

Defending DWI Cases: The Critical Issues

NYSBA CLE Program

Friday, September 8, 2017

9:00 a.m. – 5:30 p.m.

Buffalo

Hyatt Place Buffalo/Amherst

Thursday, September 14, 2017

9:00 a.m. – 5:30 p.m.

NYC

Radisson Martinique on Broadway

Thursday, September 28, 2017

9:00 a.m. – 5:30 p.m.

Albany | Live & Webcast

New York State Bar Association

8.0 MCLE Credits | 3.5 Skills; 3.5 Professional Practice; 1.0 Ethics

www.nysba.org/DefendingDWICases/

Co-sponsored by the Criminal Justice Section and the Committee on Continuing Legal Education of the New York State Bar Association

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Program Description

DWI dispositions rise and fall with the factual, constitutional and statutory issues that arise in every case. It is the ability to spot, understand, and argue these issues that makes the difference for both the prosecution and the defense. This DWI program will focus on the critical issues that determine the ultimate disposition of these cases.

Program Chair

Peter Gerstenzang, Esq. | Gerstenzang, Sills, Davis, Cohn & Gerstenzang

Additional information about the program can be found at
<http://www.nysba.org/DefendingDWICases/>

Program Agenda

| | |
|------------------------|--|
| 8:30 a.m. – 9:00 a.m. | Registration |
| 9:00 a.m. – 9:10 a.m. | Welcome and Introduction |
| 9:10 a.m. – 10:25 a.m. | <p>I. Refusal Issues</p> <ul style="list-style-type: none">(a) Right to Counsel(b) Report of Refusal Analysis(c) Effect on Conditional Licenses & 20-Day Order(d) Use of Refusal at Trial(e) Commercial Driver's Licenses(f) PSD Refusals & the 2-Hour Rule |

1.5 MCLE Credits in Skills

Speaker:

Peter Gerstenzang, Esq. | Gerstenzang, Sills, Davis, Cohn & Gerstenzang | Albany

| | |
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| 10:25 a.m. – 10:35 a.m. | Refreshment Break |
| 10:35 a.m. – 11:25 a.m. | <p>II. Breath Test Issues</p> <ul style="list-style-type: none">(a) Mouth Alcohol & Slope Detector(b) Partition Ratio(c) Body Temperature(d) 2-Hour Rule |

1.0 MCLE Credit in Skills

Speaker:

Steven Epstein, Esq. | Barket, Marion, Epstein and Kearon, LLP
Garden City

| | |
|-------------------------|---|
| 11:25 p.m. - 12:15 p.m. | <p>III. Stop & Arrest Issues</p> <ul style="list-style-type: none">(a) Hollman & DeBour(b) Anonymous Tips vs. Known Informant(c) Mistake of Fact vs. Mistake of Law(d) Bad Stops and Arrests |
|-------------------------|---|

1.0 MCLE Credit in Professional Practice

Speaker:

Eric H. Sills, Esq. | Gerstenzang, Sills, Davis, Cohn & Gerstenzang | Albany

| | |
|------------------------|--|
| 12:15 a.m. – 1:15 p.m. | Lunch (On your own) |
| 1:15 p.m. – 2:05 p.m. | <p>IV. Blood Test Issues</p> <ul style="list-style-type: none">(a) Extrapolation(b) Blood Test Kit Issues |

- (c) The Compulsory Chemical Test
- (d) Physician-Patient Privilege
- (e) Admissibility

1.0 MCLE Credit in Skills

Speaker:

Edward L. Fiandach, Esq. | Fiandach & Fiandach | Rochester

2:05 p.m. – 3:20 p.m.

V. Deposition Issues

- (a) Ignition Interlock Device
- (b) DMV Regulations
- (c) Out-of-State Defendants
- (d) Youthful Offender & Zero Tolerance

1.5 MCLE Credits in Professional Practice

Speaker:

Jonathan D. Cohn, Esq. | Gerstenzang, Sills, Davis, Cohn & Gerstenzang | Albany

3:20 p.m. – 3:40 p.m.

Refreshment Break

3:40 p.m. – 4:30 p.m.

VI. DWAI Drugs Issues

- (a) Impairment – Drugs or Something Else
- (b) Drugs & HGN
- (c) Drug Concentration & Impairment
- (d) Blood vs. Urine
- (e) The DRE & The Rolling Log

1.0 MCLE Credit in Professional Practice

Speaker:

Joseph M. Gerstenzang, Esq. | Gerstenzang, Sills, Davis, Cohn & Gerstenzang | Albany

4:30 p.m. – 5:20 p.m.

VII. Ethics Issues

- (a) Prior Convictions & Pending Charges
- (b) Client Relations
- (c) Nasty Judges & Lawyers
- (d) Judicial Policies

1.0 MCLE Credit in Ethics

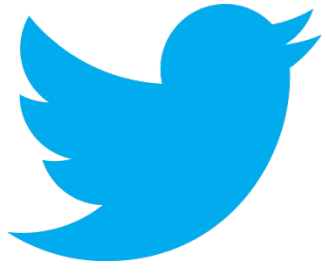
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Supplemental Outlines may be
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Topic 1:

Refusal Issues

DEFENDING DWI CASES - THE CRITICAL ISSUES

REFUSAL ISSUES

Sponsored by

THE NEW YORK STATE BAR ASSOCIATION

September 8, 2017 -- Buffalo/Amherst
September 14, 2017 -- New York City
September 28, 2017 -- Albany

Materials Prepared By

PETER GERSTENZANG, ESQ. and ERIC H. SILLS, ESQ.
GERSTENZANG, SILLS, COHN & GERSTENZANG
210 Great Oaks Boulevard
Albany, New York 12203
Tel: (518) 456-6456

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TEST REFUSALS

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§ 41:1 In general

A motorist suspected of violating VTL § 1192 will generally be requested to submit to three separate and distinct types of tests -- (1) field sobriety tests, such as the Horizontal Gaze Nystagmus test, the Walk-and-Turn test and the One-Leg Stand test, (2) a breath screening test, such as the Alco-Sensor test, and (3) a chemical test, such as the Breathalyzer, DataMaster, Intoxilyzer, Alcotest, etc., and/or a blood or urine test. This chapter deals with the consequences of refusing to submit to such testing, with the primary focus being on the consequences of a refusal to submit to a chemical test.

§ 41:2 Refusal to communicate with police -- Generally

As a general rule, the People cannot use a defendant's refusal to communicate with the police as part of their direct case, and/or to impeach the defendant's testimony at trial, regardless of whether such conduct takes place pre-arrest, post-arrest, or at the time of arrest. See, e.g., People v. Basora, 75 N.Y.2d 992, 993, 557 N.Y.S.2d 263, 264 (1990); People v. DeGeorge, 73 N.Y.2d 614, 618-20, 543 N.Y.S.2d 11, 12-14 (1989); People v. Conyers, 52 N.Y.2d 454, 438 N.Y.S.2d 741 (1981), and 49 N.Y.2d 174, 424 N.Y.S.2d 402 (1980). See also Miranda v. Arizona, 384 U.S. 436, 468 n.37, 86 S.Ct. 1602, 1624 n.37 (1966).

Nonetheless, in People v. Johnson, 253 A.D.2d 702, ___, 679 N.Y.S.2d 361, 362 (1st Dep't 1998), the Court held that "defendant's refusal to give his name or other pedigree information to the police was properly admitted as evidence of his consciousness of guilt."

§ 41:3 Refusal to submit to field sobriety tests

There is no requirement, statutory or otherwise, that a DWI suspect submit to field sobriety tests. See Berkemer v. McCarty, 468 U.S. 420, 439, 104 S.Ct. 3138, 3150 (1984) ("[T]he officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obligated to respond"). However, although a DWI suspect has the right to refuse to perform field sobriety tests, the police are not required to inform the suspect of such right, as "[t]here is no statutory or other requirement for the establishment of rules regulating field sobriety tests." People v. Sheridan, 192 A.D.2d 1057, ___, 596 N.Y.S.2d 245, 245-46 (4th Dep't 1993).

In addition, the refusal to perform field sobriety tests is admissible against the defendant at trial. See People v. Berg, 92 N.Y.2d 701, 703, 685 N.Y.S.2d 906, 907 (1999) ("evidence of defendant's refusal to submit to certain field sobriety tests

[is] admissible in the absence of Miranda warnings . . . because the refusal was not compelled within the meaning of the Self-Incrimination Clause"). The Berg Court noted, however, that "the inference of intoxication arising from failure to complete the tests successfully 'is far stronger than that arising from a refusal to take the test.'" Id. at 706, 685 N.Y.S.2d at 909 (citation omitted).

Similarly, in People v. Powell, 95 A.D.2d 783, ___, 463 N.Y.S.2d 473, 476 (2d Dep't 1983), the Court held that:

It is true that the admission into evidence of defendant's refusal to submit to the sobriety test here cannot be deemed a violation of his Federal or State privilege against self-incrimination on the basis that it was coerced. . . . There is no constitutional violation in so using defendant's refusal even if defendant was not specifically warned that it could be used against him at trial. . . .

[However,] though *admissible*, the defendant's refusal to submit to co-ordination tests in this case on the ground that they would be painful because of his war wounds was nevertheless of *limited probative value* in proving circumstantially that defendant would have failed the tests.

Notably, the Powell Court made clear that "[a]s the Court of Appeals has stated in respect to another example of assertive conduct, '[t]his court has always recognized the ambiguity of evidence of flight and insisted that the jury be closely instructed as to its weakness as an indication of guilt of the crime charged' (People v. Yazum, 13 N.Y.2d 302, 304, 246 N.Y.S.2d 626, 196 N.E.2d 263)." Id. at ___, 463 N.Y.S.2d at 476.

§ 41:4 Refusal to submit to breath screening test

VTL § 1194(1)(b) provides that:

(b) Field testing. Every person operating a motor vehicle which has been involved in an accident or which is operated in violation of any of the provisions of [the VTL] shall, at the request of a police officer, submit to a *breath test* to be administered by the police officer. If such test indicates that such operator has consumed alcohol, the police officer may request such operator to submit

to a chemical test in the manner set forth in [VTL § 1194(2)].

(Emphasis added).

The phrase "breath test" in VTL § 1194(1)(b) refers to a preliminary test of a DWI suspect's breath for the presence of alcohol using a preliminary breath screening device such as an Alco-Sensor (commonly referred to as a "PBT"). The refusal to submit to a breath screening test in violation of VTL § 1194(1)(b) is a traffic infraction. See VTL § 1800(a); People v. Leontiev, 38 Misc. 3d 716, ___, 956 N.Y.S.2d 832, 837-38 (Nassau Co. Dist. Ct. 2012); People v. Pecora, 123 Misc. 2d 259, ___, 473 N.Y.S.2d 320, 323 (Wappinger Just. Ct. 1984); People v. Steves, 117 Misc. 2d 841, ___, 459 N.Y.S.2d 402, 403 (Webster Just. Ct. 1983); People v. Hamza, 109 Misc. 2d 1055, ___, 441 N.Y.S.2d 579, 581 (Gates Just. Ct. 1981); People v. Graser, 90 Misc. 2d 219, ___, 393 N.Y.S.2d 1009, 1014 (Amherst Just. Ct. 1977). See generally People v. Cunningham, 95 N.Y.2d 909, 910, 717 N.Y.S.2d 68, 68 (2000).

VTL § 1194(1)(b) makes clear that a motorist is under no obligation to submit to a breath screening test unless he or she has either (a) been involved in an accident, or (b) committed a VTL violation. In addition, since obtaining a breath sample from a motorist for alcohol analysis constitutes a "search" within the meaning of the 4th Amendment, see Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616-17, 109 S.Ct. 1402, 1413 (1989); Schmerber v. California, 384 U.S. 757, 767, 86 S.Ct. 1826, 1834 (1966), submission to such a search cannot lawfully be required in the absence of probable cause. See People v. Brockum, 88 A.D.2d 697, ___, 451 N.Y.S.2d 326, 327 (3d Dep't 1982); Pecora, 123 Misc. 2d at ___, 473 N.Y.S.2d at 322. See generally People v. Kates, 53 N.Y.2d 591, 594-95, 444 N.Y.S.2d 446, 448 (1976). As such, absent a proper factual predicate for a police officer to request that a motorist submit to a breath screening test, a refusal to submit thereto does not violate VTL § 1194(1)(b). See also Chapter 7, *supra*.

Although the results of an Alco-Sensor test are inadmissible at trial, see People v. Thomas, 121 A.D.2d 73, ___, 509 N.Y.S.2d 668, 671 (4th Dep't 1986), aff'd, 70 N.Y.2d 823, 523 N.Y.S.2d 437 (1987), in People v. MacDonald, 89 N.Y.2d 908, 910, 653 N.Y.S.2d 267, 268 (1996), the Court of Appeals held that "testimony regarding defendant's attempts to avoid giving an adequate breath sample for alco-sensor testing was properly admitted as evidence of consciousness of guilt, particularly in light of the trial court's limiting instructions to the jury on this point."

In perhaps the only published case dealing directly with the issue of the admissibility of an Alco-Sensor test refusal at trial, the Court held that an Alco-Sensor test refusal, like an

Alco-Sensor test result, is inadmissible. People v. Ottino, 178 Misc. 2d 416, 679 N.Y.S.2d 271 (Sullivan Co. Ct. 1998). In so holding, the Court reasoned that "to allow the jury to hear the evidence of an alco-sensor test refusal would in effect make admissible that evidence which is clearly inadmissible." Id. at ___, 679 N.Y.S.2d at 273. Although MacDonald, *supra*, appears at first glance to hold otherwise, MacDonald is distinguishable from Ottino in that the evidence that was permitted in MacDonald was not evidence of defendant's refusal to submit to an Alco-Sensor test, but rather "testimony regarding defendant's [conduct in] attempt[ing] to avoid giving an adequate breath sample for alco-sensor testing." 89 N.Y.2d at 910, 653 N.Y.S.2d at 268.

§ 41:5 Refusal to submit to chemical test

The remainder of this chapter deals with the consequences of, and procedures applicable to, a DWI suspect's refusal to submit to a chemical test. In New York, there are two separate and very distinct consequences of refusing to submit to a chemical test. First, the refusal generally can be used against the defendant in a VTL § 1192 prosecution as "consciousness of guilt" evidence. Second, the refusal is a civil violation -- wholly independent of the VTL § 1192 charge in criminal Court -- which results in proceedings before a DMV Administrative Law Judge ("ALJ"), and generally results in both a significant driver's license revocation and a civil penalty (*i.e.*, fine).

§ 41:6 DMV refusal sanctions civil, not criminal, in nature

A DMV refusal hearing is "civil" or "administrative" in nature, as are the consequences resulting therefrom. See, e.g., Matter of Barnes v. Tofany, 27 N.Y.2d 74, 77, 313 N.Y.S.2d 690, 693 (1970) ("We hold that the 'double punishment' feature of our Vehicle and Traffic statute -- one criminal and the other administrative -- is lawful"); Matter of Brennan v. Kmiotek, 233 A.D.2d 870, ___, 649 N.Y.S.2d 611, 612 (4th Dep't 1996); Matter of Geary v. Commissioner of Motor Vehicles, 92 A.D.2d 38, ___, 459 N.Y.S.2d 494, 496-97 (4th Dep't), aff'd, 59 N.Y.2d 950, 466 N.Y.S.2d 304 (1983).

§ 41:7 Civil sanctions for chemical test refusal -- First offense

A chemical test refusal is considered to be a "first offense" if, within the past 5 years, the person has neither (a) had his or her driving privileges revoked for refusing to submit to a chemical test, nor (b) been convicted of violating any subdivision of VTL § 1192, or been found to have violated VTL § 1192-a, *not arising out of the same incident*. See VTL § 1194(2)(d). The civil sanctions for refusing to submit to a chemical test as a first offense are:

1. Mandatory revocation of the person's driver's license, permit, or non-resident operating privilege for at least 1 year. VTL § 1194(2)(d)(1)(a);
2. A civil penalty in the amount of \$500. VTL § 1194(2)(d)(2); and
3. A driver responsibility assessment of \$250 a year for 3 years. VTL § 1199. See also § 46:47, *infra*.

The driver responsibility assessment is also imposed for a conviction of a violation of any subdivision of VTL § 1192. VTL § 1199(1). However, if a person is both convicted of a violation of VTL § 1192 *and* found to have refused a chemical test in accordance with VTL § 1194 in connection with the same incident, only one driver responsibility assessment will be imposed. Id.

§ 41:8 Civil sanctions for chemical test refusal -- Repeat offenders

A chemical test refusal is considered to be a "repeat offense" if, within the past 5 years, the person has either (a) had his or her driving privileges revoked for refusing to submit to a chemical test, or (b) been convicted of violating any subdivision of VTL § 1192, or been found to have violated VTL § 1192-a, *not arising out of the same incident*. See VTL § 1194(2)(d). In addition, a prior "Zero Tolerance" chemical test refusal, in violation VTL § 1194-a(3), has the same effect as a prior refusal pursuant to VTL § 1194(2)(c) "solely for the purpose of determining the length of any license suspension or revocation required to be imposed under any provision of [VTL Article 31], provided that the subsequent offense or refusal is committed or occurred prior to the expiration of the retention period for such prior refusal as set forth in [VTL § 201(1)(k)]." VTL § 1194(2)(d)(1)(a).

The civil sanctions for refusing to submit to a chemical test as a repeat offender are:

1. Mandatory revocation of the person's driver's license, permit, or non-resident operating privilege for at least 18 months. VTL § 1194(2)(d)(1)(a);
2. A civil penalty in the amount of \$750 (unless the predicate was a violation of VTL § 1192-a or VTL § 1194-a(3), in which case the civil penalty is \$500). VTL § 1194(2)(d)(2); and
3. A driver responsibility assessment of \$250 a year for 3 years. VTL § 1199. See also § 46:47, *infra*.

The driver responsibility assessment is also imposed for a conviction of a violation of any subdivision of VTL § 1192. VTL § 1199(1). However, if a person is both convicted of a violation of VTL § 1192 *and* found to have refused a chemical test in accordance with VTL § 1194 in connection with the same incident, only one driver responsibility assessment will be imposed. Id.

In addition, DMV will require evidence of alcohol evaluation and/or rehabilitation before it will relicense the person. See Chapter 50, *infra*.

§ 41:9 Civil sanctions for chemical test refusal -- Commercial drivers

Effective November 1, 2006, the holder of a commercial driver's license who refuses to submit to a chemical test as a first offense is subject to the following civil sanctions:

1. Mandatory revocation of the person's commercial driver's license for at least 18 months -- *even if the person was operating a personal, non-commercial motor vehicle* (at least 3 years if the person was operating a commercial motor vehicle transporting hazardous materials). VTL § 1194(2)(d)(1)(c); and
2. A civil penalty in the amount of \$500 (\$550 if the person was operating a commercial motor vehicle). VTL § 1194(2)(d)(2).

A chemical test refusal by the holder of a commercial driver's license is considered to be a "repeat offense" if the person has ever either (a) had a prior finding that he or she refused to submit to a chemical test, or (b) had a prior conviction of any of the following offenses:

1. Any violation of VTL § 1192;
2. Any violation of VTL § 600(1) or (2); or
3. Any felony involving the use of a motor vehicle pursuant to VTL § 510-a(1)(a).

See VTL § 1194(2)(d)(1)(c).

The holder of a commercial driver's license who is found to have refused to submit to a chemical test as a repeat offender is subject to the following civil sanctions:

1. Permanent disqualification from operating a commercial motor vehicle. VTL § 1194(2)(d)(1)(c); and

2. A civil penalty in the amount of \$750. VTL § 1194(2)(d)(2).

The DMV Commissioner has the authority to waive such "permanent revocation" from operating a commercial motor vehicle where at least 10 years have elapsed from the commencement of the revocation period, provided:

(i) that during such [10] year period such person has not been found to have refused a chemical test pursuant to [VTL § 1194] and has not been convicted of any one of the following offenses: any violation of [VTL § 1192]; refusal to submit to a chemical test pursuant to [VTL § 1194]; any violation of [VTL § 600(1) or(2)]; or has a prior conviction of any felony involving the use of a motor vehicle pursuant to [VTL § 510-a(1)(a)];

(ii) that such person provides acceptable documentation to the commissioner that such person is not in need of alcohol or drug treatment or has satisfactorily completed a prescribed course of such treatment; and

(iii) after such documentation is accepted, that such person is granted a certificate of relief from disabilities as provided for in [Correction Law § 701] by the court in which such person was last penalized.

VTL § 1194(2)(d)(1)(c)(i)-(iii).

However, "[u]pon a third finding of refusal and/or conviction of any of the offenses which require a permanent commercial driver's license revocation, such permanent revocation may not be waived by the commissioner under any circumstances." VTL § 1194(2)(d)(1)(d).

§ 41:10 Chemical test refusal revocation -- Underage offenders

A person under the age of 21 who is found to have refused to submit to a chemical test, in violation of either VTL § 1194(2)(c) or VTL § 1194-a(3), will have his or her driver's license, permit, or non-resident operating privilege revoked for at least 1 year. VTL § 1194(2)(d)(1)(b).

A person under the age of 21 who is found to have refused to submit to a chemical test, in violation of either VTL § 1194(2)(c) or VTL § 1194-a(3), and who "has a prior finding,

conviction or youthful offender adjudication resulting from a violation of [VTL § 1192] or [VTL § 1192-a], *not arising from the same incident,*" will have his or her driver's license, permit, or non-resident operating privilege revoked for at least 1 year or until the person reaches the age of 21, *whichever is longer.* VTL § 1194(2)(d)(1)(b) (emphasis added).

For further treatment of chemical test refusals by underage offenders, see Chapter 15, *supra*.

§ 41:11 Chemical test refusal revocation runs separate and apart from VTL § 1192 suspension/revocation

The license revocation which results from a chemical test refusal is a "civil" or "administrative" penalty separate and distinct from the license suspension/revocation which results from a VTL § 1192 conviction in criminal Court. See § 41:6, *supra*. As such, the suspension/revocation periods run separate and apart from each other to the extent that they do not overlap.

In other words, to the extent that a VTL § 1192 suspension/revocation and a chemical test refusal revocation overlap, DMV runs the suspension/revocation periods *concurrently*; but to the extent that the suspension/revocation periods do *not* overlap, DMV runs the periods *consecutively*. The following example will illustrate this situation:

A woman over the age of 21 with a New York State driver's license is (a) charged with 1st offense DWI, and (b) accused of refusing to submit to a chemical test arising out of the same incident

If the woman pleads guilty to DWAI at arraignment, the 90-day license suspension arising from such conviction will start immediately, and the suspension period will not be credited toward any revocation period imposed by DMV for the chemical test refusal

If the woman pleads guilty to DWI at arraignment, the 6-month license revocation arising from such conviction will start immediately, and the revocation period will not be credited toward any revocation period imposed by DMV for the chemical test refusal

If the woman pleads not guilty at arraignment, the arraigning Judge will suspend her driver's license and provide her with a form entitled "Notice of Temporary Suspension and Notice of Hearing" on one side, and "Waiver of Hearing" on the other side

This suspension, which lasts the shorter of 15 days or until the DMV refusal hearing, will not be credited toward either (a) any revocation period imposed for the chemical test refusal, and/or (b) any suspension/revocation period imposed for a VTL § 1192 conviction

If the woman loses her refusal hearing while the criminal case is still pending, her driver's license will be revoked for at least 1 year commencing at the conclusion of the hearing, and the revocation period will not be credited toward any suspension/revocation period imposed for a VTL § 1192 conviction

If the woman waives her right to a refusal hearing, DMV will commence the 1-year refusal revocation as of the date it receives the "Waiver of Hearing" form

Thus, if the woman in the example is not interested in contesting either the DWI charge or the alleged chemical test refusal, her defense counsel should attempt to minimize the amount of time that her driver's license will be suspended/revoked. In this regard, the best course of action is to negotiate a plea bargain (hopefully to DWAI) which will be entered at the time of arraignment, and to execute the "Waiver of Hearing" form provided by the Court and mail it to DMV immediately.

§ 41:12 DMV refusal sanctions do not apply if chemical test result is obtained

Under the circumstances set forth in VTL § 1194(3), a DWI suspect can be subjected to a compulsory (*i.e.*, forcible) Court-Ordered chemical test despite his or her refusal to consent to such test. If a compulsory chemical test is administered to a DWI suspect, his or her refusal to voluntarily submit to the test is admissible in Court as consciousness of guilt evidence. See People v. Demetsenare, 243 A.D.2d 777, ___, 663 N.Y.S.2d 299, 302 (3d Dep't 1997). See also VTL § 1194(2)(f).

By contrast, where a compulsory chemical test is administered, a DWI suspect's refusal to voluntarily submit to the test is *not* a refusal for DMV purposes. In this regard, VTL § 1194(2)(b)(1) provides, in pertinent part:

(b) Report of refusal. (1) If: (A) such person having been placed under arrest; or (B) after a breath [screening] test indicates the presence of alcohol in the person's system; . . . and having thereafter been requested to submit to such chemical test and having been informed that the person's

license or permit to drive and any non-resident operating privilege shall be immediately suspended and subsequently revoked . . . for refusal to submit to such chemical test or any portion thereof, whether or not the person is found guilty of the charge for which such person is arrested . . . , refuses to submit to such chemical test or any portion thereof, *unless a court order has been granted pursuant to [VTL § 1194(3)], the test shall not be given and a written report of such refusal shall be immediately made by the police officer before whom such refusal was made.*

(Emphasis added).

Similarly, VTL § 1194(2)(b)(2) provides that the officer's Report of Refusal must satisfy all of the following requirements:

The report of the police officer shall set forth reasonable grounds to believe [1] such arrested person . . . had been driving in violation of any subdivision of [VTL § 1192] . . . , [2] that said person had refused to submit to such chemical test, and [3] *that no chemical test was administered pursuant to the requirements of [VTL § 1194(3)].*

(Emphasis added). See also 15 NYCRR § 139.2(a) ("No report [of refusal] shall be made if there was a compulsory test administered pursuant to [VTL § 1194(3)]").

The rationale is that the civil sanctions for a refusal are designed to penalize those who frustrate prosecution under VTL § 1192 by refusing to submit to a chemical test; since prosecution is not frustrated where a compulsory chemical test is obtained pursuant to VTL § 1194(3), DMV refusal sanctions are unnecessary, "and no departmental chemical test refusal hearing should be held in any such case." See Appendix 39.

Although both VTL § 1194 and the regulations promulgated thereunder provide that no Report of Refusal should be made where there is a chemical test refusal combined with a compulsory chemical test, no provision is made in either the statute or the regulations for the situation where a DWI suspect refuses a chemical test but is thereafter persuaded by the police to change his or her mind and submit to a test. This is presumably due to the fact that the statute contemplates that once a DWI suspect refuses a chemical test, "unless a court order has been granted

pursuant to [VTL § 1194(3)], *the test shall not be given* and a written report of such refusal shall be immediately made by the police officer before whom such refusal was made." VTL § 1194(2)(b)(1) (emphasis added).

In practice, however, the police often persuade a DWI suspect who has refused to submit to a chemical test to change his or her mind and submit to a test. See, e.g., People v. Cragg, 71 N.Y.2d 926, 528 N.Y.S.2d 807 (1988); People v. Stisi, 93 A.D.2d 951, ___, 463 N.Y.S.2d 73, 75 (3d Dep't 1983). Under such circumstances (i.e., where a chemical test is administered and a test result obtained despite an initial refusal), can the person also be subjected to DMV refusal sanctions? The answer is no.

In this regard, DMV's position is that the rationale applicable to compulsory chemical tests is equally applicable in this situation. That is, the civil sanctions of refusal are designed to penalize those who frustrate prosecution under VTL § 1192 by refusing to submit to a chemical test; since prosecution is not frustrated where a chemical test is obtained, DMV refusal sanctions are unnecessary and no departmental chemical test refusal hearing should be held in any such case. See Appendix 60. Cf. Matter of Hickey v. New York State Dep't of Motor Vehicles, 142 A.D.3d 668, 36 N.Y.S.3d 720 (2d Dep't 2016).

§ 41:13 VTL § 1194 preempts field of chemical testing

In People v. Moselle, 57 N.Y.2d 97, 109, 454 N.Y.S.2d 292, 297 (1982), the Court of Appeals made clear that VTL § "1194 has pre-empted the administration of chemical tests for determining alcoholic blood content with respect to violations under [VTL §] 1192." See also People v. Prescott, 95 N.Y.2d 655, 659 & n.3, 722 N.Y.S.2d 778, 780 & n.3 (2001); People v. Ameigh, 95 A.D.2d 367, ___, 467 N.Y.S.2d 718, 718 (3d Dep't 1983). See generally People v. Smith, 18 N.Y.3d 544, 548, 942 N.Y.S.2d 426, 429 (2012) ("The standards governing the administration of chemical tests to ascertain BAC in this circumstance are set forth in Vehicle and Traffic Law § 1194").

§ 41:14 What is a "chemical test"?

In the field of New York DWI law, the phrase "breath test" refers to a preliminary test of a DWI suspect's breath for the presence of alcohol using a preliminary breath screening device such as an Alco-Sensor (commonly referred to as a "PBT"). See § 41:4, supra. By contrast, the phrase "chemical test" is the term used to describe a test of the alcoholic and/or drug content of a DWI suspect's blood using an instrument other than a PBT.

In other words, BAC tests conducted utilizing breath testing instruments such as the Breathalyzer, DataMaster, Intoxilyzer, Alcotest, etc. are referred to as "chemical tests," *not* "breath tests." Similarly, the phrase "refusal to submit to a chemical test" refers to a DWI suspect's refusal to submit to such a test -- *not* to the mere refusal to submit to a breath screening test in violation of VTL § 1194(1)(b).

A chemical test is usually performed both (a) at a police station, and (b) *after* the suspect has been placed under arrest for DWI. By contrast, a breath test is usually performed both (a) at the scene of a traffic stop, and (b) *before* the suspect has been placed under arrest for DWI.

§ 41:15 Who can lawfully be requested to submit to a chemical test?

VTL § 1194(2)(a) provides, in pertinent part:

2. Chemical tests. (a) When authorized. Any person who operates a motor vehicle in this state shall be deemed to have given consent to a chemical test of one or more of the following: breath, blood, urine, or saliva, for the purpose of determining the alcoholic and/or drug content of the blood provided that such test is administered by or at the direction of a police officer with respect to a chemical test of breath, urine or saliva or, with respect to a chemical test of blood, at the direction of a police officer:

(1) having reasonable grounds to believe such person to have been operating in violation of any subdivision of [VTL § 1192] and within two hours after such person has been placed under arrest for any such violation; or . . .

(2) within two hours after a breath [screening] test, as provided in [VTL § 1194(1)(b)], indicates that alcohol has been consumed by such person and in accordance with the rules and regulations established by the police force of which the officer is a member.
. . .

For underage offenders being requested to submit to a chemical test pursuant to the Zero Tolerance laws, see § 15:30, *supra*.

As VTL § 1194(2)(a) makes clear, either a lawful VTL § 1192 arrest, or a positive result from a lawfully requested breath screening test, is a prerequisite to a valid request that a DWI suspect submit to a chemical test. See, e.g., People v. Moselle, 57 N.Y.2d 97, 107, 454 N.Y.S.2d 292, 296 (1982); Matter of Gagliardi v. Department of Motor Vehicles, 144 A.D.2d 882, ___, 535 N.Y.S.2d 203, 204 (3d Dep't 1988) ("In order for the testing strictures of Vehicle and Traffic Law § 1194 to come into play, there must have been a lawful arrest for driving while intoxicated"); People v. Stisi, 93 A.D.2d 951, ___, 463 N.Y.S.2d 73, 74 (3d Dep't 1983); Matter of June v. Tofany, 34 A.D.2d 732, ___, 311 N.Y.S.2d 782, 783 (4th Dep't 1970); Matter of Burns v. Hults, 20 A.D.2d 752, ___, 247 N.Y.S.2d 311, 312 (4th Dep't 1964); Matter of Leonard v. Melton, 58 A.D.2d 669, ___, 395 N.Y.S.2d 526, 527 (3d Dep't 1977) (proof that DWI suspect operated vehicle is necessary prerequisite to valid request to submit to chemical test pursuant to VTL § 1194). See also Welsh v. Wisconsin, 466 U.S. 740, 744, 104 S.Ct. 2091, 2095 (1984) ("It is not disputed by the parties that an arrestee's refusal to take a breath test would be reasonable, and therefore operating privileges could not be revoked, if the underlying arrest was not lawful. Indeed, state law has consistently provided that a valid arrest is a necessary prerequisite to the imposition of a breath test").

§ 41:16 Who can lawfully request that a DWI suspect submit to a chemical test?

VTL § 1194(2)(a) provides, among other things, that a chemical test must be "administered by or at the direction of a police officer." This requirement "does not preclude the police officer who determines that testing is warranted from administering the test as well. . . . [C]orroboation of the results is not required." People v. Evers, 68 N.Y.2d 658, 659, 505 N.Y.S.2d 68, 69 (1986).

In Matter of Murray v. Tofany, 33 A.D.2d 1080, ___, 307 N.Y.S.2d 776, 779 (3d Dep't 1970), the Appellate Division, Third Department, held that a "special policeman" duly appointed by the Mayor of Lake George was a "police officer" authorized to request a chemical test of a DWI suspect. See also Matter of Giacone v. Jackson, 267 A.D.2d 673, ___, 699 N.Y.S.2d 587, 588 (3d Dep't 1999) (fact that State Trooper's "Certificate of Appointment and Acceptance" was not properly filed with Secretary of State does not invalidate his arrests). See generally Matter of Metzgar v. Tofany, 78 Misc. 2d 1002, 359 N.Y.S.2d 160 (Nassau Co. Sup. Ct. 1974).

§ 41:17 Should a DWI suspect refuse to submit to a chemical test?

There is no simple answer (or even necessarily a correct answer) to the question of whether a DWI suspect should submit to a chemical test in a given situation -- a question which usually arises in the middle of the night! The answer depends upon many factors, such as whether there has been an accident involving serious physical injury or death, whether the DWI charge is a felony, whether the person is a repeat/multiple offender, whether the person needs to drive to earn a living, whether the test result is likely to be above the legal limit, whether there is a plea bargaining policy in the county with regard to test refusals and/or BAC limits (e.g., no reduction to DWAI if the defendant's BAC is above .15), etc.

The following *general* rules represent the authors' current opinions on this issue:

If there has been an accident involving serious physical injury or death -- *refuse the test*

In such a situation, the civil consequences of a refusal are comparatively insignificant; and, in any event, the compulsory chemical test that the police will obtain voids the refusal for DMV purposes. See § 41:12, *supra*

If the DWI charge is a felony -- *refuse the test*

In such a situation:

(a) The civil consequences of a refusal are comparatively insignificant; and, in any event, the defendant will frequently receive a sentence from the Court that will cause his or her driving privileges to be revoked for at least as long as from the refusal

(b) Most defendants in this situation accept a negotiated plea bargain prior to being indicted; thus, the DMV refusal hearing is defense counsel's best opportunity to obtain information that would justify a plea bargain outside of a standard, policy-driven offer

(c) If the case is litigated, a DWAI verdict is more likely where there is a refusal than where there is a chemical test result of .08 or more

If the DWI charge is a misdemeanor and the person needs to drive to earn a living -- *take the test*

In such a situation, a refusal (i) will mandate that the person obtain a VTL § 1192 conviction (in order to obtain a conditional license), and (ii) the person will have to remain on the conditional license longer than if he or she had taken the test. See § 41:71, *infra*

If the DWI charge is the person's 3rd within the past 25 years (or the person's 5th in his or her entire lifetime), keep in mind that for purposes of the "new" DMV regulations affecting repeat DWI offenders, see Chapter 55, *infra*, a chemical test refusal counts the same as a DWI-related conviction

If there is a plea bargaining policy in the county with regard to test refusals and/or BAC limits -- take the action that will reduce the likelihood of an unfavorable plea bargain (e.g., some prosecutors tend to offer a better deal where the defendant refuses -- others tend to punish the defendant for the refusal)

If the person *credibly* claims to have only consumed enough alcohol to produce a chemical test result of less than .08 (such a conversation should not be had in a manner likely to be overheard by the police) -- take the test

The police almost always charge VTL § 1192 suspects who refuse the chemical test with common law DWI, in violation of VTL § 1192(3), and *not* with DWAI; thus, where the person consumed alcohol -- but only enough to produce a chemical test result of less than .08 -- the chemical test result may lead to a DWAI charge (or even to no VTL § 1192 charge at all)

In most other situations -- *refuse* the test

In light of New York's current DWI laws (e.g., a person who refuses the test cannot be charged with Aggravated DWI (unless there is a child under 16 years of age in the vehicle); everyone convicted of DWI now faces the ignition interlock device requirement; a person whose BAC is .08% or more faces the indefinite suspension of his or her driver's license pending prosecution (with no credit for "time served" upon conviction); etc.), it is increasingly likely that the consequences of taking the test will be more severe than the consequences of refusing (unless the defendant is sure to "pass" the test).

If the person is under the age of 21 -- the same rules apply as for a person who is 21 years of age or older.

§ 41:18 There is no Constitutional right to refuse to submit to a chemical test

It is well settled that "a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test." South Dakota v. Neville, 459 U.S. 553, 560 n.10, 103 S.Ct. 916, 921 n.10 (1983). See also id. at 565, 103 S.Ct. at 923 ("Respondent's right to refuse the blood-alcohol test . . . is simply a matter of grace bestowed by the . . . legislature"); People v. Smith, 18 N.Y.3d 544, 548, 942 N.Y.S.2d 426, 429 (2012); People v. Thomas, 46 N.Y.2d 100, 106, 412 N.Y.S.2d 845, 848 (1978) ("inasmuch as a defendant can constitutionally be compelled to take such a test, he has no constitutional right not to take one"); People v. Shaw, 72 N.Y.2d 1032, 1033, 534 N.Y.S.2d 929, 930 (1988); People v. Mosher, 93 Misc. 2d 179, ___, 402 N.Y.S.2d 735, 736 (Webster Just. Ct. 1978). There are, however, three exceptions to this general rule:

Taking a driver's blood for alcohol analysis does not . . . involve an unreasonable search under the Fourth Amendment *when there is [1] probable cause, [2] exigent circumstances and [3] a reasonable examination procedure.* So long as these requirements are met . . . the test may be performed absent defendant's consent and indeed over his objection without violating his Fourth Amendment rights.

People v. Kates, 53 N.Y.2d 591, 594-95, 444 N.Y.S.2d 446, 448 (1981) (emphasis added) (citation omitted). See also Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966); Missouri v. McNeely, 133 S.Ct. 1552 (2013).

§ 41:19 There is a statutory right to refuse to submit to a chemical test

Although there is no *Constitutional* right to refuse to submit to a chemical test, see § 41:18, *supra*, VTL § 1194(2)(b)(1) grants a DWI suspect a qualified "statutory right to refuse the test." People v. Shaw, 72 N.Y.2d 1032, 1034, 534 N.Y.S.2d 929, 930 (1988). See also People v. Smith, 18 N.Y.3d 544, 548, 942 N.Y.S.2d 426, 429 (2012); People v. Daniel, 84 A.D.2d 916, ___, 446 N.Y.S.2d 658, 659 (4th Dep't 1981) ("The 1953 statute conferred upon the motorist certain rights, the most important of which was the right to refuse to take the test. That statutory right is in excess of the motorist's constitutional rights"), aff'd sub nom. People v. Moselle, 57 N.Y.2d 97, 454 N.Y.S.2d 292 (1982); People v. Wolter, 83 A.D.2d 187, ___, 444 N.Y.S.2d 331, 333 (4th Dep't 1981), aff'd sub nom. People v. Moselle, 57 N.Y.2d 97, 454 N.Y.S.2d 292 (1982); People v. Haitz, 65 A.D.2d 172, ___, 411 N.Y.S.2d 57, 60 (4th Dep't

1978) ("The defendant's right of refusal . . . is a qualified statutory right designed to avoid the unpleasantness connected with administering a chemical test on an unwilling subject"); People v. Porter, 46 A.D.2d 307, ___, 362 N.Y.S.2d 249, 254 (3d Dep't 1974); People v. Smith, 79 Misc. 2d 172, ___, 359 N.Y.S.2d 446, 448 (Broome Co. Ct. 1974).

