Criminal Justice with any questions or issues. Municipal Prosecutors and law enforcement agency personnel, other than the Division of State Police, should not attempt to

contact the Division of Criminal Justice directly. Law enforcement officers with questions regarding these Guidelines or the interpretation of any case or statute relating to these Guidelines should contact the County Prosecutor's Office.

Definitions

These Guidelines apply to the offenses, listed below. Accordingly, references, within these Guidelines, to a DWI offense, or a DWI refusal offense shall include all of the offenses referenced below:

• N.J.S.A. 39:4-50: DWI. Operating or allowing another person to operate a vehicle while intoxicated or with a blood alcohol concentration at, or above, the per se limit set by the statute.

• N.J.S.A. 39:4-50.4a.a.: DWI refusal. Refusal to submit to chemical breath testing, in violation of N.J.S.A. 39:4-50.2 [Note 3]

• N.J.S.A. 39:4-50(g): DWI in a "school zone." [Note 4] Operating or allowing another person to operate a vehicle while intoxicated or with a blood alcohol concentration at, or above, the per se limit set by the statute while on school property used for school purposes owned by or leased to any element or secondary school or school board, or within 1,000 feet of such school property or driving through a school crossing designated as such by ordinance, or driving through a school crossing, knowing that juveniles are present.

• N.J.S.A. 39:4-50.4a.b.: DWI refusal in a "school zone." Refusal to submit to chemical breath testing, in violation of N.J.S.A. 39:4-50.2. while on school property used for school purposes owned by or leased to any element or secondary school or school board, or within 1,000 feet of such school property or driving through a school crossing designated as such by ordinance, or driving through a school crossing, knowing that juveniles are present.

• N.J.S.A. 39:3-10.13: CDL/DWI. Operation of a commercial motor vehicle while under the influence of alcohol or a controlled dangerous substance, or with an alcohol concentration of 0.04% or more.

• N.J.S.A. 39:3-10.24f: CDL/DWI refusal. Refusal to submit to chemical breath testing, in violation of N.J.S.A. 39:3-10.24.

• N.J.S.A. 12:7-46: OVWI. Operating or allowing another person to operate a vessel while intoxicated or with a blood alcohol concentration at, or above, the per se limit set by the statute.

• N.J.S.A. 12:7-57, OVWI Refusal. Refusal to submit to chemical breath testing, in violation of N.J.S.A. 12:7-55.

• N.J.S.A. 39:4-50.14, Zero Tolerance law. Operation of a motor vehicle by a person who has consumed alcohol and has a blood alcohol concentration of 0.01% or more, but less than 0.08%, and who is under the legal age to purchase alcoholic beverages.

DWI and DWI Refusal Offenses - Elements

The uniform prosecution of persons charged with a DWI and/or a DWI refusal violation requires both prosecutors and law enforcement officers to be familiar with the offenses, the elements of those offenses, and the requisite burdens of proof to establish a violation.

The elements of a violation of the DWI offenses are:

• Operation
• Of a vehicle or vessel
• By a person
• While intoxicated, and/or

• With a blood alcohol or alcohol concentration at, or above, the per se limit set by the statute.

The elements of a violation of a DWI "school zone" offense (N.J.S.A. 39:4-50(g)) are the same as a DWI offense with the additional requirement to prove:

• The offense occurred while on school property used for school purposes owned by or leased to any elementary or secondary school or school board, or within 1,000 feet of such school property, or driving through a school crossing designated as such by ordinance, or driving through a school crossing, knowing that juveniles are present.

The elements of a violation of the DWI refusal offenses are:

• A person

• Was operating a motor vehicle on a public highway, or vessel

• The person was arrested, on probable cause, for a DWI violation

• The person refused to submit to chemical breath testing, after the law enforcement officer read the Standard New Jersey Motor Vehicle Commission [NJ MVC] (Refusal) Statement for that offense to that person.

The elements of a violation of a DWI refusal "school zone" offense are the same as a DWI refusal offense with the additional requirement to prove:

• The offense occurred while on school property used for school purposes owned by or leased to any elementary or secondary school or school board, or within 1,000 feet of such school property, or driving through a school crossing designated as such by ordinance, or driving through a school crossing, knowing that juveniles are present.

DWI and DWI Refusal Offenses - Burdens of Proof

Because a DWI violation is treated, by the Court, as a quasi-criminal prosecution, every element of a DWI offense must meet the evidentiary standard of "beyond a reasonable doubt." Romano v. Kimmelman, 96 N.J. 66, 89-90 (1984). In contrast, since a DWI refusal violation is not treated as a quasi-criminal prosecution, it does not have to meet the higher evidentiary standard for criminal conduct, beyond a reasonable doubt. The Legislature has determined that proof of a violation of the DWI refusal statute is satisfied when the State presents evidence meeting the preponderance of the evidence standard of proof. State v. Leavitt, 107 N.J. 534 (1987); State v. Widmaier, 157 N.J. 475 (1999).

DWI Without a Chemical Breath Test (Observational Offense)

In the case of a DWI violation, case law has long held that the beyond a reasonable doubt standard can be met based exclusively upon the observational testimony of the arresting officer that the defendant was operating a motor vehicle while intoxicated or under the influence. This last element, while intoxicated or under the influence of alcohol or drugs, can be based upon the officers testimony of his/her observations of the defendant, admissions by the defendant, field sobriety tests, and the training and/or experience of the officer in dealing with intoxicated persons. State v. Johnson, 42 N.J. 146, 165-166 (1964); State v. Guerrido, 60 N.J. Super. 505, 510 (App. Div. 1960); State v. Hudes, 128 N.J. Super. 589, 608 (Bergen Cty. Ct. 1974). Moreover, a DWI conviction can be sustained on both direct and circumstance evidence, State v. Emery, 27 N.J. 348, 355 (1958), as well as statements by a defendant and observations made by police officers of defendant's behavior and actions, State v. Nemesh, 228 N.J. Super. 597 (App. Div. 1988), certif. den. 114 N.J. 473 (1989).

A chemical breath test reading or result is not required to satisfy this aspect of a DWI violation. Even in cases where the chemical breath test result are unavailable, either as a result of a refusal, inability to obtain a result, or where the result has been suppressed or otherwise deemed inadmissible, an observational case can, and should, be capable of standing on its own merits.

A DWI case should not be dismissed by a prosecutor solely on the basis that there is, or may be, an issue with the chemical breath test readings or results, and such a dismissal does not fall within the scope of "good cause" under N.J.S.A. 2B:25-5c, or R. 7:8-5. State v. Fox, 249 N.J.Super. 521, 526 (Law Div. 1991). Requests for a dismissal of a DWI prosecution invokes an extreme remedy which should be sparingly used. See, State in Interest of D.J.C., 257 N.J. Super. 118, 121-123 (App. Div. 1992) and State v. Sapienza, 202 N.J. Super. 282,287 (App. Div. 1985), certif. den. 102 N.J. 312 (1985). "Charges based on adequate evidence should not be dismissed without good cause." IMO Norton & Kress, 128 N.J. 520, 538 (1992).

