

## Memorandum in Opposition

### CRIMINAL JUSTICE SECTION

CJS #1

September 19, 2012

S. 6636  
A. 9544

By: Senator Fuschillo

By: M. of A. Weisenberg

Senate Committee: Transportation

Assembly Committee: Transportation

Effective Date: 90 days after enactment

**AN ACT** to amend the vehicle and traffic law, the executive law, the penal law and the criminal procedure law, in relation to driving while intoxicated and ignition interlock devices

This bill would amend various bodies of law to provide a stricter statutory scheme by which to penalize individuals convicted of driving while intoxicated.

#### **Background**

Chapter 496 of the Laws of 2009, known as Leandra's Law, was enacted with the goal of creating strict penalties for those convicted of impaired driving who had minors in the vehicle at the time of the incident. At the same time, Chapter 496 created a new ignition interlock requirement for those convicted of impaired driving. This bill would expand upon the ignition interlock requirement.

Chapter 496 requires all criminal DWI convicts to install vehicle ignition interlock devices, but according to the Sponsor's Memorandum in Support the actual installation rate is less than one-third. This bill would provide enhanced penalties and alternatives to increase the compliance rate. The Criminal Justice Section does not believe this bill is the mechanism with which to accomplish this goal, and therefore, opposes its passage.

#### **Discussion**

This bill would introduce a new level of restriction on all individuals convicted of Vehicle and Traffic Law (VTL) Section 1192 offenses that goes far beyond the goal of preventing recidivism. Moreover, the bill, by mandating a sentence that requires either the installation of an ignition interlock device in a person's car or that a person wear an alcohol monitoring device, also known as a SCRAM device, creates a more restrictive penalty on the indigent and youth who often do not have the means to own a car.

For individuals convicted under this bill, who do not own a vehicle in which an ignition interlock would otherwise be installed, a sentence of not less than six months wearing a SCRAM device would be required. This may have the effect of limiting people from holding certain employment, because of the physical limitations imposed by the wearing of a SCRAM device.

Finally, and perhaps most importantly for the purposes of the goal of this legislation, unlike the ignition interlock device which prevents a car from being operated, the SCRAM device does nothing of the sort. Those who support its use argue that it will deter a person from driving simply by the fact that their alcohol intake is being monitored, but there is nothing to show that this is the case. A person wearing a SCRAM device is just as capable as a person not wearing one to operate a motor vehicle under the influence of alcohol. The device monitors his or her blood alcohol every 30 minutes and reports any blood alcohol content (BAC) reading over 0.02. This is an invasion of personal privacy that goes well beyond determining an individual's legal limit of intoxication. Moreover, such monitoring is incongruous with the stated intent of this legislation—to prevent recidivism and drinking and driving.

### **Scram Devices**

This legislation would require defendants convicted of DWI to install an ignition interlock device on their vehicle or, alternatively, wear a “transdermal” ankle bracelet for at least six months. The proposed statute calls for installation of the device on any vehicle titled or registered to the defendant, *“or, if such person does not own a motor vehicle, in the vehicle operated by such person at the time of the violation...or in at least one vehicle registered to such person’s household.”*

In broad terms, the bill would amend VTL Section 1198 (4) to allow a defendant to show good cause as to why the installation of an ignition interlock device is impracticable. If the court finds good cause as to the impracticability of installing an ignition interlock device, then the court must order the person to wear a transdermal monitoring device for a period “of not less than six months.” We note that there is no indication about what the court is to do if good cause is not found. This provision raises questions about where and/or how a defendant gets the interlock device installed if he or she does not own any vehicle; and the owner of the vehicle in which the violation took place or the owner of a vehicle in the defendant’s household does not consent to the installation of the device?

It is our observation, that this bill would limit judicial discretion in deciding the severity of punishment to be afforded due to the bill’s rigid requirements. Imposition of such a mandatory penalty would not allow a judge to evaluate important factors, such as sufficiency of the evidence and prior records of accused. Moreover, penalties of this sort make it difficult to provide just punishment for guilty parties. The bottom line is that this bill would require judges to punish in accordance with the statute, and not to evaluate the facts and circumstances of each case when determining the appropriate penalty.

Instead of instantaneously preventing people from driving when their ability to do so may be impaired by the consumption of alcohol, as ignition interlock devices do, the SCRAM device imposes complete abstinence for the period of the imposed suspension (at a minimum), or for the full extent of the term of probation or conditional discharge imposed. As we understand how the SCRAM device operates, a positive reading would be a reading of 0.02 or more for three consecutive readings, which occur approximately every thirty minutes. Further, the device does not download the results of daily monitoring after 9pm and if a person leaves his or her host state, the device ceases downloading the results of the testing until that person returns. Therefore, and most importantly, when weighed against the goal of this bill, this device does not and would not prevent a person from operating a motor vehicle while intoxicated.

### **Youthful Offenders**

Of particular significance is that the bill would apply to those defendants that are adjudicated youthful offenders (YOs). While this amendment seems consistent with the intent of the underlying statute, the inclusion of YOs creates various problems for the youth—especially poor youth. Not only would the youth have to face the stigma of being identified as a criminal, he or she would have to pay for the maintenance of the device. Youthful offenders would be required to finance the monitoring and functionality of the device for a period of at least six months. If one does not have sufficient financial means to finance the device, its mandatory use could have significant unintended financial penalties.

### **Combined Influence**

Another significant, if not ironic amendment, made by this legislation is that it would include convictions for a violation of VTL Section 1192 (4-a), which deals with driving under the combined influence of alcohol and drugs. Under the current statutory scheme, Section 1192 (4-a) was a unified category. However, the proposed legislation would divide 1192 (4-a) into two subsections, 1192 (4-a) (a) and 1192 (4-a) (b). Section 1192 (4-a) (b) would continue the prohibition against driving under the combined influence of alcohol and drugs. However, the statute would be amended so that a violation of the proposed Section 1192 (4-a) (b) would require an ignition interlock.

While these amendments maintain the original intent of the statute—preventing drinking and driving—ironically, such amendments would also require an ignition interlock or SCRAM device in the case of a conviction of driving under the influence of drugs or combined influence of drugs and alcohol. As the Criminal Justice Section understands the operation of these devices, they do not monitor an individual for drug use, thereby not fulfilling the goal of this legislation. This will lead, in some cases, to the unnecessary and inefficient monitoring of an individual for alcohol use, where the legitimate underlying concern is drug use, which would continue to go unmonitored.

## Conclusion

The intended use of the ignition interlock device is not that it is used as a punishment, but rather as a monitoring device intended to protect innocent drivers on state roadways. The SCRAM device, subjects its wearer to a continuous, intrusive monitoring that follows them everywhere. The requirement that a person wear an alcohol monitoring device is much more invasive than the installation of an ignition interlock device. The SCRAM device is worn on a person's body, while the ignition interlock device is merely installed on one's personal property. The SCRAM provisions also create a more severe penalty for those who don't own a vehicle. Monitoring through SCRAM devices can be easily thrown off by outside, non-alcohol variables, which will immediately subject the accused to more hearings and possibly further punishment. Instead of this new device, firmer, more rigid punishment could be imposed if one is found to be tampering with the current interlock device requirements.

The SCRAM requirements in this legislation should be cautiously considered. We recommend that time be taken to examine whether the amendments made by this bill are necessary and justified.

Based on the foregoing, the Criminal Justice Section **OPPOSES** the enactment of this legislation.

Section Chair:

Persons who prepared memorandum:

Marvin Schechter, Esq

Sherry Wallach, Esq. and

Tucker Stanclift, Esq.