The right of refusal is "qualified" in two ways. First, VTL § 1194(2) penalizes the exercise of the right with a civil penalty, "license revocation and disclosure of [the] refusal in a prosecution for operating a vehicle while under the influence of alcohol or drugs." People v. Thomas, 46 N.Y.2d 100, 108, 412 N.Y.S.2d 845, 850 (1978). See also People v. Smith, 18 N.Y.3d 544, 548, 942 N.Y.S.2d 426, 429 (2012). Second, under the circumstances set forth in VTL § 1194(3), a DWI suspect can be subjected to a compulsory (*i.e.*, forcible) Court-Ordered chemical test despite his or her refusal to consent to such test.

In addition, there is no requirement that the defendant be advised of his or her right to refuse, "and the absence of such an advisement does not negate consent otherwise freely given." People v. Marietta, 61 A.D.3d 997, ___, 879 N.Y.S.2d 476, 477 (2d Dep't 2009).

§ 41:20 Legislative policy for creating statutory right of refusal

The Legislative policy behind the creation of the statutory right of refusal was set forth by the Court of Appeals in People v. Kates, 53 N.Y.2d 591, 596, 444 N.Y.S.2d 446, 448 (1981):

"The only reason the opportunity to revoke is given is to eliminate the need for the use of force by police officers if an individual in a drunken condition should refuse to submit to the test" (Report of Joint Legislative Committee on Motor Vehicle Problems, McKinney's 1953 Session Laws of N.Y., pp. 1912-1928). * * *

It was reasonable for the Legislature, concerned with avoiding potentially violent conflicts between the police and drivers arrested for intoxication, to provide that the police must request the driver's consent, advise him of the consequences of refusal and honor his wishes if he decides to refuse.

See also People v. Paddock, 29 N.Y.2d 504, 506, 323 N.Y.S.2d 976, 977 (1971) (Jasen, J., concurring); People v. Ameigh, 95 A.D.2d 367, ___, 467 N.Y.S.2d 718, 719 (3d Dep't 1983); People v. Haitz,

65 A.D.2d 172, ___, 411 N.Y.S.2d 57, 60 (4th Dep't 1978); People v. Smith, 79 Misc. 2d 172, ___, 359 N.Y.S.2d 446, 448 (Broome Co. Ct. 1974).

§ 41:21 Refusal to submit to a chemical test is not an appropriate criminal charge

The Court of Appeals has made clear that "the Legislature in the enactment of section 1194 of the Vehicle and Traffic Law [embodied] two penalties or adverse consequences of refusal [to submit to a chemical test] -- license revocation and disclosure of [the] refusal in a prosecution for operating a vehicle while under the influence of alcohol or drugs." People v. Thomas, 46 N.Y.2d 100, 108, 412 N.Y.S.2d 845, 849-50 (1978). See also VTL § 1194(2); People v. Leontiev, 38 Misc. 3d 716, ___, 956 N.Y.S.2d 832, 837 (Nassau Co. Dist. Ct. 2012). See generally People v. Ashley, 15 Misc. 3d 80, ___, 836 N.Y.S.2d 758, 761 (App. Term, 9th & 10th Jud. Dist. 2007) ("defendant was also convicted of 'refusal to submit to a breath test.' Though the accusatory instrument refers to Vehicle and Traffic Law § 1194(3), that statute neither compels a person who is arrested for driving while intoxicated to submit to a 'breath test,' nor deems the failure to do so to be a criminal offense. Therefore, the judgment convicting defendant of refusal to take a breath test must be reversed").

Nonetheless, in People v. Burdick, 266 A.D.2d 711, ___, 699 N.Y.S.2d 173, 175 (3d Dep't 1999), the Appellate Division, Third Department, appears to affirm defendant's conviction in Delaware County Court of, among other things, "refusal to submit to a chemical test (Vehicle and Traffic Law § 1194[2])." In this regard, Delaware County District Attorney Richard D. Northrup, Jr. confirms that this reference in Burdick is a typographical error -- the defendant was in actuality charged with, and convicted of, refusal to submit to a *breath test* (i.e., Alco-Sensor test), in violation of VTL § 1194(1)(b), which has been held to be a traffic infraction. See, e.g., People v. Leontiev, 38 Misc. 3d 716, ___, 956 N.Y.S.2d 832, 837-38 (Nassau Co. Dist. Ct. 2012); People v. Pecora, 123 Misc. 2d 259, ___, 473 N.Y.S.2d 320, 323 (Wappinger Just. Ct. 1984); People v. Hamza, 109 Misc. 2d 1055, ___, 441 N.Y.S.2d 579, 581 (Gates Just. Ct. 1981). Cf. People v. Wrenn, 2016 WL 4275031, *3 (App. Term, 9th & 10th Jud. Dist. 2016) ("Defendant's conviction of refusing to submit to a breath test must be reversed, and the accusatory instrument charging that offense must be dismissed. This court has repeatedly held that the refusal to submit to a breath test pursuant to Vehicle and Traffic Law § 1194(1)(b) is not a cognizable offense") (citation omitted); People v. Villalta, ___, Misc. 3d ___, ___, N.Y.S.3d ___, 2017 WL 2382317 (App. Term, 9th & 10th Jud. Dist. 2017) (same).

§ 41:22 Refusal warnings -- Generally

Various subdivisions of VTL § 1194(2) mandate that a DWI suspect be given adequate "refusal warnings" before an alleged chemical test refusal can be used against him or her at trial and/or at a DMV refusal hearing. See VTL § 1194(2)(b)(1); VTL § 1194(2)(c); VTL § 1194(2)(f). To satisfy this requirement, most law enforcement agencies have adopted standardized, boilerplate refusal warnings which track the statutory language of VTL § 1194(2).

In this regard, most police officers carry wallet-size cards which contain Miranda warnings on one side, and so-called "DWI warnings" on the other. Model refusal warnings promulgated by DMV read as follows:

1. You are under arrest for driving while intoxicated.
2. A refusal to submit to a chemical test, or any portion thereof, will result in the immediate suspension and subsequent revocation of your license or operating privilege, whether or not you are convicted of the charge for which you were arrested.
3. If you refuse to submit to a chemical test, or any portion thereof, your refusal can be introduced into evidence against you at any trial, proceeding, or hearing resulting from this arrest.
4. Will you submit to a chemical test of your (breath/blood/urine) for alcohol? or (will you submit to a chemical analysis of your blood/urine for drugs)?

People v. Robles, 180 Misc. 2d 512, ____ n.1, 691 N.Y.S.2d 697, 698-99 n.1 (N.Y. City Crim. Ct. 1999). See also People v. Smith, 18 N.Y.3d 544, 546-47, 942 N.Y.S.2d 426, 427 (2012); People v. Lynch, 195 Misc. 2d 814, ____, 762 N.Y.S.2d 474, 477 (N.Y. City Crim. Ct. 2003).

The statutory refusal warnings, although arguably coercive in nature, do not constitute *impermissible* coercion. See People v. Dillin, 150 Misc. 2d 311, ____-____, 567 N.Y.S.2d 991, 993-95 (N.Y. City Crim. Ct. 1991). See also People v. Hochheimer, 119 Misc. 2d 344, ____, 463 N.Y.S.2d 704, 710 (Monroe Co. Sup. Ct. 1983).

§ 41:23 Refusal warnings need not precede request to submit to chemical test

Most police officers, prosecutors, Courts and even defense attorneys are under the incorrect impression that VTL § 1194(2) requires that refusal warnings be read to a DWI suspect before he or she can lawfully be requested to submit to a chemical test. See, e.g., People v. Whelan, 165 A.D.2d 313, ___ n.1, 567 N.Y.S.2d 817, 819 n.1 (2d Dep't 1991) ("Vehicle and Traffic Law § 1194(2)(b) mandates that prior to requesting an arrested defendant to consent to a chemical test, he must be advised that his license or permit to drive and any non-resident operating privilege shall be immediately suspended and subsequently revoked for refusal to submit to such chemical test whether or not he is found guilty of the charge for which he is arrested").

However, "[o]nly if the driver declines the initial offer to submit to a chemical test, [the driver] having consented to a chemical test by virtue of the operation of a vehicle within the State, VTL § 1194(2)(a), need he or she be informed of the effect of that refusal." People v. Rosado, 158 Misc. 2d 50, ___ n.1, 600 N.Y.S.2d 624, 625 n.1 (N.Y. City Crim. Ct. 1993). In other words, it is only once a DWI suspect initially refuses to submit to a properly requested chemical test that refusal warnings must be read to him or her in "clear and unequivocal" language, thereby giving the suspect the choice of whether to "persist" in the refusal. See also People v. Smith, 18 N.Y.3d 544, 549, 942 N.Y.S.2d 426, 429 (2012) ("To implement the statute, law enforcement authorities have developed a standardized verbal warning of the consequences of refusal to take the test that is given to a motorist suspected of driving under the influence The duty to give the warning is triggered if the motorist is asked to take a chemical test and declines to do so. If, after being advised of the effect of such a refusal, the motorist nonetheless withholds consent, the motorist may be subjected to the statutory consequences").

As the Court of Appeals explained in People v. Thomas, 46 N.Y.2d 100, 108, 412 N.Y.S.2d 845, 850 (1978), "[u]nder the procedure prescribed by section 1194 of the Vehicle and Traffic Law a driver who has initially declined to take one of the described chemical tests is to be informed of the consequences of such refusal. If he thereafter persists in a refusal the test is not to be given (§ 1194, subd. 2); the choice is the driver's." (Emphasis added). See also Matter of Geary v. Commissioner of Motor Vehicles, 92 A.D.2d 38, ___, 459 N.Y.S.2d 494, 497 (4th Dep't), aff'd, 59 N.Y.2d 950, 466 N.Y.S.2d 304 (1983). See generally South Dakota v. Neville, 459 U.S. 553, 565 n.16, 103 S. Ct. 916, 923 n.16 (1983) ("Even though the officers did not specifically advise respondent that the test results could be used against him in court, no one would seriously contend that

this failure to warn would make the test results inadmissible, had respondent chosen to submit to the test").

In this regard, the Rosado Court stated:

Although the drivers in both Thomas and Geary were given warnings twice, the statute contains no requirement that warnings precede the initial request to submit to the test. As all drivers consent to submit to the test, VTL § 1194(2)(a), no warnings need precede the first request. It is my belief, having viewed numerous videotaped "refusals," that the practice of reading a legalistic set of warnings to an allegedly intoxicated driver, before the driver is first requested to submit to the test, results in many more refusals to submit than would occur if the driver were first just simply asked. It is my further belief that many police officers mistakenly assume that the refusal warnings are analogous to Miranda warnings and must be fully delivered before a chemical test may be administered; I have viewed a number of videotapes in which the officer continued to read the warnings even though the driver agreed to submit to the test.

158 Misc. 2d at ____ n.3, 600 N.Y.S.2d at 626 n.3. See also People v. Coludro, 166 Misc. 2d 662, 634 N.Y.S.2d 964 (N.Y. City Crim. Ct. 1995). Cf. People v. Pagan, 165 Misc. 2d 255, ____, 629 N.Y.S.2d 656, 659-60 (N.Y. City Crim. Ct. 1995) (disapproving of procedure set forth in Thomas and approved in Rosado).

Thus, where a police officer reads the refusal warnings to a DWI suspect prior to requesting that the suspect submit to a chemical test (and the suspect initially refuses), the officer has created a situation in which he or she may be required to read the warnings a second time (in order to allow the suspect to "persist" in the refusal). See, e.g., Rosado, supra.

§ 41:24 Refusal warnings must be given in "clear and unequivocal" language

VTL § 1194(2)(f) mandates that refusal warnings be administered to a DWI suspect in "clear and unequivocal" language. See also VTL § 1194(2)(b)(1); VTL § 1194(2)(c); People v. Smith, 18 N.Y.3d 544, 549, 550, 942 N.Y.S.2d 426, 429, 430 (2012). In this regard, "[t]he determination of the standard for clear and unequivocal language is viewed in the eyes of the person who is being told the warnings, not the person

administering them. . . . Therefore, the question of whether the warnings were clear and unequivocal [is] decided on the defendant's understanding them, not on the objective standard of whether the police officer read the warnings verbatim from the statute." People v. Lynch, 195 Misc. 2d 814, ___, 762 N.Y.S.2d 474, 477-78 (N.Y. City Crim. Ct. 2003).

People v. Smith, 18 N.Y.3d 544, 942 N.Y.S.2d 426 (2012), is the seminal case on this issue. In Smith, the police read the standardized chemical test refusal warnings to the defendant three times. The defendant's response to the first set of warnings was "that he understood the warnings but wanted to speak to his lawyer before deciding whether to take a chemical test." Id. at 547, 942 N.Y.S.2d at 427. The defendant's response to the second set of warnings was that he wanted to call his lawyer (which he attempted to do but was unsuccessful). Id. at 547, 942 N.Y.S.2d at 428. The defendant's response to the third set of warnings was "that he was waiting for his attorney to call him back." Id. at 547, 942 N.Y.S.2d at 428. "At this juncture, the troopers interpreted defendant's response as a refusal to submit to the test." Id. at 547, 942 N.Y.S.2d at 428.

The Court of Appeals held that there was no refusal, as (a) the defendant never actually refused to submit to a chemical test, and (b) the police never advised him that his third statement (*i.e.*, that he was waiting for his attorney to call him back) would be construed as a refusal. Critically, the Court found that even though the refusal warnings had been read from the standardized warning card three separate times, "[s]ince a reasonable motorist in defendant's position would not have understood that, unlike the prior encounters, the further request to speak to an attorney would be interpreted by the troopers as a binding refusal to submit to a chemical test, defendant was not adequately warned that his conduct would constitute a refusal. The evidence of that refusal therefore was received in error at trial." Id. at 551, 942 N.Y.S.2d at 431.

In this regard, the Smith Court noted that:

All that is required for a refusal to be admissible at trial is a record basis to show that, through words or actions, defendant declined to take a chemical test despite having been clearly warned of the consequences of refusal. In this case, such evidence would have been present if, during the third request, troopers had merely alerted defendant that his time for deliberation had expired and if he did not consent to the chemical test at that juncture his response would be deemed a refusal.

Id. at 551-52, 942 N.Y.S.2d at 431. See also Matter of Lamb v. Egan, 150 A.D.3d 854, ____ N.Y.S.3d ____ (2d Dep't 2017) (same rule applies to DMV chemical test refusal hearings).

An issue can (and often does) arise where an individual who is read the refusal warnings does not understand what is meant by the term "chemical test" -- especially if the individual has already submitted to one or more breath screening tests. In People v. Cousar, 226 A.D.2d 740, ____, 641 N.Y.S.2d 695, 695 (2d Dep't 1996), the Appellate Division, Second Department, found that the refusal warnings given to the defendant were sufficiently clear and unequivocal where, when the defendant stated that he did not understand the warning as recited from the police officer's DWI warning card, "the arresting officer explained the warnings to him 'in layman's terms.'" See also Matter of Cruikshank v. Melton, 82 A.D.2d 932, 440 N.Y.S.2d 759 (3d Dep't 1981); Matter of Jason v. Melton, 60 A.D.2d 707, 400 N.Y.S.2d 878 (3d Dep't 1977); Matter of Warren v. Melton, 59 A.D.2d 963, 399 N.Y.S.2d 295 (3d Dep't 1977); Kowanes v. State Dep't of Motor Vehicles, 54 A.D.2d 611, 387 N.Y.S.2d 331 (4th Dep't 1976).

On the other hand, where an officer who attempts to explain the refusal warnings in layman's terms does so incorrectly, such warnings do not satisfy the "clear and unequivocal" language requirement. See Matter of Gargano v. New York State Dep't of Motor Vehicles, 118 A.D.2d 859, 500 N.Y.S.2d 346 (2d Dep't 1986). See generally People v. Morris, 8 Misc. 3d 360, 793 N.Y.S.2d 754 (N.Y. City Crim. Ct. 2005); Matter of Pucino v. Tofany, 60 Misc. 2d 778, 304 N.Y.S.2d 81 (Dutchess Co. Sup. Ct. 1969).

Various Courts have found that refusal warnings administered to non-English speaking defendants did not satisfy the "clear and unequivocal" language requirement. See, e.g., People v. Garcia-Cepero, 22 Misc. 3d 490, ____, 874 N.Y.S.2d 689, 692-94 (Bronx Co. Sup. Ct. 2008); People v. Robles, 180 Misc. 2d 512, 691 N.Y.S.2d 697 (N.Y. City Crim. Ct. 1999); People v. Camagos, 160 Misc. 2d 880, 611 N.Y.S.2d 426 (N.Y. City Crim. Ct. 1993); People v. Niedzwiecki, 127 Misc. 2d 919, 487 N.Y.S.2d 694 (N.Y. City Crim. Ct. 1985). But see People v. Burnet, 24 Misc. 3d 292, ____, 882 N.Y.S.2d 835, 841-42 (Bronx Co. Sup. Ct. 2009); People v. An, 193 Misc. 2d 301, 748 N.Y.S.2d 854 (N.Y. City Crim. Ct. 2002).

Refusal warnings read from an outdated warning card (which had not been amended to reflect changes in the law) do not satisfy the "clear and unequivocal" language requirement. People v. Philbert, 110 Misc. 2d 1042, 443 N.Y.S.2d 354 (N.Y. City Crim. Ct. 1981).

§ 41:25 Incomplete refusal warnings invalidates chemical test refusal

VTL § 1194(2)(f) provides that:

(f) Evidence. Evidence of a refusal to submit to such chemical test or any portion thereof shall be admissible in any trial, proceeding or hearing based upon a violation of the provisions of [VTL § 1192] *but only upon a showing that the person was given sufficient warning, in clear and unequivocal language, of the effect of such refusal and that the person persisted in the refusal.*

(Emphasis added).

Where a person has been lawfully arrested for a suspected violation of VTL § 1192, VTL § 1194(2)(b)(1) provides, in pertinent part:

(b) Report of refusal. (1) If: (A) such person having been placed under arrest; or (B) after a breath [screening] test indicates the presence of alcohol in the person's system; . . . *and having thereafter been requested to submit to such chemical test and having been informed that the person's license or permit to drive and any non-resident operating privilege shall be immediately suspended and subsequently revoked for refusal to submit to such chemical test or any portion thereof, whether or not the person is found guilty of the charge for which such person is arrested . . .*, refuses to submit to such chemical test or any portion thereof, unless a court order has been granted pursuant to [VTL § 1194(3)], the test shall not be given and a written report of such refusal shall be immediately made by the police officer before whom such refusal was made.

(Emphasis added).

In the context of a DMV refusal hearing, VTL § 1194(2)(c) provides that:

The hearing shall be limited to the following issues: (1) did the police officer have reasonable grounds to believe that such

person had been driving in violation of any subdivision of [VTL § 1192]; (2) did the police officer make a lawful arrest of such person; (3) *was such person given sufficient warning, in clear or unequivocal language, prior to such refusal that such refusal to submit to such chemical test or any portion thereof, would result in the immediate suspension and subsequent revocation of such person's license or operating privilege whether or not such person is found guilty of the charge for which the arrest was made;* and (4) did such person refuse to submit to such chemical test or any portion thereof.

(Emphasis added).

Where the police administer incomplete refusal warnings to a DWI suspect, his or her subsequent refusal to submit to a chemical test is both inadmissible at trial, and invalid for DMV purposes. See, e.g., People v. Boone, 71 A.D.2d 859, ___, 419 N.Y.S.2d 187, 188 (2d Dep't 1979); Matter of Harrington v. Tofany, 59 Misc. 2d 197, ___, 298 N.Y.S.2d 283, 285-86 (Washington Co. Sup. Ct. 1969).

On the other hand, in People v. Sanchez, 48 Misc.3d 765, ___, 11 N.Y.S.3d 454, 455 (N.Y. City Crim. Ct. 2015):

After a pretrial Dunaway/Huntley/Refusal hearing, the Court suppressed evidence of defendant's refusal to take a breathalyzer test. The Court found that the IDTU officer had not given the defendant adequate warnings as to the consequences of the refusal. However, at trial, after hearing from the parties, the Court granted the People's application to cross-examine the defendant about that refusal in the event he elected to testify, relying on People v. Harris, 25 N.Y.2d 175, 250 N.E.2d 349, 303 N.Y.S.2d 71 (1969), aff'd sub nom. Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), which holds that a statement that has been suppressed due to a Miranda violation, and is hence inadmissible at trial, can still be used on cross-examination of the defendant for impeachment purposes.

In so holding, the Court reasoned as follows:

It appears that no court in New York has expressly considered the question whether a

defendant can be impeached, should he elect to testify at trial, by a refusal to take a breathalyzer test, where that refusal was suppressed under VTL § 1194(2)(f). In this Court's view, however, since it is clear that impeaching a defendant on cross-examination with his refusal is not the same as "admitting" the refusal into evidence, such impeachment is permissible by analogy to Harris. If a defendant can be impeached on cross-examination with a statement obtained in violation of Miranda, he can also be impeached on cross-examination with a refusal that was obtained in violation of VTL § 11924(2)(f).

Id. at ___, 11 N.Y.S.3d at 457-58.

§ 41:26 Informing defendant that chemical test refusal will result in incarceration pending arraignment, whereas submission to test will result in release on appearance ticket, does not constitute impermissible coercion

Many police departments have a policy pursuant to which, in addition to advising the defendant of the statutory refusal warnings, the defendant is also informed that refusal to submit to a chemical test will result in either (a) incarceration pending arraignment, and/or (b) immediate arraignment at which bail will be set, whereas submission to the test will result in his or her immediate release on an appearance ticket (such as a UTT or DAT). Although such a policy is clearly "coercive" in nature, it apparently does not constitute *impermissible* coercion.

In this regard, in People v. Cragg, 71 N.Y.2d 926, 528 N.Y.S.2d 807 (1988), "[d]efendant contend[ed] that the police violated Vehicle and Traffic Law § 1194(2) by administering a breathalyzer test despite defendant's initial refusal to submit to the test, and by informing him of certain consequences -- not specifically prescribed by the statute -- of such refusal." In rejecting defendant's claims, the Court of Appeals held:

Contrary to defendant's assertion, the statute is not violated by an arresting officer informing a person as to the consequences of his choice to take or not take a breathalyzer test. Thus, it cannot be said, in the circumstances of this case, that by informing defendant that his refusal to submit to the test would result in his arraignment before a Magistrate and the posting of bail, the officer violated the provisions of the Vehicle and Traffic Law.

71 N.Y.2d at 927, 528 N.Y.S.2d at 807-08.

Similarly, in People v. Bracken, 129 Misc. 2d 1048, ___, 494 N.Y.S.2d 1021, 1023 (N.Y. City Crim. Ct. 1985), the Court held that:

"A state plainly has the right to offer incentives for taking a test that provides the most reliable form of evidence of intoxication for use in subsequent proceedings." The issuance of a DAT is such an incentive. * * *

When the police informed the defendant of the consequences of his failure to submit to a breathalyzer test they were simply providing him a factual recitation of what would happen. . . .

The VTL requires that persons who refuse the test have their licenses "immediately" suspended and sets forth a magistrate as one of those persons who have the right to effectuate the suspension[.] VTL § 1194(2). The policy to withhold the issuance of the DAT and bring "refusers" to the magistrate is reasonable and not shown to be part of any systemic plan or desire to coerce persons arrested to take the breathalyzer test.

In fact, it would have been unreasonable and unfair not to tell the defendant of the policy to be followed upon his refusal to take the test. Giving the defendant knowledge of his choices concerning his liberty undoubtedly put pressure upon him to take the test. This was not a pressure, however, which rose to the level of impermissible coercion by any constitutional standard.

(Citation omitted). See also People v. Harrington, 111 Misc. 2d 648, 444 N.Y.S.2d 848 (Monroe Co. Ct. 1981) (same). Cf. People v. Stone, 128 Misc. 2d 1009, ___-___, 491 N.Y.S.2d 921, 923-25 (N.Y. City Crim. Ct. 1985) (reaching opposite conclusion).

§ 41:27 What constitutes a chemical test refusal?

"A refusal to submit [to a chemical test] may be evidenced by words or conduct." People v. Massong, 105 A.D.2d 1154, ___, 482 N.Y.S.2d 601, 602 (4th Dep't 1984). See also People v.

Smith, 18 N.Y.3d 544, 550, 942 N.Y.S.2d 426, 430 (2012) ("whether a defendant refused in a particular situation may be difficult to ascertain in cases where the accused did not communicate that intent in so many words. To be sure, a defendant need not expressly decline a police officer's request in order to effectuate a refusal that is admissible at trial. A defendant can signal an unwillingness to cooperate that is tantamount to a refusal in any number of ways, including through conduct. For example, where a motorist fails to follow the directions of a police officer prior to or during the test, thereby interfering with the timing of the procedure or its efficacy, this can constitute a constructive refusal"); Matter of Lamb v. Egan, 150 A.D.3d 854, ___, ___ N.Y.S.3d ___, ___ (2d Dep't 2017) ("the consequences of refusing to accede to a chemical test may be imposed only if the motorist, after being adequately warned of those consequences, has refused to accede to the test"); People v. Lizaldo, 124 A.D.3d 432, ___, 998 N.Y.S.2d 380, 381 (1st Dep't 2015); People v. Richburg, 287 A.D.2d 790, ___, 731 N.Y.S.2d 256, 258 (3d Dep't 2001); Matter of Stegman v. Jackson, 233 A.D.2d 597, ___, 649 N.Y.S.2d 529, 530 (3d Dep't 1996); Matter of McGuirk v. Fisher, 55 A.D.2d 706, ___, 389 N.Y.S.2d 47, 48 (3d Dep't 1976).

"[A] defendant's mere silence cannot be deemed a refusal if the defendant was not *told* any refusal would be introduced into evidence against him." People v. Niedzwiecki, 127 Misc. 2d 919, ___, 487 N.Y.S.2d 694, 696 (N.Y. City Crim. Ct. 1985). See also People v. Pagan, 165 Misc. 2d 255, ___, 629 N.Y.S.2d 656, 659 (N.Y. City Crim. Ct. 1995) (no refusal where defendant not read full set of refusal warnings until *after* arresting officer deemed her to have refused).

In Matter of Sullivan v. Melton, 71 A.D.2d 797, 419 N.Y.S.2d 343 (4th Dep't 1979), petitioner consented to a chemical test, but placed chewing gum in his mouth at a time and in a manner that the arresting officer took to be a refusal (in light of the requirement in 10 NYCRR § 59.5 that nothing be placed in a DWI suspect's mouth for at least 15 minutes prior to the collection of a breath sample). In reversing the finding of a refusal, the Appellate Division, Fourth Department, found:

Petitioner consented to submit to the test and was not advised that placing gum in his mouth would constitute a refusal. . . . No evidence supports a finding that the test here could not have been given pursuant to this regulation, or that petitioner knowingly thwarted the test. . . . No prejudice resulted from petitioner's placing gum in his mouth. This is not the case where an initial consent to submit to the test is vitiated by conduct evidencing a refusal or where the

test failed for reasons attributable to petitioner. . . . His actions under the circumstances were not the equivalent of a refusal.

Id. at ___, 419 N.Y.S.2d at 344-45 (citations omitted).

By contrast, in Matter of White v. Melton, 60 A.D.2d 1000, ___, 401 N.Y.S.2d 664, 665 (4th Dep't 1978), the same Court upheld a refusal where:

[T]he officer warned the petitioner not once but twice of the consequences of refusal and his directive to petitioner that he should not place anything in his mouth was prompted by a rule on a direction sheet from the State Breathalyzer Operator which provides that nothing should be placed in the mouth for twenty minutes prior to taking a test. On the basis of the facts in this record, the referee was justified in finding that petitioner expressed no willingness to take the test and his conduct was the equivalent of a refusal.

See also Matter of Dykeman v. Foschio, 90 A.D.2d 892, ___, 456 N.Y.S.2d 514, 515 (3d Dep't 1982) (refusal upheld where petitioner failed to stop smoking even after being warned that such conduct would be treated as a refusal).

Similarly, in Matter of Brueck v. Melton, 58 A.D.2d 1000, ___, 397 N.Y.S.2d 271, 272 (4th Dep't 1977), the Court upheld a refusal where:

At the administrative hearing the arresting officer testified that although petitioner initially consented to take a breathalyzer test, she failed to blow any air into the machine as instructed to and only drooled. When advised to sit down and rest before attempting the test again, petitioner responded, "Leave me alone, I'm not going to take any test." Furthermore, petitioner never indicated to the administrator of the test that she was unable to complete it or that there was any physical reason preventing her from blowing air into the breathalyzer device.

A DWI suspect's refusal/failure to provide an adequate breath (or urine) sample for chemical testing can constitute a refusal. See, e.g., Matter of Craig v. Swarts, 68 A.D.3d 1407,

_____, 891 N.Y.S.2d 204, 205 (3d Dep't 2009) ("Although petitioner verbally consented to taking the chemical test, numerous attempts on two separate machines failed to yield a testable sample and petitioner was deemed to have refused the test by his conduct"); Matter of Johnson v. Adduci, 198 A.D.2d 352, _____, 603 N.Y.S.2d 332, 333 (2d Dep't 1993) (refusal upheld where "petitioner refused to blow into the tube of [a properly functioning] testing machine, thereby preventing his breath from being tested"); People v. Bratcher, 165 A.D.2d 906, _____, 560 N.Y.S.2d 516, 517 (3d Dep't 1990) ("Defendant's refusal to breathe into the Intoxilyzer after being advised that his first attempt was inadequate to show a reading, together with proof that the machine was in good working order, was sufficient to constitute a refusal"); Matter of Beaver v. Appeals Bd. of Admin. Adjudication Bureau, 117 A.D.2d 956, _____, 499 N.Y.S.2d 248, 251 (3d Dep't) (dissenting opinion), rev'd for the reasons stated in the dissenting opinion below, 68 N.Y.2d 935, 510 N.Y.S.2d 79 (1986); People v. Adler, 145 A.D.2d 943, _____, 536 N.Y.S.2d 315, 316 (4th Dep't 1988) ("On three separate occasions in the conduct of the test, defendant ostensibly blew into the instrument used to record his blood alcohol content but, in the opinion of the administering officer, did so in such way that the instrument failed to record that a sample was received"); Matter of Van Sickle v. Melton, 64 A.D.2d 846, _____, 407 N.Y.S.2d 334, 335 (4th Dep't 1978) (petitioner "blew into the mouthpiece of the [properly functioning] apparatus on five occasions without activating the machine"); Matter of Kennedy v. Melton, 62 A.D.2d 1152, 404 N.Y.S.2d 174 (4th Dep't 1978); Matter of DiGirolamo v. Melton, 60 A.D.2d 960, _____, 401 N.Y.S.2d 893, 894 (3d Dep't 1978) ("The consent by the petitioner may be regarded as no consent at all if, as it appears from this record, the test failed for reasons attributable to him"); People v. Kearney, 196 Misc. 2d 335, _____ n.2, 764 N.Y.S.2d 542, 543 n.2 (Sullivan Co. Ct. 2003).

In this regard, "[t]o establish a refusal, the People must show that the failure to register a sample is the result of defendant's action and not of the machine's inability to register the sample." People v. Adler, 145 A.D.2d 943, _____, 536 N.Y.S.2d 315, 316 (4th Dep't 1988). See also People v. Bombard, 143 A.D.3d 1257, _____, 38 N.Y.S.3d 923, 923 (4th Dep't 2016); People v. Bratcher, 165 A.D.2d 906, _____, 560 N.Y.S.2d 516, 517 (3d Dep't 1990); Matter of Van Sickle v. Melton, 64 A.D.2d 846, 407 N.Y.S.2d 334 (4th Dep't 1978). See generally Matter of Cushman v. Tofany, 36 A.D.2d 1000, _____, 321 N.Y.S.2d 831, 833 (3d Dep't 1971).

By its terms VTL § 1194(2)(f) applies to a persistent "refusal" to take the breathalyzer test; it does not apply to a mere "failure" to take or complete the test. The distinction is important. By using the term "refusal" the Legislature made it plain that

the statute is directed only at an intentional or willful refusal to take the breathalyzer test. The statute is not directed at a mere unintentional failure by the defendant to comply with the requirements of the breathalyzer test.

The requirement that defendant's refusal be intentional grows out of the evidentiary theory underlying the statute. Evidence of a refusal is admissible on the theory that it evinces a defendant's consciousness of guilt. Obviously, an unintentional failure to complete the test does not evidence consciousness of guilt. * * *

The crucial consideration in this regard is whether defendant's conduct was deliberate. Where a defendant does not consciously intend to evade the breathalyzer test, his mere failure to take or complete the test cannot properly be regarded either as a true "refusal" within the meaning of § 1194(2)(f) or as evidence of consciousness of guilt.

People v. Davis, 8 Misc. 3d 158, ___, ___, 797 N.Y.S.2d 258, 262-63, 263-64 (Bronx Co. Sup. Ct. 2005) (citations omitted). See generally Matter of Prince v. Department of Motor Vehicles, 36 Misc. 3d 314, 945 N.Y.S.2d 843 (N.Y. Co. Sup. Ct. 2011).

Where a DWI suspect persistently refuses to submit to a properly requested chemical test, but subsequently changes his or her mind and consents to the test, the subsequent consent does not void the prior refusal. See, e.g., Matter of Viger v. Passidomo, 65 N.Y.2d 705, 707, 492 N.Y.S.2d 2, 3 (1985) ("Petitioner's willingness to undergo the chemical test to determine the alcohol content of his blood approximately 1 hour and 40 minutes after his arrest does not preclude a determination that he had refused to take such test within the meaning of Vehicle and Traffic Law § 1194(3)(a)"); Matter of Nicol v. Grant, 117 A.D.2d 940, ___, 499 N.Y.S.2d 247, 248 (3d Dep't 1986); Matter of O'Brien v. Melton, 61 A.D.2d 1091, 403 N.Y.S.2d 353 (3d Dep't 1978); Matter of Reed v. New York State Dep't of Motor Vehicles, 59 A.D.2d 974, 399 N.Y.S.2d 332 (3d Dep't 1977); Matter of O'Dea v. Tofany, 41 A.D.2d 888, 342 N.Y.S.2d 679 (4th Dep't 1973). See generally Matter of Wilkinson v. Adduci, 176 A.D.2d 1233, ___, 576 N.Y.S.2d 728, 729 (4th Dep't 1991). In People v. Ferrara, 158 Misc. 2d 671, ___, 602 N.Y.S.2d 86, 89 (N.Y. City Crim. Ct. 1993), the Court stated:

The defendant's subsequent willingness to have a blood test performed does not affect

the admissibility of the defendant's prior refusal. The fact that the test could have been performed when the defendant agreed does not undermine the admissibility of the refusal. The defendant's later recantation of an earlier refusal doesn't "suffice to undo that refusal." * * *

Thus, the defendant's initial refusal, after having been clearly and unequivocally advised as to the consequences of that refusal, stands as evidence of a consciousness of guilt despite a subsequent change of mind. The defendant may, if he or she chooses, explain to the trier of fact his reasons for refusing to take the test when offered and may, of course, testify to his later willingness to take the blood test in order to soften or obviate the impact of the evidence of the refusal. Plainly, this testimony might convince the trier of fact not to infer a consciousness of guilt from the defendant's refusal to take the test. However, these same facts do not render evidence of the refusal inadmissible at trial.

(Citations omitted).

Where a DWI suspect persistently refuses to submit to a properly requested chemical test, but subsequently changes his or her mind and consents, the police can refuse to administer the test to the suspect. See People v. Adler, 145 A.D.2d 943, ___, 536 N.Y.S.2d 315, 316 (4th Dep't 1988); Matter of Nicol v. Grant, 117 A.D.2d 940, 499 N.Y.S.2d 247 (3d Dep't 1986); Matter of White v. Fisher, 49 A.D.2d 450, 375 N.Y.S.2d 663 (3d Dep't 1975).

An attempt by a DWI suspect to select the type of chemical test to be administered (e.g., "I consent to a chemical test of my blood, but not of my breath"), to select the location of the test (e.g., "I consent to a test at the hospital, but not at the police station"), to select the person who will draw the blood (e.g., "I consent to a blood test, but only if the blood is drawn by my doctor"), and/or to otherwise place conditions on his or her consent to submit to a chemical test, generally constitutes a refusal. See, e.g., People v. Williams, 68 A.D.3d 414, ___, 891 N.Y.S.2d 17, 18 (1st Dep't 2009); Matter of Ehman v. Passidomo, 118 A.D.2d 707, ___, 500 N.Y.S.2d 44, 45 (2d Dep't 1986) ("Vehicle and Traffic Law § 1194 authorizes the police officer to decide the type of test to be administered; it does not provide an option to the petitioner"); Matter of Gilman v. Passidomo, 109 A.D.2d 1082, 487 N.Y.S.2d 186 (4th Dep't 1985) (same); People v.

Aia, 105 A.D.2d 592, ___, 482 N.Y.S.2d 56, 57 (3d Dep't 1984) ("The choice of test was the officer's, not defendant's, and there is no showing that the officer was in any way unreasonable in his choice of which test to use"); Matter of Litts v. Melton, 57 A.D.2d 1027, 395 N.Y.S.2d 264 (3d Dep't 1977); Matter of Cushman v. Tofany, 36 A.D.2d 1000, ___, 321 N.Y.S.2d 831, 833 (3d Dep't 1971); Matter of Shields v. Hults, 26 A.D.2d 971, 274 N.Y.S.2d 760 (3d Dep't 1966); Matter of Breslin v. Hults, 20 A.D.2d 790, 248 N.Y.S.2d 70 (2d Dep't 1964). See generally Matter of Martin v. Tofany, 46 A.D.2d 967, ___, 362 N.Y.S.2d 57, 58 (3d Dep't 1974) (Petitioner's "explanation that he believed a blood test was required by law, and not chemical test by use of a breathalyzer, as requested by the trooper, lacks merit"); Matter of Blattner v. Tofany, 34 A.D.2d 1066, ___, 312 N.Y.S.2d 173, 174 (3d Dep't 1970) (Petitioner's "arbitrary insistence that the sample be taken from his hip rather than his arm [together with other conduct] constituted a refusal").

Where a DWI suspect desires to consult with, but is unable to reach, his attorney, "the police officer's statement to him that his insistence on waiting for his attorney constituted a refusal was not misleading or inaccurate." People v. O'Rama, 78 N.Y.2d 270, 280, 574 N.Y.S.2d 159, 164 (1991). See also People v. Smith, 18 N.Y.3d 544, 551-52, 942 N.Y.S.2d 426, 431 (2012).

In Matter of Smith v. Commissioner of Motor Vehicles, 103 A.D.2d 865, ___, 478 N.Y.S.2d 103, 104 (3d Dep't 1984), a refusal was found where, after being arrested for DWI and read proper refusal warnings, "petitioner refused to accompany the officer, but instead surrendered the keys to his truck to him and left the scene on foot, announcing that he could be found at a local bar."

§ 41:28 Chemical test refusal must be "persistent"

VTL § 1194(2)(f) provides that:

(f) Evidence. Evidence of a refusal to submit to such chemical test or any portion thereof shall be admissible in any trial, proceeding or hearing based upon a violation of the provisions of [VTL § 1192] *but only upon a showing that the person was given sufficient warning, in clear and unequivocal language, of the effect of such refusal and that the person persisted in the refusal.*

(Emphases added).

The "persistence" requirement, while applicable to Court proceedings based upon a violation of VTL § 1192, is inapplicable to a DMV chemical test refusal hearing -- where "the only

evidence of refusal necessary [i]s that the petitioner refused at least once to submit to a chemical test." Matter of Hahne v. New York State Dep't of Motor Vehicles, 63 A.D.3d 936, 882 N.Y.S.2d 434 (2d Dep't 2009). See also VTL § 1194(2)(c) (one of the issues to be determined at a DMV chemical test refusal hearing is "did such person refuse to submit to such chemical test or any portion thereof").