Even in those cases where the defense asserts a claim based upon a report from an "expert witness," a Municipal Prosecutor need not automatically concede that the report, or any purported testimony from an "expert witness" is, or will be, dispositive in the resolution of the case. In cases where a breath test reading has been obtained, our Supreme Court has strongly counseled against the use of expert witnesses, particularly where the evidence does not remotely suggest there is even a reason to suspect that the breath tests administered to the defendant were not correct. State v. Downie, 117 N.J. 450, 468 (1990), cert. den. 498 U.S. 819, 111 S.Ct. 63, 112 L.Ed.2d 38 (1990); State v, Tischio, 107 N.J. 504, 517-518 (1987), app. dism. 484 U.S. 1038 (1987); State v. Hammond, 118 N.J. 306, 317 (1990); State v. Lentini, 240 N.J. Super. 330, 334336 (App. Div. 1990); State v. Maure, 240 N.J.Super. 269, 283 (App. Div. 1990), aff'd o.b. 123 N.J. 457 (1991). In State v. Johnson, supra, the Supreme Court determined that "[B]reathalyzer test results are admissible upon a simple certification as to the operability and accuracy of the [B]reathalyzer instrument used to perform the test. Id. at 171. [The court also] concluded that expert testimony attacking the accuracy and reliability of [B]reathalyzer tests, while 'probably technically still admissible,' had virtually no probative value. Ibid." State v. Tischio, 107 N.J. at 517-518.

DWI With a Chemical Breath Test (Per se Offense)

Where a chemical breath test has been administered and results or readings were obtained, a per se DWI violation can be proven by the State, using the same observations, described above, and by also introducing the chemical breath test result or reading. The results or readings obtained from chemical breath testing have been deemed to be admissible, as having met the beyond a reasonable doubt standard of proof, if the State satisfies the standard of evidence for the foundational evidentiary criteria of "no greater than clear and convincing evidence." Those foundational criteria are: (1) judicial notice of the scientific reliability and accuracy of the chemical breath test instrument; (2) the Operator was properly trained; (3) the Instrument was operating properly; (4) the Operator used the instrument in accordance with the training. State v. Johnson, 42 N.J. at 170-17 1; Romano v. Kimmelman, 96 N.J. at 73, 86, 87-8, 93, 94.

(1) Judicial Notice/Scientific Reliability

The issue of judicial notice of the scientific reliability of chemical breath testing instruments, as a foundational criterion, has been settled, and is essentially

no longer an issue in dispute. See, N.J.A.C. 13:51-3.5(a)(1), and State v. Johnson, 42 N.J. at 170; Romano v. Kimmelman, 96 N.J. at 82; State v. Tischio, 107 N.J. at 516, n.5, 517-8, 520; State v. Downie, 117 N.J. at 453, 457, 466-469 for photometric instruments [Breathalyzer]. See, N.J.A.C. 13:513.5(a)(2), and State v. Foley, et al., 370 N.J. Super. 341, 348, 351, 359 (Law Div. 2004) for infrared and electrochemical instruments, when used as a dual system of chemical breath testing [Alcotest 7110 MKIII-C]

(2) Operator properly trained

In general, proof of the status of a Breath Test Operator is obtained through the introduction of the officer's "replica" certificate. It is not necessary or required that the State establish or prove facts behind the certification of the operator, particularly in the absence of some relevant factual evidence from the defense that might bring the document into question. State v. Maure, 240 N.J. Super. at 278-9.

Documents such as an "Operator's Certificate" and "replica" certificates are self authenticating documents. State v. Cardone, 146 N.J. Super. 23, 28-29 (App. Div. 1976), certif. den. 73 N.J. 3 (1977). N.J.R.E. §902. Furthermore there is a presumption, at law, that the Attorney General as a public official does not act improperly in the exercise of official duties such as the issuance of an "Operator's Certificate" or "replica" certificate. State v. Matulewicz, 101 N.J. 27, 31 (1985). Also N.J.R.E. §803(c)(8).

However, in the event there is any question regarding the certification status of an Operator, the provisions of the Chemical Breath Testing Rules, at N.J.A.C. 13:51-1.14 and 13:514.2(a)1 control. The Alcohol/Drug Test Unit, in the Division of State Police maintain records of all Breath Test Operators and can, on request, provide a prosecutor with a "Master Certification" record showing the official status of a law enforcement officer who has been trained and certified as a Breath Test Operator.

(3) Instrument operating properly

Since Romano was decided, our Courts have held that "State Police Coordinator certifications indicating that random sample ampoules from the same batch as that used in the defendants' [B]reathalzyer examination have been tested satisfy the spot checking requirement." State v. Maure, 240 N.J. Super. at 283; State v. Ernst, 230 N.J. Super. 238, 243-244 (App. Div. 1989), certif. den. 117 N.J. 40 (1990). Consequently, the pre-test and post-test certifications by the Coordinator (N.J.A.C. 13:51-3.4) provides "prima facie proof the ampoules used in testing [a defendant] were properly constituted," thereby assuring that the tests, if properly administered were reliable. State v. Garthe, 145 N.J. 1,13-14 (1996); State v. Cleverley, 348 N.J. Super. 455, 459 (App. Div. 2002). See, State v. Maure, 240 N.J. Super. at 286; State v. Sandstrom, 277 N.J. Super. 354 (App. Div. 1994)

Proof of operability of a breath test instrument is considered sufficient upon presentation of documentary evidence (e.g., Breath Testing Instrument Inspection Certificates) prepared by a Breath Test Coordinator. State v. Garthe, 145 N.J. at 13-14; State v. Tischio, 107 N.J. at 514-517; State v. Matulewicz, 101 N.J. at 29-31; State v. Cleverley, 348 N.J. Super. at 459; State v. Maure, 240 N.J. Super. at 281, 286-289; State v. Ernst, 230 N.J. Super. at 243-244; State v. Ettore, 228 N.J. Super. 25, 32 (App. Div. 1988); State v, Dickens, 130 N.J. Super. 73, 79 (App. Div. 1974); State v. DeVito, 125 N.J. Super. 478, 479-480 (App. Div. 1973). See also, State v. Samarel, 231 N.J. Super. 134, 141-142 (App. Div. 1989); State v. McGeary, 129 N.J. Super. 219, 224-228 (App. Div. 1974). Likewise, the periodic

inspections of the breath test instruments (N.J.A.C. 13:51-3.4), as reflected by the Breath Testing Instrument Inspection Certificates, have been found to establish prima facie proof that the breath test reagent ampoules solution(s) have been properly spot checked and randomly tested. State v. Maure, 240 N.J. Super. at 281-283 & 286-289.

Moreover, our courts have stated that Breath Test Instrument Inspection Certificates (BTIIC's), which are prepared pursuant to N.J.A.C. 13:51-3.4, are prepared accurately, carefully, competently and have a "strong and convincing indices of trustworthiness." State v. Garthe, 145 N.J. at 13-14; State v. Cleverley, 348 N.J. Super. at 459; State v. McGeary, 129 N.J. Super. at 224-227; State v. Matulewicz, 101 N.J. at 30-31; State v. DeVito, 125 N.J. Super. at 479-480; State v. Teare, 133 N.J. Super. 338, 341 (App. Div. 1975), rev'g. 129 N.J. Super. 562 (Law Div. 1974), aff'd. 135 N.J. Super. 19 (App. Div. 1975); State v. Ettore, 228 N.J. Super. at 31-32; State v. Ernst, 230 N.J. Super. at 243-244; State v. Lanahan, 110 N.J. Super. 578, 580-583 (Cty. Ct. 1970); State v. Hudes, 128 N.J. Super. at 591-595, 596-598.