§ 41:29 What constitutes a "persistent" refusal?

In order for a refusal to be considered "persistent," the motorist must be "offered at least two opportunities to submit to the chemical test, 'at least one of which must take place after being advised of the sanctions for refusal.'" People v. Pagan, 165 Misc. 2d 255, ___, 629 N.Y.S.2d 656, 660 (N.Y. City Crim. Ct. 1995) (citation omitted). See also People v. Thomas, 46 N.Y.2d 100, 108, 412 N.Y.S.2d 845, 850 (1978) ("Under the procedure prescribed by section 1194 of the Vehicle and Traffic Law a driver who has initially declined to take one of the described chemical tests is to be informed of the consequences of such refusal. If he thereafter persists in a refusal the test is not to be given (§ 1194, subd. 2); the choice is the driver's"); People v. Rosado, 158 Misc. 2d 50, ___ & n.1, ___ & n.3, 600 N.Y.S.2d 624, 625 & n.1, 626 & n.3 (N.Y. City Crim. Ct. 1993); People v. Camagos, 160 Misc. 2d 880, ___, 611 N.Y.S.2d 426, 429 (N.Y. City Crim. Ct. 1993) ("The dictionary defines persistence as to continue steadfastly or often annoyingly, especially in spite of opposition"); People v. Garcia-Cepero, 22 Misc. 3d 490, ___, 874 N.Y.S.2d 689, 694 (Bronx Co. Sup. Ct. 2008). See generally People v. O'Reilly, 16 Misc. 3d 775, ___, 842 N.Y.S.2d 292, 297-98 (Suffolk Co. Dist. Ct. 2007); People v. Davis, 8 Misc. 3d 158, ___, 797 N.Y.S.2d 258, 262-63 (Bronx Co. Sup. Ct. 2005); People v. Nigohosian, 138 Misc. 2d 843, ___, 525 N.Y.S.2d 556, 559 (Nassau Co. Dist. Ct. 1988).

In People v. D'Angelo, 244 A.D.2d 788, ___, 665 N.Y.S.2d 713, 713 (3d Dep't 1997), the Appellate Division, Third Department, held that "defendant's words and conduct clearly evince a persistent refusal to submit to a breathalyzer test" where:

[F]ollowing his arrest, defendant was taken to the City of Glens Falls Police Station, arriving at around 5:00 A.M. on June 1, 1995, where he was immediately provided with the requisite warning. Defendant initially agreed to take the test but, upon learning that he was going to be charged with a felony, changed his mind stating to the officer "What's the point?" The police then reread the warning to him, eliciting an

unintelligible mumble from defendant who lay down on a bench and went to sleep. At 5:37 A.M. and 5:47 A.M., the arresting officer unsuccessfully attempted to rouse defendant to ask him to take the test.

See also People v. Richburg, 287 A.D.2d 790, ___, 731 N.Y.S.2d 256, 258 (3d Dep't 2001); People v. O'Reilly, 16 Misc. 3d 775, ___, 842 N.Y.S.2d 292, 297-98 (Suffolk Co. Dist. Ct. 2007).

§ 41:29A VTL § 1194(2)(f) claim is waived by guilty plea

In People v. Sirico, 135 A.D.3d 19, 18 N.Y.S.3d 430 (2d Dep't 2015), the Appellate Division, Second Department, held that a VTL § 1194(2)(f) claim is waived by guilty plea. Specifically:

Among the limited group of issues that survive a valid guilty plea and may be raised on a subsequent appeal are those relating to the denial of a motion to suppress evidence under CPL 710.20. The Legislature has preserved such claims for appellate review through the enactment of CPL 710.70(2). CPL 710.70(2) expressly grants a defendant a statutory right to appellate review of an order denying a motion to suppress evidence "notwithstanding the fact" that the judgment of conviction "is entered upon a plea of guilty." However, the statutory right to appellate review created by CPL 710.70(2) applies to orders which deny a motion to suppress evidence on the grounds enumerated by CPL 710.20. Although CPL 710.20(5) authorizes a defendant to move to suppress evidence of "a chemical test of the defendant's blood administered in violation of the provisions" of Vehicle and Traffic Law § 1194(3) or "any other applicable law," that provision is not implicated here. In this case, the defendant did not move to suppress the results of a chemical test of his blood. Indeed, the police did not perform a chemical test upon the defendant. Rather, he moved to preclude the People from admitting testimony of his refusal to submit to a chemical test. Such a motion cannot be characterized as one seeking suppression under CPL 710.20(5). Accordingly, the defendant does not have a statutory right to appellate review of the County Court's ruling permitting the introduction of evidence of his refusal to submit to a chemical test.

Nor is the defendant's claim that the County Court erred in ruling that the People would be permitted to introduce evidence at trial of his refusal to submit to a chemical test a claim of constitutional dimension, or one that bears upon the integrity of the judicial process. Rather, the court's determination relates to an evidentiary or technical matter. The defendant's motion to preclude evidence of his refusal to submit to a chemical test was predicated upon his claim that the evidence was not admissible pursuant to Vehicle and Traffic Law § 1194(2)(f), rather than upon a claim that evidence was obtained in violation of his constitutional rights. Moreover, the admission of such evidence at trial merely allows a jury to draw an inference of a defendant's consciousness of guilt. The County Court's determination at issue is akin to a Ventimiglia/Molineux ruling, a Sandoval ruling, and other pretrial rulings that decide motions in limine and which are generally forfeited by virtue of a plea of guilty.

Therefore, we hold that by pleading guilty, the defendant forfeited appellate review of his claim that the County Court erred in ruling that the People would be permitted to introduce evidence at trial that he refused a chemical test pursuant to Vehicle and Traffic Law § 1194(2)(f).

Id. at ___, 18 N.Y.S.3d at 435-36 (citations omitted).

§ 41:30 Chemical test refusal need not be "knowing"

At least two Departments of the Appellate Division have held that, for DMV purposes, a chemical test refusal does not have to be "knowing" in order to be valid. See, e.g., Matter of Gagliardi v. Department of Motor Vehicles, 144 A.D.2d 882, ___, 535 N.Y.S.2d 203, 204 (3d Dep't 1988); Matter of Carey v. Melton, 64 A.D.2d 983, 408 N.Y.S.2d 817 (2d Dep't 1978). The rationale for such a ruling was set forth in Carey:

We note that there is evidence that the petitioner may not have fully comprehended the consequences of his refusal because he was so intoxicated by the consumption of alcohol and/or the inhalation of toxic fumes.

Nevertheless, we do not construe the statutory warning contained in [VTL § 1194(2)] as requiring a "knowing" refusal by the petitioner. This interpretation would lead to the absurd result that the greater the degree of intoxication of an automobile driver, the less the degree of his accountability.

64 A.D.2d at ___, 408 N.Y.S.2d at 818. See also Matter of Hickey v. New York State Dep't of Motor Vehicles, 142 A.D.3d 668, ___, 36 N.Y.S.3d 720, 723 (2d Dep't 2016).

By contrast, in Matter of Jentzen v. Tofany, 33 A.D.2d 532, ___, 314 N.Y.S.2d 297, 297 (4th Dep't 1969), the Appellate Division, Fourth Department, annulled a DMV refusal revocation where "petitioner did not make an understanding refusal to take the test."

§ 41:31 Refusal on religious grounds does not invalidate chemical test refusal

In People v. Thomas, 46 N.Y.2d 100, 109 n.2, 412 N.Y.S.2d 845, 850 n.2 (1978), the Court of Appeals made clear that:

Proof . . . that might be explanatory of a particular defendant's refusal to take the test unrelated to any apprehension as to its results (*as, for instance, religious scruples or individual syncopephobia*) should be treated not as tending to establish any form of compulsion but rather as going to the probative worth of the evidence of refusal. Thus, a jury might in such circumstances reject the inference of consciousness of guilt which would otherwise have been available.

(Emphasis added) (citations omitted). See also People v. Sukram, 142 Misc. 2d 957, 539 N.Y.S.2d 275 (Nassau Co. Dist. Ct. 1989).

§ 41:32 Suppression of chemical test refusal

A refusal to submit to a chemical test is potentially suppressible on several grounds. For example, a chemical test refusal, like a chemical test result, can be suppressed:

- (a) As the fruit of an illegal stop. See, e.g., Matter of Byer v. Jackson, 241 A.D.2d 943, 661 N.Y.S.2d 336 (4th Dep't 1997); Matter of McDonell v. New York State Dep't of Motor Vehicles, 77 A.D.3d 1379, 908 N.Y.S.2d 507 (4th Dep't 2010);

- (b) As the fruit of an illegal arrest. See, e.g., Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248 (1979); Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254 (1975); Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961). See generally Welsh v. Wisconsin, 466 U.S. 740, 744, 104 S.Ct. 2091, 2095 (1984);
- (c) If it is obtained in violation of the right to counsel. See, e.g., People v. Washington, 23 N.Y.3d 228, 989 N.Y.S.2d 670 (2014); People v. Smith, 18 N.Y.3d 544, 550, 942 N.Y.S.2d 426, 430 (2012); People v. Shaw, 72 N.Y.2d 1032, 534 N.Y.S.2d 929 (1988); People v. Gursey, 22 N.Y.2d 224, 292 N.Y.S.2d 416 (1968); and/or
- (d) If it is obtained in violation of VTL § 1194. See, e.g., VTL § 1194(2)(f); People v. Boone, 71 A.D.2d 859, 419 N.Y.S.2d 187 (2d Dep't 1979).

In this regard, the Courts of this State have long recognized the need for a pre-trial suppression hearing on the issue of the admissibility of a defendant's alleged refusal to submit to a chemical test. See, e.g., People v. Boone, 71 A.D.2d 859, ___, 419 N.Y.S.2d 187, 187 (2d Dep't 1979) ("the denial, without a hearing, of defendant's motion to suppress his alleged refusal to submit to a chemical test" constituted reversible error); People v. Smith, 18 N.Y.3d 544, 547, 942 N.Y.S.2d 426, 428 (2012) (issue of admissibility of alleged chemical test refusal was addressed at pre-trial hearing); id. at 551, 942 N.Y.S.2d at 430 ("whether defendant's words or actions amounted to a refusal often constitutes a mixed question of law and fact that requires the court to view defendant's actions in light of all the surrounding circumstances and draw permissible inferences from equivocal words or conduct"); People v. Williams, 99 A.D.3d 955, ___, 952 N.Y.S.2d 281, 282 (2d Dep't 2012) ("The defendant correctly contends that the hearing court erred in denying his motion to suppress evidence of his refusal to take a breathalyzer test, as the officer administering the test did not advise the defendant that his refusal could be used against him at a trial, proceeding, or hearing resulting from the arrest"); People v. Guzman, 247 A.D.2d 552, ___, 668 N.Y.S.2d 918, 918 (2d Dep't 1998) (same); People v. Jones, 51 Misc. 3d 863, 27 N.Y.S.3d 830 (N.Y. City Crim. Ct. 2016) (Court held "Dunaway/Johnson/Refusal hearing"); People v. Popko, 33 Misc. 3d 277, ___, 930 N.Y.S.2d 782, 784 (N.Y. City Crim. Ct. 2011) (Court held "combined Ingle and refusal hearing"); People v. Brito, 26 Misc. 3d 1097, 892 N.Y.S.2d 752 (Bronx Co. Sup. Ct. 2010); People v. Rodriguez, 26 Misc. 3d 238, 891 N.Y.S.2d 246 (Bronx Co. Sup. Ct. 2009); People v. O'Reilly, 16 Misc. 3d 775, ___, 842 N.Y.S.2d 292, 294 (Suffolk Co. Dist. Ct. 2007) (Court held "a Dunaway/Huntley/Mapp and refusal hearing"); People v. Davis, 8 Misc. 3d 158, ___, 797 N.Y.S.2d 258, 259 (Bronx Co. Sup. Ct. 2005) ("pre-trial 'refusal hearings' have become common in New York criminal practice");

People v. Lynch, 195 Misc. 2d 814, ___, 762 N.Y.S.2d 474, 476 (N.Y. City Crim. Ct. 2003) ("the determination of the admissibility of a refusal to submit to a chemical test is best addressed at a hearing held prior to commencement of trial"); People v. An, 193 Misc. 2d 301, ___, 748 N.Y.S.2d 854, 855 (N.Y. City Crim. Ct. 2002) (Court held Dunaway- "Refusal" hearing); People v. Burtula, 192 Misc. 2d 597, ___, 747 N.Y.S.2d 692, 693 (Nassau Co. Dist. Ct. 2002) ("Whether this request is labeled one for 'suppression' or for a pre-trial determination into the admissibility of evidence, there exists a sufficient body of case law establishing that a defendant is entitled to such a hearing"); People v. Dejac, 187 Misc. 2d 287, ___, 721 N.Y.S.2d 492, 493 (Monroe Co. Sup. Ct. 2001) (Court held "combined probable cause/Huntley and chemical test refusal hearing"); People v. Robles, 180 Misc. 2d 512, ___, 691 N.Y.S.2d 697, 699 (N.Y. City Crim. Ct. 1999) ("It has become common practice for defendants to request and for the courts to conduct pre-trial hearings on the issue of the admissibility of a defendant's refusal to consent to a chemical test"); People v. Coludro, 166 Misc. 2d 662, 634 N.Y.S.2d 964 (N.Y. City Crim. Ct. 1995); People v. Pagan, 165 Misc. 2d 255, 629 N.Y.S.2d 656 (N.Y. City Crim. Ct. 1995); People v. Camagos, 160 Misc. 2d 880, 611 N.Y.S.2d 426 (N.Y. City Crim. Ct. 1993); People v. McGorman, 159 Misc. 2d 736, ___, 606 N.Y.S.2d 566, 568 (N.Y. Co. Sup. Ct. 1993); People v. Ferrara, 158 Misc. 2d 671, 602 N.Y.S.2d 86 (N.Y. City Crim. Ct. 1993); People v. Rosado, 158 Misc. 2d 50, 600 N.Y.S.2d 624 (N.Y. City Crim. Ct. 1993); People v. Martin, 143 Misc. 2d 341, ___, 540 N.Y.S.2d 412, 416 (Newark Just. Ct. 1989) ("This Court thus holds that a defendant is entitled to a separate pre-trial hearing to determine whether his refusal to take a breathalyzer [sic] test should be submitted to the jury"); People v. Walsh, 139 Misc. 2d 161, ___, 527 N.Y.S.2d 349, 351 (Nassau Co. Dist. Ct. 1988) ("Where there is a denial by a defendant of a refusal to give his consent to take the test, this Court favors a pre-trial hearing"); People v. Cruz, 134 Misc. 2d 115, 509 N.Y.S.2d 1002 (N.Y. City Crim. Ct. 1986); People v. Delia, 105 Misc. 2d 483, 432 N.Y.S.2d 321 (Onondaga Co. Ct. 1980); People v. Hougland, 79 Misc. 2d 868, 361 N.Y.S.2d 827 (Suffolk Co. Dist. Ct. 1974). See generally People v. Reynolds, 133 A.D.2d 499, ___, 519 N.Y.S.2d 425, 427 (3d Dep't 1987) ("County Court, following a suppression hearing, did not err in denying defendant's motion to suppress evidence of his refusal to submit to a blood alcohol test after the accident"); People v. McMahon, 149 A.D.3d 1102, ___ N.Y.S.3d ___ (2d Dep't 2017) (same); People v. Scaccia, 4 A.D.3d 808, 771 N.Y.S.2d 772 (4th Dep't 2004) (same); People v. Cousar, 226 A.D.2d 740, 641 N.Y.S.2d 695 (2d Dep't 1996) (same); People v. Boudreau, 115 A.D.2d 652, 496 N.Y.S.2d 489 (2d Dep't 1985) (same). Cf. People v. Carota, 93 A.D.3d 1072, ___, 941 N.Y.S.2d 302, 307 (3d Dep't 2012); People v. Kinney, 66 A.D.3d 1238, 888 N.Y.S.2d 260 (3d Dep't 2009) (hearing held after both parties had rested but before case was submitted to jury).

The rationale for such a hearing was concisely set forth by the Court in Cruz, *supra*:

A hearing held during trial, or a ruling made during the course of the trial, has little practical value to a defendant. Absent pre-trial suppression, the prosecutor is entitled to discuss the refusal to submit to the breathalyzer test with the jury in his opening statement. Once the jury is made aware of this evidence, the damage is done regardless of whether the prosecution is permitted to introduce that evidence at trial. A ruling made during trial excluding that evidence may thus be futile. Nor would curative instructions warning the jury not to consider the evidence eliminate the tremendous prejudicial effect. Therefore the ruling must be made pre-trial. That same conclusion was reached in People v. Delia, 105 Misc. 2d 483, 484, 432 N.Y.S.2d 321 (Co. Ct, Onondaga Cty, 1980) and People v. Houghland [sic], *supra*, the only reported cases which have dealt with the issue of pre-trial determination of the admissibility of this type of evidence.

134 Misc. 2d at ___, 509 N.Y.S.2d at 1004. *See also* Burtula, 192 Misc. 2d at ___, 747 N.Y.S.2d at 693-94.

At such a hearing, "the People should assume the burden of demonstrating by a fair preponderance of the evidence . . . that the defendant refused to consent to the test as mandated by V.T.L. 1194(1), (4) [currently VTL § 1194(2)(a), (f)]." People v. Walsh, 139 Misc. 2d 161, ___, 527 N.Y.S.2d 349, 351 (Nassau Co. Dist. Ct. 1988). *See also* People v. Rodriguez, 26 Misc. 3d 238, ___, 891 N.Y.S.2d 246, 248 (Bronx Co. Sup. Ct. 2009); People v. Burnet, 24 Misc. 3d 292, ___, 882 N.Y.S.2d 835, 841 (Bronx Co. Sup. Ct. 2009); Davis, 8 Misc. 3d at ___, 797 N.Y.S.2d at 260 ("at a refusal hearing (in addition to addressing any special issues that may arise) the People in essence must meet a two part burden. First, they must show by a preponderance of the evidence that clear and proper refusal warnings were delivered to the defendant. Second, they must also show by a preponderance of the evidence that a true and persistent refusal then followed"); *id.* at ___, 797 N.Y.S.2d at 267 (same); Lynch, 195 Misc. 2d at ___, 762 N.Y.S.2d at 478-79; Burtula, 192 Misc. 2d at ___, 747 N.Y.S.2d at 694; Robles, 180 Misc. 2d at ___, 691 N.Y.S.2d at 699; Camagos, 160 Misc. 2d at ___, 611 N.Y.S.2d at 428. *See generally* People v. Dejac, 187 Misc. 2d 287, ___, 721 N.Y.S.2d 492, 495-96 (Monroe Co. Sup. Ct. 2001).

In People v. Annis, 134 A.D.3d 1433, 21 N.Y.S.3d 795 (4th Dep't 2015), the Appellate Division, Fourth Department, intimated that defense counsel's unreasonable withdrawal of a request for such a hearing can constitute ineffective assistance of counsel.

§ 41:33 Invalid stop voids chemical test refusal

In Matter of Byer v. Jackson, 241 A.D.2d 943, ___, 661 N.Y.S.2d 336, 337 (4th Dep't 1997), petitioner's car was stopped by the police "after he turned right out of a parking lot without using his turn signal," which led to petitioner being arrested for, among other things, DWI. Petitioner thereafter refused to submit to a chemical test.

A DMV refusal hearing was held, following which petitioner's driver's license was revoked. On appeal, respondent conceded "that petitioner did not violate Vehicle and Traffic Law § 1163(a), the underlying predicate for the stop, because the statute does not require a motorist to signal a turn from a private driveway," but nonetheless contended "that the officer's good faith belief that there was a violation of the Vehicle and Traffic Law, coupled with the surrounding circumstances, provided reasonable suspicion of criminality to justify the stop." Id. at ___, 661 N.Y.S.2d at 337-38.

The Appellate Division, Fourth Department, disagreed, holding that "[w]here the officer's belief is based on an erroneous interpretation of law, the stop is illegal at the outset and any further actions by the police as a direct result of the stop are illegal." Id. at ___, 661 N.Y.S.2d at 338. See also Matter of McDonell v. New York State Dep't of Motor Vehicles, 77 A.D.3d 1379, ___, 908 N.Y.S.2d 507, 508 (4th Dep't 2010) (same).

In People v. Guthrie, 25 N.Y.3d 130, 132, 8 N.Y.S.3d 237, 239 (2015), the Court of Appeals partially abrogated the mistake of law doctrine set forth in Byer, holding that as long as "the officer's mistake about the law is reasonable, the stop is constitutional." In so holding, the Court reasoned that "the relevant question before us is not whether the officer acted in good faith, but whether his belief that a traffic violation had occurred was objectively reasonable. Recently, in Heien v. North Carolina, the Supreme Court of the United States clarified that the Fourth Amendment tolerates objectively reasonable mistakes supporting such a belief, whether they are mistakes of fact or mistakes of law." Id. at 134, 8 N.Y.S.3d at 240-41 (citations and footnote omitted).

Critically, in the footnote omitted from the above quote, the Guthrie Court stated:

This distinction is significant in that a mistake of law that is merely made in "good faith" will not validate a traffic stop; rather, unless the mistake is objectively reasonable, any evidence gained from the stop -- whether based on a mistake of law or a mistake of fact -- must be suppressed. Thus, contrary to the dissent's suggestion, our holding in this case does not represent a limitation on the rule set forth in People v. Bigelow that there is no good faith exception to the exclusionary rule.

Id. at 134 n.2, 8 N.Y.S.3d at 240 n.2 (citation omitted). See also id. at 139, 8 N.Y.S.3d at 244-45 ("As the Supreme Court explained, the requirement that the mistake be objectively reasonable prevents officers from 'gain[ing] [any] Fourth Amendment advantage through a sloppy study of the laws [they are] duty-bound to enforce'") (citation omitted).

Thus, Guthrie clearly does not stand for the proposition that all mistake of law stops are now valid. It merely stands for the proposition that "objectively reasonable" mistake of law stops are valid.

§ 41:34 Probable cause to believe motorist violated VTL § 1192 must exist at time of arrest

One of the issues to be determined at a DMV refusal hearing is whether the police officer had reasonable grounds (*i.e.*, probable cause) to believe that the motorist had been driving in violation of VTL § 1192. See VTL § 1194(2)(c). In determining whether probable cause existed for the motorist's arrest, observations made, or evidence obtained, *subsequent to the arrest* cannot be considered. See, e.g., People v. Loria, 10 N.Y.2d 368, 373, 223 N.Y.S.2d 462, 467 (1961); People v. Oquendo, 221 A.D.2d 223, ___, 633 N.Y.S.2d 492, 493 (1st Dep't 1995); People v. Feingold, 106 A.D.2d 583, ___, 482 N.Y.S.2d 857, 859 (2d Dep't 1984); People v. Bruno, 45 A.D.2d 1025, ___, 358 N.Y.S.2d 183, 184 (2d Dep't 1974); People v. Garafolo, 44 A.D.2d 86, ___, 353 N.Y.S.2d 500, 502 (2d Dep't 1974); Matter of Obrist v. Commissioner of Motor Vehicles, 131 Misc. 2d 499, 500 N.Y.S.2d 909 (Onondaga Co. Sup. Ct. 1985).

In Obrist, *supra*, the police, who were waiting at petitioner's home to arrest him pursuant to a warrant, arrested petitioner upon his arrival. The police thereafter (a) suspected that petitioner was intoxicated, (b) requested that petitioner submit to a chemical test, and (c) upon petitioner's refusal to submit to such a test, *re-arrested* him for DWI. Petitioner ultimately brought an Article 78 proceeding challenging the

revocation of his driver's license following a DMV refusal hearing.

In granting the petition, Supreme Court held that "[t]he pre-requisite that the arrest must be based upon probable cause of driving while intoxicated has not been met in this case," in that "[a]t the time of the arrest under the warrant, there was no evidence that [petitioner] was intoxicated. He did not stagger. His words were not slurred at the time he was taken into custody. At best, there was an odor of beer on his breath, and his face was slightly flushed." 131 Misc. 2d at ___, 500 N.Y.S.2d at 910. More specifically, the Court held that:

The general rule is that there must be probable cause at the time of the arrest. That is, the arresting officer must have "reasonable grounds" for believing that the suspect is or has been under the influence of liquor while operating his vehicle. There was no evidence offered which could establish "reasonable grounds" sufficient to sustain an arrest. The arrest was on other grounds unrelated to a violation under this statute. It is not proper execution of the statutory requirements to make the arrest when the signs of intoxication are not present and then, at some later time decide to request the chemical test.

This is not a case of placing form over substance but rather an insistence [sic] that the statutory requirements of this quasi criminal statute be strictly met.

Id. at ___, 500 N.Y.S.2d at 911 (citations omitted).

§ 41:35 Procedure upon arrest -- Report of Refusal

Where a person has been lawfully arrested for a suspected violation of VTL § 1192, VTL § 1194(2)(b)(1) provides, in pertinent part:

(b) Report of refusal. (1) If: (A) such person having been placed under arrest; or (B) after a breath [screening] test indicates the presence of alcohol in the person's system; . . . and having thereafter been requested to submit to such chemical test and having been informed that the person's license or permit to drive and any non-resident operating privilege shall be

immediately suspended and subsequently revoked for refusal to submit to such chemical test or any portion thereof, whether or not the person is found guilty of the charge for which such person is arrested . . . , refuses to submit to such chemical test or any portion thereof, unless a court order has been granted pursuant to [VTL § 1194(3)], the test shall not be given and a written report of such refusal shall be immediately made by the police officer before whom such refusal was made.

See also 15 NYCRR § 139.2(a). Similar provisions exist for individuals charged with Boating While Intoxicated, see Navigation Law § 49-a; 15 NYCRR § 139.2(b), and Snowmobiling While Intoxicated. See Parks, Recreation & Historic Preservation Law § 25.24; 15 NYCRR § 139.2(c).

In Matter of Smith v. Commissioner of Motor Vehicles, 103 A.D.2d 865, ___, 478 N.Y.S.2d 103, 104 (3d Dep't 1984), the Appellate Division, Third Department, rejected a claim that the validity of the Report of Refusal was somehow affected by the fact that it was filled out by the chief of police rather than the arresting officer.

§ 41:36 Report of Refusal -- Verification

A Report of Refusal "may be verified by having the report sworn to, or by affixing to such report a form notice that false statements made therein are punishable as a class A misdemeanor pursuant to [PL § 210.45] and such form notice together with the subscription of the deponent shall constitute a verification of the report." VTL § 1194(2)(b)(1). See also 15 NYCRR § 139.2(a).

§ 41:37 Report of Refusal -- Contents

The officer's Report of Refusal must "set forth reasonable grounds to believe [1] such arrested person . . . had been driving in violation of any subdivision of [VTL § 1192] . . . , [2] that said person had refused to submit to such chemical test, and [3] that no chemical test was administered pursuant to the requirements of [VTL § 1194(3)]." VTL § 1194(2)(b)(2).

In Matter of Peeso v. Fiala, 130 A.D.3d 1442, ___, 13 N.Y.S.3d 742, 743 (4th Dep't 2015), the Appellate Division, Fourth Department, held that a Report of Refusal is not required to expressly allege that the motorist's purported intoxication was "voluntary." Cf. People v. Cruz, 48 N.Y.2d 419, 428, 423 N.Y.S.2d 625, 629 (1979) ("intoxication is a greater degree of impairment which is reached when the driver has voluntarily

consumed alcohol to the extent that he is incapable of employing the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver") (emphasis added). In so holding, the Court found that "[p]etitioner's reliance on People v. Cruz is misplaced inasmuch as that case involved a criminal conviction for driving while intoxicated." Id. at ___, 13 N.Y.S.3d at 743-44 (citation omitted).

§ 41:38 Report of Refusal -- To whom is it submitted?

The officer's Report of Refusal "shall be presented to the court upon arraignment of an arrested person." VTL § 1194(2)(b)(2). See also 15 NYCRR § 139.2(d) ("Upon the arraignment of the defendant, the police officer shall present to the court copies of the report of refusal to submit to chemical test").

For individuals under the age of 21 charged with a Zero Tolerance law refusal, see § 15:54, *supra*.

§ 41:39 Procedure upon arraignment -- Temporary suspension of license

At arraignment in a refusal case, the Court is required to temporarily suspend the defendant's driving privileges pending the outcome of a DMV refusal hearing. See VTL § 1194(2)(b)(3) ("For persons placed under arrest for a violation of any subdivision of [VTL § 1192], the license or permit to drive and any non-resident operating privilege shall, upon the basis of such written report, be temporarily suspended by the court without notice pending the determination of a hearing as provided in [VTL § 1194(2)(c)]"). See also 15 NYCRR § 139.3(a).

Similar provisions exist for individuals charged with Boating While Intoxicated, see Navigation Law § 49-a; 15 NYCRR § 139.3(b), and Snowmobiling While Intoxicated. See Parks, Recreation & Historic Preservation Law § 25.24; 15 NYCRR § 139.3(c). This procedure does not violate the Due Process Clause. See Matter of Ventura, 108 Misc. 2d 281, 437 N.Y.S.2d 538 (Monroe Co. Sup. Ct. 1981). See generally Mackey v. Montrym, 443 U.S. 1, 99 S.Ct. 2612 (1979).

However, "[i]f the department fails to provide for such hearing [15] days after the date of the arraignment of the arrested person, the license, permit to drive or non-resident operating privilege of such person shall be reinstated pending a hearing pursuant to this section." VTL § 1194(2)(c). In addition, "[i]f the respondent appears for a first scheduled chemical test refusal hearing, and the arresting officer does not appear, the matter will be adjourned and any temporary suspension still in effect shall be terminated." 15 NYCRR § 127.9(c).

In other words, the temporary license suspension imposed at arraignment in a refusal case lasts *the shorter of* 15 days or until the DMV refusal hearing.

§ 41:40 Procedure upon arraignment -- Court must provide defendant with waiver form and notice of DMV refusal hearing date

VTL § 1194(2)(b)(4) provides that "[t]he court . . . shall provide such person with a scheduled hearing date, a waiver form, and such other information as may be required by the commissioner." 15 NYCRR § 139.3(d) provides more specificity in this regard:

Upon arraignment . . ., the court shall complete a temporary suspension and notice of hearing form (adding the location and the next available hearing date and time, as provided by the commissioner), and give the appropriate copies to the defendant and the police officer.

See generally 15 NYCRR § 127.1(a) (general requirements of hearing notice); 15 NYCRR § 139.2(d) ("The police officer shall bring his or her own copy of such report to the refusal hearing at the location and on the date and time specified in the temporary suspension and notice of hearing form provided by the court").

The "temporary suspension and notice of hearing form" referenced in 15 NYCRR § 139.3(d) is a 2-sided document. The front side is entitled "Notice of Temporary Suspension and Notice of Hearing." The back side is entitled "Waiver of Hearing."

In terms of hearing date availability, 15 NYCRR § 139.4(a) provides that "[t]he commissioner shall provide to all magistrates, in advance, a schedule of hearing dates and locations and forms necessary to carry out the provisions of this Part."

§ 41:41 Effect of failure of Court to schedule DMV refusal hearing

The arraigning Court will occasionally fail to schedule a DMV refusal hearing, in violation of VTL § 1194(2)(b)(4) and 15 NYCRR § 139.3(d). In this regard, 15 NYCRR § 127.9(a) provides that a chemical test refusal hearing "may be scheduled by the department if the court fails to do so."

§ 41:42 Effect of delay by Court in forwarding Report of Refusal to DMV

In Matter of Mullen v. New York State Dep't of Motor Vehicles, 144 A.D.2d 886, 535 N.Y.S.2d 206 (3d Dep't 1988), Town Court failed to temporarily suspend petitioner's driver's license at arraignment and/or forward the Report of Refusal to DMV within 48 hours, as is required by VTL § 1194(2). Approximately 10 months later, following a Huntley/probable cause hearing, the Court finally filed the Report of Refusal. Petitioner sought a writ of prohibition, claiming that, as a result of Town Court's delay in forwarding the Report of Refusal to DMV, "respondents never obtained jurisdiction to review her refusal." Id. at ___, 535 N.Y.S.2d at 207. The Appellate Division, Third Department, disagreed. In so holding, the Court reasoned that:

It is well established that mere delay in scheduling a refusal hearing will not oust respondents of jurisdiction. . . . [W]e cannot accept petitioner's premise that the 48-hour transfer provision constitutes a jurisdictional prerequisite. In our view, the time schedules specified in Vehicle and Traffic Law § 1194(2) are directory only. By providing for an immediate license suspension procedure in the event of a test refusal, the Legislature was clearly acting "to protect the public, not the impaired driver."

Id. at ___, 535 N.Y.S.2d at 207 (citation omitted).

§ 41:43 Effect of delay by DMV in scheduling refusal hearing

In Matter of Geary v. Commissioner of Motor Vehicles, 92 A.D.2d 38, 459 N.Y.S.2d 494 (4th Dep't), aff'd, 59 N.Y.2d 950, 466 N.Y.S.2d 304 (1983), the refusal paperwork was properly forwarded to DMV by the arraigning Court. Nonetheless, DMV did not schedule a refusal hearing until approximately 7½ months later. Following the refusal hearing, petitioner's driver's license was revoked. Petitioner filed an Article 78 proceeding, claiming "that he was denied his right to a hearing and determination within a reasonable time under the State Administrative Procedure Act." Id. at ___, 459 N.Y.S.2d at 496. The Appellate Division, Fourth Department, disagreed. In so holding, the Court reasoned that:

The statute [VTL § 1194] was designed to enable the authorities to deal promptly and effectively with the scourge of drunken drivers by immediate revocation of their licenses either upon chemical proof of

intoxication or upon refusal to submit to the blood test. Time schedules specified in similar legislation for performance of certain acts on the part of an administrative agency have been held to be directory only.

. . .

No physical characteristic or condition could be more closely related to incompetence to operate a motor vehicle than inebriation, and no aspect of motor vehicle regulation can be more important to the welfare of both operators and the public than keeping inebriated drivers off the public highways. . . . [Recent amendments to VTL § 1194] should more effectively accomplish the intent to protect the public, not the impaired driver.

Id. at ___-___, 459 N.Y.S.2d at 496-97 (citations omitted). See also Matter of Maxwell v. Commissioner of Motor Vehicles, 100 A.D.2d 746, 473 N.Y.S.2d 940 (4th Dep't 1984), rev'g 109 Misc. 2d 62, 437 N.Y.S.2d 554 (Erie Co. Sup. Ct. 1981); Matter of Tzetzso v. Commissioner of Motor Vehicles, 97 A.D.2d 978, 468 N.Y.S.2d 787 (4th Dep't 1983); Matter of Brown v. Tofany, 33 A.D.2d 984, 307 N.Y.S.2d 268 (4th Dep't 1970).

In affirming the Appellate Division, the Court of Appeals noted that, although a lengthy delay by DMV in scheduling a refusal hearing is not *jurisdictional* in nature, in an appropriate case such a delay could result in a finding of an "erroneous exercise of authority" by the Commissioner. Matter of Geary v. Commissioner of Motor Vehicles, 59 N.Y.2d 950, 952, 466 N.Y.S.2d 304, 304 (1983). See also Matter of Correale v. Passidomo, 120 A.D.2d 525, ___, 501 N.Y.S.2d 724, 725 (2d Dep't 1986) ("In order to successfully argue that a delay in scheduling a refusal hearing pursuant to Vehicle and Traffic Law § 1194 constituted a violation of the State Administrative Procedure Act § 301, the petitioner must show that he was substantially prejudiced by such delay"). See generally Matter of Reed v. New York State Dep't of Motor Vehicles, 59 A.D.2d 974, ___, 399 N.Y.S.2d 332, 333 (3d Dep't 1977) (DMV refusal revocation is "a civil, not criminal, sanction, and, therefore, constitutional speedy trial rights are not in issue"); Matter of Minnick v. Melton, 53 A.D.2d 1016, 386 N.Y.S.2d 488 (4th Dep't 1976) (same).

In any event, DMV regulations enacted subsequent to Geary expressly provide that a chemical test refusal hearing must be commenced within "[6] months from the date the department receives notice of [the] refusal," 15 NYCRR § 127.2(b)(2), absent (a) "reasonable grounds for postponing the commencement of [the] hearing," and (b) "provided the respondent is given prior notice

thereof and an explanation of the grounds for such postponement." 15 NYCRR § 127.2(c). In such a case, "[t]he reasonableness of such postponement shall be reviewable by the Administrative Appeals Board established pursuant to [VTL] article 3-A." 15 NYCRR § 127.2(c).

In Matter of Hildreth v. New York State Dep't of Motor Vehicles Appeals Bd., 83 A.D.3d 838, ___, 921 N.Y.S.2d 137, 139-40 (2d Dep't 2011), the Appellate Division, Second Department, rejected petitioner's claim that his re-scheduled refusal hearing "should have been dismissed for failure to hold a hearing within a reasonable time as required under the State Administrative Procedure Act § 301 or within six months from the date the DMV received notice of his chemical test refusal as required under 15 NYCRR 127.2(b)(2)." In so holding, the Court reasoned that:

Time limitations imposed on administrative agencies by their own regulations are not mandatory. Absent a showing of substantial prejudice, a petitioner is not entitled to relief for an agency's noncompliance. Accordingly, a petitioner must demonstrate substantial prejudice in order to challenge a delayed chemical test refusal hearing under section 301(1) of the State Administrative Procedure Act. As the petitioner retained his driving privileges while awaiting the hearing, he was not prejudiced by the delay.

Id. at ___, 921 N.Y.S.2d at 140 (citations omitted).

§ 41:44 Report of Refusal must be forwarded to DMV within 48 hours of arraignment

VTL § 1194(2)(b)(3) provides that "[c]opies of such report must be transmitted by the court to the commissioner. . . . Such report shall be forwarded to the commissioner within [48] hours of such arraignment." See also 15 NYCRR § 139.3(d) ("Within 48 hours of the arraignment, the court must forward copies of both the refusal report and the temporary suspension and notice of hearing form to the commissioner").

§ 41:45 Forwarding requirement cannot be waived -- even with consent of all parties

VTL § 1194(2)(b)(3) expressly provides that copies of the Report of Refusal "*must be transmitted by the court to the commissioner and such transmittal may not be waived even with the consent of all the parties.*" (Emphasis added). See also 15 NYCRR § 139.3(d) ("Timely submission of the refusal report to the Commissioner of Motor Vehicles may not be waived even with

consent of all parties"). This section prohibits the parties from negotiating a plea bargain pursuant to which the Report of Refusal is not forwarded to DMV -- which would allow the defendant to avoid the civil consequences of his or her refusal to submit to a chemical test.

§ 41:46 DMV regulations pertaining to chemical test refusals

VTL § 1194(2)(e) mandates that DMV enact regulations pertaining to chemical test refusals:

(e) Regulations. The commissioner shall promulgate such rules and regulations as may be necessary to effectuate the provisions of [VTL § 1194(1) and (2)].

Pertinent DMV regulations are set forth at 15 NYCRR Parts 127, 134, 135, 136, 139 and 155.

§ 41:47 DMV refusal hearings -- Generally

VTL § 1194(2)(c) provides for a Due Process hearing prior to the imposition of civil sanctions for refusal to submit to a chemical test:

(c) Hearings. Any person whose license or permit to drive or any non-resident driving privilege has been suspended pursuant to [VTL § 1194(2)(b)] is entitled to a hearing in accordance with a hearing schedule to be promulgated by the commissioner.

§ 41:48 DMV refusal hearings -- Waiver of right to hearing

VTL § 1194(2)(c) provides that "[a]ny person may waive the right to a [DMV refusal] hearing under this section." See also 15 NYCRR § 139.4(c) (waiver must be in writing). In this regard, VTL § 1194(2)(b)(4) provides that "[i]f a hearing, as provided for in [VTL § 1194(2)(c)] . . . is waived by such person, the commissioner shall immediately revoke the license, permit, or non-resident operating privilege, *as of the date of receipt of such waiver* in accordance with the provisions of [VTL § 1194(2)(d)]." (Emphasis added). See also 15 NYCRR § 139.4(c) ("Any such waiver shall constitute an admission that a chemical test refusal occurred as contemplated by [VTL §] 1194 . . . , and such waiver shall result in administrative sanctions provided by law for the chemical test refusal").