In that same context, the BTIIC, and the Alcohol Influence Report both constitute records of a public official, performed in an official capacity. Thus, those documents are subject to mandatory judicial notice under N.J.R.E. §201 as official public records prepared and maintained by a public official under N.J.R.E. §803(c)(8) & N.J.A.C. 13:51-4.3(b). Therefore, they are admissible as records of a public official, pursuant to N.J.R.E. §803(c)(8). State v. Garthe, 145 N.J. at 13-14; State v. Cleverley, 348 N.J. Super. at 459. The same rationale holds for documents such as an "Operator's Certificate" and "replica" certificates which are self authenticating documents. State v. Cardone, 146 N.J. Super. at 28-29. N.J.R.E. §902.

Consequently, information contained on those documents, such as the name and serial number of the chemical breath test instrument, its location, the results of the tests performed, including the identification of the breath test ampoules used in the testing, become part of the record.

(4) Operator used the instrument in accordance with his/her training

This element of the foundational criteria is ordinarily fulfilled through the testimony of the Breath Test Operator that he/she followed the steps on the Alcohol Influence Report Check List for tests administered on a photometric breath test instrument, or in the case of the Alcotest 7110 MK III-C, the Operator testifies that he/she followed all of the steps to administer a chemical breath test on that instrument and authenticates the Alcohol Influence Report for that defendant's tests.

DWI With a Blood Test (Per se Offense)

Where a sample of blood has been drawn from a defendant and results or readings were obtained, a per se DWI violation can be proven by the State, using the same observations described above and by also introducing the laboratory report containing the blood test results.

The proofs for the admissibility of blood test results, while similar to those for chemical breath testing, will require some additional documentation. As with chemical breath test results, the results or readings obtained from blood tests have been deemed to be admissible, as having met the beyond a reasonable doubt standard of proof, if the State satisfies the standard of evidence for the foundational evidentiary criteria of "no greater than clear and convincing

evidence." Those foundational criteria are: (1) judicial notice of the scientific reliability and accuracy of the instrument used to analyze or test the blood sample; (2) the lab technician was properly trained; (3) the instrument used for the analysis or testing was operating properly; (4) the lab tech used the instrument in accordance with their training.

In addition, the State will also be required to establish that the blood sample was drawn in a medically acceptable manner, by a person qualified to perform that function. If the police officer observed the blood sample being drawn by another person, such as a medical professional, it is not required that the medical professional appear and testify. Nor is it required that the medical professional comply with the affidavit provisions of N.J.S.A. 2A:62A-10 or -11. State v. Casele, 198 N.J. Super. 462, 467-8 (App. Div. 1985), citing with approval State v. Rypkema, 191 N.J. Super. 388, 392-3 (Law Div. 1983); State v. Burns, 159 N.J. Super. 539, 544 (App. Div. 1978); State v. Woomer, 196 N.J. Super. 583, 585-7 (App. Div. 1984).

A defendant has no right to refuse to allow blood to be drawn as long as the police or law enforcement officer has probable cause to believe that the blood sample will contain evidence of alcohol and/or drugs. Reasonable force to obtain a blood sample may be used, subject to the limitations set forth in State v. Ravotto, 169 N.J. 227, 250-1 (2001), rev'g. 333 N.J. Super. 247 (App. Div. 2000).

When a defendant, in a DWI prosecution, was also the victim of some injury sustained in a motor vehicle accident, the defendant's blood is often drawn by hospital personnel for medical purposes. The results of any analysis done by the hospital is generally protected by the Physician-Patient privilege. N.J.R.E. §506(b). In the event that there is an evidentiary need for the results of blood analysis, performed by a hospital for non-evidential purposes, on a blood sample taken from a defendant who has been charged with DWI, those results may be obtained by use of a subpoena duces tecum. A Subpoena duces tecum can be issued by a Judge of a Municipal Court upon a showing that the police have a reasonable basis to believe that the defendant was operating a motor vehicle while under the influence of alcohol or drugs. State v. Dyal, 97 N.J. 229 (1984). Those results may be entered into evidence under N.J.R.E. §803(c)(6).

The issue of judicial notice of the scientific reliability of the instruments used to test a blood sample, as a foundational criterion, has been settled, and is no longer an issue in dispute. State v. Blair, 45 N.J. 43 (1965) relying on State v. Alexander, 7 N.J. 585 (1951), cert. den. 343 U.S. 908 (1952). Likewise, the admissibility of blood test results is no longer in dispute, since blood has been deemed non-testimonial (State v. Oliveri, 336 N.J. Super. 244 (App. Div. 2001); State v. Weller, 225 N.J. Super. 274, 281-282 (Law Div. 1986) on remand from State v. Flynn, 103 N.J. 446 (1986) relying upon the holding in State v. Matulewicz, supra.) and it does not rise to the level of a Constitutional issue. See, Breithaupt v. Abrams, 352 U.S. 432 (1957), 77 S.Ct. 408, 1 L.Ed.2d 448 (1957) and Schmerber v. Calif., 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), both of which have been adopted by the decisional law of New Jersey. Moreover, blood test analysis is not subject to the requirements set forth in State v. Simbara, 135 N.J. 37 (2002) on the grounds that the laboratory analysis documents pertaining to the testing of blood for the presence of alcohol are not proffered under the provisions of N.J.S.A. 2C:35-19 and, unlike the analysis of CDS, our Courts have determined that the analysis of blood for the presence of alcohol does not require

the presence of the lab technician to authenticate or testify to the analysis processes. Ibid

DWI Refusal

To prove a DWI refusal violation the evidentiary standard is the preponderance of the evidence. In general, the proofs are met based upon the testimony of the arresting officer of his/her observations that the defendant was operating a motor vehicle, the defendant had been arrested for a DWI violation, the officer read the defendant the Standard NJ MVC (Refusal) Statement, and the defendant refused to submit to chemical breath testing.

Prosecution of DWI and DWI Refusal Offenses

The prosecution of a DWI and/or a DWI Refusal offense requires that the State must be prepared to meet and satisfy each and every element of the offense charged to the required burden of proof. In those situations where a prosecutor concludes that the evidence does not meet the required evidentiary burdens, then the prosecutor must make a determination as to how to most appropriately resolve the case. Where the evidence is deemed sufficient by the prosecutor, prosecutors should be prepared to present the case to the court where the evidence will be reviewed and a judicial determination made on its sufficiency. Prosecutors should not automatically dismiss a DWI case solely because the chemical breath test results or blood test results may have been excluded. A DWI violation can, and should be provable based on the observational testimony of the police officer. See cases cited supra, under "DWI Without a Chemical Breath Test (Observational Offense)."