As is noted in § 41:40, *supra*, at arraignment in a refusal case the Court is required to provide the defendant with, among other things, a "waiver" form. See VTL § 1194(2)(b)(4). The

waiver form is located on the reverse side of the form providing the defendant with notice of the date and time of the DMV refusal hearing. However, some Courts make (and utilize) photocopies of the "Notice of Temporary Suspension and Notice of Hearing" form -- which tend to be blank on the back side. In such a case, if the defendant wishes to waive his or her right to a refusal hearing, defense counsel should specifically request a "Waiver of Hearing" form from the Court.

The waiver form allows the defendant to "plead guilty" to, and accept the civil consequences of, refusing to submit to a chemical test. This raises the obvious question -- under what circumstances would it be in a defendant's best interest to execute the waiver form?

Since the license revocation which results from a chemical test refusal is a "civil" or "administrative" penalty separate and distinct from the license suspension/revocation which results from a VTL § 1192 conviction in criminal Court, the suspension/revocation periods run separate and apart from each other (to the extent that they do not overlap). In other words, to the extent that a VTL § 1192 suspension/revocation and a chemical test refusal revocation overlap, DMV runs the suspension/revocation periods *concurrently*; but to the extent that the suspension/revocation periods do *not* overlap, DMV runs the periods *consecutively*. See § 41:11, *supra*.

Thus, if the defendant is not interested in contesting either the DWI charge or the alleged chemical test refusal, defense counsel should attempt to minimize the amount of time that the defendant's driving privileges will be suspended/revoked. In this regard, the best course of action is to negotiate a plea bargain which will be entered at the time of arraignment (or as soon thereafter as possible), and to execute the Waiver of Hearing form and mail it to DMV immediately.

§ 41:49 DMV refusal hearings -- Failure of motorist to appear at hearing

The failure of the motorist to appear at a scheduled DMV refusal hearing "shall constitute a waiver of such hearing, provided, however, that such person may petition the commissioner for a new hearing which shall be held as soon as practicable." VTL § 1194(2)(c). See also 15 NYCRR § 127.8; 15 NYCRR § 127.9(b); 15 NYCRR § 139.4(c) (request for new hearing must be in writing).

"However, any action taken at the original hearing, or in effect at that time, may be continued pending such rescheduled hearing." 15 NYCRR § 127.8. In addition, "[a] respondent who has waived a hearing by failing to appear may be suspended

pending attendance at an adjourned hearing or a final determination." Id. In such a case, the period of license suspension pending the adjourned hearing will not be credited toward any license revocation resulting from the hearing.

Even though the respondent's failure to appear at a chemical test refusal hearing constitutes a waiver of the hearing, the DMV hearing officer "may receive the testimony of available witnesses and enter evidence into the record." 15 NYCRR § 127.8. 15 NYCRR § 127.9(b) is more specific in this regard:

(b) If no adjournment has been granted, and the respondent fails to appear for a scheduled hearing, the hearing officer may take the testimony of the arresting officer and any other witnesses present and consider all relevant evidence in the record. If such testimony and evidence is sufficient to find that respondent refused to submit to a chemical test, the hearing officer shall revoke the respondent's driver's license, permit or privilege of operating a vehicle. If, following such a determination, respondent petitions for a rehearing, pursuant to [15 NYCRR § 127.8] and [VTL § 1194(2)(c)], *it shall be the responsibility of the respondent to insure the presence [i.e., subpoena] of any witness he or she wishes to question or cross-examine.*

(Emphasis added).

§ 41:50 DMV refusal hearings -- Failure of arresting officer to appear at hearing

Not infrequently, the respondent will appear for the DMV refusal hearing at the date and time set forth in the notice of hearing form, but the arresting officer will fail to appear. Such a situation is governed by 15 NYCRR § 127.9(c) and case law. 15 NYCRR § 127.9(c) provides that:

(c) If the respondent appears for a first scheduled chemical test refusal hearing, and the arresting officer does not appear, the matter will be adjourned and any temporary suspension still in effect shall be terminated. *At any subsequent hearing, the hearing officer may make findings of fact and conclusions of law based upon the chemical test refusal report and any other relevant evidence in the record, notwithstanding the police officer's nonappearance.*

(Emphasis added).

In other words, even if the arresting officer fails to appear for the DMV refusal hearing not just once, but twice, the respondent can still lose the hearing based solely upon the contents of the officer's written Report of Refusal (assuming that the Report is filled out properly and sets forth a *prima facie* case). This procedure was condoned in Matter of Gray v. Adduci, 73 N.Y.2d 741, 742-43, 536 N.Y.S.2d 40, 41 (1988) (over the persuasive dissent of Judge Kaye):

Hearsay evidence can be the basis of an administrative determination. Here, the arresting officer's written report of petitioner's refusal is sufficiently relevant and probative to support the findings of the Administrative Law Judge that petitioner refused to submit to the chemical test after being warned of the consequences of such refusal. . . .

Petitioner's additional claim that the Commissioner's determination was made without cross-examination in violation of the State Administrative Procedure Act § 306(3), and of petitioner's right to due process is without merit. Petitioner had the right to call the officer as a witness (see, State Administrative Procedure Act § 304[2]). Even though the Administrative Law Judge had adjourned the hearing on prior occasions due to the absence of the police officer, this inconvenience cannot be determinative as a matter of law. Petitioner always had it within his power to subpoena the officer at any time. Even after the Administrative Law Judge decided to introduce the written report on his own motion and proceed with the hearing, petitioner's sole objection voiced was on hearsay grounds. He never claimed on the record before the Administrative Law Judge who was in the best position to afford him a remedy, that he had been misled, prejudiced or biased by the Judge's actions. Indeed, petitioner could have sought an adjournment to subpoena the officer. That he chose not to, was a tactical decision, which is not dispositive of the outcome.

(Citations omitted).

Gray makes clear that before a respondent can lose a DMV refusal hearing based solely upon a non-appearing police officer's Report of Refusal, he or she has both (a) the right to subpoena and cross-examine the arresting officer, and (b) the right to an adjournment for the purpose of subpoenaing the officer. If the respondent requests an adjournment to subpoena the officer (in compliance with Gray), and the officer fails to appear in response to such subpoena, Due Process requires that the refusal charge be dismissed. See In the Matter of the Administrative Appeal of Thomas A. Deyhle, Case No. D95-33398, Docket No. 18657 (DMV Appeals Board decision dated August 1, 1997). Our thanks to Glenn Gucciardo, Esq., of Northport, New York, for alerting us to this important decision.

The respondent also has the option of testifying, as well as the right to call "defense" witnesses and to present relevant evidence. In such a case, the officer's Report of Refusal "may be overcome by contrary, substantial evidence of the motorist or others." See Memorandum from DMV Administrative Office Director Sidney W. Berke to All Safety Administrative Law Judges, dated June 5, 1986, set forth at Appendix 44. See also Appendix 42.

Notably, although the contents of the officer's written Report of Refusal can provide sufficient evidence to sustain a refusal revocation where the officer *fails to appear* for a DMV refusal hearing, where the officer does appear for the hearing and testifies, but fails to demonstrate that complete refusal warnings were administered, the submission into evidence of the Report of Refusal (which contains the complete refusal warnings pre-printed thereon) cannot "cure" this defect. See Matter of Maxfield v. Tofany, 34 A.D.2d 869, ___, 310 N.Y.S.2d 783, 785 (3d Dep't 1970); Matter of Maines v. Tofany, 61 Misc. 2d 546, ___, 306 N.Y.S.2d 50, 52 (Broome Co. Sup. Ct. 1969). Cf. Matter of McGowan v. Foschio, 82 A.D.2d 1015, ___, 442 N.Y.S.2d 154, 156 (3d Dep't 1981) (Report of Refusal was properly used to refresh officer's recollection as to content of refusal warnings; not as affirmative proof of the contents therein); Matter of Babcock v. Melton, 57 A.D.2d 554, ___, 393 N.Y.S.2d 76, 77 (2d Dep't 1977) ("Alcohol/Drug Influence Report" form was properly admitted into evidence "since it was admitted only to indicate the exact words of the [refusal] warning").

§ 41:51 DMV refusal hearings -- Failure of either party to appear at hearing

Where neither the arresting officer nor the respondent appear for a scheduled DMV refusal hearing, the respondent will lose the "hearing" based upon either (a) a waiver theory, see § 41:49, *supra*, and/or (b) the contents of the officer's written Report of Refusal (assuming that the Report is filled out properly and sets forth a *prima facie* case). See Matter of

Whelan v. Adduci, 133 A.D.2d 273, 519 N.Y.S.2d 62 (2d Dep't 1987). See generally Matter of Gray v. Adduci, 73 N.Y.2d 741, 536 N.Y.S.2d 40 (1988).

§ 41:52 DMV refusal hearings -- Should defense counsel bring a stenographer?

In the past, the authors recommended that defense counsel should bring a stenographer to a DMV chemical test refusal hearing. The reason was primarily based upon the fact that although DMV refusal hearings are tape recorded by the DMV hearing officer, the quality of the recording equipment was generally poor and thus the recordings were often unreliable. This has changed.

Accordingly, it is no longer critical to bring one's own stenographer to a refusal hearing, with one important exception: where time is of the essence in obtaining the hearing transcript. In this regard, it generally takes a long time -- sometimes too long -- to obtain a refusal hearing transcript via the official transcription service utilized by DMV.

Where counsel chooses to hire a private stenographer at a DMV refusal hearing, it should be kept in mind that the stenographer's minutes are *not* the official record of the hearing. Rather, the DMV tape recording is the official record. While the ALJ will not object to the stenographer's presence, he or she will object if the stenographer unduly impedes the proceedings (e.g., by frequently interrupting, asking witnesses to speak up or slow down, etc.). As such, in order to avoid an unpleasant confrontation with the ALJ, counsel should "prep" the stenographer ahead of time as to his or her role in the proceedings.

§ 41:53 DMV refusal hearings -- 15-day rule

At arraignment in a refusal case, the Court is required to temporarily suspend the defendant's driving privileges pending the outcome of a DMV refusal hearing. See VTL § 1194(2)(b)(3) ("For persons placed under arrest for a violation of any subdivision of [VTL § 1192], the license or permit to drive and any non-resident operating privilege shall, upon the basis of such written report, be temporarily suspended by the court without notice pending the determination of a hearing as provided in [VTL § 1194(2)(c)]"). See also 15 NYCRR § 139.3(a).

Similar provisions exist for individuals charged with Boating While Intoxicated, see Navigation Law § 49-a; 15 NYCRR § 139.3(b), and Snowmobiling While Intoxicated. See Parks, Recreation & Historic Preservation Law § 25.24; 15 NYCRR § 139.3(c). This procedure does not violate the Due Process

Clause. See Matter of Ventura, 108 Misc. 2d 281, 437 N.Y.S.2d 538 (Monroe Co. Sup. Ct. 1981). See generally Mackey v. Montrym, 443 U.S. 1, 99 S.Ct. 2612 (1979).

However, "[i]f the department fails to provide for such hearing [15] days after the date of the arraignment of the arrested person, the license, permit to drive or non-resident operating privilege of such person shall be reinstated pending a hearing pursuant to this section." VTL § 1194(2)(c). In addition, "[i]f the respondent appears for a first scheduled chemical test refusal hearing, and the arresting officer does not appear, the matter will be adjourned and any temporary suspension still in effect shall be terminated." 15 NYCRR § 127.9(c).

In other words, the temporary license suspension imposed at arraignment in a refusal case lasts *the shorter of* 15 days or until the DMV refusal hearing.

§ 41:54 DMV refusal hearings -- Time and place of hearing

15 NYCRR § 139.4(b) provides that "[t]he refusal hearing shall commence at the place provided in the notice of hearing form and as close as practicable to the designated time. If the hearing cannot be commenced due to the absence of a hearing officer or the unavailability of the planned hearing site, it will be rescheduled by the department, with notice to the police officer and person accused of the refusal." See also 15 NYCRR § 127.2(a).

§ 41:55 DMV refusal hearings -- Right to counsel

"A respondent may be represented by counsel or, in the discretion of the hearing officer, by any other person of his or her choosing." 15 NYCRR § 127.4(a). "Any person representing the respondent must conform to the standards of conduct required of attorneys appearing before courts of this State." Id. "Failure to conform to such standards shall be grounds for prohibiting the continued appearance of such person on behalf of the respondent." Id.

§ 41:56 DMV refusal hearings -- Adjournment requests

"Adjournment requests for hearings held pursuant to [VTL § 1194] shall be considered in accordance with [15 NYCRR §§ 127.7 and 127.9]. All other requests for adjournments shall be addressed to the hearing officer, who may order a temporary suspension of the license, permit, [or] nonresident operating privilege . . . pursuant to law and [15 NYCRR] Part 127." 15 NYCRR § 139.4(b). In this regard, 15 NYCRR § 127.7 provides, in pertinent part:

(a) Adjournments of hearings may only be granted by the hearing officer responsible for the particular hearing, or by the Safety Hearing Bureau or the Division of Vehicle Safety, as appropriate.

(b) It is the department's general policy to grant a request for adjournment for good cause if such request is received at least [7] days prior to the scheduled date of hearing and if no prior requests for adjournment have been made. Notwithstanding this policy, requests for adjournments made more than [7] days prior to hearing may be denied by the hearing officer, or supervisor of the hearing officer or by the Safety Hearing Bureau or Division of Vehicle Safety, in their discretion. Grounds for such a denial include, but are not limited to, such a request being a second or subsequent request for adjournment, or where there is reason to believe such request is merely an attempt to delay the holding of a hearing, or where an adjournment will significantly affect the availability of other witnesses scheduled to testify.

(c) Any motorist or designated representative requesting an adjournment should obtain the name and title of the person granting such request. This information will be required in the event of any dispute as to whether an adjournment was in fact granted. Any request which is not specifically granted shall be deemed denied.

(d) Requests for adjournments within [7] days of a scheduled hearing must be made directly to the hearing officer. Such requests will generally not be granted.

(e) (1) Except as provided for in paragraphs (2) and (3) of this subdivision, in any case where an adjournment is granted, any suspension or revocation of a license, permit or privilege already in effect may be continued pending the adjourned hearing. In addition, in the event no such action is in effect, a temporary suspension of such license, permit or privilege may be imposed at the time the adjournment is granted provided that the records of the department

or the evidence already admitted furnishes reasonable grounds to believe such suspension is necessary to prevent continuing violations or a substantial traffic safety hazard.

(2) Adjournment of a chemical test refusal hearing held pursuant to Vehicle and Traffic Law, section 1194. Where an adjournment of a chemical test refusal hearing is granted at the request of the respondent, any suspension of a respondent's license, permit or privilege already in effect shall be continued pending the adjourned hearing. In addition, in the event no such suspension is in effect when the adjournment is granted, a temporary suspension of such license, permit or privilege shall be imposed and shall take effect on the date of the originally scheduled hearing. Such suspension shall not be continued or imposed if the hearing officer affirmatively finds, on the record, that there is no reason to believe that the respondent poses a substantial traffic safety hazard and sets forth the basis for that finding on the record.

(3) Continuance of a chemical test refusal hearing held pursuant to Vehicle and Traffic Law, section 1194. If a chemical test refusal hearing is continued at the discretion of the hearing officer, in order to complete testimony, to subpoena witnesses or for any other reason, and if the respondent's license, permit or privilege was suspended pending such hearing, such suspension shall remain in effect pending the continued hearing unless the hearing officer affirmatively finds on the record that there is no reason to believe that the respondent poses a substantial traffic safety hazard and sets forth the basis for that finding on the record. If respondent's license, permit or privilege was not suspended pending the hearing, the hearing officer may suspend such license, permit or privilege, based upon the testimony provided and evidence

submitted at such hearing, if the hearing officer affirmatively finds, on the record, that there is reason to believe that the respondent poses a substantial traffic safety hazard and sets forth the basis for that finding on the record.

(4) In addition to any grounds for suspension authorized pursuant to paragraphs (2) and (3) of this subdivision, a hearing officer must impose a suspension or continue a suspension of a respondent's driver's license, pursuant to paragraphs (2) and (3) of this subdivision, if the respondent's record indicates that:

(i) The person has been convicted of homicide, assault, criminal negligence or criminally negligent homicide arising out of the operation of a motor vehicle.

(ii) The person has [2] or more revocations and/or suspensions of his driver's license within the last [3] years, other than a suspension that may be terminated by performance of an act by the person.

(iii) The person has been convicted more than once of reckless driving within the last [3] years.

(iv) The person has [3] or more alcohol-related incidents within the last 10 years, including any conviction of Vehicle and Traffic Law, section 1192, any finding of a violation of section 1192-a of such law, and a refusal to submit to a chemical test. If a refusal that arises out of the same incident as a section 1192 conviction, this shall count as [1] incident.

The provisions of 15 NYCRR § 127.7 govern requests for adjournments of chemical test refusal hearings "[n]otwithstanding the fact that such hearings may be held less than [7] days from the date on which the respondent is arraigned in court." 15 NYCRR § 127.9(a).

If an adjournment is granted but the ALJ suspends the motorist's driving privileges during the time period of the adjournment, such suspension period will not be credited toward any revocation period ultimately imposed by DMV for the chemical test refusal.

§ 41:57 DMV refusal hearings -- Responsive pleadings

DMV regulations provide that "[n]o pre-hearing answers or responsive pleadings are permitted." 15 NYCRR § 127.1(a).

§ 41:58 DMV refusal hearings -- Pre-hearing discovery

Pre-hearing discovery is governed by 15 NYCRR § 127.6(a):

Prior to a hearing, a respondent may make a request to review nonconfidential information in the hearing file including information which is not protected by law from disclosure. If the file has been sent to the hearing officer or is scheduled to be sent within [7] days of receipt of a request by the Safety Hearing Bureau, examination of the information will be arranged by the hearing officer. The examination will be scheduled for a time at least [5] days prior to the hearing unless a shorter time is mutually agreed between the hearing officer and the requestor. If the file has not been sent to the hearing officer and is not scheduled to be sent within [7] days of receipt of a request by the Safety Hearing Bureau, the file will be made available for examination at the Safety Hearing Bureau before the usual date scheduled for sending the file to the hearing officer. A respondent may elect to examine the file after it is received by the hearing officer rather than while it is in the custody of the Safety Hearing Bureau. If a request to examine the file is received less than [7] days prior to the hearing date, the requestor will be afforded an opportunity to examine the file immediately prior to commencement of the hearing or at an earlier time as may be agreed to in the discretion of the hearing officer.

§ 41:59 DMV refusal hearings -- Recusal of ALJ

Requests for recusal of the DMV ALJ are governed by 15 NYCRR § 127.5(a):

A respondent or designated representative may request recusal of an assigned hearing officer. The request and the reason for it must be made to the assigned hearing officer at the beginning of the hearing or as soon thereafter as the requestor receives information which forms the basis for such request. Denial of a request for recusal shall be reviewable by the Administrative Appeals Board . . . under procedures established pursuant to [VTL article] 3-A.

§ 41:60 DMV refusal hearings -- Conduct of hearing

Specific procedures for the conduct of DMV refusal hearings are set forth throughout 15 NYCRR Part 127. Refusal hearings are also governed generally by Article 3 of the State Administrative Procedure Act, by case law, and by the Constitutional right to Due Process. 15 NYCRR § 127.5(c) provides that:

The order of proof at a hearing shall be determined by the hearing officer. Testimony shall be given under oath or affirmation. The hearing officer, in his or her discretion, may exclude any witnesses, other than a respondent or a representative of the department, if one is present, during other testimony. The hearing officer may also admit any relevant evidence in addition to oral testimony. Any witness may be questioned and/or cross-examined by the hearing officer, by his or her own counsel or representative, and by the party who did not call the witness.

"The privileges set forth in [CPLR article 45] shall be applicable in hearings conducted pursuant to this Part." 15 NYCRR § 127.6(c). "The provisions of [CPLR § 2302], regarding the issuance of subpoenas, are applicable to hearings conducted in accordance with this Part." 15 NYCRR § 127.11(b). See also State Administrative Procedure Act § 304(2); Matter of Gray v. Adduci, 73 N.Y.2d 741, 743, 536 N.Y.S.2d 40, 41 (1988). In all other respects, "the provisions of the Civil Practice Law and Rules are not binding upon the conduct of administrative hearings." 15 NYCRR § 127.11(a).

"Rules governing the admissibility of evidence in a court of law are not applicable to hearings held by the department." 15 NYCRR § 127.6(b). "Evidence which would not be admissible in a court, such as hearsay, is admissible in a departmental hearing." Id.

"The provisions of the Criminal Procedure Law are not binding upon the conduct of administrative hearings." 15 NYCRR § 127.11(a). "The provisions of those laws regarding forms of pleading, motion practice, discovery procedures, including demands for bills of particulars, and other matters are not applicable to hearings conducted in accordance with this Part." Id.

"[U]nder no circumstances shall the respondent be compelled to testify. However, *the hearing officer may draw a negative inference from the failure to testify.*" 15 NYCRR § 127.5(b) (emphasis added). See also Matter of Peeso v. Fiala, 130 A.D.3d 1442, ___, 13 N.Y.S.3d 742, 744 (4th Dep't 2015).

15 NYCRR § 127.5(c) expressly provides that the ALJ can question, and indeed cross-examine, witnesses at a refusal hearing. This procedure was upheld in Matter of Clark v. New York State Dep't of Motor Vehicles, 55 A.D.3d 1284, ___, 864 N.Y.S.2d 810, 812 (4th Dep't 2008):

Petitioner . . . contends that he did not receive an impartial hearing because the administrative law judge (ALJ) acted as an advocate for respondent by questioning the witnesses. We reject that contention. The ALJ's questioning concerned whether the officer had reasonable grounds to arrest petitioner for DWI, whether petitioner was given a sufficient warning that his refusal to submit to a chemical test would result in the immediate suspension and subsequent revocation of his license, and whether petitioner refused to submit to a chemical test (see Vehicle and Traffic Law § 1194[2][c]). There is no indication in the record that the ALJ was not impartial.

§ 41:61 DMV refusal hearings -- Due Process

The imposition of civil sanctions upon a motorist for his or her refusal to submit to a chemical test "is unquestionably legitimate, assuming appropriate procedural protections." South Dakota v. Neville, 459 U.S. 553, 560, 103 S.Ct. 916, 920 (1983). In this regard, the Court of Appeals has repeatedly held that:

It is settled that even where administrative proceedings are at issue, "no essential element of a fair trial can be dispensed with unless waived." In addition, "the party whose rights are being determined must be fully apprised of the claims of the opposing party and of the evidence to be considered, and must be given the opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal."

Matter of McBarnette v. Sobol, 83 N.Y.2d 333, 339, 610 N.Y.S.2d 460, 462-63 (1994) (citations omitted). See also Matter of Simpson v. Wolansky, 38 N.Y.2d 391, 395, 380 N.Y.S.2d 630, 634 (1975); Matter of Sowa v. Looney, 23 N.Y.2d 329, 333, 296 N.Y.S.2d 760, 764 (1968); Matter of Hecht v. Monaghan, 307 N.Y. 461, 470 (1954). See generally Matter of Maxfield v. Tofany, 34 A.D.2d 869, ___, 310 N.Y.S.2d 783, 785 (3d Dep't 1970).

Similarly, the Supreme Court has both (a) made clear that "[t]he rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process," and (b) "identified these rights as among the minimum essentials of a fair trial." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045 (1973). The Chambers Court also made clear that:

The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process." It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." . . . [I]ts denial or significant diminution calls into question the ultimate "integrity of the fact-finding process."

Id. at 295, 93 S.Ct. at 1046 (citations omitted). See also Davis v. Alaska, 415 U.S. 308, 315, 316, 94 S.Ct. 1105, 1110 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. . . . [T]he cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness").

Also inherent in the right of cross-examination is the ability to "test the witness' recollection [and] to 'sift' his conscience," Chambers, 410 U.S. at 295, 93 S.Ct. at 1045; see

also People ex rel. McGee v. Walters, 62 N.Y.2d 317, 322, 476 N.Y.S.2d 803, 806 (1984), and to "expose intentionally false swearing and also to bring to light circumstances bearing upon inaccuracies of the witnesses in observation, recollection and narration, and to lay the foundation for impeachment of the witnesses." Hecht, 307 N.Y. at 474.

The fundamental right of cross-examination is also both (a) codified in State Administrative Procedure Act § 306(3) ("A party shall have the right of cross-examination"), which is applicable to DMV refusal hearings, and (b) contained in DMV's regulations. See 15 NYCRR § 127.5(c); 15 NYCRR § 127.9(b). See generally Matter of Epstein, 267 A.D. 27, ___, 44 N.Y.S.2d 921, 922 (3d Dep't 1943) ("Generally speaking, in quasi judicial proceedings before administrative agencies where the same agency is both the prosecutor and judge, with the resultant tendency to predetermination, practically the only shield left to the accused is his right of cross-examination. Deprived of this, he stands defenseless before a tribunal predisposed to conviction. This right should therefore be preserved in full vigor").

Finally, where Due Process is concerned, the underlying merits of the case are irrelevant: "'To one who protests against the taking of his property without due process of law, it is no answer to say that in this particular case due process of law would have led to the same result because he had no adequate defense upon the merits.'" Hecht, 307 N.Y. at 470 (citation omitted).

§ 41:62 DMV refusal hearings -- Applicability of Rosario rule

It appears clear that the Rosario rule, in sum or substance, is applicable to administrative proceedings where a violation of law is alleged and a "license" is at stake. See, e.g., Matter of Inner Circle Restaurant, Inc. v. New York State Liquor Auth., 30 N.Y.2d 541, 543, 330 N.Y.S.2d 389, 390 (1972) ("Upon the new hearing which our reversal mandates the police officer's memorandum book should be made available"); Matter of Fenimore Circle Corp. v. State Liquor Auth., 27 N.Y.2d 716, 314 N.Y.S.2d 180 (1970) ("The State Liquor Authority Hearing Officer should have permitted petitioner's counsel to examine the statements made by Trooper Smith, when that witness took the stand, for purposes of cross-examination, there being no indication that they contained matter that must be kept confidential or that their disclosure would be inimical to the public interest"); People ex rel. Deyver v. Travis, 172 Misc. 3d 83, ___, 657 N.Y.S.2d 306, 307 (Erie Co. Sup. Ct.) ("requiring the production of a witness' notes before an administrative hearing is not so much a grant of a full discovery right to prior written or recorded statements of witnesses . . . but rather, is merely a conformance with the Relator's statutory right to effective

cross-examination. Such production, which is neither burdensome nor destructive to the hearing process but which is essential to a knowledgeable examination of the facts to which the witness has just testified, constitutes only fundamental fairness in a quasi-judicial process"), aff'd for the reasons stated in the opinion below, 244 A.D.2d 990, 668 N.Y.S.2d 966 (4th Dep't 1997).

In Matter of Inner Circle Restaurant, Inc., *supra*, the Court of Appeals cited Matter of Garabedian v. New York State Liquor Auth., 33 A.D.2d 980, 307 N.Y.S.2d 270 (4th Dep't 1970), which held that:

In *People v. Rosario*, . . . it was held that in a criminal trial a defendant is entitled to examine any pre-trial statement of a witness as long as the statement relates to the subject matter of the witness' testimony and is not confidential. We conclude that a similar rule should be applied in this proceeding which, at least in form, is not of a criminal character but, like a criminal proceeding, is brought to penalize for the commission of an offense against the law.

There should be a new hearing at which the reports of any police officers testifying thereat should be made available to petitioners prior to the commencement of cross-examination.

33 A.D.2d at ___, 307 N.Y.S.2d at 271 (citations omitted).

The position of the Department of Motor Vehicles appears to be that the Rosario rule is inapplicable to DMV refusal hearings. Nonetheless, 15 NYCRR § 127.6, which governs "discovery" and "evidence" at DMV refusal hearings, provides in pertinent part:

(a) Prior to a hearing, a respondent may make a request to review nonconfidential information in the hearing file including information which is not protected by law from disclosure. . . . The examination will be scheduled for a time at least five days prior to the hearing unless a shorter time is mutually agreed between the hearing officer and the requestor. . . . If a request to examine the file is received less than seven days prior to the hearing date, the requestor will be afforded an opportunity to examine the file immediately prior to commencement of the hearing or at an earlier time as may be agreed to in the discretion of the hearing officer.

In addition, most DMV hearing officers will allow defense counsel to review any documents that a testifying police officer has either (a) brought to the hearing and reviewed prior to testifying, and/or (b) used to refresh his or her recollection while testifying.

§ 41:63 DMV refusal hearings -- Issues to be determined at hearing

VTL § 1194(2)(c) provides that:

The hearing shall be limited to the following issues: (1) did the police officer have reasonable grounds to believe that such person had been driving in violation of any subdivision of [VTL § 1192]; (2) did the police officer make a lawful arrest of such person; (3) was such person given sufficient warning, in clear or unequivocal language, prior to such refusal that such refusal to submit to such chemical test or any portion thereof, would result in the immediate suspension and subsequent revocation of such person's license or operating privilege whether or not such person is found guilty of the charge for which the arrest was made; and (4) did such person refuse to submit to such chemical test or any portion thereof.

"At a hearing held pursuant to Vehicle and Traffic Law § 1194, the hearing officer is required to determine, inter alia, whether the police lawfully arrested the operator of the motor vehicle for operating such vehicle while under the influence of alcohol or drugs in violation of Vehicle and Traffic Law § 1192. In order for an arrest to be lawful, the initial stop must itself be lawful." Matter of Stewart v. Fiala, 129 A.D.3d 852, ___, 12 N.Y.S.3d 138, 139 (2d Dep't 2015) (citations omitted).

Proof with regard to the chemical test rules and regulations of the arresting officer's police department is not required at a DMV refusal hearing. Matter of Goebel v. Tofany, 44 A.D.2d 615, ___, 353 N.Y.S.2d 73, 75 (3d Dep't 1974). See also Matter of Strack v. Tofany, 46 A.D.2d 712, ___, 360 N.Y.S.2d 312, 313 (3d Dep't 1974); Matter of Manley v. Tofany, 70 Misc. 2d 910, ___, 335 N.Y.S.2d 338, 342-43 (Chenango Co. Sup. Ct. 1972).

§ 41:64 DMV refusal hearings -- DMV action where evidence fails to establish all 4 issues at hearing

"If, after such hearing, the hearing officer, acting on behalf of the commissioner, finds on any one of said issues in

the negative, the hearing officer shall immediately terminate any suspension arising from such refusal." VTL § 1194(2)(c). This is referred to as "closing out" the hearing.

§ 41:65 DMV refusal hearings -- DMV action where evidence establishes all 4 issues at hearing

"If, after such hearing, the hearing officer, acting on behalf of the commissioner finds all of the issues in the affirmative, such officer shall immediately revoke the license or permit to drive or any non-resident operating privilege in accordance with the provisions of [VTL § 1194(2)(d)]." VTL § 1194(2)(c). See generally Matter of Van Woert v. Tofany, 45 A.D.2d 155, 357 N.Y.S.2d 175 (3d Dep't 1974) (VTL § 1194 applies to motorists operating motor vehicles in New York regardless of whether they possess valid out-of-state driver's licenses).

§ 41:66 DMV refusal hearings -- Decision following hearing

"At the conclusion of all proceedings necessary to determine whether the respondent has violated [VTL § 1194(2)], the hearing officer must, as provided in [15 NYCRR § 127.10], either render or reserve decision." 15 NYCRR § 127.5(d). In this regard, 15 NYCRR § 127.10 provides:

(a) The hearing officer may announce his or her decision at the conclusion of the hearing or may reserve decision. A written determination of the case, specifying the findings of fact, conclusions of law and disposition, including any penalty or penalties imposed, shall be sent to the respondent and his or her designated representative by first-class mail.

(b) Except where otherwise specified by statute, the effective date of any penalty or sanction shall be a date established by the hearing officer, which shall in no event be more than 60 days from the date of the determination.

(c) If the hearing officer does not render a decision within 45 days of the conclusion of the hearing, the respondent may serve a demand for decision on the hearing officer. Upon receipt of such demand, the hearing officer must render a decision within 45 days, or the charges shall be deemed dismissed.

"[A] decision by a hearing officer shall be based upon substantial evidence." 15 NYCRR § 127.6(b).

In Matter of Fermin-Perea v. Swarts, 95 A.D.3d 439, ___, 943 N.Y.S.2d 96, 98-99 (1st Dep't 2012):

The arresting officer's refusal report, admitted in evidence at the hearing, indicates that upon stopping petitioner because he was speeding, following too closely, and changing lanes without signaling, the officer observed that petitioner was unsteady on his feet, had bloodshot eyes, slurred speech and "a strong odor of alcoholic beverage on [his] breath." However, the field sobriety test, administered approximately 25 minutes later, a video of which was admitted in evidence at the hearing, establishes that petitioner was not impaired or intoxicated. Specifically, the video demonstrates that over the course of four minutes, petitioner was subjected to standardized field sobriety testing and at all times clearly communicated with the arresting officer, never slurred his speech, never demonstrated an inability to comprehend what he was being asked, and followed all of the officer's commands. Petitioner successfully completed the three tests he was asked to perform; thus never exhibiting any signs of impairment or intoxication.

Certainly, the contents of the arresting officer's refusal report, standing alone, establish reasonable grounds for the arrest under the Vehicle and Traffic Law. However, where, as here, a field sobriety test conducted less than 30 minutes after the officer's initial observations, convincingly establishes that petitioner was not impaired or intoxicated, respondent's determination that there existed reasonable grounds to believe that petitioner was intoxicated has no rational basis and is not inferable from the record. . . . Here, the field sobriety test, conducted shortly after petitioner was operating his motor vehicle, which failed to establish that petitioner was intoxicated or otherwise impaired, leads us to conclude that respondent's determination is not supported by substantial evidence.

The dissent ignores the threshold issue here, namely, that refusal to submit to a chemical test only results in revocation of an operator's driver's license if there are reasonable grounds to believe that the operator was driving while under the influence of drugs or alcohol and more specifically, insofar as relevant here, while intoxicated or impaired. Here, while the officer's initial observations are indeed indicative of intoxication or at the very least, impairment, the results of the field sobriety test administered thereafter -- a more objective measure of intoxication -- necessarily precludes any conclusion that petitioner was operating his vehicle while intoxicated or impaired. Any conclusion to the contrary simply disregards the applicable burden which, as the dissent points out, requires less than a preponderance of the evidence, demanding only that "a given inference is reasonable and plausible." Even under this diminished standard of proof, it is simply unreasonable and uninferable that petitioner was intoxicated or impaired while operating his motor vehicle and yet, 25 minutes later he successfully and without any difficulty passed a field sobriety test.

(Citations omitted).

Clearly, the majority of the Fermin-Perea Court believed that the arresting officer's Report of Refusal was not credible.

In Matter of DeMichele v. Department of Motor Vehicles of New York State, 136 A.D.3d 629, ___, 24 N.Y.S.3d 402, 402-03 (2d Dep't 2016), the Appellate Division, Second Department, annulled a refusal revocation, with costs, under the following circumstances:

In August 2012, while riding his motorcycle in Westchester County, the petitioner lost control and crashed; no other vehicles or individuals were involved in the accident. The petitioner alleges that the accident happened when a coyote struck his motorcycle. As a result of the accident, the petitioner was injured and transferred by ambulance to a nearby hospital. Approximately two hours later, while he was still at the hospital, the petitioner was questioned by a New York State Trooper, who asked if he had consumed

alcohol prior to the crash. The petitioner denied such consumption. Nevertheless, according to the Trooper's later filed "Report of Refusal to Submit to Chemical Test" (hereinafter the report), the Trooper detected a "strong odor of alcoholic beverage emanating from [the petitioner's] breath" during their conversation. The petitioner was then arrested for driving while intoxicated in violation of Vehicle and Traffic Law § 1192(3), and subsequently warned that, pursuant to Vehicle and Traffic Law § 1194, a refusal to submit to a chemical test would result in immediate suspension of his driver license. The petitioner declined to submit to the test.

Following an administrative hearing, at which the petitioner testified and the Trooper did not appear, but the report was admitted into evidence, the petitioner was found to have violated Vehicle and Traffic Law § 1194, and his license was revoked. This determination was affirmed after an administrative appeal to the New York State Department of Motor Vehicles Administrative Appeals Board. The petitioner then commenced this CPLR article 78 proceeding to review the determination, contending that the determination was not supported by substantial evidence. The Supreme Court transferred the matter to this Court pursuant to CPLR 7804(g).

"To annul an administrative determination made after a hearing directed by law at which evidence is taken, a court must conclude that the record lacks substantial evidence to support the determination." Review of the record in this matter demonstrates that the finding of the Administrative Law Judge is not supported by substantial evidence.

As a prerequisite to the chemical test, the Trooper had to have reasonable grounds to believe that the petitioner was operating his motorcycle while under the influence of alcohol. Reasonable grounds are to be determined on the basis of the totality of the circumstances. Here, the Trooper did not witness the circumstances leading to the accident or the accident itself, and his report states that no field sobriety tests

were conducted at the scene. Other than the statement in the report that there was a strong odor of alcoholic beverage on the petitioner's breath, there was no evidence that would suggest the petitioner operated his vehicle in an intoxicated state. Accordingly, the totality of circumstances did not warrant the determination that the petitioner violated Vehicle and Traffic Law § 1194 by refusing to submit to a chemical test and to revoke the petitioner's driver license.

(Citations omitted).

§ 41:67 DMV refusal hearings -- Appealing adverse decision

"A person who has had a license or permit to drive or non-resident operating privilege suspended or revoked pursuant to [VTL § 1194(2)(c)] may appeal the findings of the hearing officer in accordance with the provisions of [VTL Article 3-A (*i.e.*, VTL §§ 260-63)]." VTL § 1194(2)(c). See also VTL § 261(1); 15 NYCRR § 127.12. Appeals are filed with the DMV Administrative Appeals Board, see VTL § 261(3), using form AA-33A (entitled "New York State Department of Motor Vehicles Appeal Form"), at the following address:

DMV Appeals Board
P.O. Box 2935
Albany, NY 12220-0935

Appeals are submitted to the Appeals Board in writing only. "The fact that personal appearances are apparently not permitted before that entity deprive[s] [a petitioner] of no rights." Matter of Jason v. Melton, 60 A.D.2d 707, ___, 400 N.Y.S.2d 878, 879 (3d Dep't 1977).

The appeal form, together with a non-refundable \$10 filing fee, must be filed within 60 days after *written* notice is given by DMV of the ALJ's disposition of the refusal hearing. See VTL § 261(2); VTL § 261(4). See also 15 NYCRR § 155.3(a).

DMV refusal hearings are tape recorded. Despite the fact that the recordings (a) routinely contain portions which are inaudible, and (b) are occasionally misplaced or even lost, they nonetheless constitute the "official record" of the hearing, even if the respondent brings his or her own stenographer to the hearing.

In this regard, a timely filed appeal of a DMV refusal hearing disposition is not considered "finally submitted" (and

will not be considered by the Appeals Board) until the respondent orders and obtains a transcript of the tape recording of the hearing (at a non-refundable cost of \$3.19 a page). See VTL § 261(3). See also DMV Form AA-33A; Matter of Nolan v. Adduci, 166 A.D.2d 277, ___, 564 N.Y.S.2d 118, 119 (1st Dep't 1990). Once the transcript is received, the respondent has an additional 30 days within which to submit further argument in support of the appeal.

At the time that the appeal is filed, the respondent can request a "stay" pending the outcome of the appeal. Where such a request is made:

The appeals board, or chairman thereof, upon the request of any person who has filed an appeal, may, in its discretion, grant a stay pending a determination of the appeal. *Whenever a determination has not been made within [30] days after an appeal has been finally submitted, a stay of execution will be deemed granted by operation of law, and the license, certificate, permit or privilege affected will be automatically restored pending final determination.*

VTL § 262 (emphasis added). See also 15 NYCRR § 155.5(b).

If the respondent is dissatisfied with the outcome of the administrative appeal, he or she can seek judicial review via a CPLR Article 78 proceeding. See VTL § 263. See also 15 NYCRR § 155.6(b). However, "[n]o determination of the commissioner or a member of the department which is appealable under the provisions of this article shall be reviewed in any court unless an appeal has been filed and determined in accordance with this article." VTL § 263. See also Matter of Winters v. New York State Dep't of Motor Vehicles, 97 A.D.2d 954, 468 N.Y.S.2d 749 (4th Dep't 1983); Matter of Giambra v. Commissioner of Motor Vehicles, 59 A.D.2d 648, ___, 398 N.Y.S.2d 301, 302 (4th Dep't 1977).

There are two exceptions to the requirement that the respondent exhaust administrative remedies prior to filing an Article 78 proceeding challenging the outcome of a DMV refusal hearing. First:

The requirement of filing an appeal from a determination of the commissioner with the appeals board before a judicial review of such determination may be commenced shall apply only if the appellant is provided with written notification as to the existence of [VTL Article 3-A] and this Part prior to or with the written notice of the determination of the commissioner.

15 NYCRR § 155.7. See Matter of Laugh & Learn, Inc. v. State of N.Y. Dep't of Motor Vehicles, 263 A.D.2d 854, 693 N.Y.S.2d 723 (3d Dep't 1999).

Second, VTL § 263 provides that "the refusal of an appeals board to grant a stay pending appeal shall be deemed a final determination for purposes of appeal."

In Matter of Dean v. Tofany, 48 A.D.2d 964, 369 N.Y.S.2d 550 (3d Dep't 1975), the petitioner, who was appealing a chemical test refusal revocation to the Appellate Division, died subsequent to oral argument. The Court held that, due to petitioner's death, the proceeding was moot, and dismissed the petition.

§ 41:68 Failure to pay civil penalty or driver responsibility assessment

VTL § 1194(2)(d)(2), which governs the civil penalties imposed for chemical test refusals, provides that "[n]o new driver's license or permit shall be issued, or non-resident operating privilege restored to such person unless such penalty has been paid." See also VTL § 1196(5); 15 NYCRR § 139.4(d) ("No new license, permit or privilege (other than a conditional license, permit or privilege issued pursuant to Part 134 of this Title) shall be issued, or restored, until such civil penalty has been paid"); 15 NYCRR § 134.11.

If a person fails to pay the driver responsibility assessment, DMV will suspend his or her driver's license (or privilege of obtaining a driver's license). VTL § 1199(4). See also § 46:47, *infra*. "Such suspension shall remain in effect until any and all outstanding driver responsibility assessments have been paid in full." Id.

§ 41:69 Chemical test refusals and 20-day Orders

Where a license suspension/revocation is required to be imposed for a conviction of DWAI or DWI, see VTL § 1193(2)(a), (b), the Court is required to suspend/revoke the defendant's driver's license at the time of sentencing, at which time the defendant is required to surrender his or her license to the Court. See VTL § 1193(2)(d)(1). Similar provisions apply where a license suspension is required to be imposed for DWAI Drugs. See VTL § 510(2)(b)(v); VTL § 510(2)(b)(vi).

Although the license suspension/revocation takes effect immediately, see VTL § 1193(2)(d)(1); VTL § 510(2)(b)(vi), under certain circumstances the sentencing Court may issue a so-called "20-day Order," which makes the "license suspension or revocation

take effect [20] days after the date of sentencing." VTL § 1193(2)(d)(2). See also VTL § 510(2)(b)(vi); Chapter 49, *infra*.

In VTL § 1192 cases, a 20-day Order is only appropriately granted to a defendant who is eligible for *both* (a) the DDP, and (b) a conditional or restricted use license. This is because the purpose of the 20-day Order is to continue the defendant's driving privileges during the time period that it takes for the Court to send, and DMV to receive and process, the paperwork required for the defendant to sign up for the DDP and obtain a conditional/restricted use license.

In addition, a 20-day Order merely continues the defendant's *existing* driving privileges for 20 days. Thus, if the defendant has any pre-existing suspension/revocation on his or her driver's license (other than the suspension/revocation caused by the instant VTL § 1192 conviction), a 20-day Order is useless (as it merely "continues" nonexistent driving privileges).

In the test refusal context, a chemical test refusal does not affect a person's *eligibility* for a 20-day Order, but in many cases a test refusal will render a 20-day Order *ineffective*. For example, if the defendant in a refusal case enters a VTL § 1192 plea at arraignment, the Court is required to issue a temporary suspension of the defendant's driving privileges at that time -- independent of the VTL § 1192 suspension/revocation -- based upon the alleged chemical test refusal. See VTL § 1194(2)(b)(3); 15 NYCRR § 139.3(a); § 41:39, *supra*; § 41:53, *supra*. In such a case, a 20-day Order would continue nonexistent driving privileges, and would thus be a legal nullity (at least until the temporary suspension is terminated).

Similarly, if the defendant's VTL § 1192 plea is entered subsequent to a DMV chemical test refusal revocation, a 20-day Order would continue nonexistent driving privileges and would be a legal nullity.

Conversely, a valid 20-day Order would become invalid if the defendant's driving privileges are revoked at a DMV refusal hearing held during the 20 day lifespan of the Order.

§ 41:70 Chemical test refusals and the Drinking Driver Program

A conditional license allows a person to drive to, from and during work (among other places) during the time period that the person's driving privileges are suspended or revoked as a result of an alcohol-related traffic offense. See VTL § 1196(7). See also Chapter 50, *infra*. To be eligible for a conditional license, a person must, among other things, participate in the so-called Drinking Driver Program ("DDP").

However, eligibility for the DDP requires an alcohol or drug-related conviction. In this regard, VTL § 1196(4) provides, in pertinent part, that:

Participation in the [DDP] shall be limited to those persons convicted of alcohol or drug-related traffic offenses or persons who have been adjudicated youthful offenders for alcohol or drug-related traffic offenses, or persons found to have been operating a motor vehicle after having consumed alcohol in violation of [VTL § 1192-a], who choose to participate and who satisfy the criteria and meet the requirements for participation as established by [VTL § 1196] and the regulations promulgated thereunder.

(Emphasis added). See also 15 NYCRR § 134.2.

Thus, a person who refuses to submit to a chemical test and whose driving privileges are revoked by DMV as a result thereof (and who is otherwise eligible for a conditional license), will not be able to obtain a conditional license unless and until the person obtains a VTL § 1192 conviction. As a result, many people who lose their refusal hearings (and who need to drive to earn a living) are virtually forced to accept a DWAI or DWI plea in criminal Court in order to obtain a conditional license. This seemingly unfair restriction on conditional license eligibility has been found to be Constitutional. See Matter of Miller v. Tofany, 88 Misc. 2d 247, ____-____, 387 N.Y.S.2d 342, 345-46 (Broome Co. Sup. Ct. 1975).

By contrast, a policy pursuant to which participants in the DDP who had refused to submit to a chemical test were, for that reason alone, automatically referred for additional evaluation and treatment was found to be illegal. See People v. Ogden, 117 Misc. 2d 900, ____-____, 459 N.Y.S.2d 545, 547-48 (Batavia City Ct. 1983).

§ 41:71 Successful DDP completion does not terminate refusal revocation

Ordinarily, upon successful completion of the Drinking Driver Program ("DDP"), "a participant may apply to the commissioner . . . for the termination of the suspension or revocation order issued as a result of the participant's conviction which caused the participation in such course." VTL § 1196(5). In other words, successful DDP completion generally allows the defendant to apply for reinstatement of his or her full driving privileges.

However, in a further attempt to encourage DWI suspects to submit to properly requested chemical tests, the Legislature enacted VTL § 1194(2)(d)(3), which applies where an underlying revocation is for a chemical test refusal:

(3) Effect of rehabilitation program. No period of revocation arising out of this section may be set aside by the commissioner for the reason that such person was a participant in the alcohol and drug rehabilitation program set forth in [VTL § 1196].

See also VTL § 1196(5); 15 NYCRR § 136.3(a).

§ 41:72 Chemical test refusals and conditional licenses

As § 41:70 makes clear, eligibility for a conditional license is contingent upon, among other things, eligibility for the DDP. In addition, even if a person is eligible for the DDP, a conditional license will be denied where, among other things, the person (a) has 3 or more alcohol-related convictions or incidents within the previous 25 years (in this regard, a chemical test refusal is an alcohol-related incident), see 15 NYCRR § 134.7(a)(11), and/or (b) is convicted of DWAI Drugs in violation of VTL § 1192(4) (in which case, the person may be eligible for a restricted use license). See 15 NYCRR § 134.7(a)(10); 15 NYCRR § 135.5(d); § 41:73, *infra*.

If the person does receive a conditional license, a chemical test refusal revocation has a significant impact on when DMV will allow the person's full, unrestricted driving privileges to be restored. The reason for this is that successful completion of the DDP does not terminate a refusal revocation. See § 41:71, *supra*. However, DMV will allow the person to continue to use his or her conditional license pending the expiration of the refusal revocation period (provided that the person does not violate any of the conditions of the conditional license). See generally VTL § 1196(7)(e), (f); 15 NYCRR § 134.9(d)(1).

§ 41:73 Chemical test refusals and restricted use licenses

A restricted use license is very similar to a conditional license, with the exception that to be eligible for a restricted use license the underlying suspension/revocation must be imposed pursuant to VTL § 510 or VTL § 318. See VTL § 530; 15 NYCRR § 135.1(a); 15 NYCRR § 135.2; 15 NYCRR § 135.5(b); 15 NYCRR § 135.5(d); 15 NYCRR § 135.9(b).

VTL § 510(2)(b)(v) provides for a mandatory 6-month driver's license suspension upon conviction of various drug crimes.

Included in the list of such crimes is DWAI Drugs, in violation of VTL § 1192(4). The inclusion of DWAI Drugs under this provision was redundant, in that a conviction of DWAI Drugs had already resulted in a license revocation. See VTL § 1193(2)(b)(2), (3).

Adding to the confusion, although VTL § 510(6)(i) provides that, where a person's driver's license is suspended pursuant to VTL § 510(2)(b)(v) for a violation of VTL § 1192(4), "the commissioner may issue a restricted use license pursuant to [VTL § 530]," VTL § 530(2) clearly and expressly states that a restricted use license is not available (but a conditional license may be available) to a person whose driver's license is revoked for either (a) a conviction of VTL § 1192(4), and/or (b) refusal to submit to a chemical test.

In this regard, DMV Counsel's Office advises that DMV interprets VTL § 510(2)(b)(v) and VTL § 510(6)(i) as having (a) shifted the licensing consequences of DWAI Drugs from VTL § 1193 to VTL § 510, (b) shifted the license eligibility of a person convicted of DWAI Drugs from a conditional license (see VTL § 1196) to a restricted use license (see VTL § 530), and (c) superseded the language of VTL § 530(2) to the extent that it prohibits the issuance of a restricted use license to a person whose driver's license is revoked for either (i) a conviction of DWAI Drugs, and/or (ii) refusal to submit to a chemical test in conjunction with a conviction of DWAI Drugs. See also 15 NYCRR § 134.7(a)(10); 15 NYCRR § 135.5(d).

In other words, a person whose driver's license is revoked for refusal to submit to a chemical test in conjunction with a conviction of DWAI Drugs (who is otherwise eligible for a restricted use license) is eligible for a restricted use license. As with a conditional license, eligibility for a restricted use license requires eligibility for, and participation in, the DDP. See 15 NYCRR § 135.5(d). See also VTL § 1196(4); 15 NYCRR § 134.2; Chapter 50, *infra*.

In addition, as with a conditional license, a chemical test refusal revocation has a significant impact on when DMV will allow the person's full, unrestricted driving privileges to be restored. The reason for this is that successful completion of the DDP does not terminate a refusal revocation. See § 41:71, *supra*. However, DMV will allow the person to continue to use his or her restricted use license pending the expiration of the refusal revocation period (provided that the person does not violate any of the restrictions of the restricted use license). See generally VTL § 530(3).

Our thanks to Ida L. Traschen, Esq. of DMV Counsel's Office, for clarifying this confusing topic.

§ 41:74 Chemical test refusals as consciousness of guilt

Where a defendant refuses to submit to a chemical test in violation of VTL § 1194(2), evidence of the refusal is admissible against the defendant to show his or her "consciousness of guilt." See, e.g., VTL § 1194(2)(f); People v. Smith, 18 N.Y.3d 544, 550, 942 N.Y.S.2d 426, 430 (2012); People v. Thomas, 46 N.Y.2d 100, 412 N.Y.S.2d 845 (1978). In People v. Haitz, 65 A.D.2d 172, ___, 411 N.Y.S.2d 57, 60 (4th Dep't 1978), the Appellate Division, Fourth Department, stated:

[I]t has long been recognized that the conduct of the accused indicative of a guilty mind has been admissible against him on the theory that an inference of guilt may be drawn from consciousness of guilt. Evidence of the defendant's refusal to blow air into a bag is conduct which may be admitted on the same principle that evidence of an accused's flight or concealment is admissible to show consciousness of guilt. The defendant's refusal to submit to the test constitutes the destruction of incriminating evidence because of the rapid rate at which the body eliminates alcohol from the blood. There is no real difference between a defendant who flees to avoid or escape custody and one who, although in custody, wrongfully withholds his body (the source of incriminating evidence) from examination. The inference of guilt is not illogical or unjustified. As Judge Jasen points out in his concurring opinion in People v. Paddock, 29 N.Y.2d 504, 323 N.Y.S.2d 976, 272 N.E.2d 486, "It should be quite obvious that the primary reason for a refusal to submit to a chemical test is that a person fears its results."

(Citations and footnote omitted). See also Thomas, 46 N.Y.2d at 106, 412 N.Y.S.2d at 848 ("Realistically analyzed such testimony is relevant only in consequence of the inference it permits that defendant refused to take the test because of his apprehension as to whether he would pass it"); Smith, 18 N.Y.3d at 550, 942 N.Y.S.2d at 430 (same); People v. Beyer, 21 A.D.3d 592, ___, 799 N.Y.S.2d 620, 623 (3d Dep't 2005); People v. Gallup, 302 A.D.2d 681, ___, 755 N.Y.S.2d 498, 500 (3d Dep't 2003); Bazza v. Banscher, 143 A.D.2d 715, ___, 533 N.Y.S.2d 285, 286 (2d Dep't 1988) ("Banscher's refusal to submit to a breathalyzer test is admissible as an admission by conduct and serves as circumstantial evidence indicative of a consciousness of guilt"); People v. Powell, 95 A.D.2d 783, ___, 463 N.Y.S.2d 473, 476 (2d

Dep't 1983); People v. Ferrara, 158 Misc. 2d 671, ___, 602 N.Y.S.2d 86, 89 (N.Y. City Crim. Ct. 1993) ("Evidence of a defendant's refusal to take a chemical test is relevant to demonstrate a defendant's consciousness of guilt").

Proof . . . that might be explanatory of a particular defendant's refusal to take the test unrelated to any apprehension as to its results (as, for instance, religious scruples or individual syncopephobia) should be treated not as tending to establish any form of compulsion but rather as going to the probative worth of the evidence of refusal. Thus, a jury might in such circumstances reject the inference of consciousness of guilt which would otherwise have been available.

Thomas, 46 N.Y.2d at 109 n.2, 412 N.Y.S.2d at 850 n.2 (citations omitted).

"Needless to say, refusal evidence is probative of a defendant's consciousness of guilt only if the defendant actually declined to take the test." People v. Smith, 18 N.Y.3d 544, 550, 942 N.Y.S.2d 426, 430 (2012).

§ 41:75 Test refusals -- Jury charge

The "pattern jury instruction" for a chemical test refusal contained in the Office of Court Administration's Criminal Jury Instructions, *Second Edition* ("CJI"), provides as follows:

Under our law, if a person has been given a clear and unequivocal warning of the consequences of refusing to submit to a chemical test and persists in refusing to submit to such test, and there is no innocent explanation for such refusal, then the jury may, but is not required to, infer that the defendant refused to submit to a chemical test because he or she feared that the test would disclose evidence of the presence of alcohol in violation of law.

See CJI, at p. VTL 1192-1007 (footnote omitted); CJI, at p. VTL 1192-1021 (footnote omitted). The only cite listed for this instruction is People v. Thomas, 46 N.Y.2d 100, 412 N.Y.S.2d 845 (1978). It is safe to say that this instruction is both (a) insufficient as a general matter, and (b) incorrect in at least one important respect.

As a general matter, it is the authors' opinion that the CJI chemical test refusal instruction provides insufficient guidance to the jury as to the probative value of so-called "consciousness of guilt" evidence. In this regard, in People v. Kurtz, 92 A.D.2d 962, ___, 460 N.Y.S.2d 642, 642-43 (3d Dep't 1983), the Appellate Division, Third Department, upheld the trial court's charge to the jury "that defendant's refusal to take the test 'raised an inference that * * * he was afraid that he could not pass the test' and this 'raises an inference of consciousness of guilt' which by itself was insufficient to convict, but which could be considered along with all the other evidence in determining whether the prosecution had proven its case beyond a reasonable doubt." The Court also cautioned that:

It is also worth noting that [VTL § 1194] deals only with an inference which can be either accepted or rejected by the jury in light of the other evidence presented and can never be the sole basis for guilt. Here, the trial court made this eminently clear to the jurors and kept the burden of proof . . . squarely upon the prosecution.

Id. at ___, 460 N.Y.S.2d at 643. See also People v. Selsmeyer, 128 A.D.2d 922, ___, 512 N.Y.S.2d 733, 734 (3d Dep't 1987).

Similarly, both the Court of Appeals and the Appellate Division, Second Department, have made clear that, to be sufficient, a consciousness of guilt jury charge must "closely instruct" the jury as to the comparative weakness of such evidence on the issue of guilt. See, e.g., People v. Powell, 95 A.D.2d 783, ___, 463 N.Y.S.2d 473, 476 (2d Dep't 1983) ("As the Court of Appeals has stated in respect to another example of assertive conduct, '[t]his court has always recognized the ambiguity of evidence of flight and insisted that the jury be closely instructed as to its weakness as an indication of guilt of the crime charged' (People v. Yazum, 13 N.Y.2d 302, 304, 246 N.Y.S.2d 626, 196 N.E.2d 263)"); People v. Berg, 92 N.Y.2d 701, 706, 685 N.Y.S.2d 906, 909 (1999) ("the inference of intoxication arising from failure to complete [certain field sobriety tests] successfully 'is far stronger than that arising from a refusal to take the test'" (citation omitted); People v. MacDonald, 89 N.Y.2d 908, 910, 653 N.Y.S.2d 267, 268 (1996) ("testimony regarding defendant's attempts to avoid giving an adequate breath sample for alco-sensor testing was properly admitted as evidence of consciousness of guilt, particularly in light of the trial court's limiting instructions to the jury on this point").

Since the CJI pattern jury instruction for a chemical test refusal fails to closely instruct the jury as to the comparative weakness of such evidence on the issue of guilt, and/or provide any limiting instructions to the jury on this point, it clearly does not satisfy MacDonald, Yazum, Powell, and/or Kurtz.

Aside from a general objection to the CJI chemical test refusal instruction, a specific objection should be made to the inclusion of the phrase "and there is no innocent explanation for such refusal" in the instruction. Not only does this language improperly shift the burden of proof to the defendant, such burden shifting is particularly prejudicial because it comes from the Court as opposed to the prosecution.

In addition, the "innocent explanation" language is misleading. In this regard, the CJI pattern instruction appears to instruct the jury that, if the defendant does in fact offer an innocent explanation for his or her refusal, the jury *cannot* infer "that the defendant refused to submit to [the] chemical test because he or she feared that the test would disclose evidence of the presence of alcohol in violation of law." However, Thomas clearly states that a defendant's innocent explanation for refusal to submit to a chemical test goes to the weight to be given to the refusal, not its admissibility. See People v. Thomas, 46 N.Y.2d 100, 109 n.2, 412 N.Y.S.2d 845, 850 n.2 (1978).

At a minimum, defense counsel should request that the Court also read the generic CJI "consciousness of guilt" pattern jury instruction (*i.e.*, the consciousness of guilt instruction that applies to *all* consciousness of guilt situations). This charge, which can be found at "<http://www.courts.state.ny.us/cji/>" under the heading "GENERAL CHARGES," provides as follows:

CONSCIOUSNESS OF GUILT

In this case the People contend that (*briefly specify the defendant's conduct; e.g. the defendant fled New York shortly after the crime*), and that such conduct demonstrates a consciousness of guilt.

You must decide first, whether you believe that such conduct took place, and second, if it did take place, whether it demonstrates a consciousness of guilt on the part of the defendant.

In determining whether conduct demonstrates a consciousness of guilt, you must consider whether the conduct has an innocent explanation. Common experience teaches that even an innocent person who finds himself or herself under suspicion may resort to conduct which gives the appearance of guilt.

The weight and importance you give to evidence offered to show consciousness of guilt depends on the facts of the case. Sometimes such evidence is only of slight value, and standing alone, it may never be the basis for a finding of guilt.

(Footnotes omitted).

Unlike the consciousness of guilt portion of the DWI jury instruction, see supra, this instruction properly instructs the jury as to the weight to afford consciousness of guilt evidence. It also explains where the "innocent explanation" language in the DWI jury instruction comes from, and places such language in proper context.

Nonetheless, in People v. Lizaldo, 124 A.D.3d 432, ___, 998 N.Y.S.2d 380, 381 (1st Dep't 2015), the Appellate Division, First Department, held as follows:

The court properly exercised its discretion in declining to expand upon the Criminal Jury Instructions regarding defendant's refusal to take the test. The standard instruction sufficiently instructed the jury to consider all the surrounding facts and circumstances, and the additional language proposed by defendant concerning consciousness of guilt was unnecessary.

In any event, any error was harmless in view of the overwhelming evidence, independent of the refusal, that defendant [who was only convicted of DWAI] drove while his ability was at least impaired by alcohol.

(Citation omitted).

In People v. Vinogradov, 294 A.D.2d 708, ___, 742 N.Y.S.2d 698, 700 (3d Dep't 2002), "County Court instructed the jury that asking defendant if he was willing to submit to a breathalyzer test after defendant had declined to speak without an attorney was not a violation of defendant's constitutional right to remain silent." The Appellate Division, Third Department, found that this "instruction was an accurate statement of the law, given the specific facts presented here." Id. at ___, 742 N.Y.S.2d at 700.

§ 41:76 Chemical test refusals and the 5th Amendment

The 5th Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a

witness against himself." It is well settled that, in the absence of Miranda warnings, or an exception thereto, a Court must suppress most verbal statements of a defendant that are both (a) communicative or testimonial in nature, and (b) elicited during custodial interrogation. See Pennsylvania v. Muniz, 496 U.S. 582, 590, 110 S.Ct. 2638, 2644 (1990). Although test refusals are "communicative or testimonial" in nature, see, e.g., People v. Thomas, 46 N.Y.2d 100, 106-07, 412 N.Y.S.2d 845, 849 (1978); People v. Peeso, 266 A.D.2d 716, ___, 699 N.Y.S.2d 136, 138 (3d Dep't 1999), case law has virtually -- but not completely -- eliminated the circumstances under which a request that a DWI suspect submit to sobriety and/or chemical testing constitutes a "custodial interrogation."

In Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138 (1984), the Supreme Court held that, although the protections of Miranda v. Arizona apply to misdemeanor traffic offenses, persons detained during "ordinary" or "routine" traffic stops are not "in custody" for purposes of Miranda. See also Pennsylvania v. Bruder, 488 U.S. 9, 109 S.Ct. 205 (1988). Note, however, that Berkemer "did not announce an absolute rule for all motorist detentions, observing that lower courts must be vigilant that police do not 'delay formally arresting detained motorists, and . . . subject them to sustained and intimidating interrogation at the scene of their initial detention.'" Bruder, 488 U.S. at 10 n.1, 109 S.Ct. at 207 n.1 (quoting Berkemer). In other words, "[i]f a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by Miranda." Berkemer, 468 U.S. at 440, 104 S.Ct. at 3150.

In South Dakota v. Neville, 459 U.S. 553, 564 n.15, 103 S.Ct. 916, 923 n.15 (1983), the Supreme Court held that "[i]n the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of Miranda." See also id. at 564, 103 S.Ct. at 923 ("We hold . . . that a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination"); People v. Smith, 18 N.Y.3d 544, 550, 942 N.Y.S.2d 426, 430 (2012); People v. Berg, 92 N.Y.2d 701, 703, 685 N.Y.S.2d 906, 907 (1999) ("It is . . . settled that Miranda warnings are not required in order to admit the results of chemical analysis tests, or a defendant's refusal to take such tests"); People v. Thomas, 46 N.Y.2d 100, 103, 412 N.Y.S.2d 845, 846 (1978); People v. Craft, 28 N.Y.2d 274, 321 N.Y.S.2d 566 (1971); People v. Boudreau, 115 A.D.2d 652, ___, 496 N.Y.S.2d 489, 491 (2d Dep't 1985); Matter of Hoffman v. Melton, 81 A.D.2d 709, ___, 439 N.Y.S.2d 449, 450-51 (3d Dep't 1981); People v. Haitz, 65 A.D.2d 172, ___, 411 N.Y.S.2d 57, 60 (4th Dep't 1978); People v. Dillin,

150 Misc. 2d 311, ___, 567 N.Y.S.2d 991, 992 (N.Y. City Crim. Ct. 1991).

In Berg, *supra*, the Court of Appeals extended the rationale of Neville and Thomas to the refusal to submit to field sobriety tests, holding that "evidence of defendant's refusal to submit to certain field sobriety tests [is] admissible in the absence of Miranda warnings . . . because the refusal was not compelled within the meaning of the Self-Incrimination Clause." 92 N.Y.2d at 703, 685 N.Y.S.2d at 907. Stated another way, the Court held that "defendant's refusal to perform the field sobriety tests [is] not compelled, and therefore [is] not the product of custodial interrogation." Id. at 704, 685 N.Y.S.2d at 908. See also People v. Powell, 95 A.D.2d 783, ___, 463 N.Y.S.2d 473, 476 (2d Dep't 1983).

§ 41:77 Chemical test refusals and the right to counsel

In People v. Smith, 18 N.Y.3d 544, 549-50, 942 N.Y.S.2d 426, 429-30 (2012), the Court of Appeals summarized the law in this area:

Vehicle and Traffic Law § 1194 does not address whether a motorist has a right to consult with a lawyer prior to determining whether to consent to chemical testing. However, if the motorist is arrested for driving while intoxicated or a related offense, this Court has recognized a limited right to counsel associated with the criminal proceeding. In People v. Gursey, we held that if a defendant arrested for driving while under the influence of alcohol asks to contact an attorney before responding to a request to take a chemical test, the police "may not, without justification, prevent access between the criminal accused and his lawyer, available in person or by immediate telephone communication, if such access does not interfere unduly with the matter at hand." If such a request is made, and it is feasible for the police to allow defendant to attempt to reach counsel without unduly delaying administration of the chemical test, a defendant should be afforded such an opportunity. As we explained in Gursey, the right to seek the advice of counsel -- typically by telephone -- could be accommodated in a matter of minutes and in most circumstances would not substantially interfere with the investigative procedure.

That being said, we made clear that there is no absolute right to refuse to take the test until an attorney is actually consulted, nor can a defendant use a request for legal consultation to significantly postpone testing. "If the lawyer is not physically present and cannot be reached promptly by telephone or otherwise," a defendant who has asked to consult with an attorney can be required to make a decision without the benefit of counsel's advice on the question. Where there has been a violation of the limited right to counsel recognized in Gursey, any resulting evidence may be suppressed at the subsequent criminal trial.

(Citations omitted). See also People v. Shaw, 72 N.Y.2d 1032, 1033-34, 534 N.Y.S.2d 929, 930 (1988); People v. Gursey, 22 N.Y.2d 224, 292 N.Y.S.2d 416 (1968); Matter of Boyce v. Commissioner of N.Y. State Dep't of Motor Vehicles, 215 A.D.2d 476, ___, 626 N.Y.S.2d 537, 538 (2d Dep't 1995) ("an individual may not condition his or her consent to a chemical test to determine blood alcohol content on first consulting with counsel"); Matter of Lamb v. Egan, 150 A.D.3d 854, ___, ___ N.Y.S.3d ___, ___ (2d Dep't 2017) (same); Matter of Clark v. New York State Dep't of Motor Vehicles, 55 A.D.3d 1284, ___, 864 N.Y.S.2d 810, 811 (4th Dep't 2008) (same); Matter of Cook v. Adduci, 205 A.D.2d 903, 613 N.Y.S.2d 475 (3d Dep't 1994) (same); Matter of Wilkinson v. Adduci, 176 A.D.2d 1233, 576 N.Y.S.2d 728 (4th Dep't 1991) (same); Matter of Nolan v. Adduci, 166 A.D.2d 277, 564 N.Y.S.2d 118 (1st Dep't 1990) (same); Matter of Gagliardi v. Department of Motor Vehicles, 144 A.D.2d 882, 535 N.Y.S.2d 203 (3d Dep't 1988) (same); Matter of Smith v. Passidomo, 120 A.D.2d 599, ___, 502 N.Y.S.2d 73, 74 (2d Dep't 1986) (same); Matter of Brady v. Tofany, 29 N.Y.2d 680, 325 N.Y.S.2d 415 (1971) (same); Matter of Finocchiaro v. Kelly, 11 N.Y.2d 58, 226 N.Y.S.2d 403 (1962); People v. Nigohosian, 138 Misc. 2d 843, ___, 525 N.Y.S.2d 556, 558 (Nassau Co. Dist. Ct. 1988); Matter of Leopold v. Tofany, 68 Misc. 2d 3, ___, 325 N.Y.S.2d 24, 27 (N.Y. Co. Sup. Ct.), aff'd, 38 A.D.2d 550, 327 N.Y.S.2d 999 (1st Dep't 1971). See generally People v. Wassen, 150 Misc. 2d 662, 569 N.Y.S.2d 877 (N.Y. City Crim. Ct. 1991) (lawyer under arrest not "available"); People v. Wilmot-Kay, 134 Misc. 2d 1081, 514 N.Y.S.2d 313 (Brighton Just. Ct. 1987) (defendant's breath test result suppressed where isolation of in-custody defendant from her sister amounted to a violation of right to counsel).

A request for assistance of counsel must be specific in order to invoke the right to counsel. See, e.g., People v. Hart, 191 A.D.2d 991, ___, 594 N.Y.S.2d 942, 943 (4th Dep't 1993). See generally Shaw, 72 N.Y.2d at 1034, 534 N.Y.S.2d at 930.

Several Courts have held that the right to effective assistance of counsel is violated where the police do not permit the defendant "to conduct a *private* phone conversation with his attorney concerning a breathalyzer test." People v. Iannopollo, 131 Misc. 2d 15, ___, 502 N.Y.S.2d 574, 577 (Ontario Co. Ct. 1983) (emphasis added). See also People v. Moffitt, 50 Misc. 3d 803, ___, 19 N.Y.S.3d 713, 715 (N.Y. City Crim. Ct. 2015) (if the "qualified right [to counsel] is to have any meaning, the communication between the defendant and his or her attorney must be private. Because the police prevented that privacy here, the court suppresses the results of the breath test, all statements defendant made while on the phone with his attorney, and that portion of the video showing defendant's breath test and statements to counsel"); People v. O'Neil, 43 Misc. 3d 693, ___, 986 N.Y.S.2d 302, 312 (Nassau Co. Dist. Ct. 2014) ("if the police are not going to provide a defendant with privacy during a telephone conversation with counsel concerning whether or not to submit to a chemical test, then statements overheard by the police during such consultation with counsel must be suppressed"). In People v. Youngs, 2 Misc. 3d 823, ___, 771 N.Y.S.2d 282, 284 (Yates Co. Ct. 2003), the Court distinguished Iannopollo, finding that, in the particular circumstances presented, "private access to the defendant's attorney would have unduly interfered with the matter at hand," and thus was not required under either Shaw or Gursey.

If the police do not honor a DWI suspect's request to speak with an attorney, and/or fail to take adequate steps to enable the suspect to attempt to reach an attorney, a motion to suppress the suspect's subsequent chemical test refusal (or chemical test result, if the test is taken) will likely be granted. See, e.g., People v. Washington, 23 N.Y.3d 228, 989 N.Y.S.2d 670 (2014); People v. Green, 141 A.D.3d 746, ___, 35 N.Y.S.3d 534, 535 (3d Dep't 2016) ("The People further conceded at oral argument that defendant invoked his constitutional and limited statutory right to counsel in response to those warnings and that, under the circumstances of this case, valid grounds existed to suppress his post-invocation statements and evidence related to the DRE, second breathalyzer and blood tests"); People v. Mora-Hernandez, 77 A.D.3d 531, 909 N.Y.S.2d 435 (1st Dep't 2010); People v. Borst, 49 Misc. 3d 63, ___, 20 N.Y.S.3d 838, 840-41 (App. Term, 9th & 10th Jud. Dist. 2015); People v. Nieves, 2016 WL 3869792, *3-*4 (N.Y. City Crim. Ct. 2016); People v. Stanciu, 49 Misc. 3d 430, 11 N.Y.S.3d 836 (N.Y. City Crim. Ct. 2015); People v. Cole, 178 Misc. 2d 166, 681 N.Y.S.2d 447 (Brighton Just. Ct. 1998); People v. Anderson, 150 Misc. 2d 339, 568 N.Y.S.2d 306 (Nassau Co. Dist. Ct. 1991); People v. Martin, 143 Misc. 2d 341, ___, 540 N.Y.S.2d 412, 415 (Newark Just. Ct. 1989); People v. Stone, 128 Misc. 2d 1009, ___, 491 N.Y.S.2d 921, 925 (N.Y. City Crim. Ct. 1985); People v. Rinaldi, 107 Misc. 2d 916, 436 N.Y.S.2d 156 (Chili Just. Ct. 1981); People v. Sweeney, 55 Misc. 2d 793, 286 N.Y.S.2d 506 (Suffolk Co. Dist. Ct. 1968).

In Mora-Hernandez, *supra*, the Appellate Division, First Department, held that:

The court properly granted defendant's motion to suppress the results of a breathalyzer test and the videotape made of the test on the ground that the officers violated his right to counsel. The police ignored defendant's repeated requests for counsel prior to the administration of the test. A defendant who has been arrested for driving while intoxicated and requests assistance of counsel generally has the right to consult with an attorney before deciding whether to consent to a sobriety test. As in People v. Gursey, the officers prevented defendant from contacting his lawyer when there was no indication that granting defendant's request would have substantially interfered with the investigative procedure. The record contradicts the People's contention that defendant voluntarily abandoned his request for counsel when he agreed to take the test.

77 A.D.3d at ___, 909 N.Y.S.2d at 435-36 (citations omitted).

In Borst, *supra*, the Appellate Term, 9th & 10th Judicial Districts, held as follows:

Here, notwithstanding the Justice Court's finding to the contrary, the record demonstrates that defendant unequivocally requested the assistance of counsel in connection with making a decision about whether he would take a chemical test. Moreover, since defendant was in police custody at the time that he requested to consult with counsel and he had not memorized the telephone numbers of either of the attorneys he sought to consult, he was reliant on the police to contact the counsel he had requested or to facilitate such contact. As a result, the police were required, but failed, to make reasonable and sufficient efforts to facilitate defendant in contacting counsel, which, under the circumstances presented, could have included either contacting the night operator at the garage where defendant's car was taken to determine whether his cell phones were in his car, and, if so, to retrieve them, or allowing defendant to dial 411 or look in a

telephone book for the telephone numbers. Instead, the officers took no affirmative steps to try to help place defendant in contact with either of the requested attorneys. By failing to do so, the police, "without justification, prevent[ed] access between the criminal accused and his lawyer."

49 Misc. 3d at ___, 20 N.Y.S.3d at 841 (citations and footnote omitted).

In Martin, *supra*, the Court held that:

[T]he denial of access to counsel, after a request for such access is made, is at least as serious a breach of defendant's rights as the failure adequately to advise a defendant of the consequences of his refusal to take the test. I therefore hold that if a defendant is denied access to counsel for the purpose of consulting on the decision of whether or not to submit to a chemical test to determine the alcohol content of his blood, a refusal to submit to such a test may not be used as evidence against the defendant at a subsequent trial. It follows, of course, that the prosecutor may not comment on such refusal, nor shall there be a charge to the jury on such subject.

143 Misc. 2d at ___, 540 N.Y.S.2d at 415.

In Cole, *supra*, defendant stated that he wanted to speak with his attorney prior to deciding whether or not to take a requested breath test. In response to defendant's request, the police attempted to reach defendant's attorney, but only at his office phone number (where he was not likely to be, given that it was approximately 3:00 AM). Notably, the attorney's home phone number was also listed in the phone book. Under these circumstances, the Court granted defendant's motion to suppress his breath test result on the ground that the police failed to satisfy their responsibility under Gursey. In so holding, the Court reasoned that:

The right to consult with counsel cannot be realized if counsel cannot be contacted. Where the defendant is in custody and is reliant on a law enforcement officer to contact the attorney, the officer must make a reasonable attempt to reach defendant's lawyer. If the contact is attempted well outside of normal business hours, efforts to

reach the lawyer only at the office when the home phone number is readily available are not reasonable and therefore are insufficient. A reasonable effort in such circumstances requires the officer to locate the lawyer's home phone number if it is listed in either the yellow or the white pages of the phone book. Anything less deprives defendant of his right to access to counsel.

178 Misc. 2d at ___, 681 N.Y.S.2d at 449.

In People v. O'Reilly, 16 Misc. 3d 775, 842 N.Y.S.2d 292 (Suffolk Co. Dist. Ct. 2007), the Court suppressed the defendant's refusal to submit to a chemical test under the following circumstances:

[T]he defendant invoked his right to counsel when first asked if he would submit to a chemical test of his blood, and again when he was read the Miranda warnings, also stating that he did not wish to speak to the officer without his attorney present. A defendant has a qualified right to consult with a lawyer before deciding whether to consent to a chemical test, provided he makes such a request and no danger of delay is posed. Although the defendant received a telephone call at 1:03 a.m., it cannot be determined from the record whether the person he spoke with was an attorney. The record does establish that John Demonico called the precinct at 1:36 a.m. and identified himself as the defendant's attorney.

Officer Talay's two requests that the defendant submit to a chemical test, made before the 1:36 a.m. call by defendant's attorney, were made in violation of the defendant's qualified right to counsel, since the record does not clearly show that the defendant was able to speak with an attorney before the requests were made. After counsel's call at 1:36 a.m., the officer improperly asked the defendant to disclose the content of a privileged communication by asking him if his attorney had advised him to take a chemical test or not, interpreting the defendant's negative response to his question as a refusal.

The defendant's negative response to the officer's improper question was obtained in violation of his Sixth Amendment right to counsel, and the statement itself is subject to suppression on that ground. In addition, it is not clear that this statement was intended to express the defendant's refusal to take the test. The defendant's answer "no" was ambiguous, as the defendant could have meant either that his attorney had not told him whether or not to take the test, or that his attorney had advised him not to take it. Evidence of a defendant's refusal to submit to a chemical test is not admissible at trial unless the People show that the defendant "was given sufficient warning, in clear and unequivocal language, of the effect of such refusal and that [he] persisted in the refusal." The People have not met their burden of demonstrating that the defendant refused to take the chemical test and that he persisted in his refusal, and this evidence shall not be admitted at trial.

Id. at ___, 842 N.Y.S.2d at 297-98 (citations omitted).

By contrast, in People v. O'Rama, 162 A.D.2d 727, ___, 557 N.Y.S.2d 124, 125 (2d Dep't 1990), rev'd on other grounds, 78 N.Y.2d 270, 574 N.Y.S.2d 159 (1991), the Appellate Division, Second Department, held that "under the facts of this case, although the defendant requested the assistance of counsel, he was not entitled to wait for an attorney before deciding to take the test since he indicated to the police that he could not get in touch with his attorney because it was too late at night." See also People v. Dejac, 187 Misc. 2d 287, 721 N.Y.S.2d 492 (Monroe Co. Sup. Ct. 2001); People v. Phraner, 151 Misc. 2d 961, 574 N.Y.S.2d 147 (Suffolk Co. Dist. Ct. 1991). See generally People v. Vinogradov, 294 A.D.2d 708, ___, 742 N.Y.S.2d 698, 700 (3d Dep't 2002); People v. DePonceau, 275 A.D.2d 994, 715 N.Y.S.2d 197 (4th Dep't 2000); People v. Kearney, 261 A.D.2d 638, 691 N.Y.S.2d 71 (2d Dep't 1999).