The State should be represented, by the Municipal Prosecutor, at every stage of a case: pre-trial discovery or motions; trial; a guilty plea; or a guilty plea on a plea bargain or on a conditional plea of guilty. This applies equally at the sentencing phase. The appearance of the State will assure that there is adequate compliance with Constitutional requirements, the requirements for the imposition of mandatory sentences, and compliance with Court Rules. It will also enable the prosecutor to ensure that there is an adequate record. These requirements become even more important, where a defendant has chosen to appear pro se.

In addition, as a result of the holding in State v. Reiner, 180 N.J. 307 (2004), in order for the State to prevail and obtain the mandatory enhanced penalties for a DWI offense in a school zone, two requirements must be met.

First, it is necessary for the law enforcement officer to have charged the defendant, on the Complaint/Summons (Uniform Traffic Ticket) with a violation of N.J.S.A. 39:4-50(g). Similarly, for a DWI refusal violation in a school zone, the police or law enforcement officer should have charged the defendant with a violation of N.J.S.A. 39:4-50.2a, specifying that the offense occurred in a school zone, thereby subjecting the defendant to the penalties as set forth at N.J.S.A. 39:4-50.4a.b.

Second, in school zone cases, there are additional elements, beyond the basic DWI or DWI refusal, that the State must prove to sustain a conviction. They include: (1) the violation occurred (a) on school property used for school purposes, (b) the property is owned or leased to an elementary or secondary school or a school board, (c) or within 1,000 feet of such school property; or (2) driving through a school crossing, if that crossing is designated as such by ordinance or resolution; or (3) driving through a school crossing, knowing juveniles are present. The statute permits a map depicting the location and boundaries within

1,000 feet of school property, under the provisions of N.J.S.A. 2C:35-7. The statute also precludes the use of a defense that the defendant was unaware he/she was within 1,000 feet of school property or a school zone. Nor is it deemed relevant that juveniles were or were not present or that the school was not in session at the time of the offense. See, P.L.1999, c.185.

Guilty Plea to Charge(s) as Filed

A defendant always has the option of entering plea of guilty to the charges as filed, under the provisions of R. 7:6-2(a)(1). However, it is important that the State be represented in these situations, in order to assure that the proper sentence is imposed by the Court, that the Court has addressed "the defendant personally" and that the Court has determined "by inquiry of the defendant ... that the plea is made voluntarily with the understanding of the nature of the charge and the consequence of the pleas and that there is a factual basis for the plea." Ibid. Of particular significance is the necessity for the Court to advise the defendant of the consequences of pleading guilty, such as the penalties that can imposed. State v. Laurick, 120 N.J. 1, 10 (1990), rev'g 231 N.J. Super. 464 (App. Div. 1989), [Note 5] citing State v. Kovack, 91 N.J. 476 (1982). See, State v. Manzie, 168 N.J. 113 (2001); State v. Smith, 109 N.J. Super. 9 (App. Div. 1970), certif. den. 56 N.J. 473 (1970). The presence of the prosecutor can assist the Court in its compliance with the requirements of this Court Rule. In the event the Court may overlook any of these requirements, the prosecutor is in a position to remind the Court.

Where a defendant has chosen to appear pro se, compliance with these requirements are even more important, in the event the defendant chooses to file an appeal or a PCR. Consistent with newly adopted provisions in the Appendix to Part VII of the Court Rules ("Guidelines for Determination of Consequence of Magnitude (See R. 7:3-2)), and the holding in State v. Laurick, 120 N.J. at 6, 8-9, citing Rodriguez v. Rosenblatt, 58 N.J. 281, 295 (1971), a pro se defendant is entitled to representation when he/she faces a consequence of magnitude.

A defendant who elects to proceed pro se, must knowing and intelligently waive his/her right to counsel. Thus, where a defendant is appearing pro se, and elects to enter a guilty plea, in addition to the requirements at R. 7:6-2(a)1, there should be, on the record, a waiver of the right to counsel, i.e., that the pro se defendant knew he/she had a right to counsel, and that he/she elected not to avail him/herself of that right with a full understanding of the implications of entering a guilty plea. See, In re Palumbo, 58 N.J. Super. 80 (App. Div. 1959). See also, State v. Melendez, 165 N.J. Super. 182 (App. Div. 1979).

In the event a defendant wishes to enter a guilty plea, or to resolve parts of the matter through a plea agreement pursuant to the discussion infra, the Municipal Prosecutor must verify the existence of any collateral legal proceedings. Double jeopardy applies not only to dual prosecutions for the same offense, but also to prosecutions for a lesser offense, after conviction, dismissal for successful PTI participation, or acquittal of a greater offense and to prosecutions for a greater offense after conviction or acquittal of a lesser offense. State v. Calvacca, 199 N.J. Super. 434 (App. Div. 1985). This applies to motor vehicle offenses as well as criminal offenses. State v. Dively, 92 N.J. 573 (1983). Therefore, prior to consenting to the dismissal or downgrade of a DWI offense, for any reason, or to commencing prosecution when the defendant has represented that they will plead guilty, the Municipal Prosecutor should obtain a representation, on the record, from the defendant, that there is currently no collateral legal proceedings, whether

criminal, quasi-criminal or civil, pertain to the subject matter or facts upon which the DWI offense if based. Furthermore, the Municipal Prosecutor should consult with the arresting officer to confirm this fact. If there is any doubt as to the existence of a collateral legal proceeding, the Municipal Prosecutor should seek an adjournment and further consult with the County Prosecutor for guidance.

Plea Agreements or Plea Bargains

The New Jersey Supreme Court has established its own Guidelines with respect to negotiated pleas (i.e., plea bargains) in the Municipal Courts. Plea bargains in the Municipal Courts are governed, initially by R. 7:6-2(d), but are also supplemented by "Guidelines for Operation of Plea Agreements" in an Appendix to Part VII of the Rules Governing the Courts of the State of New Jersey. Plea bargains, in the Superior Court, Law Division, are governed by a separate body of Court Rules: R. 3:9-2.

The Municipal Court Guidelines, however, contain certain limitations with respect to the disposition of DWI and DWI refusal offenses in the Municipal Courts. The relevant provisions of the Limitations, as set by the Supreme Court are as follows:

Guideline 4. Limitation

No plea agreements whatsoever will be allowed in drunken driving or certain drug offenses.

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

...

If a defendant is charged with 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.

...

Nothing contained in these limitations shall prohibit the judge from considering a plea agreement as to the collateral charges arising out of the same factual transaction connected with any of the above enumerated offenses in Sections A and B of this Guideline.

The judge may, for certain other offenses subject to minimum mandatory penalties, refuse to accept a plea agreement unless the prosecuting attorney represents that the possibility of conviction is so remote that the interests of justice requires the acceptance of a plea to a lesser offense.

Plea Agreement Guideline as adopted 7-28-2004, effective 9-1-2004.

The Supreme Court Plea Agreement Guidelines only apply to two specific offenses: DWI, N.J.S.A. 39:4-50 and DWI refusal, N.J.S.A. 39:4-50.2 and 39:4-50.4a. They do not apply to other DWI or DWI refusal offenses referenced in the definitions for this Guideline.

In any situation where a prosecutor, in a Municipal Court proceeding, intends to engage in plea bargaining, subject to the Limitations imposed by the Supreme Court, the prosecutor must consider other obligations associated with plea negotiations.

First, and foremost, the prosecutor must place on the record the terms and conditions of any plea agreement, and there must be a factual basis which supports any charge or charges to which the defendant intends to plead guilty. Finally, the Court Rules (R. 3:9-2 & 7:6-2(a) & (d)) require that the defendant must be

personally addressed by the Court and the defendant must acknowledge he/she is represented by counsel or knowingly waives the right to counsel, admit, on the record, to the facts supporting the charge for which a guilty plea is being entered.

Also, a plea to a violation of an ordinance, when the underlying charge or charges are governed by State statutes is not permitted. State (Tp. of West Orange) v. Paserchia, 356 N.J. Super. 461 (App. Div. 2003).

In addition, prosecutors must adhere to the requirements of R. 7:6-2(d)(3) that the complaining witness (police or law enforcement officer, or private citizen) and the victim are present in court, and have been "consulted about the agreement," and, where applicable the provisions of N.J.S.A. 39:4-50.12, where a victim suffered injuries, as defined in the statute.

Conditional Guilty Pleas

R. 7:6-2(c) permits, with the consent of the prosecuting attorney, a defendant to enter a "conditional plea of guilty." However, it is strongly recommended that where this provision is employed, that prosecutors, on the record, elicit from the defendant the factual predicates in support of the "conditional plea of guilty," and the precise offense for which a "conditional plea of guilty" is being entered. [Note 6] This recommendation becomes relevant in the event of an appeal or a PCR application.

Where a defendant wishes to challenge an element of the per se offense, through the use of a conditional guilty plea, a prosecutor should still present and place on the record all of the evidence in support of the charge or charges, or obtain a stipulation, from the defendant, as to all of the elements of the observational offense.

Amendment or Dismissal of DWI or DWI Refusal Cases

On December 2, 2004, the Acting Administrative Director of the Courts, issued the attached Memorandum to all Municipal Court Judges which contains a recommended series of sample questions that a Municipal Court Judge should consider asking of a Municipal Prosecutor who proposes to amend or dismiss a DWI summons. These sample questions were developed by the conference of Presiding Municipal Court Judges "to establish a record and thereby prevent an improper dismissal or amendment of a N.J.S.A. 39:4-50 charge." Thereafter, on December 10, 2004, a memorandum, from the Prosecutors Supervision & Coordination Bureau, was sent to All County Prosecutors for distribution to All Municipal Prosecutors to inform them of the AOC Memorandum and of their responsibilities with respect to dispositions of this nature. Municipal Prosecutors should familiarize themselves with the legal principles pertaining to dismissals and amendments of DWI charges as discussed in the Prosecutors Supervision & Coordination Bureau Memorandum.

Sentencing

Where the State is successful in obtaining a guilty verdict, either by trial on the merits or by a guilty plea, the prosecutor must assure that the proper sentence is imposed for that offense. Prosecutors should familiarize themselves with the provisions, as set by the Legislature, for the various mandatory sentences to be imposed for violations of the DWI and DWI refusal statutes. As a guide, a table of the sentencing provisions of these, and related statutes, as of the date of this Guideline, are attached. [Note 7]

With the enactment of P.L. 2004, c. 95, adopted 7-9-2004, eff. 11-1-2004, N.J.S.A. 2B:25-5.1, [Note 8] Municipal Prosecutor must obtain the driver abstract

from the NJ Motor Vehicle Commission (NJ MVC) for presentation to the court for sentencing in all DWI and DWI Refusal cases.

An illegal sentence, particularly in a DWI or DWI refusal matter, can be corrected at any time. State v. Nicolai, 287 N.J. Super. 528, 531-2 (App. Div. 1996), disapproving State v. Decher, 196 N.J. Super. 157 (Law Div. 1984). See, State v. Burroughs, 349 N.J. Super. 225, 227-8 (App. Div. 2002).

The Supreme Court Guidelines for Plea Agreements, permits, with the consent of the prosecutor, that a DWI refusal can be dismissed in exchange for a guilty plea to a DWI offense. But, those provisions apply only to a dismissal of a DWI refusal (N.J.S.A. 39:4-50.2a) accompanied by a plea of guilty to the underlying DWI (N.J.S.A. 39:4-50) offense, and do not otherwise contradict or nullify the other statutory requirements regarding non-merger of sentences. In addition, sentences for second or subsequent DWI refusal convictions must run consecutively to any other sentence. The Legislative intent for the enhanced sentencing for DWI refusal is intentional. State v. Tekel, 281 N.J. Super. 502, 507 (App. Div. 1995); State v. Fielding, 290 N.J. Super. 191, 193-4 (App. Div. 1996); State v. Widmaier, 157 N.J. at 488.

Finally, in those cases where a defendant is subject to the enhanced penalties as a second, third or subsequent offender, any challenge to the defendant's prior convictions can only be made in the Court where the prior conviction was entered. R. 7:10-2(a); State v. Laurick, 120 N.J. at 11-12. The Court where the defendant is currently found guilty or has entered a plea of guilty to a DWI or DWI refusal violation, does not have jurisdiction to review or otherwise rule upon the validity of any prior conviction or any penalties imposed in connection with that conviction. This applies equally to any administrative suspensions imposed by NJMVC. State v. Laurick, 120 N.J. at 13, 17. [Note 9] In such cases, a Court should impose the sentence based upon the prior record, as it is at the time of conviction. See, N.J.S.A. 2B:25-5.1, requiring Municipal Prosecutors to review motor vehicle abstracts of DWI offenders and present that information to the Court. If a defendant is successful in a later PCR application regarding the prior sentence, then the defendant can move for re-sentencing. Cf., State v. Haliski, 140 N.J. 1 (1995) (Graves Act sentence to be imposed until a defendant's conviction is otherwise found deficient.)

Observation of a Violation, Arrest and Processing of a Defendant

The usual circumstances attendant upon a DWI or DWI refusal arrest include that a law enforcement officer will have observed the operator in the act of operating the vehicle or vessel in a manner suggesting or indicating intoxication or other impairment. However, circumstances may arise where the observation component may not be possible: e.g., an accident scene, or an encounter at a location where the vehicle or vessel is not moving, but the location is such that operation is inferred (e.g., one car motor vehicle accident, vehicle parked on the side of a limited access roadway, vehicle parked in a rest area, with or without the motor running.)

Once the vehicle has been stopped, the officer will generally continue to observe the operator. If the officer, based upon their training and experience, suspects the operator is intoxicated or under the influence of alcohol or drugs, then the officer will request the operator to exit the vehicle. Once the operator is out of the vehicle, the officer will generally request the operator to perform field sobriety tests. Where possible, the use of uniform field sobriety testing procedures by

police officers is preferred. For those officers with the requisite training, they will generally employ the Standard Field Sobriety Testing [SFST] methods, as taught in the Division of State Police 5-day training course, "Driving While Intoxicated Course/Standardized Field Sobriety Testing [SFST]."