Where counsel has been contacted by phone and advises the motorist to refuse to submit to a chemical test, the motorist can thereafter validly choose to ignore the attorney's advice and consent to the test, and/or waive the limited "right to counsel" without counsel present. People v. Nigohosian, 138 Misc. 2d 843, ___, 525 N.Y.S.2d 556, 559 (Nassau Co. Dist. Ct. 1988). See also People v. Harrington, 111 Misc. 2d 648, 444 N.Y.S.2d 848 (Monroe Co. Ct. 1981). See generally People v. Phraner, 151 Misc. 2d 961, 574 N.Y.S.2d 147 (Suffolk Co. Dist. Ct. 1991).

In People v. Dejac, 187 Misc. 2d 287, ___, 721 N.Y.S.2d 492, 495-96 (Monroe Co. Sup. Ct. 2001), the Court addressed the issue of the burden of proof at a hearing dealing with an alleged violation of the qualified right to counsel, and held that:

[A]fter the People come forward at the hearing to show the legality of police conduct in the first instance, which is required by the statute, Vehicle & Traffic Law § 1194(2)(f) . . . , if defendant makes a claim that he was not "afforded an adequate opportunity to consult with counsel," or that the efforts of the police were not "reasonable and sufficient under the circumstances," it is the defendant's burden to establish such a claim at the hearing.

(Citations omitted).

It has been held that where the defendant persistently refuses to submit to a properly requested chemical test on counsel's advice, such refusal (including the videotape thereof) is admissible at trial. See People v. McGovern, 179 Misc. 2d 159, ___, 683 N.Y.S.2d 822, 823-24 (Nassau Co. Dist. Ct. 1998).

§ 41:78 Right to counsel more limited at DMV refusal hearing

The limited "right to counsel" discussed in the previous section is even more limited in the context of a DMV refusal hearing. In this regard, in Matter of Cook v. Adduci, 205 A.D.2d 903, ___, 613 N.Y.S.2d 475, 476 (3d Dep't 1994), the Appellate Division, Third Department, stated that "[w]hile indeed, in a criminal proceeding, the failure to comply with a defendant's request for assistance of counsel may result in the suppression of evidence obtained, the same consequence does not apply in the context of an administrative license revocation proceeding." (Citations omitted). See also Matter of Finocchiaro v. Kelly, 11 N.Y.2d 58, 226 N.Y.S.2d 403 (1962); Matter of Clark v. New York State Dep't of Motor Vehicles, 55 A.D.3d 1284, ___, 864 N.Y.S.2d 810, 811-12 (4th Dep't 2008); Matter of Wilkinson v. Adduci, 176 A.D.2d 1233, ___, 576 N.Y.S.2d 728, 729 (4th Dep't 1991); Matter of Smith v. Passidomo, 120 A.D.2d 599, ___, 502 N.Y.S.2d 73, 74 (2d Dep't 1986).

By contrast, in Matter of Leopold v. Tofany, 68 Misc. 2d 3, ___, 325 N.Y.S.2d 24, 27 (N.Y. Co. Sup. Ct.), aff'd, 38 A.D.2d 550, 327 N.Y.S.2d 999 (1st Dep't 1971), the Court held that:

[W]here, as here, an attorney seeks to confer with his client, who is then in custody, and such conferring will not improperly delay the

timely administering of the chemical examination, that right must be granted, or else a refusal to take such examination or the results of the examination may not be utilized against the alleged drunken driver, either in a criminal proceeding, or in the quasi-criminal proceeding to revoke the driver's license.

In any event, DMV's position on this issue is set forth in an internal memorandum to "All Safety ALJs" dated May 8, 1990:

If a respondent is asked to take a chemical test, and responds by requesting the advice of an attorney, the police officer is not required, for Section 1194 purposes, to grant the request. However, if the officer does not inform the respondent that his request is denied and just records a refusal, there has not been a refusal. The respondent should be reasonably informed in some way (words, conduct, circumstances) that he is not going to be given a chance to consult with an attorney before his insistence on speaking to one can be considered a refusal.

A copy of this memorandum is set forth at Appendix 47.

§ 41:79 Chemical test refusals and the right of foreign nationals to consult with consular officials

"Article 36 of the Vienna Convention on Consular Relations . . . provides for notification of a foreign national's consulate upon the arrest of that foreign national." People v. Litarov, 188 Misc. 2d 234, ___, 727 N.Y.S.2d 293, 295 (N.Y. City Crim. Ct. 2001) (citation omitted). In Litarov, the Court held that the Vienna Convention "does not require that a refusal to take a Breathalyzer test should be suppressed because a defendant was denied access to a consular official." Id. at ___, 727 N.Y.S.2d at 295.

§ 41:80 Chemical test refusals and unconscious defendants

"If a person is unconscious or appears to be unconscious, he is deemed to have impliedly consented to a chemical test." People v. Feine, 227 A.D.2d 901, ___, 643 N.Y.S.2d 281, 282 (4th Dep't 1996). See also VTL § 1194(2)(a); People v. Massong, 105 A.D.2d 1154, ___, 482 N.Y.S.2d 601, 602 (4th Dep't 1984). As such, blood can properly be drawn from the person for purposes of chemical testing despite the fact that he or she is not afforded an opportunity to refuse the test. See, e.g., People v. Kates, 53 N.Y.2d 591, 444 N.Y.S.2d 446 (1981).

By contrast, a DWI suspect who feigns unconsciousness should be treated as a test refusal. See Massong, 105 A.D.2d at ___, 482 N.Y.S.2d at 602 ("Pretending to be unconscious in our view would be conduct evidencing a refusal to submit to a chemical test"). In such a case, blood cannot properly be drawn from the person for purposes of chemical testing without a Court Order. See, e.g., VTL § 1194(2)(b)(1); VTL § 1194(3); People v. Smith, 18 N.Y.3d 544, 549 n.2, 942 N.Y.S.2d 426, 429 n.2 (2012).

In Matter of Taney v. Melton, 89 A.D.2d 1000, 454 N.Y.S.2d 322 (2d Dep't 1982), the Appellate Division, Second Department, held that there was no refusal where (a) the petitioner, who was injured and in the hospital following an automobile accident, agreed to submit to a chemical test but thereafter fell asleep or became unconscious, and (b) there was no competent proof that petitioner was feigning unconsciousness.

The issue thus becomes whether a DWI suspect is actually unconsciousness, or rather is merely pretending to be. In this regard, Courts appear loathe to allow DWI defendants to benefit from feigning unconsciousness. See, e.g., Feine, 227 A.D.2d at ___, 643 N.Y.S.2d at 282 ("Feigning unconsciousness constitutes a refusal only when it is apparent that defendant is feigning unconsciousness for the purpose of refusing to take the test"); Massong, 105 A.D.2d at ___, 482 N.Y.S.2d at 602 ("Trooper Hibsich was not qualified to express a medical opinion as to whether the defendant was unconscious or faking; his opinion [that defendant was faking] was inapposite and because the defendant appeared unconscious there was no refusal to submit to the chemical test") (citation omitted); People v. Stuart, 216 A.D.2d 682, ___, 628 N.Y.S.2d 421, 422 (3d Dep't 1995).

In Kates, *supra*, the Court of Appeals held that "denying the unconscious driver the right to refuse a blood test does not violate his right to equal protection." Id. at 596, 444 N.Y.S.2d at 449. In so holding, the Court reasoned:

The distinction drawn between the conscious driver and the unconscious or incapacitated driver does not offend the equal protection clause. It was reasonable for the Legislature, concerned with avoiding potentially violent conflicts between the police and drivers arrested for intoxication, to provide that the police must request the driver's consent, advise him of the consequences of refusal and honor his wishes if he decides to refuse, but to dispense with these requirements when the driver is unconscious or otherwise incapacitated to the point where he poses no threat. Indeed there is a rational basis for distinguishing

between the driver who is capable of making a choice and the driver who is unable to do so. Thus, denying the unconscious driver the right to refuse a blood test does not violate his right to equal protection.

Id. at 596, 444 N.Y.S.2d at 448-49.

§ 41:81 Chemical test refusals and CPL § 60.50

CPL § 60.50 provides that "[a] person may not be convicted of any offense solely upon evidence of a confession or admission made by him without additional proof that the offense charged has been committed." In the context of DWI cases, CPL § 60.50 can apply where there is a lack of corroboration of a DWI suspect's admission of operation. See Chapter 2, *supra*.

In Matter of Van Tassell v. New York State Comm'r of Motor Vehicles, 46 A.D.2d 984, ___, 362 N.Y.S.2d 281, 282 (3d Dep't 1974), the Appellate Division, Third Department, held that the corroboration requirement of CPL § 60.50 does not apply to DMV refusal hearings, as evidence necessary to sustain a criminal conviction is not required.

§ 41:82 Chemical test refusals and CPL § 200.60

Several crimes are raised from a "lower grade" to a "higher grade" if the defendant commits them while his or her driving privileges are revoked for refusing to submit to a chemical test. See, e.g., PL § 125.13(2)(b) (Vehicular Manslaughter in the 1st Degree); PL § 120.04(2)(b) (Vehicular Assault in the 1st Degree); VTL § 511(3)(a)(i); VTL § 511(2)(a)(ii) (AUO 1st). Since an underlying chemical test refusal revocation raises the grade of each of these offenses, proof of such revocation is an element of such offenses. See CPL § 200.60(1).

As a result, the People and the Court must utilize the procedure set forth in CPL § 200.60. See People v. Cooper, 78 N.Y.2d 476, 478, 577 N.Y.S.2d 202, 203 (1991) ("When a defendant's prior conviction raises the grade of an offense, and thus becomes an element of the higher grade offense, the Criminal Procedure Law -- reflecting a concern for potential prejudice and unfairness to the defendant in putting earlier convictions before the jury -- specifies a procedure for alleging and proving the prior convictions (CPL 200.60)"). This statute provides, in pertinent part, that:

A previous conviction that "raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter" may not be referred to in the indictment (CPL

200.60[1])). Instead, it must be charged by special information filed at the same time as the indictment (CPL 200.60[2])). An arraignment must be held on the special information outside the jury's presence. If a defendant admits a previous conviction, "that element of the offense * * * is deemed established, no evidence in support thereof may be adduced by the people, and the court must submit the case to the jury without reference thereto and as if the fact of such previous conviction were not an element of the offense." (CPL 200.60[3][a])). If, however, the defendant denies the previous conviction or remains silent, the People may prove that element before the jury as part of their case (CPL 200.60[3][b])).

Id. at 481-82, 577 N.Y.S.2d at 205.

Construed literally, CPL § 200.60 only applies to a defendant's previous *convictions* -- not to "*conviction-related facts*" such as a chemical test refusal revocation. Faced with this "Catch-22" situation in Cooper, the Court of Appeals held that the spirit and purpose of CPL § 200.60 requires that the statute be applied not only to previous convictions, but also to relevant "*conviction-related facts*":

In a situation such as the one before us -- where pleading and proving knowledge of a prior conviction necessarily reveals the conviction -- the protection afforded by CPL 200.60 can be effectuated only by reading the statute to require resort to the special information procedure for all of the conviction-related facts that constitute the enhancing element.

Proper application of CPL 200.60 required that defendant be given an opportunity to admit -- outside the jury's presence -- the element that raised his crime in grade. That opportunity could have been afforded by a special information charging him with the prior conviction, the revocation of his license, and knowledge of the conviction and revocation. If defendant chose to admit those facts, no mention of them was necessary before the jury. If defendant denied all or any of those facts, the People could have proceeded with their proof, as the statute provides.

Id. at 482-83, 577 N.Y.S.2d at 205.

In this regard, a chemical test refusal revocation is a "conviction-related fact" for purposes of Cooper and CPL § 200.60. See, e.g., People v. Alshoaibi, 273 A.D.2d 871, 711 N.Y.S.2d 646 (4th Dep't 2000); People v. Orlen, 170 Misc. 2d 737, 651 N.Y.S.2d 860 (Nassau Co. Ct. 1996).

§ 41:83 Chemical test refusals and CPL § 710.30 Notice

A refusal to submit to a chemical test is communicative or testimonial in nature, regardless of the form of the refusal (e.g., oral, written, conduct). People v. Thomas, 46 N.Y.2d 100, 106-07, 412 N.Y.S.2d 845, 849 (1978). See also People v. Peeso, 266 A.D.2d 716, ___, 699 N.Y.S.2d 136, 138 (3d Dep't 1999). In addition, a refusal to submit to a chemical test is potentially suppressible on several grounds. For example, a test refusal, like a chemical test, can be suppressed:

- (a) As the fruit of an illegal stop. See, e.g., Matter of Byer v. Jackson, 241 A.D.2d 943, 661 N.Y.S.2d 336 (4th Dep't 1997); Matter of McDonell v. New York State Dep't of Motor Vehicles, 77 A.D.3d 1379, 908 N.Y.S.2d 507 (4th Dep't 2010);
- (b) As the fruit of an illegal arrest. See, e.g., Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248 (1979); Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254 (1975); Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961). See generally Welsh v. Wisconsin, 466 U.S. 740, 744, 104 S.Ct. 2091, 2095 (1984);
- (c) If it is obtained in violation of the right to counsel. See, e.g., People v. Washington, 23 N.Y.3d 228, 989 N.Y.S.2d 670 (2014); People v. Smith, 18 N.Y.3d 544, 550, 942 N.Y.S.2d 426, 430 (2012); People v. Shaw, 72 N.Y.2d 1032, 534 N.Y.S.2d 929 (1988); People v. Gursey, 22 N.Y.2d 224, 292 N.Y.S.2d 416 (1968); and/or
- (d) If it is obtained in violation of VTL § 1194. See, e.g., VTL § 1194(2)(f); People v. Boone, 71 A.D.2d 859, 419 N.Y.S.2d 187 (2d Dep't 1979).

Nonetheless, in Peeso, *supra*, the Appellate Division, Third Department, stated:

We . . . reject the contention that the absence of notice pursuant to CPL 710.30 precluded the People's offer of evidence concerning defendant's test refusal (see, Vehicle and Traffic Law § 1194[2][f]). It is

settled law that because there is no compulsion on a defendant to refuse to submit to the chemical test provided for in Vehicle and Traffic Law § 1194(2), the defendant "ha[s] no constitutional privilege or statutory right to refuse to take the test." Therefore, defendant's refusal, although constituting communicative or testimonial evidence, could not "[c]onsist[] of a record or potential testimony reciting or describing a statement of [] defendant involuntarily made, within the meaning of [CPL] 60.45" (CPL 710.20[3]) or thereby implicate the notice requirement of CPL 710.30(1)(a).

266 A.D.2d at ___, 699 N.Y.S.2d at 138 (citations omitted). Cf. People v. Burtula, 192 Misc. 2d 597, ___, 747 N.Y.S.2d 692, 694 (Nassau Co. Dist. Ct. 2002). Notably, since the Peeso Court found that "the record demonstrates that the People provided adequate notice pursuant to CPL 710.30(1) of their intent to introduce the refusal at trial," 266 A.D.2d at ___, 699 N.Y.S.2d at 138, the above-quoted language is arguably *dicta*.

In any event, a defendant's refusal to submit to a chemical test is discoverable pursuant to CPL § 240.20(1)(a), which provides for disclosure of "[a]ny written, recorded or oral statement of the defendant . . . made, other than in the course of the criminal transaction, to a public servant engaged in law enforcement activity or to a person then acting under his direction or in cooperation with him."

In this regard, "[i]t is beyond dispute that a defendant's own statements to police are highly material and relevant to a criminal prosecution. It is for this reason that such statements are always discoverable, even when the People do not intend to offer them at trial." People v. Combest, 4 N.Y.3d 341, 347, 795 N.Y.S.2d 481, 485 (2005) (emphasis added). See also People v. Fields, 258 A.D.2d 809, ___, 687 N.Y.S.2d 184, 186 (3d Dep't 1999) ("CPL 240.20(1)(a) . . . is not limited to statements intended to be offered by the People 'at trial', i.e., statements offered as part of the People's direct case (see, CPL 240.10[4])"); People v. Crider, 301 A.D.2d 612, ___, 756 N.Y.S.2d 223, 225 (2d Dep't 2003) (pursuant to CPL § 240.20(1)(a), "the People shall provide the defendant with notice of any of his statements they are aware of, whether or not they intend to use them for any purpose, including but not limited to rebuttal") (emphases added); People v. Wyssling, 82 Misc. 2d 708, 372 N.Y.S.2d 142 (Suffolk Co. Ct. 1975); People v. Bennett, 75 Misc. 2d 1040, ___ - ___, 349 N.Y.S.2d 506, 519-20 (Erie Co. Sup. Ct. 1973). Thus, any argument by the People that they need only disclose statements to which CPL § 710.30 applies is without merit. See Combest, 4 N.Y.3d at 347, 795 N.Y.S.2d at 485;

Fields, 258 A.D.2d at ___, 687 N.Y.S.2d at 185; People v. Hall, 181 A.D.2d 1008, 581 N.Y.S.2d 951 (4th Dep't 1992).

§ 41:84 Chemical test refusals and collateral estoppel

In People v. Walsh, 139 Misc. 2d 182, ___, 527 N.Y.S.2d 708, 709 (Monroe Co. Ct. 1988), the Court held that "the County Court, in criminal proceedings, is not subject to collateral estoppel by decisions resulting from Section 1194 hearings of the Department of Motor Vehicles." See also People v. Kearney, 196 Misc. 2d 335, 764 N.Y.S.2d 542 (Sullivan Co. Ct. 2003) (same); People v. Riola, 137 Misc. 2d 616, 522 N.Y.S.2d 419 (Nassau Co. Dist. Ct. 1987) (same); People v. Lalka, 113 Misc. 2d 474, 449 N.Y.S.2d 579 (Rochester City Ct. 1982) (same). See generally Matter of Duran v. Melton, 108 Misc. 2d 120, 437 N.Y.S.2d 49 (Monroe Co. Sup. Ct. 1981).

By contrast, DMV's position on the issue of collateral estoppel is as follows:

In adjourned cases, a conviction may already exist on the alcohol charge underlying the refusal on which you are holding the hearing. If there has been a conviction or plea to [VTL §] 1192(2,3,4), then the issues of probable cause and lawful arrest are conclusively decided (collateral estoppel). If there has been a plea to [VTL §] 1192(1), it can be considered an admission against interest on these two issues, but is subject to attac[k] and explanation by the motorist. If there has been an 1192(1) conviction after trial, then all issues must be established without reference to the conviction.

See Memorandum from DMV Administrative Office Director Sidney W. Berke to All Safety Administrative Law Judges, dated June 5, 1986, set forth at Appendix 44. See also Appendix 47 (same).

Where a DWI arrest is found to be supported by probable cause both (a) at a DMV refusal hearing, and (b) following a probable cause hearing in Town Court, the doctrine of collateral estoppel precludes the motorist from relitigating the issue of probable cause in an action for false arrest, false imprisonment or malicious prosecution, and thus precludes such an action. Janendo v. Town of New Paltz Police Dep't, 211 A.D.2d 894, 621 N.Y.S.2d 175 (3d Dep't 1995). See also Holmes v. City of New Rochelle, 190 A.D.2d 713, 593 N.Y.S.2d 320 (2d Dep't 1993); Coffey v. Town of Wheatland, 135 A.D.2d 1125, 523 N.Y.S.2d 267 (4th Dep't 1987). Cf. Menio v. Akzo Salt Inc., 217 A.D.2d 334, ___ n.2, 634 N.Y.S.2d 802, 803 n.2 (3d Dep't 1995) ("To the

extent that Janendo v. Town of New Paltz Police Dept. (*supra*) may be interpreted to enable collateral estoppel to be grounded solely upon a probable cause determination of a town justice, we decline to follow it").

§ 41:85 Chemical test refusals and equitable estoppel

In Matter of Ginty, 74 Misc. 2d 625, 345 N.Y.S.2d 856 (Niagara Co. Sup. Ct. 1973), following his arrest for DWI, the petitioner feigned a heart attack. During the "chaotic" situation which ensued, petitioner was requested to submit to a chemical test, but the arresting officer failed to administer sufficient refusal warnings to petitioner. Under these unique circumstances, the Court held that "the petitioner because of his own actions is estopped" from challenging the sufficiency of the refusal warnings. Id. at ___, 345 N.Y.S.2d at 858.

§ 41:86 Chemical test refusal sanctions as Double Jeopardy

The prosecution of a defendant for a violation of VTL § 1192 following a chemical test refusal revocation does not violate the Double Jeopardy Clause. Matter of Brennan v. Kmiotek, 233 A.D.2d 870, 649 N.Y.S.2d 611 (4th Dep't 1996). See also Matter of Barnes v. Tofany, 27 N.Y.2d 74, 77, 313 N.Y.S.2d 690, 693 (1970) ("We hold that the 'double punishment' feature of our Vehicle and Traffic statute -- one criminal and the other administrative -- is lawful"); People v. Frank, 166 Misc. 2d 277, 631 N.Y.S.2d 1014 (N.Y. City Crim. Ct. 1995). See generally People v. Demetsenare, 243 A.D.2d 777, ___, 663 N.Y.S.2d 299, 303 (3d Dep't 1997); People v. Roach, 226 A.D.2d 55, 649 N.Y.S.2d 607 (4th Dep't 1996); Matter of Smith v. County Court of Essex County, 224 A.D.2d 89, 649 N.Y.S.2d 507 (3d Dep't 1996).

Similarly, the Double Jeopardy Clause is not violated where a DMV license revocation proceeding is commenced despite the motorist's previous acquittal in a criminal case stemming from the same conduct. Matter of Giudice v. Adduci, 176 A.D.2d 1175, ___, 575 N.Y.S.2d 611, 612 (3d Dep't 1991).

§ 41:87 Admissibility of chemical test result obtained despite refusal

In the field of chemical testing and chemical test refusals, there is a clear (and critical) distinction between a DWI suspect's Constitutional rights and his or her statutory rights. Thus, for example, while a DWI suspect has no *Constitutional* right to refuse to submit to a chemical test, see, e.g., South Dakota v. Neville, 459 U.S. 553, 560 n.10, 103 S.Ct. 916, 921 n.10 (1983); Missouri v. McNeely, 133 S.Ct. 1552, 1566 (2013); Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966); People v. Shaw, 72 N.Y.2d 1032, 1033, 534 N.Y.S.2d 929, 930

(1988); People v. Kates, 53 N.Y.2d 591, 594-95, 444 N.Y.S.2d 446, 448 (1981); People v. Thomas, 46 N.Y.2d 100, 106, 412 N.Y.S.2d 845, 848 (1978), he or she nonetheless has a well recognized statutory right to do so. See, e.g., Shaw, 72 N.Y.2d at 1034, 534 N.Y.S.2d at 930; People v. Daniel, 84 A.D.2d 916, ___, 446 N.Y.S.2d 658, 659 (4th Dep't 1981), aff'd sub nom. People v. Moselle, 57 N.Y.2d 97, 454 N.Y.S.2d 292 (1982); People v. Wolter, 83 A.D.2d 187, ___, 444 N.Y.S.2d 331, 333 (4th Dep't 1981), aff'd sub nom. People v. Moselle, 57 N.Y.2d 97, 454 N.Y.S.2d 292 (1982); People v. Haitz, 65 A.D.2d 172, ___, 411 N.Y.S.2d 57, 60 (4th Dep't 1978).

In this regard, VTL § 1194(2)(b)(1) provides that, unless a Court Order has been granted pursuant to VTL § 1194(3), if a DWI suspect has refused to submit to a chemical test "*the test shall not be given and a written report of such refusal shall be immediately made by the police officer before whom such refusal was made.*" (Emphasis added). See also VTL § 1194(3)(b) ("Upon refusal by any person to submit to a chemical test or any portion thereof as described above, the test shall not be given unless a police officer or a district attorney . . . requests and obtains a court order to compel [the test]") (emphasis added).

In People v. Moselle, 57 N.Y.2d 97, 454 N.Y.S.2d 292 (1982), the Court of Appeals:

- (a) Made clear that VTL § "1194 has pre-empted the administration of chemical tests for determining alcoholic blood content with respect to violations under [VTL §] 1192." Id. at 109, 454 N.Y.S.2d at 297; and
- (b) Held that "[a]bsent a manifestation of a defendant's consent thereto, blood samples taken without a court order other than in conformity with the provisions of subdivisions 1 and 2 of section 1194 of the Vehicle and Traffic Law are inadmissible in prosecutions for operating a motor vehicle while under the influence of alcohol under section 1192 of that law. Beyond that, blood samples taken without a defendant's consent are inadmissible in prosecutions under the Penal Law unless taken pursuant to an authorizing court order." Id. at 101, 454 N.Y.S.2d at 293.

See also People v. Smith, 18 N.Y.3d 544, 549 n.2, 942 N.Y.S.2d 426, 429 n.2 (2012) ("If the motorist declines to consent, the police may not administer the test unless authorized to do so by court order (see Vehicle and Traffic Law § 1194[3])"); People v. Kates, 53 N.Y.2d 591, 596, 444 N.Y.S.2d 446, 448 (1981) ("the Legislature . . . provide[d] that the police must request the driver's consent, advise him of the consequences of refusal and honor his wishes if he decides to refuse") (emphasis added);

People v. Thomas, 46 N.Y.2d 100, 108, 412 N.Y.S.2d 845, 850 (1978) ("Under the procedure prescribed by section 1194 of the Vehicle and Traffic Law a driver who has initially declined to take one of the described chemical tests is to be informed of the consequences of such refusal. If he thereafter persists in a refusal *the test is not to be given* (§ 1194, subd. 2); the choice is the driver's") (emphasis added).

Clearly, according to VTL § 1194(2)(b)(1), VTL § 1194(3)(b), Moselle, Smith, Kates and Thomas, where a DWI suspect is requested to submit to a chemical test, declines, is read refusal warnings, and thereafter persists in his or her refusal, "*the test shall not be given*" (absent a Court Order pursuant to VTL § 1194(3)). See also Mackey v. Montrym, 443 U.S. 1, 5, 99 S.Ct. 2612, 2614 (1979) ("The statute leaves an officer no discretion once a breath-analysis test has been refused: 'If the person arrested refuses to submit to such test or analysis, . . . the police officer before whom such refusal was made *shall immediately* prepare a written report of such refusal'"). Accordingly, a test result obtained under such circumstances should be inadmissible -- not because it violates the Constitution -- but rather because it violates the statutory scheme of VTL § 1194.

Nonetheless, in People v. Stisi, 93 A.D.2d 951, ___, 463 N.Y.S.2d 73, 74-75 (3d Dep't 1983), the Appellate Division, Third Department, held:

Defendant interprets section 1194 (subd. 2) of the Vehicle and Traffic Law to mandate that once a defendant refuses to submit to a chemical test after being fully apprised of the consequences of such refusal, all further requests and prompting by the police for defendant to reconsider and submit must immediately cease and the chemical test not be given. . . . Defendant's suggested literal interpretation of the subject statutory provision is misplaced and without merit. . . .

Section 1194 of the Vehicle and Traffic Law does not, either expressly or by implication, foreclose the police from resuming discussion with a defendant and renewing their request that he submit to a chemical test.

Notably, the Stisi Court failed to cite Kates and/or Thomas, each of which appears to support the defendant's "suggested literal interpretation" of VTL § 1194(2).

Although People v. Cragg, 71 N.Y.2d 926, 528 N.Y.S.2d 807 (1988), appears at first glance to reach the same conclusion as the Stisi Court, in actuality it does not. In Cragg, "[d]efendant contend[ed] that the police violated Vehicle and Traffic Law § 1194(2) by administering a breathalyzer test despite defendant's initial refusal to submit to the test, and by informing him of certain consequences -- not specifically prescribed by the statute -- of such refusal." In rejecting defendant's claims, the Court of Appeals held:

Contrary to defendant's assertion, the statute is not violated by an arresting officer informing a person as to the consequences of his choice to take or not take a breathalyzer test. Thus, it cannot be said, *in the circumstances of this case*, that by informing defendant that his refusal to submit to the test would result in his arraignment before a Magistrate and the posting of bail, the officer violated the provisions of the Vehicle and Traffic Law.

71 N.Y.2d at 927, 528 N.Y.S.2d at 807-08 (emphasis added).

However, the wording of the Cragg decision indicates that defendant's "initial refusal" to submit to the test preceded the refusal warnings -- requiring that defendant be informed of the consequences of a refusal and given a chance to change his mind. See Thomas, 46 N.Y.2d at 108, 412 N.Y.S.2d at 850 ("Under the procedure prescribed by section 1194 of the Vehicle and Traffic Law a driver who has initially declined to take one of the described chemical tests is to be informed of the consequences of such refusal. If he thereafter persists in a refusal the test is not to be given (§ 1194, subd. 2); the choice is the driver's"). Thus, the procedure followed in Cragg did not constitute an attempt to persuade the defendant to change his mind after a valid, persistent refusal had occurred. Rather, it is an example of the statute being implemented exactly as envisioned by the Legislature and the Court of Appeals. The position that Cragg was not intended to change settled law in this area is supported by the fact that Cragg (a) is a memorandum decision, (b) did not cite Stisi, and (c) did not cite Moselle, Kates and/or Thomas.

In People v. Ameigh, 95 A.D.2d 367, 467 N.Y.S.2d 718 (3d Dep't 1983), the defendant refused to submit to a police-requested chemical test, but his blood was nonetheless drawn and tested by hospital personnel for "diagnostic purposes." In ruling that the test result obtained in this manner was admissible, the Appellate Division, Third Department, reasoned:

[W]e are not unmindful of the holding by the Court of Appeals in People v. Moselle, 57

N.Y.2d 97, 454 N.Y.S.2d 292, 439 N.E.2d 1235 that "[VTL §] 1194 has preempted the administration of chemical tests for determining alcoholic blood content with respect to violations under [VTL §] 1192."

. . .

[However], the statutory framework simply does not address itself to evidence of blood-alcohol levels derived as a result of bona fide medical procedures in diagnosing or treating an injured driver. In that context, it is apparent to us that the provision in section 1194 (subd. 2) that the test shall not be given to a person expressly declining the officer's request does not render inadmissible the results of tests not taken at the direction or on behalf of the police. The legislative purpose underlying that provision was "to eliminate the need for the use of force by police officers if an individual in a drunken condition should refuse to submit to the test."

Id. at ____-____, 467 N.Y.S.2d at 718-19 (citation omitted).

§ 41:88 Admissibility of chemical test refusal evidence in actions arising under Penal Law

In People v. Loughlin, 154 A.D.2d 552, ___, 546 N.Y.S.2d 392, 393 (2d Dep't 1989), the Appellate Division, Second Department, held that "[t]he defendant's contention that evidence of his refusal to take a breathalyzer test should not have been admitted because he was charged with crimes arising under the Penal Law rather than under the Vehicle and Traffic Law . . . is without merit." See also People v. Stratis, 137 Misc. 2d 661, ____-____, 520 N.Y.S.2d 904, 910-11 (Kings Co. Sup. Ct. 1987) (VTL § 1194(4) (currently VTL § 1194(2)(f)) applies to Penal Law violations, and thus evidence of defendant's refusal to submit to chemical test inadmissible where refusal warnings were not read to defendant in "clear and unequivocal" language), aff'd on other grounds, 148 A.D.2d 557, 54 N.Y.S.2d 186 (2d Dep't 1989).

§ 41:89 Admissibility of chemical test refusal evidence in civil actions

In Bazza v. Banscher, 143 A.D.2d 715, ___, 533 N.Y.S.2d 285, 286 (2d Dep't 1988), the Appellate Division, Second Department, held that:

The trial court . . . erred when it prevented the plaintiffs from introducing into evidence Banscher's refusal to submit to a breathalyzer test after the accident. The admission of evidence was not barred by Vehicle and Traffic Law § 1194(4) [currently VTL § 1194(2)(f)]. This provision does not preclude the admission of evidence of a refusal to submit to a blood-alcohol test in proceedings other than criminal prosecutions under Vehicle and Traffic Law § 1192. Instead, with respect to proceedings pursuant to § 1192 only, it establishes prerequisites for the admission of such evidence.

§ 41:90 Applicability of "two-hour rule" to chemical test refusals

The two-hour rule stems from VTL § 1194(2)(a), which provides, in pertinent part:

2. Chemical tests. (a) When authorized. Any person who operates a motor vehicle in this state shall be deemed to have given consent to a chemical test of one or more of the following: breath, blood, urine, or saliva, for the purpose of determining the alcoholic and/or drug content of the blood *provided that* such test is administered by or at the direction of a police officer with respect to a chemical test of breath, urine or saliva or, with respect to a chemical test of blood, at the direction of a police officer:

(1) having reasonable grounds to believe such person to have been operating in violation of any subdivision of [VTL § 1192] *and within two hours* after such person has been placed under arrest for any such violation; or . . .

(2) *within two hours* after a breath test, as provided in [VTL § 1194(1)(b)], indicates that alcohol has been consumed by such person and in accordance with the rules and regulations established by the police force of which the officer is a member.

VTL § 1194(2)(a)(1), (2) (emphases added). See Chapter 31, *supra*.

In People v. Brol, 81 A.D.2d 739, ___, 438 N.Y.S.2d 424, 424 (4th Dep't 1981), the Appellate Division, Fourth Department, held that if the defendant "was requested to take the [chemical] test after the two hours had expired, evidence of his refusal was incompetent and should not have been considered by the jury." See also People v. Walsh, 139 Misc. 2d 161, ___, 527 N.Y.S.2d 349, 350 (Nassau Co. Dist. Ct. 1988).

By contrast, in People v. Ward, 176 Misc. 2d 398, ___, 673 N.Y.S.2d 297, 300 (Richmond Co. Sup. Ct. 1998), the Court held that "considering the reasoning in Brol, *supra* in conjunction with several subsequent decisions interpreting the scope of the two hour rule, it seems clear that today the rule has no application in a determination of the admissibility of evidence that a defendant refused a chemical test." See also People v. Robinson, 82 A.D.3d 1269, ___, 920 N.Y.S.2d 162, 164 (2d Dep't 2011) ("Where, as here, the person is capable, but refuses to consent, evidence of that refusal, as governed by Vehicle and Traffic Law § 1194(2)(f), is admissible into evidence regardless of whether the refusal is made more than two hours after arrest"); People v. Rodriguez, 26 Misc. 3d 238, ___, 891 N.Y.S.2d 246, 248-49 (Bronx Co. Sup. Ct. 2009); People v. Coludro, 166 Misc. 2d 662, ___, 634 N.Y.S.2d 964, 967-68 (N.Y. City Crim. Ct. 1995); People v. Morales, 161 Misc. 2d 128, ___, 611 N.Y.S.2d 980, 984 (N.Y. City Crim. Ct. 1994).

In People v. Morris, 8 Misc. 3d 360, ___, 793 N.Y.S.2d 754, 757-58 (N.Y. City Crim. Ct. 2005), the Court expressly disagreed with the above-quoted language in Ward, and held that the two-hour rule is still applicable to chemical test refusals. See also id. at ___, 793 N.Y.S.2d at 758 ("the evidence of the refusal is suppressed based upon the tolling of the two-hour rule. Two-hours should mean two-hours, absent a knowing waiver and consent to take the test"). In addition, in People v. Rosa, 112 A.D.3d 551, ___, 977 N.Y.S.2d 250, 250-51 (1st Dep't 2013), the Appellate Division, First Department, stated that "[b]ecause more than two hours had passed since defendant's arrest, the officer who administered the breathalyzer test should not have advised defendant that, if he refused to take the test, his driver's license would be suspended and the refusal could be used against him in court."

Regardless of the admissibility of such evidence at trial, the two-hour rule had always applied to DMV refusal hearings. In this regard, the standardized DMV Report of Refusal to Submit to Chemical Test form expressly stated that "[s]ection 1194 of the Vehicle and Traffic Law requires that the refusal must be within two hours of the arrest." This makes sense in that the "implied consent" provisions of VTL § 1194 only apply "provided that" the chemical test is administered within two hours of either the time of arrest for a violation of VTL § 1192 or the time of a positive breath screening test. See VTL § 1194(2)(a)(1), (2); § 31:2,

supra. Since the civil sanctions for a chemical test refusal are imposed on a motorist as a penalty for revoking his or her implied consent, and are wholly unrelated to the issue of guilt or innocence, they should not be imposed when the requirements of VTL § 1194(2)(a) are not met.

Nonetheless, in 2012 DMV switched its position on this issue. In other words, DMV no longer applies the two-hour rule to chemical test refusal hearings. A copy of DMV Counsel's Office's letter in this regard is attached hereto as Appendix 68. Critically, however, in Rosa, *supra*, the Appellate Division, First Department, stated that "[b]ecause more than two hours had passed since defendant's arrest, the officer who administered the breathalyzer test should not have advised defendant that, if he refused to take the test, his driver's license would be suspended and the refusal could be used against him in court." 112 A.D.3d at ___, 977 N.Y.S.2d at 250-51. See also People v. Odum, 2016 WL 7434671, *1 (App. Term, 1st Dep't 2016) (per curiam):

The suppression court . . . properly suppressed the breathalyzer test results. "Because more than two hours had passed since defendant's arrest, the officer who administered the breathalyzer test should not have advised defendant that if he refused to take the test, his driver's license would be suspended and the refusal could be used against him in court." Inasmuch as defendant agreed to take the test only after the officer gave the "inappropriate warnings," the court properly found that defendant's consent was involuntary.

(Citations omitted).

In People v. Harvin, 40 Misc. 3d 921, ___, 969 N.Y.S.2d 851, 856 (N.Y. City Crim. Ct. 2013), the Court summarized the evolution of the two-hour rule as applied to chemical test refusals, and concluded as follows:

Jurisprudence like many things can be a continuous journey. The law is not fixed, and even the opinions of a judge can change over the years through discussions with colleagues and by hearing the arguments of advocates. Additionally, the courts that review our decisions, the "policy-making" courts, influence what the law is and what the law should be. Such an evolution has taken place in my decisions on the two-hour rule. While my personal belief may be that the two-hour rule is one of evidence, and

that the Legislature designed it as such, clearly that is not a majority opinion, nor does it represent the current state of the law in New York. Likewise, it is clear that if our policy courts consider this rule to be no more than an implied consent rule, then a refusal after two hours should be admitted into evidence as long as it is knowing and persistent, and the People have met their burden as to that knowing and unequivocal refusal in this case. The Legislature, for its part, has had ample opportunity to clearly state a desire to return the two-hour rule to an evidentiary rule if it deemed the courts' positions to be incorrect.

(Citations omitted).

§ 41:91 Loss of videotape containing alleged chemical test refusal requires sanction

In People v. Marr, 177 A.D.2d 964, 577 N.Y.S.2d 1008 (4th Dep't 1991), the police erased a videotape which had contained discoverable evidence pertaining to, among other things, defendant's alleged unsuccessful attempts to submit to a breathalyzer test. Following a hearing, County Court "imposed a sanction precluding the People from introducing any evidence of defendant's alleged refusal to submit to the breathalyzer test." Id. at ___, 577 N.Y.S.2d at 1009.

On appeal, the Appellate Division, Fourth Department, held that "County Court properly exercised its discretion in fashioning an appropriate sanction. Although an adverse inference charge may also have been appropriate, in our view, the court did not abuse its discretion in precluding the prosecution from introducing evidence at trial of defendant's alleged refusal to submit to the breathalyzer test as its sole sanction for the prosecution's failure to preserve the videotape." Id. at ___, 577 N.Y.S.2d at 1009 (citations omitted). See also People v. Litarov, 188 Misc. 2d 234, ___, 727 N.Y.S.2d 293, 297 (N.Y. City Crim. Ct. 2001) (under circumstances presented, adverse inference charge appropriate sanction for People's loss of videotape of defendant's chemical test refusal).