Subject to a limitation, set forth in State v. Doriguzzi, 334 N.J. Super. 530 (App. Div. 2000), Standardized Field Sobriety Testing [SFST] can be used to establish the requisite proofs necessary in an observational prosecution. The limitation in Doriguzzi, pertains to the use of only one of the four SFST's, the Horizontal Gaze Nystagmus [HGN] test. [Note 10] State v. Doriguzzi, 334 N.J. Super. at 533. HGN can, however, be utilized as part of the observations of the police officer which form the totality of circumstances giving rise to the probable cause necessary to arrest the defendant for DWI and to subject the defendant to the provisions of the Implied Consent Statutes.

Upon a determination by the law enforcement officer that there is sufficient probable cause to believe the operator of the vehicle or vessel is intoxicated, under the influence of alcohol or drugs, or has a blood alcohol or alcohol concentration at, or above, the per se limit set by the statute, the officer will place the operator under arrest and advise the operator of his/her Miranda rights as required under the holding in State v. Wright, 107 N.J. 488 (1987).

The Implied Consent Laws

As a matter of law, no person may legally refuse to submit to chemical breath testing. Refusal to submit to chemical breath testing constitutes a separate offense under one of the following statutes: N.J.S.A. 39:4-50.4a; 39:3-10.24f, 12:7-55f. The implied consent statute becomes operative as a result of a police or law enforcement officer having arrested the operator for a violation of N.J.S.A. 39:4-50 (DWI), N.J.S.A. 39:3-10.13 (CDL/DWI), or N.J.S.A. 12:7-46 (OVWI).

While it is unlawful for a person to refuse to submit to chemical breath testing, it is also noted that a chemical breath test cannot be forcibly taken or compelled. See, N.J.S.A. 39:450.2(e); 39:3-10.24e; and 12:7-55e. These statutory requirements, however, are merely a reflection of the fact that a chemical breath test requires the active participation and cooperation of the defendant. [Note 11]

A refusal to submit to chemical breath testing is a non-criminal offense which permits the State to prove a violation of the offense by meeting and satisfying the preponderance of the evidence standard of proof. Penalties for refusing to submit to chemical breath testing are substantial and are to be imposed in addition to any other penalties imposed for a violation of the DWI statute. The sentences for DWI and refusal are mandatory and may not be merged. State v. Widmaier, 157 N.J. at 496, 498-9.

The legislative purpose for enacting the Implied Consent statutes is reflected by the following statement "that the Implied Consent Law is a strong disincentive to driving while intoxicated." State v. Widmaier, 157 N.J. at 488.

The purpose of the Implied Consent statutory scheme is "to encourage motorists suspected of driving under the influence to submit to [B]reathalyzer tests." State v. Widmaier, 157 N.J. at 487.

The need to obtain chemical breath test evidence, in a prompt manner, due to the speed with which alcohol is dissipated by the body is also discussed.

Breath samples are a nontestimonial form of evidence. State v. Macuk, 57 N.J. 1, 14 (1970). Accordingly, a defendant does not have a Fifth Amendment right to consult with an attorney before taking the test, nor does a defendant have a right

to have an attorney present when the test is performed. State v. Leavitt, 107 N.J. 534, 536, 540 (1987); see also, Macuk, supra, 57 N.J. at 16, (holding that police officers are not required to give defendants Miranda warnings prior to administration of [a B]reathalyzer test because "fundamental reason for the Miranda rules is just not present"). Additionally, because breath sample evidence "is evanescent and may disappear in a few hours," State v. Dyal, 97 N.J. 229, 239 (1984), police must administer the [B]reathalyzer test within a reasonable time after the arrest in order to obtain an accurate reading. Leavitt, supra, 107 N.J. at 541; see also, State v. Pandoli, 109 N.J. Super. 1, 4 (App. Div. 1970) (noting "rapidity with which the passage of time and physiological processes tend to eliminate evidence of ingested alcohol in the system"); State v. Corrado, 184 N.J. Super. 561, 568 (App. Div. 1982) (holding one-hour delay in consenting to take [a B]reathalyzer test violated Implied Consent Law).

State v. Widmaier, 157 N.J. at 487-8.

Fulfilling the Statutory Requirements for Implied Consent by Law Enforcement

While at the law enforcement facility, the defendant should also be continuously observed. In addition, during the observation period, and prior to the administration of any chemical breath testing, the provisions of N.J.S.A. 39:4-50.2, N.J.S.A. 39:3-10.24a through e, or N.J.S.A. 12:7-55, regarding implied consent, must have been followed.

Those statutory provisions are:

1 The police or law enforcement officer "shall inform the person tested of his[/her] rights" to be furnished with a copy of the record of any chemical breath tests administered.

This first provision is designed to inform the defendant that a record of any chemical breath tests administered will be made and that the defendant is entitled to receive a copy of that record. N.J.S.A. 39:4-50.2(b); N.J.S.A. 39:3-10.24b; N.J.S.A. 12:7-55b. That record, pursuant to N.J.A.C. 13:51-3.6(a)2, is the "Alcohol Influence Report Form, Breathalyzer Check List." N.J.A.C. 13:51 Appendix. With the introduction of the Alcotest 7110 MKIII-C, a printed record, in the form of an Alcohol Influence Report, will be automatically printed by the Alcotest 7110 MKIII-C. N.J.A.C. 13:51-3.6(c)2.

Following the administration of any breath tests, regardless of the results obtained, and the normal processing of a defendant, the defendant should be given a copy of the Alcohol Influence Report.

#2 The person "shall be permitted to have such samples taken and chemical tests of his[/her] breath, urine or blood made by a person or physician of his own selection."

This second provision is designed to inform the defendant of his/her statutory right to obtain an independent test of their own breath, blood or urine. N.J.S.A. 39:4-50.2(c); N.J.S.A. 39:3-10.24c; N.J.S.A. 12:7-55c. State v. Jalkiewicz, 303 N.J. Super. 430, 432, 434, 435 (App. Div. 1997), questioning State v. Broadley, 281 N.J. Super. 230 (Law Div. 1992), certif. den. 135 N.J. 468 (1994); State v. Hicks, 228 N.J. Super. 541, 544 (App. Div. 1988), certif. den. 127 N.J. 324 (1990); State v. Ettore, 228 N.J. Super. at 30-1.

Moreover, case law supports the proposition that the police do not have an affirmative obligation to transport, or arrange transportation for a DWI defendant, following the administration of the breath tests and issuance of a summons. State

v. Ettore, 228 N.J. Super. at 30-31; State v. Weber, 220 N.J. Super. 420, 424 (App. Div. 1987), certif. den. 109 N.J. 39 (1987); State v. Hudes, 128 N.J. Super. at 606. Likewise, the police do not have an affirmative obligation to arrange for, or consent to, independent tests to be performed by a non-police agency such as a hospital. State v. Weber, 220 N.J. Super. at 424; State v. Ettore, 228 N.J. Super. at 31; State v. Hudes, 128 N.J. Super. at 606. Cf., State v. Hicks, 228 N.J. Super. at 550. These cases effectively stand for the proposition that the police cannot impermissibly interfere with a defendant's attempts to obtain an independent test. State v. Greeley, 178 N.J. 38, 43-5 (2003). In addition, the fact that a hospital may refuse to perform such tests with or without police consent cannot be held against the State. State v. Weber, 220 N.J. Super. at 424; State v. Ettore, 228 N.J. Super. at 31; State v. Hudes, 128 N.J. Super. at 606.

With the adoption of "John's Law," P.L.2001, c.69, N.J.S.A. 39:4-50.22 & 39:4-50.23, the ability of a defendant to secure an independent test may be somewhat restricted, but that restriction should not be viewed as police interference. What the statute requires is that another person accept responsibility for the defendant before the defendant can be released. Once a defendant is released under the provisions of "John's Law" the defendant is free to take whatever steps he/she may chose to obtain an independent test. [Note 12] "[A] policy of releasing an intoxicated DWI arrestee only to persons responsible for the arrestee's conduct strikes a proper balance between the right to an independent BAC test and the continuing duty of the police to safeguard the public." State v. Greeley, 178 N.J. at 48-9. [Note 13]

#3 "[t]he police officer shall, however, inform the person arrested of the consequences of refusing to submit to such test ..."

Every person who receives a license to operate a motor vehicle in New Jersey, and in every other State, by virtue of applying for, taking the written and driving tests, and accepting the driver's license, has already given their implied consent to submit to chemical breath testing. However, the act of being licensed is not, in and of itself, an element of a DWI refusal violation. The violation is operating a motor vehicle and refusing to submit to chemical breath testing, when so requested by the police or law enforcement officer.

This third provision, again informs the defendant that refusing to submit to chemical breath testing will, upon conviction, result in the imposition of additional penalties, beyond any penalties imposed for a DWI conviction. N.J.S.A. 39:4-50.2(e); N.J.S.A. 39:3-10.24e; N.J.S.A. 12:7-55e. This provision also addresses the issue of a defendant's right to speak with an attorney, as well as the "confusion" defense. See, State v. Leavitt, supra. This component, is fulfilled, by the fourth provision, discussed, infra.

#4 "A standard statement, prepared by the [NJ Motor Vehicle Commission,] Chief Administrator shall be read by the police officer to the person under arrest."

This fourth provision, fulfills the statutory requirements at N.J.S.A. 39:4-50.2(e); N.J.S.A. 39:3-10.24e; N.J.S.A. 12:7-55e. A law enforcement officer accomplishes this provision by reading the applicable Standard (Refusal) Statement to a defendant, prior to the administration of any chemical breath tests. The Legislature has mandated that these Standard (Refusal) Statements, prepared by the NJMVC Chief Administrator, be "read to the defendant." State v. Widmaier, 157 N.J. at 489. Therefore, they must be read, exactly as written.

APPENDIX M

Copies of the most recently approved Standard Statements are included in the Appendix to this Guideline.

The essential key, is that the legislative mandate requires that the police officer be the person who reads the Standard Statement to the defendant. Giving or handing the Standard Statement to the defendant to read for him or herself will not suffice as complying with the statutory mandate that the officer read it to the defendant. State v. Widmaier, 157 N.J. at 489.

In addition, the Standard Statement contains a recitation of the range of the statutory penalties which a court will impose, if the defendant is found guilty. Therefore, police and law enforcement officers must strictly comply with the statutory requirements that the Standard Statement, as approved by the NJ MVC Chief Administrator, be read, as written, to the defendant. Deviation from, or variation of, the exact language of the Standard Statement, for whatever reason, could be viewed by a Court as non-compliance with the statutory requirements.

However, in a circumstance where, due to inadvertence or mistake, a law enforcement officer reads a Standard Statement that is not the current Standard Statement, such an error should not result in the dismissal of the DWI refusal charge. The key factor is that a Standard Statement was read to the defendant, albeit one that has been revised or replaced.

A review of the Standard Statements which preceded the current Standard Statement reveals that they all contain the essential elements required under the statute: i.e., informing the defendant that he/she must take the tests; informing the defendant that a copy of the breath test results will be provided; informing the defendant of their right to an independent test; and informing the defendant of the consequences of refusing to take the tests. With each successive revision of the Standard Statements, other than the revisions made in 1987 to conform to the recommendation of the Supreme Court in State v. Leavitt, 107 N.J. at 542, it is only this last element that has been revised, to conform to changes in the penalties for refusal. Thus, where a law enforcement officer has read an incorrect Standard Statement, the prosecutor should represent to the Court that the incorrect Standard Statement was read, and therefore, in the interests of fairness, the State would only ask the Court, upon a verdict of guilty, to impose the penalties recited in that Standard Statement, rather than the penalties currently required by law. Such a position is fully consistent with the intention of the statutory scheme while not seeking to overreach with regard to penalties. Every effort should be made to insure that the correct form is used.

Also, where a law enforcement agency may have a policy or practice which goes beyond the statutory requirements discussed herein, and those policies or practices are not prohibited by this Guideline, then those policies or practices should be reviewed for legal sufficiency by the Municipal Prosecutor or the appropriate legal counsel for the law enforcement agency.

Unlike a Miranda warning, which requires the defendant to affirmatively acknowledge a constitutional right, the Standard (Refusal) Statement does not require such an affirmative acknowledgment. What is required is that the defendant must give an “unconditional, unequivocal assent” (State v. Widmaier, 157 N.J. at 497) to the request to submit to chemical breath testing. Anything less, including silence, constitutes a refusal, and subjects the defendant to penalties, in addition to any penalties imposed for DWI.

A [B]reathalyzer test is not an occasion "for debate, maneuver or negotiation, but rather for a simple 'yes' or 'no' to the officer's request." Ibid. [State v. Bernhardt, 245 N.J. Super. 210, 219 (App. Div. 1991), certif. den. 123 N.J. 323 (1991)] (quoting [State v.] Corrado, supra, 184 N.J. Super. [561] at 569 [(App. Div. 1970)] (quoting [State v.] Pandoli, supra, 109 N.J. Super. [1] at 4 (App. Div. 1970])). Any other result would undermine law enforcement's ability to remove intoxicated drivers from the roadways.

State v. Widmaier, 157 N.J. at 497

Similarly, a violation of the refusal statute, like a violation of the DWI statutes, is a strict liability offense. There simply is no issue for a court to decide with respect to a defendant's subjective intent. State v. Widmaier, 157 N.J. at 498.

Finally, a "conditional or ambiguous response to a police officer's final demand to submit to the [B]reathalyzer test constitutes a violation of the refusal statute whether or not the suspect intended to refuse to take the test." Ibid.

In situations where the defendant does not respond, or gives a vague or inconclusive response, or requests to speak with an attorney before providing breath samples, the officer is then required to read an additional paragraph on the Standard Statement informing the defendant that he/she must respond and does not have a right to speak to an attorney. See, State v. Leavitt, 107 N.J. at 541-2. See also, State v. Widmaier, 157 N.J. at 487-8.

Once a police or law enforcement officer makes a determination, after having read to the defendant, the appropriate Standard Statement, that the defendant has refused to submit to chemical breath testing, the defendant is not entitled to "cure" that violation. State v. Bernhardt, 245 N.J. Super. 210 (App. Div. 1991), certif. den. 126 N.J. 323 (1991). Defendants' are afforded constitutionally sufficient notice and an opportunity to respond affirmatively and submit to chemical breath testing.