§ 41:92 Policy of sentencing defendants convicted of DWAI to jail if they refused chemical test is illegal

In People v. McSpirit, 154 Misc. 2d 784, 595 N.Y.S.2d 660 (App. Term, 9th & 10th Jud. Dist. 1993), the defendant was sentenced to, *inter alia*, 5 days in jail upon her conviction of DWAI, in violation of VTL § 1192(1). In this regard, the Town

Court apparently had "a policy of incarcerating those who refuse to take a breathalyzer test and are thereafter convicted of driving while impaired." Id. at ___, 595 N.Y.S.2d at 661.

On appeal, the Appellate Term modified defendant's sentence by deleting the term of incarceration, holding that "the policy as such is arbitrary, capricious and unauthorized by statute." Id. at ___, 595 N.Y.S.2d at 661.

§ 41:93 Report of refusal to submit to chemical test is discoverable pursuant to CPL § 240.20

Where a DWI defendant refuses to submit to a chemical test, or any portion thereof, to determine the alcoholic and/or drug content of his or her blood, "unless a court order has been granted pursuant to [VTL § 1194(3)], the test shall not be given and a written report of such refusal shall be immediately made by the police officer before whom such refusal was made." VTL § 1194(2)(b)(1) (emphasis added). Such a report (a.k.a. a Report of Refusal to Submit to Chemical Test) constitutes a written report or document concerning a physical examination and/or a scientific test or experiment relating to the criminal action. As such, it is discoverable pursuant to CPL §§ 240.20(1)(c) and 240.20(1)(k) (and is not merely Rosario material).

A defendant's refusal to submit to a chemical test is also discoverable pursuant to CPL § 240.20(1)(a), which provides for the disclosure of "[a]ny written, recorded or oral statement of the defendant . . . made, other than in the course of the criminal transaction, to a public servant engaged in law enforcement activity or to a person then acting under his direction or in cooperation with him."

§ 41:94 Dentures and test refusals

There is research indicating that dentures can retain "mouth alcohol" for longer than the 15-20 minute continuous observation period which is required to insure that a breath test is not contaminated by mouth alcohol. See 10 NYCRR § 59.5(b). See generally People v. Ormsby, 119 A.D.3d 1159, ___, 989 N.Y.S.2d 688, 690 (3d Dep't 2014) ("the record reflects that the alcohol absorbed in denture adhesive would only persist for about an hour after its consumption"). As a result, breath test operators are generally trained to inquire as to whether a DWI suspect wears dentures; and, if the suspect answers affirmatively, to (a) direct the suspect to remove the dentures, (b) direct the suspect to rinse his or her mouth out with water, and (c) conduct a new observation period, prior to the administration of the breath test.

However, a DWI suspect may feel particularly self-conscious in this regard. Thus, the situation can arise where the suspect consents to take a breath test but refuses to remove his or her dentures in connection therewith. Does such conduct constitute a test refusal?

DMV's position on this issue is that such conduct will constitute a chemical test refusal so long as the police "have advised the individual as to why the dentures must be removed and how such removal is necessary to the validity of the test." See Letter from former DMV First Assistant Counsel Joseph R. Donovan to Peter Gerstenzang, set forth at Appendix 45. In this regard, DMV strongly recommends that police departments incorporate denture removal procedures into their breath test rules and regulations. See id. See also Letter from former DMV First Assistant Counsel Joseph R. Donovan to Peter Gerstenzang, set forth at Appendix 46.

§ 41:95 Prosecutor's improper cross-examination and summation in refusal case results in reversal

In People v. Handwerker, 12 Misc. 3d 19, 816 N.Y.S.2d 824 (App. Term, 9th & 10th Jud. Dist. 2006), the defendant was convicted of DWAI following a jury trial. On appeal, the Appellate Term reversed, finding merit in defendant's claim "that he was denied a fair trial because, during cross-examination and summation, the prosecution improperly shifted the burden of proof to him by creating a presumption against him that he had to prove his innocence by taking a chemical test." Id. at ___, 816 N.Y.S.2d at 826. Specifically:

During cross-examination, the prosecutor asked the defendant the following question: "[y]ou didn't say, I want to prove my innocence so give me the test, 'right?" The court overruled defense counsel's objection and defendant indicated that he had not made such a request. During summation, the prosecutor remarked, "[w]ell, if he's innocent, then why doesn't he want to take the test to prove that?"

It is well settled that the People have the unalterable burden of proving beyond a reasonable doubt every element of the crime charged. The prosecutor's inquiry during cross-examination and his remark during summation, in effect, suggested to the jury that it was defendant's burden to prove his innocence by submitting to a chemical test. . . . While refusal to take a chemical test

is admissible at trial against a defendant as evidence of his consciousness of guilt, the prosecution sought to use defendant's refusal for purposes beyond that allowed by the law. We conclude that the cumulative effect of such misconduct by the prosecution substantially prejudiced defendant's right to a fair trial. Accordingly, the judgment convicting defendant of driving while ability impaired is reversed and a new trial is ordered as to said charge.

Id. at ___, 816 N.Y.S.2d at 826 (citations omitted).

In People v. Anderson, 89 A.D.3d 1161, ___, 932 N.Y.S.2d 561, 563 (3d Dep't 2011):

No dispute exist[ed] that defendant was adequately warned as to the consequences of his refusal to submit to a chemical test, or that he repeatedly refused to take such a test. Defendant argue[d], nevertheless, that the People's statements and questioning of him at trial regarding his refusal to consent to a chemical blood test deprived him of a fair trial by impermissibly shifting the burden of proof to him. Specifically, during both cross-examination and summation, the People suggested that, by refusing to take the test, defendant forewent the opportunity to prove his innocence. Supreme Court sustained defendant's objections to these questions and comments, informing the jury that defendant did not bear any burden of proof and that it was entitled, but not required, to infer that defendant refused the test because he feared it would provide evidence of his guilt. *Under these circumstances*, we see no evidence that the burden of proof was improperly shifted to defendant or that he was deprived of a fair trial.

(Emphasis added).

§ 41:96 Improper presentation of refusal evidence to Grand Jury did not require dismissal of indictment

In People v. Jeffery, 70 A.D.3d 1512, ___, 894 N.Y.S.2d 797, 798 (4th Dep't 2010), "the People failed to comply with the requirements of Vehicle and Traffic Law § 1194(2)(f) and thus

improperly presented evidence to the grand jury concerning defendant's refusal to submit to a chemical test." After concluding that the remaining evidence before the Grand Jury was legally insufficient, County Court dismissed the indictment. The Appellate Division, Fourth Department, reversed, concluding that:

Although the court properly concluded that the evidence of defendant's refusal to submit to a chemical test was erroneously presented to the grand jury, we note that "'dismissal of an indictment under CPL 210.35(5) must meet a high test and is limited to instances of prosecutorial misconduct, fraudulent conduct or errors which potentially prejudice the ultimate decision reached by the [g]rand [j]ury.'" We agree with the People that there were no such instances here. Furthermore, we reject defendant's contention that the grand jury proceedings were impaired by the presentation of the inadmissible evidence. It is well settled that "not every . . . elicitation of inadmissible testimony . . . renders an indictment defective. Typically, the submission of some inadmissible evidence will be deemed fatal only when the remaining evidence is insufficient to sustain the indictment." We also agree with the People that the remaining admissible evidence was legally sufficient to support the indictment.

Id. at ___, 894 N.Y.S.2d at 798 (citations omitted).

APPENDIX 39

Department of Motor Vehicles' Counsel's Opinion Regarding VTL § 1194(A) Orders' Effect on Test Refusal

STATE OF NEW YORK

DEPARTMENT OF MOTOR VEHICLES

THE GOVERNOR NELSON A. ROCKEFELLER

JOHN A. PASSIDOMO
COMMISSIONER

EMPIRE STATE PLAZA

ALBANY, NEW YORK 12228

STANLEY M. GRUSS
DEPUTY COMMISSIONER AND COUNSEL

May 13, 1985

Peter Gerstenzang, Esq.
Gerstenzang, Weiner & Gerstenzang
41 State Street
Albany, New York 12207

Dear Mr. Gerstenzang:

You have requested an opinion regarding the ramifications of a chemical test of blood, ordered pursuant to Section 1194-a of the Vehicle and Traffic Law, on a prior refusal to submit to a breath test, resulting in the issuance of such order.

The procedure which ultimately results in a Department of Motor Vehicles' chemical test refusal hearing is set forth in Section 1194-2 of the Vehicle and Traffic Law. That procedure is initiated by the police officer's submission to the court of a written report of refusal. Section 1194-2 provides that such report must state that no chemical test was administered pursuant to Section 1194-a of the Vehicle and Traffic Law.

This is consistent with the intent of Section 1194, which is designed to provide an equivalent penalty for those who frustrate prosecution under Section 1192 of the Vehicle and Traffic Law by virtue of refusal. Where evidence of blood alcohol content is obtained under Section 1194-a, prosecution is not frustrated.

It is, therefore, this Department's opinion that a test ordered pursuant to Section 1194-a vitiates a prior chemical test refusal, and no departmental chemical test refusal hearing should be held in any such case.

If I may be of any further assistance, please do not hesitate to contact me.

Sincerely,

STANLEY M. GRUSS
Deputy Commissioner and Counsel

SMG/dc

APPENDIX 42

New York State Department of Motor Vehicles' Commissioner's Memorandum Regarding the Introduction of Report of Refusal in Evidence Pursuant to CPLR § 4520

Re: Peter D. Parucki
Administrative Appeals Board
Docket No. 9492

COMMISSIONER'S MEMORANDUM

Appellant appeals from a determination, after a hearing, revoking his driver's license for refusal to submit to a chemical test of blood alcohol content.

The arresting police officer did not testify at the chemical test refusal hearing, but the officer's Report of Refusal was admitted into evidence by the Administrative Law Judge. In accordance with the statute (Vehicle and Traffic Law, Section 1194(2)), the report was duly verified, contained the Penal Law warning that false statements therein were punishable as a Class A misdemeanor, and was subscribed by the arresting officer.

Appellant objected to the introduction of the Report of Refusal upon the ground that it denied him the opportunity to confront and cross-examine the arresting police officer. The objection was overruled and the report was admitted into evidence. Appellant did not testify nor offer any witnesses or evidence in his behalf.

The Report of Refusal indicated that appellant had been involved in an automobile accident and that he was arrested for driving while intoxicated after the responding officer observed a strong odor of alcoholic beverage on his breath. It also noted that appellant admitted he had been drinking beer. The Report of Refusal also contains the printed form statutory chemical test warning (Vehicle and Traffic Law, Section 1194(2))* which was checked to indicate that it had been recited to the appellant and further indicated that the time of arrest was 7:20 p.m. and the refusal occurred at 7:25 p.m.

*Section 1194(2) provides in pertinent part:

"2. If such person having been placed under arrest. . . and having thereafter been requested to submit to such chemical test and having been informed that his license or permit to drive and any non-resident operating privilege shall be immediately suspended and subsequently revoked for refusal to submit to such chemical test, whether or not he is found guilty of the charge for which he is arrested, refuses to submit to such test, . . . the test shall not be given and a written report of such refusal shall be immediately made by the police officer before whom such refusal was made."

101441

Under CPLR 4520, the Report of Refusal is an official record admissible into evidence and constitutes prima facie evidence of the facts stated therein. (See People v. Hisonoff, 293 NY 597 [medical examiner's autopsy report]; Borsellin v. Wickham Brothers, Inc., 6 AD 2d 784 [police accident report]; People v. Hoata, 102 Misc. 2d 1004 [breathalyzer test results].) In conformity with the statute, it is made in the course of a police officer's official duty, is duly sworn to or certified and filed in a public office as required by statute (Vehicle and Traffic Law, Section 1194(2)).

Absent substantial evidence to the contrary, a properly admitted Report of Refusal may constitute substantial evidence of a refusal to submit to a chemical test of blood alcohol content. (CPLR 7803(4); see Richardson v. Perales, 402 US 389, 402; People ex rel. Vega v. Smith, 66 NY 2d 130, 139-140; See Richardson on Evidence, Section 58 [10th ed.].

Also, where a motorist has not exercised his or her right to subpoena the arresting officer, (State Administrative Procedure Act, Section 304(2)) there is no denial of due process where a refusal report is admitted into evidence pursuant to CPLR 4520 and findings are made thereon, despite the report's hearsay character and the absence of cross-examination. (See Richardson v. Perales, supra at 402).

In this case, based upon the contents of the Report of Refusal and absent any evidence to the contrary, the Administrative Law Judge was entitled to find as he did that (1) the police officer had reasonable grounds to believe that appellant was driving while under the influence of alcohol; (2) that a lawful arrest was made; (3) that appellant was sufficiently warned of the consequences of a test refusal; and (4) that appellant refused to submit to a chemical test.

Accordingly, the determination is affirmed.

Patricia B. Adduci
Commissioner

(22649)

Dated:

APPENDIX 44

Memorandum of Sidney W. Berke, DMV Administrative Adjudication Office Director, Regarding Introduction of Report of Refusal into Evidence

State of New York - Department of Motor Vehicles

MEMORANDUM

TO: All Safety Administrative Law Judges DATE: June 5, 1986
FROM: Sidney W. Berke OFFICE: Administrative Adjudication
SUBJECT: C.T. Refusal Report: Police Officer
Absent Implementation Commissioner's
memorandum # 9492

As previously discussed in Sid Firestone's memorandum of July 8, 1985, when a police officer has failed to appear on more than one occasion, the refusal report should be admitted into evidence. It can constitute substantial evidence of refusal.

Attached is a commissioner's memorandum approving its use as substantial evidence to support a finding of refusal in the face of an argument that cross-examination was denied (the motorist did not testify). The police officer is to be considered a public officer, thereby invoking CPLR 4520 (and the common law rule; copies attached).

As noted in both memoranda, the report may be overcome by contrary, substantial evidence of the motorist or others. This is primarily a credibility determination for the A.L.J. The motorist's demeanor and the content of his testimony may show his testimony to be incomplete, contradictory, evasive, or incredible, and therefore insufficient to overcome the refusal report.

The finding of contrary substantial evidence is to be supported by the testimony of the motorist and any other evidence. It is your obligation to obtain the facts. Please also bear in mind that the evidence offered by the respondent affects the weight to be given the Report of Refusal, not its admissibility.

In adjudicated cases, a conviction may already exist on the alcohol charge underlying the refusal on which you are holding the hearing. If there has been a conviction or plea to 1192(2,3,4), then the issues of probable cause and lawful arrest are conclusively decided (collateral estoppel). If there has been a plea to 1192(1), it can be considered an admission against interest on these two issues, but is subject to attack and explanation by the motorist. If there has been an 1192(1) conviction after trial, then all issues must be established without reference to the conviction.

SIDNEY W. BERKE
Director

SWB:amb
Enc.

11/26/86
Particularly in the type of situation, where the officer is not present to testify, it is essential that the report state a valid reason for the initial stop. E.g. stopped for speeding, disobeying sign, crossing double yellow line etc.

APPENDIX 45

Letter from Joseph R. Donovan, DMV First Assistant Counsel, Regarding Removal of Dentures Prior to Breath Test

STATE OF NEW YORK

DEPARTMENT OF MOTOR VEHICLES

THE GOVERNOR NELSON A. ROCKEFELLER

PATRICIA B. ADOLPH
COMMISSIONER

EMPIRE STATE PLAZA

ALBANY, NEW YORK 12228

LEGAL DIVISION
JOSEPH R. DONOVAN
FIRST ASSISTANT COUNSEL

EDWARD A. SHERIDAN
DEPUTY COMMISSIONER AND COUNSEL

Peter Gerstenzang, Esq.
41 State Street
Albany, New York 12207

Dear Mr. Gerstenzang:

In your telephone conversation of March 12, 1966, with Mrs. Scrodanus of this office, you requested the departmental position on the requirement of police enforcement agencies to remove dentures prior to the administration of a breathalyzer exam.

The Department of Motor Vehicles will hold that a valid chemical test refusal finding has been made if an individual has refused to remove dentures prior to submitting to the breathalyzer examination. The finding of a chemical test refusal will be upheld by the department so long as:

- 1) the police enforcement personnel have advised the individual as to why the dentures must be removed and how such removal is necessary to the validity of the test, and
- 2) the police enforcement agency has incorporated the requirement for denture removal into its regulations for the administration of a breathalyzer exam.

I trust the above explanation shall prove both informative and helpful.

Very truly yours,

JOSEPH R. DONOVAN
First Assistant Counsel
JED:W

JRD/pr

APPENDIX 46

Letter from Joseph R. Donovan, DMV First Assistant Counsel, Regarding Police Department Procedures on Test Refusals and Removal of Dentures

STATE OF NEW YORK

DEPARTMENT OF MOTOR VEHICLES

THE GOVERNOR NELSON A. ROCKWELLER

PATRICIA B. ADDUCI
COMMISSIONER

80 FINE STATE PLAZA

LEGAL DIVISION
JOSEPH R. DONOVAN
FIRST ASSISTANT COUNSEL

EDWARD A. SHERIDAN
DEPUTY COMMISSIONER AND COUNSEL

ALBANY, NEW YORK 12228

January 13, 1987

Peter Gerstenzang
Gerstenzang, Weiner & Gerstenzang
Attorneys at Law
41 State Street
Albany, NY 12207-2835

Dear Peter:

Please excuse the delay in responding to your letter (and enclosures) of December 11, 1986, regarding police department regulations and procedures concerning denture removal and breath test administration.

If the procedures which you sent to me were followed, I am (virtually) certain that a chemical test refusal, based upon the failure to remove dentures, would be found. While I am not convinced that it is absolutely necessary that the requirement be incorporated into the police department regulations, it is clearly the safer course of action.

My opinion is that the procedure clearly overcomes the problem which gave rise to the reversal of the chemical test refusal finding in the Greenlee case.

Please do not hesitate to contact me if I may be of any further assistance.

Very truly yours,

JOSEPH R. DONOVAN
First Assistant Counsel

(115-01)

JRD/HWS/ms

APPENDIX 47

DMV Commissioner's Memorandum Regarding Test Refusals and the Right to Counsel

State of New York—Department of Motor Vehicles

MEMORANDUM

| | | | |
|-------|--|-------|------------------|
| TO: | All Safety ALJs | DATE: | May 8, 1990 |
| FROM: | George Christian | OF- | Admin. Adjudica- |
| | | FICE: | tion |
| SUB- | Chemical Test Refusal | | |
| JECT: | | | |
| | (1) effect of DWI conviction | | |
| | (2) refusal conduct—request for attorney | | |

Questions regarding the above subjects were raised at regional peer review meetings.

(1) Sometimes a refusal hearing will follow a judgment of conviction for DWI. The judgment should be treated as conclusive proof of the underlying facts, and the respondent cannot contest probable cause or arrest legality at the hearing. (See *People v. Thomas*, 74 A.D.2d 317, 428 N.Y.S.2d 20, affd. 53 N.Y.2d 338, 441 N.Y.S.2d 650, 424 N.E.2d 537; *Matter of Levy*, 37 N.Y.2d 279, 372 N.Y.S.2d 41, 333 N.E.2d 350; *S.T. Grand Inc. v. City of New York*, 32 N.Y.2d 300, 344 N.Y.S.2d 938, 298 N.E.2d 105; *Matter of Arancia v. Ambach*, 76 A.D.2d 967, 429 N.Y.S.2d 67.)

If there has been a judgment of conviction of DWAI, a traffic infraction, as the result of a plea, it is an admission against interest but respondent may contest all issues (*Ando v. Woodberry*, 8 N.Y.2d 165, 203 N.Y.S.2d 74, 168 N.E.2d 520.) If the DWAI judgment was by verdict after trial, there is no admission against interest and all issues may be contested. (See *Montalvo v. Morales*, 18 A.D.2d 20, 239 N.Y.S.2d 72; *Augustine v. Village of Interlaken*, 68 A.D.2d 705, 418 N.Y.S.2d 683 (4th Dep't 1979).)

(2) If a respondent is asked to take a chemical test, and responds by requesting the advice of an attorney, the police officer is not required, for Section 1194 purposes, to grant the

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HANDLING THE DWI CASE IN NEW YORK

request. However, if the officer does not inform the respondent that his request is denied and just records a refusal, there has not been a refusal. The respondent should be reasonably informed in some way (words, conduct, circumstances) that he is not going to be given a chance to consult with an attorney before his insistence on speaking to one can be considered a refusal.

GC: pa

APPENDIX 60

Letter from Department of Motor Vehicles Regarding Chemical Test Refusal



STATE OF NEW YORK
DEPARTMENT OF MOTOR VEHICLES
6 EMPIRE STATE PLAZA, ALBANY, NY 12228

RAYMOND P. MARTINEZ
Commissioner

JILL A. DUNN
Deputy Commissioner and Counsel

Legal Division
NEAL W. SCHOEN
Chief Counsel

January 4, 2002

Eric H. Sills, Esq.
Gerstenzang, O'Hern, Hickey & Gerstenzang
210 Great Oaks Boulevard
Albany, NY 12203

Re: Chemical Test Refusal

Dear Mr. Sills:

Neal Schoen has asked that I respond to your letter of December 26, 2001 regarding chemical test refusals.

You pose the following scenario: a motorist persistently refuses to submit to a properly requested chemical test. The motorist changes her mind and consents to take the test. The police allow her to take the test and a test result is obtained. Is this deemed a refusal?

Sanctions are imposed for those who refuse a chemical test because such refusal may frustrate the prosecution's case related to the underlying DWI charge. However, in the case you describe, the prosecution's case is not impaired because a test result is obtained. Thus, the Department would not deem this scenario to constitute a refusal.

Please do not hesitate to contact me if I can be of further assistance.

Very truly yours,

Ida L. Traschen
Associate Counsel

ILT/mw
cc: Lucia Ferrara
Sandy Sussman

APPENDIX 68

Department of Motor Vehicles' Counsel's Opinion Regarding Time Limitations for Chemical Test Refusals



DEPARTMENT OF MOTOR VEHICLES COUNSEL'S OFFICE

OPINION OF COUNSEL (#1-12)

Subject: Time Limitations for Chemical Test Refusals

Date: June 29, 2012

Question

Is a motorist deemed to have refused a chemical test when the refusal occurs more than two hours after the arrest?

Discussion

It has been the long-standing position of the Department of Motor Vehicles that a motorist is deemed to have refused to submit to a chemical if the refusal occurs within two hours of the motorist's arrest. As you are aware, that position was based solely on statutory interpretation, since there are no Court of Appeals decisions that directly speak to the issue. Those Court of Appeals opinions that do exist speak only to the admissibility of evidence of a refusal, or blood alcohol content evidence obtained more than two hours after arrest, at a criminal trial.

However, evolving case law on the issue clearly indicates that the courts have taken a more expansive view. In *People v. Atkins*, 85 N.Y.2d 1007 (1995), the motorist consented to a blood test within two hours of his arrest, but it was not administered until after the two hours had expired. The Court of Appeals admitted the results of the test, holding that the two-hour rule has no application where the defendant expressly consents to the test. Relying on the holding in *Atkins*, the court in *People v. Ward*, 176 Misc. 2d 398 (Sup. Ct. Richmond Co. 1998), deciding whether to admit evidence of a refusal obtained more than two hours after arrest, held that

if evidence of the results of a chemical test expressly consented to by a defendant and administered beyond the two-hour limit is competent, then evidence of a refusal to take such a test, obtained beyond the two-hour limit, must similarly be competent (see, *People v. Morales*, 161 Misc. 2d 128; contra, *People v. Walsh*, 139 Misc. 2d 161). A contrary conclusion would not only seem to defy reason, but would permit an operator of a motor vehicle to refuse a properly requested chemical test without consequence. 176 Misc. 2d at 403.

The Ward decision has been followed in several other cases, including People v. Elfe, 33 Misc. 3d 1221A (Sup. Ct. Bronx Co. 2011) and People v. Popko, 33 Misc. 3d 277 (Crim. Ct. Kings Co. 2011).

In light of these recent and well-reasoned holdings that the two-hour rule is inapplicable to refusals, it is the Department's view that a motorist who refuses to submit to a chemical test more than two hours after the time of arrest is deemed to have refused, assuming that the other statutory elements of a refusal (i.e., reasonable grounds, arrest, warning and refusal) are established at the hearing.

Topic 2:

Breath Test Issues

DEFENDING DWI CASES – THE CRITICAL ISSUES

BREATH TEST ISSUES

Presented By Steven Epstein

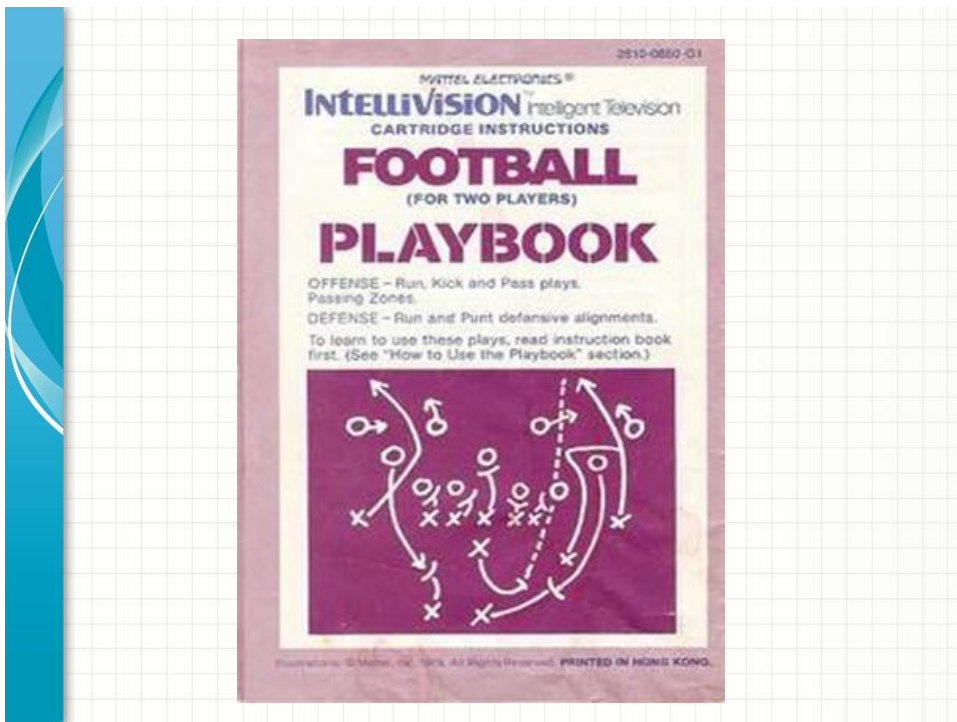
Barket, Marion, Epstein & Kearon, LLP

666 Old Country Road - Suite 700

Garden City, New York 11530

(O) 516-745-1500 (C) 516-650-1297

Sepstein@barketmarion.Com



The Playbook

1

- Manufacturer's Manual

2

- Literature (NCDD)

3

- 10 NYCRR 59.5

Breath Test Issues:

- Replicate Testing
- Mouth Alcohol & Slope Detector
- Partition Ratio
- Body Temperature
- 2 Hour Rule

Replicate Testing

1

- Measure Twice Cut Once

2

- NY Does Not Require Single Test

3

- Literature

“Repeating an analysis is a widely employed QA practice in chemical analysis. Collection and sequential analysis of at least two separate breath specimens has become accepted practice, as recommended by the NSC Committee on Alcohol and Other Drugs.”

Dubowski, K. M. "Quality Assurance in Breath-Alcohol Analysis." *Journal of Analytical Toxicology* 18.6 (1994): 306-11. Web.

Slope Detector and Mouth Alcohol

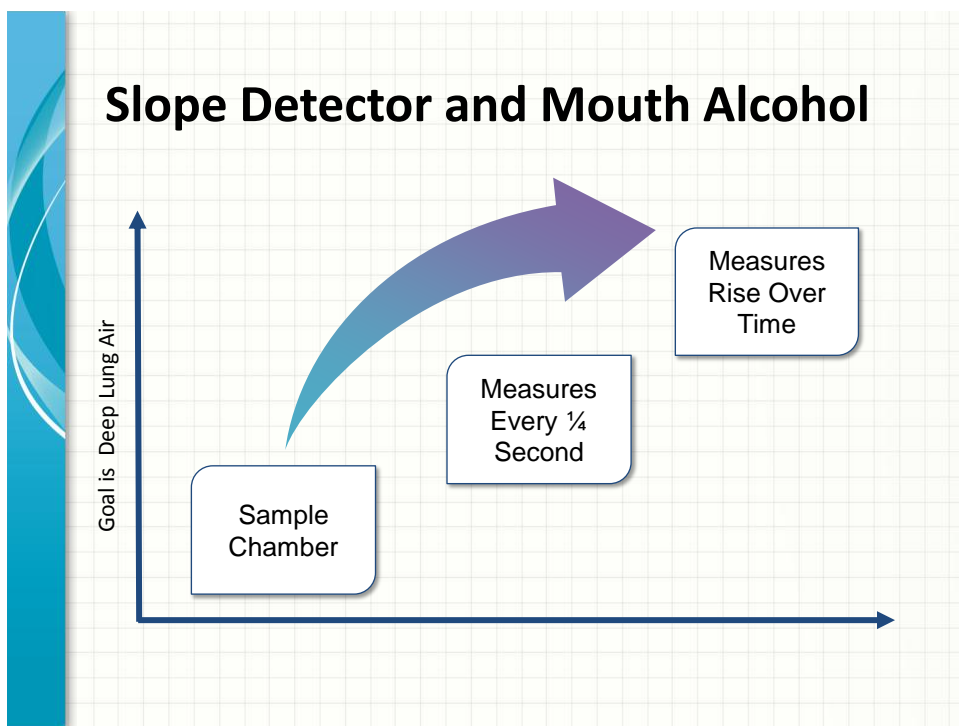
- One of the most common errors in breath testing is the presence of alcohol in the mouth which can falsely elevate the result dramatically.
- Breath testing devices assume the sample is 100% lung air and it multiplies the result by 2100 in order to get a blood alcohol reading.
- The presence of any amount of mouth alcohol can have a dramatic effect.



**TWO PRINCIPAL TOOLS ARE USED TO
SAFEGUARD AGAINST ERRORS CAUSED BY
MOUTH ALCOHOL:**

- 1. OBSERVATION PERIOD; AND**
- 2. SLOPE DETECTOR**








SLOPE DETECTOR CONCERNS:

- **PROPER CALIBRATION**
- **END BREATH CONTAMINATION**
- **SMALL QUANTITY CONTAMINATION
MIXED WITH LUNG AIR**
- **GERD**



2100:1 RATIO

BREATH TESTING DEVICES ARE
PROGRAMMED TO RECOGNIZE THAT
FOR EVERY ONE PART OF ALCOHOL IN
ONE'S BLOOD, THERE ARE 2100 PARTS
OF ALCOHOL IN ONE'S BREATH



Not One Size Fits All

- 900:1 to 3400:1
- If client has a true partition ratio of less than 2100 to one, this will actually artificially inflate his true blood alcohol level.
- NY is still BLOOD (BAC) not all are!

Partition Ratio

- Here's how to calculate your client's BAC if he has a lower partition ratio...
- $(\text{Client's BAC}) / 2100 \times (\text{lower partition ratio}) = \text{BAC}$

Partition Ratio

$$.100 / 2100 = .000047619$$

$$.000047619 \times 900 = .043$$

Body Temperature

- Henry's Law, formulated by William Henry in 1803, is bedrock principal of infrared spectroscopy.
- Simply stated, the following language appears in the operator's manual for the Intoxilyzer 5000EN...

“The concentration of a volatile substance in the air above a fluid is proportional to the concentration of the volatile substance in the fluid.”

Requirements of Henry's Law

- **Closed system**
- **Known and constant pressure**
- **Known and constant temperature**
- **Reaches equilibrium**

- They all agree temperature is important, e.g. Simulator
- Client's temperature not taken
- The machine assumes that your expired breath temperature is 34° Celsius. Is it correct?



34° C is Wrong

- In 1998 the International Association for Chemical Testing (IACT) published a literature review where they agreed that the average expired breath temperature was 35° C.
- Carpenter, D.A. and Buttram, J.A., Breath Temperature: An Alabama Perspective, IACT Newsletter, Vol. 9, No. 2, July, 1998.

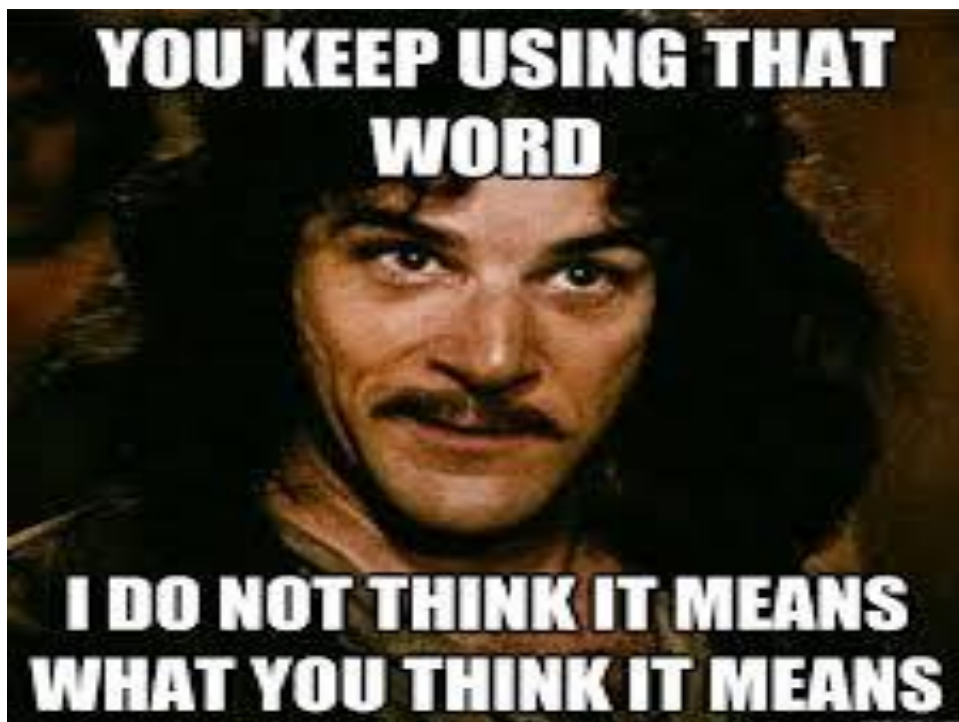
Fox, G.R. and Hayward J.S., Effect of Hyperthermia on Breath-alcohol Analysis, Journal of Forensic Science, 34(4): 836-41, July, 1989.

- In 1989 Fox and Hayward performed a study to measure how much breath readings are affected by having an elevated core body temperature.
- The BRAC increased over the BAC “8.6% for each degree Celsius increase in deep-core body temperature.”
- Still think .08 = .08?

| | | combined | |
|----------------------|------------------------------|----------|------|
| BRAC Reading of .100 | Partition Ratio 2300:1 | .110 | .149 |
| | Breath Temperature 8.6% Low | .109 | .139 |
| | Breathing Pattern 20% Low | .120 | .130 |
| | Machine Error 10% Low | .110 | |
| | | | |
| | Machine Error 10% High | .090 | |
| | Breathing Pattern 15% High | .085 | .075 |
| | Breath Temperature 8.6% High | .091 | .066 |
| | Partition Ratio of 1900:1 | .090 | .056 |
| | | | |

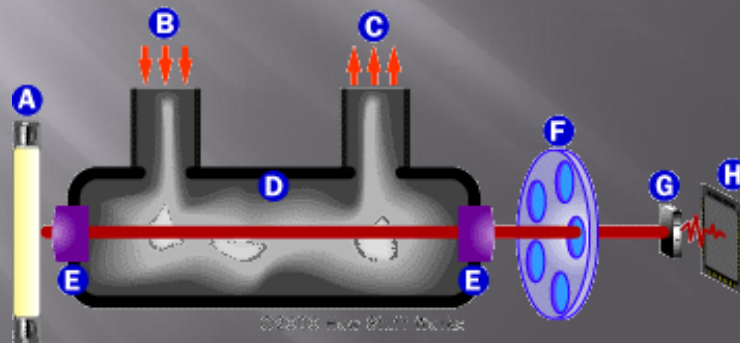
Two Hour Rule

- Two Hour Rule derives from VTL §1194(2)(a) (implied consent statute), but...
- People v. Atkins, 85 N.Y.2d 1007. Two Hour rule does not apply in cases of actual consent, but...
- Proper foundation is still required that result is relevant to BAC at time of operation. People v. Victory, 166 Misc.2d 549 (N.Y. Crim. Ct. 1995).



Fundamentals of Infrared Spectrophotometry

- | | |
|-------------------------------------|-------------------------|
| A Quartz lamp (IR source) | E Lenses |
| B Breath input | F Filter wheel |
| C Breath outlet | G Photocell |
| D Sample chamber | H Microprocessor |



Topic 3:

Stop & Arrest Issues

DEFENDING DWI CASES - THE CRITICAL ISSUES

STOP AND ARREST ISSUES

Sponsored by

THE NEW YORK STATE BAR ASSOCIATION

September 8, 2017 -- Buffalo/Amherst
September 14, 2017 -- New York City
September 28, 2017 -- Albany

Materials Prepared By

PETER GERSTENZANG, ESQ. and ERIC H. SILLS, ESQ.
GERSTENZANG, SILLS, COHN & GERSTENZANG
210 Great Oaks Boulevard
Albany, New York 12203
Tel: (518) 456-6456

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HANDLING THE DWI CASE IN NEW YORK

PART I

STOP AND ARREST

CHAPTER 1

ISSUES FROM THE STOP TO THE ARREST

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- § 1:4 Police jurisdiction to stop
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- § 1:21 Even where initial stop is lawful, continued detention may not be
- § 1:22 Length of traffic stop must be reasonable
- § 1:23 When can the police request a person's driver's license and registration?
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§ 1:1 In general

The typical arrest for Driving While Intoxicated (hereinafter "DWI") commences with a motorist attracting the attention of the police by driving erratically or otherwise violating some provision of the Vehicle and Traffic Law (hereinafter "VTL"). Once the motorist is pulled over, the police will invariably observe common indicia of intoxication (e.g., the odor of an alcoholic beverage, glassy/bloodshot eyes, flushed face, impaired speech, impaired motor coordination, etc.). The motorist will then generally be requested to submit to a variety of field sobriety tests and/or a breath screening test, following which he or she will be placed under arrest.

This chapter addresses a variety of common issues that arise in connection with DWI arrests.

§ 1:2 When can a police officer approach a parked vehicle?

The approach of a parked vehicle by a police officer is governed by the same rules that govern police-civilian street encounters. Such approaches are governed by People v. Hollman,

79 N.Y.2d 181, 581 N.Y.S.2d 619 (1992), and People v. DeBour, 40 N.Y.2d 210, 386 N.Y.S.2d 375 (1976). See also People v. Moore, 6 N.Y.3d 496, 498-99, 814 N.Y.S.2d 567, 568 (2006); People v. Ocasio, 85 N.Y.2d 982, 984, 629 N.Y.S.2d 161, 162 (1995) ("approach of a parked car may be undertaken for an objective, credible reason"). In both Hollman and DeBour, the Court of Appeals identified 4 levels of police-civilian street encounters -- (1) a request for information, (2) a common-law right of inquiry, (3) a forcible stop/detention, and (4) an arrest.

Pursuant to a DeBour level 1 request for information:

[P]olice officers have fairly broad authority to approach individuals and ask questions relating to identity or destination, provided that the officers do not act on whim or caprice and have an articulable reason not necessarily related to criminality for making the approach. DeBour also stands for the proposition that the brevity of the encounter and the absence of harassment or intimidation will be relevant in determining whether a police-initiated encounter is a mere request for information. * * *

[W]e emphasize that a request for information is a general, nonthreatening encounter in which an individual is approached for an articulable reason and asked briefly about his or her identity, destination, or reason for being in the area. If the individual is carrying something that would appear to a trained police officer to be unusual, the police officer can ask about that object.