The Standard (Refusal) Statements

The first Standard (Refusal) Statement was required with the adoption of P.L.1977, c.29, amending, N.J.S.A. 39:4-50.2 and -50.4.'4 Prior to 1977, no standard statement was required.

P.L.1966, c.142.

Thereafter, each time the Legislature has amended the DWI refusal statutes, new or revised Standard (Refusal) Statements have been approved by the NJMVC Chief Administrator (formerly the Director of DMV). Once the Standard Statement is approved, the Director of the Division of Criminal Justice distributes those new or revised Standard (Refusal) Statements to all law enforcement agencies throughout the State.

As of the date of this Guideline, three (3) Standard (Refusal) Statement forms, DWI, CDL/DWI, OVWI, have been approved by the NJMVC Chief Administrator. This guideline replaces all explanatory or cover memoranda which may have previously accompanied revisions of the statements but in no way replaces or modifies the statements as promulgated by the Chief Administrator of the NJMVC. The three approved statements are:

• DWI Refusal Statement - New Jersey Motor Vehicle Commission (NJ MVC) Standard Statement for Operators of a Motor Vehicle - N.J.S.A. 39:4-50.2(e), Revised & effective, April 26, 2004 [P.L.2004, c.8, §4].

APPENDIX M

• CDL/DWI Refusal Statement - DMV Standard Statement For Operators of a Commercial Motor Vehicle, N.J.S.A. 39:3-10.24e, Revised, February 1, 2001 to conform to State v. Widmaier, 157 N.J. 475, 498-499 (1999).

• OVWI Refusal Statement - New Jersey Motor Vehicle Commission (NJ MVC) Standard Statement for Operators of Vessels - N.J.S.A. 12:7-55e, Revised & effective, July 1, 2004 [P.L.2004, c.80, §4].

A copy of each of the above Standard (Refusal) Statements is attached to this Guideline. Copies can also be found, in an Adobe (.pdf) format, on the Division of Criminal Justice internet web site at www.njdcj.org or www.state.nj.us/lps/dcj, under the heading Attorney General Guidelines, DWI Enforcement, "NJ MVC Standard Refusal Statements." Any revision of one or more of these Standard Statements will be posted, and available, on the Division of Criminal Justice internet web site. In addition, a written notice will be sent to all law enforcement agencies advising of the change and providing a copy of the revised Standard Statement.

Note 14: In 1982, N.J.S.A. 39:4-50.4 was repealed and replaced by N.J.S.A. 39:4-50.4a. P.L.1981, c.512, §§2, 3.

[Publisher's Note: Attachments omitted.]

Note 1: The purpose of P.L.2004, c.8, was "clarify the penalties for refusing to submit to a Breathalyzer test after being arrested for drunk driving," and to clarify the language concerning consecutive license suspensions for second or subsequent refusal convictions and convictions for drunk driving. See, P.L.2003, c.314, lowering the per se offense limit to 0.08%.

Note 2: All Attorney General Directives and Guidelines related to DWI enforcement are available on the Division of Criminal Justice internet web site at www.state.nj.us/lps/dcj or www.njdcj.org under the headings "AG Directives," "AG Guidelines," or "DWI Enforcement."

Note 3: Chemical breath test or tests, means chemical analysis (N.J.A.C. 13:51-1.2) through the use of tests administered to a defendant or suspect on an approved instrument (N.J.A.C. 13:511.2, -3.5) by a certified Breath Test Operator (N.J.A.C. 13:51-1.2, 1.7), pursuant to approved methods of chemical breath testing (N.J.A.C. 13:51-3.6).

Note 4: Under the holding in State v. Reiner, 180 N.J. 307 (2004), "School zone" violations for DWI, N.J.S.A. 39:4-50, or DWI refusal, N.J.S.A. 39:4-50.4a.b., under "Filomena's Law," P.L. 1999, c. 185, §§ 3-5, need to be specifically charged, on the Uniform Traffic Ticket, as N.J.S.A. 39:4-50(g) or N.J.S.A. 39:4-50.2 in a "school zone," and the State must prove the additional elements pertaining to a "school zone" for that offense. State v. Reiner, 180 N.J. at 318-9.

Note 5: Cert. den. Laurick v. N.J., 498 U.S. 967, 111 S.Ct. 429, 112 L.Ed.2d 413 (1990).

Note 6: See, State v. Greeley, 178 N.J. 38 (2003) discussing R. 7:6-2 and the "practice of pleading guilty with a reservation," when the issue involved is rooted in a motion to suppress, R. 3:5-7; 7:5-2. Id. at 50-1.

Note 7: These tables were developed from a review of the applicable statutes, case law, and the Minimum Mandatory Fines & Penalties Schedule, Nov. 19, 2001, as prepared by the AOC.

Note 8: "Whenever a person is charged with a violation of R.S.39:4-50 section 2 of P.L.1981, c. 512 (C.39:4-50.4a), a municipal prosecutor shall contact the New

Jersey Motor Vehicle Commission by electronic or other means, for the purpose of obtaining an abstract of the person's driving record. In every such case, the prosecutor shall:

a. Determine, on the basis of the record, if the person shall be charged with enhanced penalties as a repeat offender; and

b. Transmit the abstract to the appropriate municipal court judge prior to the imposition of sentence."

Note 9: The holding in State v. Laurick, supra, with respect to enhancing sentences, has been abrogated by Nichols v. U.S., 511 U.S. 738, 742, n.7, 748-9, 114 S.Ct. 1921, 1925, n.7, 1927-8, 128 L.Ed.2d 745 (1994).

Note 10: The Appellate Division has refused to recognize HGN as being scientifically reliable and acceptable, thus allowing its admissibility, without foundational testimony, i.e. a Frye hearing in the trial court. State v. Doriguzzi, 334 N.J. Super. at 533. The Appellate Court also refused to recognize the findings made by a Law Division Judge, in State v. Maida, 332 N.J. Super. 564 (Law Div. 2000), following a Frye hearing. In that case the Law Division Judge found that HGN was scientifically reliable and generally accepted in the scientific community, and therefore, admissible. State v. Maida, 332 N.J. Super. at 572-3.

Note 11: As presently drafted, none of the provisions in the Implied Consent Laws apply to the taking of blood, urine or other bodily substance samples. Case law controls the criteria to be used by police for determining that blood or other bodily fluid samples should be drawn, the manner and methods by which it is to be drawn.

Note 12: For those municipalities which have elected to enact an ordinance under the provisions of John's Law II, P.L.2003,c.164, permitting local law enforcement to hold a DWI defendant in custody for up to 8 hours, law enforcement personnel in those municipalities will have to consult the Municipal Attorney or Solicitor for legal advice or guidance on this matter.

Note 13: The Greeley decision does not specifically mention John's Law because Mr. Greeley was arrested in Feb. 1998, prior to the adoption of P.L.2001, c.69. The case does, however, discuss John's Law II, P.L.2003, c.164. State v. Greeley, 178 N.J. at 48-9.