Hollman, 79 N.Y.2d at 190, 191, 581 N.Y.S.2d at 624-25.

By contrast:

Once the police officer's questions become extended and accusatory and the officer's inquiry focuses on the possible criminality of the person approached, this is not a simple request for information. Where the person approached from the content of the officer's questions might reasonably believe that he or she is suspected of some wrongdoing, the officer is no longer merely asking for information. The encounter has become a common-law inquiry that must be supported by founded suspicion that criminality is afoot. No matter how calm the tone of [police] officers may be, or how

polite their phrasing, a request to search a bag is intrusive and intimidating and would cause reasonable people to believe that they were suspected of criminal conduct. These factors take the encounter past a simple request for information.

Id. at 191-92, 581 N.Y.S.2d at 625. Stated another way:

Once the officer asks more pointed questions that would lead the person approached reasonably to believe that he or she is suspected of some wrongdoing and is the focus of the officer's investigation, the officer is no longer merely seeking information. This has become a common-law inquiry that must be supported by a founded suspicion that criminality is afoot.

Id. at 185, 581 N.Y.S.2d at 621.

The distinction between a DeBour level 1 request for information and a DeBour level 2 common-law right of inquiry:

[R]ests on the content of the questions, the number of questions asked, and the degree to which the language and nature of the questions transform the encounter from a merely unsettling one to an intimidating one. We do not purport to set out a bright line test for distinguishing between a request for information and a common-law inquiry. These determinations can only be made on a case-by-case basis.

Id. at 192, 581 N.Y.S.2d at 625.

Applying these principles to the facts of the companion case of People v. Saunders, the Court of Appeals held that where the police officer only had enough information to support a DeBour level 1 request for information, it was improper for the officer to have requested permission to search the defendant's bag. Id. at 194, 581 N.Y.S.2d at 626 ("[Officer] Canale crossed the line, however, when he asked to search the defendant's bag. The defendant's behavior, while it may have provided the officer with adequate basis for an approach and for a few general, nonaccusatory questions, was certainly not so suspicious as to warrant the further intrusion of a request to rummage through the defendant's luggage. Because the defendant's consent was a product of the improper police inquiry, the Appellate Division was in error when it found that the defendant had in fact consented to the search of his bag"). See also Matter of Antoine W., 79 N.Y.2d 888, 889-90, 581 N.Y.S.2d 648, 648 (1992)

("Although the police had an 'objective credible reason' for approaching the defendant, the pointed questioning regarding the ownership of the bag and consent to search it was improper because it was not based on a founded suspicion of criminal activity"); People v. Irizarry, 79 N.Y.2d 890, 581 N.Y.S.2d 649 (1992) (same).

In People v. Harrison, 57 N.Y.2d 470, 478, 457 N.Y.S.2d 199, 204 (1982), the Court of Appeals agreed that:

[T]he defendants' use of a dirty rental car in the City of New York did not establish reasonable suspicion that they were involved in criminal conduct. Contrary to the dissenter's view it is not common knowledge that ordinarily rental cars are relatively clean and well maintained. Rental companies may rent their cars in that condition but their customers are not always so fastidious. The cars are often rented to individual customers for weeks or months at a time and it is not always possible, even for concerned customers, to maintain the cars in their original condition, particularly in large metropolitan areas.

The Court further agreed that the officers' demand that the vehicle's occupants remain in the vehicle was illegal absent reasonable suspicion that criminal activity was afoot. Id. at 476, 457 N.Y.S.2d at 202-03 ("Confining the occupants to the car, even temporarily, is at least equivalent to a stop. A temporary stop is . . . a limited seizure of the person which at least requires reasonable suspicion") (citations omitted). See also People v. Cantor, 36 N.Y.2d 106, 112-13, 365 N.Y.S.2d 509, 516 (1975) ("Reasonable suspicion is the quantum of knowledge sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe criminal activity is at hand"); People v. Sobotker, 43 N.Y.2d 559, 564, 402 N.Y.S.2d 993, 996 (1978) ("Mere 'hunch' or 'gut reaction' will not do"); People v. Pizzo, 144 A.D.2d 930, 534 N.Y.S.2d 249 (4th Dep't 1988).

In People v. McIntosh, 96 N.Y.2d 521, 525, 730 N.Y.S.2d 265, 267 (2001), the Court of Appeals noted that "[a]lthough police officers have 'fairly broad authority' to approach and pose questions, they may not do so on mere 'whim or caprice'; the request must be based on 'an articulable reason not necessarily related to criminality.'" (Citations omitted). Critically, the McIntosh Court pointed out that:

We have never held that a police encounter was justified by anything so general as knowledge that an entire city is a known source of drugs. Even a discrete area of a

city identified as a high crime area has not, by itself, been sufficient justification for informational requests

Id. at 526, 730 N.Y.S.2d at 267.

The McIntosh Court made clear, several times, that in order to satisfy Hollman and DeBour, the police need an "objective, credible reason" to approach an individual to request information *in addition to* the mere fact that the person is in a "high crime" or "high drug" area. Id. at 525, 730 N.Y.S.2d at 267; id. at 526, 730 N.Y.S.2d at 268; id. at 527, 730 N.Y.S.2d at 268; id. at 527, 730 N.Y.S.2d at 269. In this regard, the Court distinguished cases in which it had previously upheld requests for information, noting that in each such case the police had observed objective, credible suspicious activity above and beyond the mere fact that the defendant was located in a high crime or high drug area:

The events in all of these cases occurred in vicinities classified by police as "drug-prone" or with a high incidence of crime. Notably, we did not base our holdings on this factor alone. In determining the legality of an encounter under DeBour and Hollman, it has been crucial whether a nexus to conduct existed, that is, whether the police were aware of or observed conduct which provided a particularized reason to request information. The fact that an encounter occurred in a high crime vicinity, without more, has not passed DeBour and Hollman scrutiny.

Id. at 526-27, 730 N.Y.S.2d at 268. See also Matter of Michael F., 84 A.D.3d 468, 923 N.Y.S.2d 61 (1st Dep't 2011); People v. Miles, 82 A.D.3d 1010, 918 N.Y.S.2d 594 (2d Dep't 2011); People v. Mobley, 48 A.D.3d 374, 853 N.Y.S.2d 31 (1st Dep't 2008); People v. Rutledge, 21 A.D.3d 1125, 804 N.Y.S.2d 321 (2d Dep't 2005); People v. Chism, 194 A.D.2d 351, 598 N.Y.S.2d 481 (1st Dep't 1993); People v. Morrison, 161 A.D.2d 608, 555 N.Y.S.2d 183 (2d Dep't 1990); People v. Medda, 28 Misc.3d 1239(A), 958 N.Y.S.2d 309 (Nassau Co. Dist. Ct. 2010); People v. Powell, 16 Misc.3d 1115(A), 847 N.Y.S.2d 898 (Nassau Co. Dist. Ct. 2007); People v. Rosenbluth, 4 Misc.3d 1025(A), 798 N.Y.S.2d 347 (Suffolk Co. Dist. Ct. 2004); People v. McMaster, 3 Misc.3d 1107(A), 787 N.Y.S.2d 680 (Webster Just. Ct. 2004).

In People v. Karagoz, 143 A.D.3d 912, ___, 39 N.Y.S.3d 217, 220 (2d Dep't 2016), the Appellate Division, Second Department, held that the officer's initial contact with the defendant was a level 1 request for information rather than a level 2 common-law inquiry where:

Based on the testimony adduced at the suppression hearing, the officer had an objective, credible reason for approaching the defendant's vehicle and asking for her license, registration, and insurance card. The defendant's vehicle was oddly stopped in the left turning lane behind the officer's vehicle, when it was obvious that she could not make a left turn. The defendant could have easily proceeded north on Oceanside Road, but instead stopped her vehicle for several minutes behind the officer's vehicle. Under these circumstances, the officer had an objective, credible reason to approach the defendant's vehicle and request information.

§ 1:3 When can a police officer approach a vehicle that is stopped but not parked?

This issue was addressed in People v. Ocasio, 85 N.Y.2d 982, 629 N.Y.S.2d 161 (1995). In Ocasio, two police officers walked up to the defendant's vehicle -- which was stopped at a red light -- tapped on the window, displayed badges, and asked the defendant for identification. The Court of Appeals laid out the factors to be considered in determining whether such a "stop" is permissible:

Determination whether a seizure occurred here -- where the car was neither parked nor moving -- requires the fact finder to apply a settled standard: whether a reasonable person would have believed, under the circumstances, that the officer's conduct was a significant limitation on his or her freedom. That involves consideration of all the facts -- for example, was there a chase; were lights, sirens or a loudspeaker used; was the officer's gun drawn, was the individual prevented from moving; how many verbal commands were given; what was the content and tone of the commands; how many officers were involved; where did the encounter take place.

Id. at 984, 629 N.Y.S.2d at 162 (citation omitted).

Considering these factors, the Court held that:

While there may be instances in which approach of a car at a stoplight constitutes a seizure, the courts below, having considered the relevant factors, found no seizure. We cannot say, as a matter of law, that this determination was wrong.

Id. at 984-85, 629 N.Y.S.2d at 162.

In People v. Thomas, 19 A.D.3d 32, 38, 792 N.Y.S.2d 472, 477 (1st Dep't 2005), the Appellate Division, First Department, held that "police officers are entitled to conduct a level I inquiry of a person at the wheel of a stationary car that is blocking a fire hydrant." The Court further held that "[i]n concluding that the officer is justified in asking to see the license, we are influenced by the consideration that a person who stops a car alongside a fire hydrant plainly invites, and should reasonably expect, an interaction with law enforcement. We also conclude that a police approach to a person in a car that is already stopped does not constitute a level III 'forcible stop and detention', even if the police stop their vehicle in a position that incidentally blocks the civilian vehicle's path." Id. at 33, 792 N.Y.S.2d at 474 (citation omitted). See also People v. Grady, 272 A.D.2d 952, 708 N.Y.S.2d 765 (4th Dep't 2000). Cf. People v. Kojac, 176 Misc. 2d 187, 671 N.Y.S.2d 949 (N.Y. Co. Sup. Ct. 1998) (approach of stopped car illegal where approach was based on nothing more than a "hunch").

§ 1:4 Police jurisdiction to stop

Where a police officer observes an offense committed within the geographical area of the officer's employment, see CPL § 140.50(1), the officer may pursue and serve an appearance ticket upon the offender "anywhere in the county in which the designated offense was allegedly committed or in any adjoining county." CPL § 150.40(3). In addition:

A police officer may, for the purpose of serving an appearance ticket upon a person, follow him in continuous close pursuit, commencing either in the county in which the alleged offense was committed or in an adjoining county, in and through any county of the state, and may serve such appearance ticket upon him in any county in which he overtakes him.

CPL § 150.40(4).

If such a traffic stop evolves into an arrest for DWI, the arrest would likely be upheld. See People v. Leitch, 178 A.D.2d 864, 577 N.Y.S.2d 725 (3d Dep't 1991). In Leitch, a village police officer:

[W]itnessed a vehicle driven by defendant inside the Village limits following too closely behind another vehicle as it headed

out of the Village. The officer turned his vehicle around and began following defendant's car outside the Village limits. The officer observed that defendant failed twice to signal turns, failed to reduce his speed at an intersection and made a wide turn into the oncoming lane of traffic. Upon pulling over defendant's vehicle and asking to see his license and registration, the officer noticed a strong odor of alcohol emanating from the car. Defendant, whose eyes were glassy and bloodshot, admitted that he had no driver's license. After defendant performed poorly on various sobriety tests and an alco-sensor breath test administered by the officer, he was arrested for drunk driving.

Id. at 864, 577 N.Y.S.2d at 725-26. Relying on CPL § 140.10, the Appellate Division, Third Department, held that defendant's arrest was legal.

By contrast, if the initial conduct which attracted the officer's attention in Leitch had occurred outside of the geographical area of the officer's employment, the vehicle stop would have been illegal. In this regard, it is well settled that:

Although CPL 140.10(3) grants law enforcement officers the power to arrest a person without a warrant anywhere in the state for a crime they have probable cause to believe he committed, *the power to stop and question a person on reasonable suspicion of criminal activity is specifically limited by statute to the geographical area of the officer's employment* (CPL 140.50[1]).

Brewster v. City of New York, 111 A.D.2d 892, 893, 490 N.Y.S.2d 601, 602 (2d Dep't 1985) (emphasis added) (citation omitted). See also CPL § 140.50(1); People v. Wolf, 166 Misc. 2d 372, 636 N.Y.S.2d 570 (App. Term, 2d Dep't 1995); People v. Graham, 192 Misc. 2d 528, 531-532, 748 N.Y.S.2d 203, 206 (Erie Co. Sup. Ct. 2002) ("the Amherst police officer herein, restricted by the clear and unambiguous language of CPL § 140.10-2(a), exceeded his authority herein from the moment he illuminated the lights on his marked patrol vehicle for the purpose of stopping the defendant for petty offenses outside the Town of Amherst, his 'bailiwick'"); People v. Edmonds, 157 Misc. 2d 966, 599 N.Y.S.2d 441 (Dutchess Co. Ct. 1993). Cf. People v. Nenni, 269 A.D.2d 785, 704 N.Y.S.2d 405 (4th Dep't 2000) (Brewster and CPL § 140.50(1) inapplicable where police officer had probable cause to

arrest defendant at time of stop); People v. Nesbitt, 1 A.D.3d 889, 889-90, 767 N.Y.S.2d 187, 188 (4th Dep't 2003) (stop of defendant by village police officer *inside* village for traffic infractions he observed defendant commit *outside* village limits was lawful where the officer's observations of defendant's erratic driving outside of village "gave rise to reasonable suspicion that defendant was driving while intoxicated within the Village").

CPL § 140.50(1) provides, in pertinent part, that:

[A] police officer may stop a person in a public place located *within the geographical area of such officer's employment* when he reasonably suspects that such person is committing, has committed or is about to commit either (a) a felony[,] or (b) a misdemeanor defined in the penal law, and may demand of him his name, address and an explanation of his conduct.

(Emphasis added). In addition:

A county, city, town or village, as the case may be, constitutes the "geographical area of employment" of any police officer employed as such by an agency of such political subdivision or by an authority which functions only in such political subdivision.

CPL § 1.20(34-a)(b).

Since most DWI cases emanate from police observation of traffic infractions, CPL § 140.50(1) and Brewster should be asserted where the officer is improperly operating outside of his or her geographical area of employment.

In People v. Van Buren, 4 N.Y.3d 640, 644, 797 N.Y.S.2d 802, 803 (2005), the Court of Appeals held that "the New York City Department of Environmental Protection (DEP) Water Supply Police are authorized to enforce traffic laws within the city watershed." "This authority includes enforcing the Vehicle and Traffic Law, violations of which necessarily create a danger to the driver of an automobile, passengers and other members of the public." Id. at 648, 797 N.Y.S.2d at 806.

By contrast, in People v. Williams, 4 N.Y.3d 535, 538-39, 797 N.Y.S.2d 35, 37 (2005), the same Court held that a Housing Authority peace officer who acts (a) outside of the geographical jurisdiction of his employment, (b) under color of law, and (c) "with all the accouterments of official authority" cannot make a valid traffic stop/citizen's arrest.

§ 1:5 When can a police officer stop a moving vehicle?

"[T]he right to stop a moving vehicle is distinct from the right to approach the occupants of a parked vehicle." People v. Spencer, 84 N.Y.2d 749, 753, 622 N.Y.S.2d 483, 486 (1995). In this regard, a vehicle stop by the police is a DeBour level 3 seizure. See, e.g., People v. Ocasio, 85 N.Y.2d 982, 984, 629 N.Y.S.2d 161, 162 (1995); Spencer, 84 N.Y.2d at 753, 622 N.Y.S.2d at 485-86; People v. May, 81 N.Y.2d 725, 727, 593 N.Y.S.2d 760, 761-62 (1992); People v. Sobotker, 43 N.Y.2d 559, 563-64, 402 N.Y.S.2d 993, 995-96 (1978). Cf. People v. Johnson, 194 A.D.2d 870, 599 N.Y.S.2d 162 (3d Dep't 1993); People v. Holstein, 154 A.D.2d 905, 545 N.Y.S.2d 865 (4th Dep't 1989). So is a gunpoint stop by the police. See, e.g., People v. Moore, 6 N.Y.3d 496, 499, 814 N.Y.S.2d 567, 569 (2006); People v. Allende, 39 N.Y.2d 474, 384 N.Y.S.2d 416 (1976).

While a DeBour level 3 seizure requires "reasonable suspicion that a particular person has committed, is committing or is about to commit a felony or misdemeanor," People v. DeBour, 40 N.Y.2d 210, 223, 386 N.Y.S.2d 375, 385 (1976); see also People v. Cantor, 36 N.Y.2d 106, 112-13, 365 N.Y.S.2d 509, 516 (1975), in the context of vehicle stops the Court of Appeals has relaxed this standard to include probable cause to believe that a motorist has committed a traffic infraction. See People v. Robinson, 97 N.Y.2d 341, 354, 741 N.Y.S.2d 147, 155 (2001) ("the decision to stop a vehicle is reasonable where the police have probable cause to believe that a traffic infraction has occurred"). See also People v. Guthrie, 25 N.Y.3d 130, 133, 8 N.Y.S.3d 237, 240 (2015); Sobotker, *supra*, 43 N.Y.2d at 563, 402 N.Y.S.2d at 996; People v. Ingle, 36 N.Y.2d 413, 414, 369 N.Y.S.2d 67, 69 (1975).

Notably, however, the term "probable cause" as used in Robinson is akin to DeBour level 3 "reasonable suspicion" as opposed to DeBour level 4 "probable cause to arrest." In this regard, in Ingle, *supra*, the Court of Appeals made clear that:

A single automobile traveling on a public highway may be stopped . . . when a police officer reasonably suspects a violation of the Vehicle and Traffic Law. Absent reasonable suspicion of a vehicle violation, a "routine traffic check" to determine whether or not a vehicle is being operated in compliance with the Vehicle and Traffic Law is permissible only when conducted according to nonarbitrary, nondiscriminatory, uniform procedures for detecting violations. It should be emphasized that, in the context of a motor vehicle inspection "stop", the degree

of suspicion required to justify the stop is minimal. *Nothing like probable cause as that term is used in the criminal law is required.*
* * *

Thus, an arbitrary stop of a single automobile for a purportedly "routine traffic check" is impermissible unless the police officer reasonably suspects a violation of the Vehicle and Traffic Law. * * *

[I]n Pennsylvania an approach quite similar to that taken here was followed. *The position there taken, however, took the form of requiring as a basis for a "routine" traffic stop what was characterized as probable cause, but which may be no different than the reasonable suspicion suggested earlier as the basis for a "routine" traffic stop.*

It should be emphasized that the factual basis required to support a stop for a "routine traffic check" is minimal. An actual violation of the Vehicle and Traffic Law need not be detectable. For example, an automobile in a general state of dilapidation might properly arouse suspicion of equipment violations. All that is required is that the stop be not the product of mere whim, caprice, or idle curiosity. It is enough if the stop is based upon "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion."

Id. at 414-15, 419, 420, 369 N.Y.S.2d at 69, 74, 74-75 (emphases added) (citations omitted). See also Sobotker, 43 N.Y.2d at 563, 402 N.Y.S.2d at 996 ("our repeated decisions make abundantly clear that, absent at least a reasonable suspicion that its occupants had been, are then, or are about to be, engaged in conduct in violation of law, the stopping of an automobile by the police constitutes an impermissible seizure").

Robinson is somewhat difficult to reconcile with Sobotker and Ingle. In this regard, the Robinson Court stated that "[t]his Court has always evaluated the validity of a traffic stop based on probable cause that a driver has committed a traffic violation." 97 N.Y.2d at 350, 741 N.Y.S.2d at 152. However, Sobotker and Ingle clearly indicate that "reasonable suspicion" has always been the relevant legal standard. On the other hand, there probably isn't a meaningful distinction between "reasonable

suspicion" to believe that a person has committed a traffic infraction and "probable cause" to believe that he or she did so. See Ingle, 36 N.Y.2d at 420, 369 N.Y.S.2d at 74 ("what was characterized as probable cause . . . may be no different than the reasonable suspicion suggested earlier as the basis for a 'routine' traffic stop"). Cf. Matter of Deveines v. New York State Dep't of Motor Vehicles Appeals Bd., 136 A.D.3d 1383, ___, 25 N.Y.S.3d 760, 761 (4th Dep't 2016) ("'[s]ince Ingle, . . . the Court of Appeals has made it 'abundantly clear' . . . that 'police stops of automobiles in this State are legal only pursuant to routine, nonpretextual traffic checks to enforce traffic regulations or when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime' . . . [,] or where the police have 'probable cause to believe that the driver . . . has committed a traffic violation'"') (citation omitted).

The bottom line is this: the police can lawfully stop a vehicle whenever they (a) have probable cause to believe that the driver has committed a traffic infraction, (b) observe an equipment violation, (c) have reasonable suspicion that criminal activity is afoot, or (d) are properly administering a valid checkpoint. See Chapter 5, *infra*.

§ 1:5A When can a police officer "stop" a parked vehicle?

A police officer can "stop" a parked vehicle by, for example, using the officer's patrol car to prevent the parked vehicle from leaving a parking space, activating the police car's emergency lights and shining a light into the vehicle. In Matter of Stewart v. Fiala, 129 A.D.3d 852, ___, 12 N.Y.S.3d 138, 138 (2d Dep't 2015), the Appellate Division, Second Department, held that such a stop was illegal under the following circumstances:

On December 17, 2011, at 1:22 a.m., a police officer was patrolling West Boston Post Road in Mamaroneck as part of his assignment to a driving-while-intoxicated detail, when he observed a parked motor vehicle in the parking lot of a gym. The vehicle was parked in a marked space, with the front end of the vehicle facing a fence, while the back end was facing the lot. The lights of the vehicle were on, and its engine was running. It was the only vehicle in the lot. Although the gym was closed, the officer knew that patrons of the adjacent restaurant, which was open, parked their vehicles in the gym's lot.

The officer pulled his vehicle perpendicular to the rear of the parked vehicle, activated the emergency lights, and shined a light from his vehicle into the parked vehicle.

§ 1:5B When can a police officer stop a person suspected of being the victim of a crime?

In People v. Coronado, 139 A.D.3d 452, ___, 30 N.Y.S.3d 628, 629 (1st Dep't 2016):

Two police officers testified that they saw defendant sitting in the driver's seat of a car, while he and a man standing outside the car but inside the driver's open door were pushing and pulling each other. The police also heard yelling but could not understand what the men were saying. After defendant got out of the car, the two men walked together toward a nearby bar. The officers indicated that they suspected that the other man had been committing a crime against defendant, such as robbery, and had coerced him to walk away from the car. However, there is no testimony indicating that the officers believed that defendant was a perpetrator of a crime until after one of the officers forcibly stopped him, by grabbing him by the shoulder to stop him from moving away, and the police then observed signs that he was intoxicated, such as bloodshot, watery eyes and an odor of alcohol on his breath.

Under these circumstances, the Court held that:

The officers' reasonable belief that defendant might have been a crime victim "authorized the police to ask [him] questions . . . and to follow [him] while attempting to engage him -- but not to seize him in order to do so." * * *

Because proof of defendant's intoxication depended on the fruits of the unlawful stop, we dismiss the accusatory instrument.

Id. at ___, ___, 30 N.Y.S.3d at 629, 630 (citation omitted).

§ 1:5C When can a police officer ask the occupants of a lawfully stopped vehicle if they possess weapons?

In People v. Garcia, 20 N.Y.3d 317, 319-20, 959 N.Y.S.2d 464, 465 (2012), the Court of Appeals held as follows:

On this appeal, we must determine whether a police officer may, without founded suspicion for the inquiry, ask the occupants of a lawfully stopped vehicle if they possess any weapons. We answer in the negative and, in so holding, necessarily conclude that the graduated framework set forth in People v. De Bour and People v. Hollman for evaluating the constitutionality of police-initiated encounters with private citizens applies with equal force to traffic stops.

(Citations omitted). See also id. at 324, 959 N.Y.S.2d at 468 ("Whether the individual questioned is a pedestrian or an occupant of a vehicle, a police officer who asks a private citizen if he or she is in possession of a weapon must have founded suspicion that criminality is afoot").

Critically, the Garcia Court made clear that this rule also applies to more general questions such as "Is there anything in the car I should know about?" Id. at 323 n.* 959 N.Y.S.2d at 468 n.*.

§ 1:6 Standard for stop differs from standard for arrest

It is well settled that an entirely different legal standard applies to the stop of a motor vehicle for a traffic infraction (*i.e.*, reasonable suspicion) than applies to the arrest of an occupant of the vehicle for a crime (*i.e.*, probable cause). As is noted in the previous section, a vehicle stop by the police is a DeBour level 3 seizure requiring reasonable suspicion. By contrast, an arrest for a crime such as DWI is a DeBour level 4 seizure requiring probable cause. See, *e.g.*, People v. Moore, 32 N.Y.2d 67, 70, 343 N.Y.S.2d 107, 111 (1973) ("the standard of reasonable suspicion to stop is lower than the standard of probable cause for an arrest"); People v. Martinez, 80 N.Y.2d 444, 447, 591 N.Y.S.2d 823, 824 (1992); People v. Sobotker, 43 N.Y.2d 559, 402 N.Y.S.2d 993 (1978); People v. Ingle, 36 N.Y.2d 413, 369 N.Y.S.2d 67 (1975); People v. Hollman, 79 N.Y.2d 181, 581 N.Y.S.2d 619 (1992); People v. DeBour, 40 N.Y.2d 210, 386 N.Y.S.2d 375 (1976). See also People v. Sarfaty, 291 A.D.2d 889, 889-90, 736 N.Y.S.2d 817, 818 (4th Dep't 2002); People v. Pistone, 284 A.D.2d 415, ___, 727 N.Y.S.2d 439, 440 (2d Dep't 2001); People v. Swanston, 277 A.D.2d 600, ___, 716 N.Y.S.2d 118, 121 (3d Dep't 2000); People v. Sawinski, 246 A.D.2d 689, ___, 667

N.Y.S.2d 472, 473 (3d Dep't 1998); People v. May, 191 A.D.2d 1011, ___, 595 N.Y.S.2d 165, 166 (4th Dep't 1993); People v. Barnum, 175 A.D.2d 332, ___, 572 N.Y.S.2d 88, 89 (3d Dep't 1991); People v. Dunlap, 163 A.D.2d 814, ___, 558 N.Y.S.2d 347, 348 (4th Dep't 1990).

§ 1:7 Can the police issue tickets for unobserved traffic infractions?

Pursuant to CPL § 140.10(1)(a), a police officer can only make a warrantless arrest for a traffic infraction when the officer has reasonable cause to believe that such infraction was *committed in his or her presence*. See § 1:8, *infra*. This raises the question of whether a police officer can validly issue a ticket for an unobserved traffic infraction.

In People v. Boback, 23 N.Y.2d 189, 191-92, 295 N.Y.S.2d 912, 914 (1968), the Court of Appeals held that "the use of the Simplified Traffic Information is authorized where the information is signed by an officer whose knowledge of the facts is based upon information and belief." See also *id.* at 194, 295 N.Y.S.2d at 917 ("It is . . . evident that neither the language nor the legislative history of the Simplified Traffic Information statute limits the use of the information to those cases where the officer making the information has some personal knowledge of the violation"); Farkas v. State of New York, 96 Misc. 2d 784, ___, 409 N.Y.S.2d 696, 698-99 (Ct. of Claims 1978); 1987 N.Y. Op. Atty. Gen. (Informal Opinion No. 87-78). Cf. People v. Genovese, 156 Misc. 2d 569, 593 N.Y.S.2d 925 (Mendon Just. Ct. 1992) (reaching opposite conclusion).

The authors would like to thank Deputy James Di Mele of the Ulster County Sheriff's Office, who brought to our attention convincing authority supporting the position that police officers can issue STIs for unobserved traffic infractions.

It should be noted that issuance of a traffic ticket is not an arrest. See, e.g., People v. Marsh, 20 N.Y.2d 98, 100, 281 N.Y.S.2d 789, 791 (1967); People v. McMillan, 112 Misc. 2d 901, 902, 447 N.Y.S.2d 626, 628 (Monroe Co. Ct. 1982); Farkas, supra; Matter of Coville v. Bennett, 57 Misc. 2d 838, 839, 293 N.Y.S.2d 685, 687 (Ontario Co. Sup. Ct. 1968).

§ 1:8 Can the police arrest a person for a mere traffic infraction?

The statutory authority for making a warrantless arrest is set forth in CPL Article 140. In the field of DWI law, the primary authority for a warrantless arrest comes from CPL § 140.10. CPL § 140.10 provides, in pertinent part:

§ 140.10. Arrest without a warrant; by police officer; when and where authorized.

1. Subject to the provisions of subdivision two, a police officer may arrest a person for:
 - (a) Any offense when he or she has reasonable cause to believe that such person has committed such offense in his or her presence; and
 - (b) A crime when he or she has reasonable cause to believe that such person has committed such crime, whether in his or her presence or otherwise.
2. A police officer may arrest a person for a petty offense, pursuant to subdivision one, only when:
 - (a) Such offense was committed or believed by him or her to have been committed within the geographical area of such police officer's employment or within [100] yards of such geographical area; and
 - (b) Such arrest is made in the county in which such offense was committed or believed to have been committed or in an adjoining county; except that the police officer may follow such person in continuous close pursuit, commencing either in the county in which the offense was or is believed to have been committed or in an adjoining county, in and through any county of the state, and may arrest him or her in any county in which he or she apprehends him or her.
3. A police officer may arrest a person for a crime, pursuant to subdivision one, whether or not such crime was committed within the geographical area of such police officer's employment, and he or she may make such arrest within the state, regardless of the situs of the commission of the crime. In addition,

he or she may, if necessary, pursue such person outside the state and may arrest him or her in any state the laws of which contain provisions equivalent to those of section 140.55.

CPL § 140.10(1)-(3).

For purposes of CPL § 140.10, a traffic infraction is an offense. See, e.g., VTL § 155 ("For purposes of arrest without a warrant, pursuant to [CPL Article 140], a traffic infraction shall be deemed an offense"); PL § 10.00(2) ("'Traffic infraction' means any offense defined as 'traffic infraction' by [VTL § 155]"); CPL § 1.20(39) ("'Petty offense' means a violation or a traffic infraction").

Although it is clear that a police officer has the authority to arrest a person for a mere traffic infraction (committed in his or her presence), see, e.g., CPL § 140.10(1)(a); Atwater v. City of Lago Vista, 532 U.S. 318, 354, 121 S.Ct. 1536, 1557 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender"), it is equally clear that doing so is both uncommon and disfavored. See, e.g., People v. Marsh, 20 N.Y.2d 98, 100, 281 N.Y.S.2d 789, 791 (1967); People v. Cooper, 38 A.D.3d 678, ___, 833 N.Y.S.2d 118, 120 (2d Dep't 2007); People v. Bulgin, 29 Misc. 3d 286, ___, 908 N.Y.S.2d 817, 827 (Bronx Co. Sup. Ct. 2010); Preiser, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 11A, CPL § 140.10. See generally People v. Howell, 49 N.Y.2d 778, 426 N.Y.S.2d 477 (1980); People v. Troiano, 35 N.Y.2d 476, 363 N.Y.S.2d 943 (1974).

Indeed, the whole purpose of permitting uniform traffic tickets, see VTL § 207, and appearance tickets, see CPL Article 150, is to avoid full-blown arrests/detentions for relatively minor offenses.

§ 1:9 Can the police arrest a person for an unobserved DWAI?

Pursuant to CPL § 140.10(1)(a), a police officer can only make a warrantless arrest for a traffic infraction when the officer has reasonable cause to believe that such infraction was committed in his or her presence. See previous section. Since DWAI, in violation of VTL § 1192(1), is generally a traffic infraction, see VTL § 1193(1)(a), it would appear that a police officer could not arrest a person for DWAI unless the officer had personally observed the person operate the vehicle. In this regard, however, VTL § 1194(1)(a) provides that:

1. Arrest and field testing. (a) Arrest. Notwithstanding the provisions of [CPL § 140.10], a police officer may, without a warrant, arrest a person, in case of a violation of [VTL § 1192(1)], if such violation is coupled with an accident or collision in which such person is involved, which in fact has been committed, though not in the police officer's presence, when the officer has reasonable cause to believe that the violation was committed by such person.

§ 1:10 When can a police officer pursue a fleeing person?

In People v. Holmes, 81 N.Y.2d 1056, 601 N.Y.S.2d 459 (1993), the Court of Appeals addressed the issue of when a police officer can lawfully pursue a person who responds to a valid DeBour request for information by fleeing. In this regard, the Court held that:

Flight alone, however, or even in conjunction with equivocal circumstances that might justify a police request for information, is insufficient to justify pursuit because an individual has a right "to be let alone" and refuse to respond to police inquiry. * * *

While the police may have had an objective credible reason to approach defendant to request information -- having observed him in a "known narcotics location" with an unidentified bulge in the pocket of his jacket -- those circumstances, taken together with defendant's flight, could not justify the significantly greater intrusion of police pursuit. Defendant was merely observed in the daytime, talking with a group of men on a New York City street. Given the unfortunate reality of crime in today's society, many areas of New York City, at one time or another, have probably been described by the police as "high crime neighborhoods" or "narcotics-prone locations." Moreover, a bulging jacket pocket is hardly indicative of criminality. As we have recognized, a pocket bulge, unlike a waistband bulge, "could be caused by any number of innocuous objects."

If these circumstances could combine with flight to justify pursuit, then in essence the right to inquire would be tantamount to

the right to seize, and there would, in fact, be no right "to be let alone." That is not, nor should it be, the law.

Id. at 1058, 601 N.Y.S.2d at 461 (citations omitted). See also People v. May, 81 N.Y.2d 725, 593 N.Y.S.2d 760 (1992) (police cannot stop vehicle based solely upon fact that vehicle was parked on a desolate street in a high crime area and the driver slowly pulled away when the police approached).

§ 1:11 When is a vehicle stop improper?

Since the police can lawfully stop a vehicle whenever they have probable cause to believe that the driver has committed a traffic infraction -- no matter how minor -- there is little need to provide a comprehensive list of cases holding that a vehicle stop was lawful. By contrast, since there are comparatively few cases holding that a vehicle stop was improper, a comprehensive list of such cases is useful.

Vehicle stops have been found to be improper under the following circumstances:

1. Where the stop was nothing more than a "routine traffic check." Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391 (1979); People v. Simone, 39 N.Y.2d 818, 385 N.Y.S.2d 765 (1976); People v. Ingle, 36 N.Y.2d 413, 369 N.Y.S.2d 67 (1975); People v. Mason, 69 A.D.2d 769, 415 N.Y.S.2d 31 (1st Dep't 1979); People v. Mestey, 61 A.D.2d 447, 402 N.Y.S.2d 577 (1st Dep't 1978); People v. Conroy, 51 A.D.2d 1007, 380 N.Y.S.2d 766 (2d Dep't 1976); People v. Deacy, 140 Misc. 2d 232, 530 N.Y.S.2d 753 (Nassau Co. Dist. Ct. 1988);
2. Where there was a lack of probable cause to believe that the defendant committed a traffic infraction. People v. Chilton, 69 N.Y.2d 928, 516 N.Y.S.2d 633 (1987); People v. Mandato, 195 Misc. 2d 636, 760 N.Y.S.2d 809 (App. Term, 2d Dep't 2003);
3. Where the stop was based solely upon the fact that the vehicle was parked on a desolate street in a high crime area and the driver slowly pulled away when the police approached. People v. May, 81 N.Y.2d 725, 593 N.Y.S.2d 760 (1992);
4. Where the stop was based upon the officer's opinion that the occupants of the vehicle looked "suspicious," the vehicle or its occupants "seemed out of place," or the officer sensed that "something was not right." People v. Lopez, 75 A.D.3d 610, 905 N.Y.S.2d 647 (2d

Dep't 2010); People v. Hoglen, 162 A.D.2d 1036, 557 N.Y.S.2d 817 (4th Dep't 1990); People v. Murray, 48 A.D.2d 907, 370 N.Y.S.2d 10 (2d Dep't 1975); People v. Deer, 39 Misc. 3d 677, 960 N.Y.S.2d 891 (St. Lawrence Co. Ct. 2013); People v. Mejia, 133 Misc. 2d 755, 507 N.Y.S.2d 957 (Bronx Co. Sup. Ct. 1986); Blanchfield v. State of New York, 104 Misc. 2d 21, 427 N.Y.S.2d 682 (Ct. Cl. 1980);

5. Where the purpose of the stop was to request information of the driver concerning the whereabouts of a criminal suspect or if he knew anything about a recent crime. People v. Spencer, 84 N.Y.2d 749, 622 N.Y.S.2d 483 (1995); People v. Taylor, 31 A.D.3d 1141, 817 N.Y.S.2d 816 (4th Dep't 2006); People v. Washburn, 309 A.D.2d 1270, 765 N.Y.S.2d 76 (4th Dep't 2003); People v. McMaster, 3 Misc.3d 1107(A), 787 N.Y.S.2d 680 (Webster Just. Ct. 2004). Cf. Illinois v. Lidster, 540 U.S. 419, 124 S.Ct. 885 (2004); People v. John BB., 56 N.Y.2d 482, 453 N.Y.S.2d 158 (1982);
6. Where the stop was based upon the officer's "hunch" that a crime was about to be committed. People v. Sobotker, 43 N.Y.2d 559, 402 N.Y.S.2d 993 (1978); People v. Farrell, 90 A.D.2d 396, 457 N.Y.S.2d 260 (1st Dep't 1982), aff'd, 59 N.Y.2d 686, 463 N.Y.S.2d 416 (1983);
7. Where the stop was based upon the officer's "hunch" that a crime had recently been attempted/committed. People v. Peterson, 266 A.D.2d 738, 698 N.Y.S.2d 777 (3d Dep't 1999); People v. Sunley, 171 A.D.2d 1063, 568 N.Y.S.2d 994 (4th Dep't 1991); People v. Cascio, 63 A.D.2d 183, 407 N.Y.S.2d 703 (2d Dep't 1978); People v. Gutierrez, 3 Misc.3d 1107(A), 787 N.Y.S.2d 680 (Nassau Co. Dist. Ct. 2005);
8. Where the stop was based upon the officer's "hunch" that the defendant -- who the police were looking for -- was the driver of the car. People v. Lindsey, 13 A.D.3d 651, 787 N.Y.S.2d 385 (2d Dep't 2004), aff'g 2004 WL 1087381 (Kings Co. Sup. Ct.);
9. Where the stop was "[d]ue to the rash of crimes in the immediate area." People v. McMaster, 3 Misc.3d 1107(A), 787 N.Y.S.2d 680, *1 (Webster Just. Ct. 2004);
10. Where the stop was made pursuant to an invalid checkpoint. See Chapter 5, *infra*;
11. Where the stop was due to the defendant's purported evasion of a sobriety checkpoint. People v. Bigger, 2 Misc. 3d 937, 771 N.Y.S.2d 826 (Webster Just. Ct.

2004); People v. Rocket, 156 Misc. 2d 641, 594 N.Y.S.2d 568 (Pleasant Valley Just. Ct. 1992). Cf. People v. Chaffee, 183 A.D.2d 208, 590 N.Y.S.2d 625 (4th Dep't 1992);

12. Where the stop was based upon a mistake of law (*i.e.*, where the officer's belief that the defendant had committed a VTL infraction was based on an erroneous interpretation of the law). See § 1:12, *infra*;
13. Where the stop was an invalid anonymous tip stop. See § 1:13, *infra*;
14. Where the testimony of the arresting officer(s) at a suppression hearing was not credible. People v. Anokye, 88 A.D.3d 736, 930 N.Y.S.2d 485 (2d Dep't 2011); People v. Lewis, 195 A.D.2d 523, 600 N.Y.S.2d 272 (2d Dep't 1993); People v. Akwa, 151 Misc. 2d 106, 573 N.Y.S.2d 216 (Kings Co. Sup. Ct. 1991); People v. Jones, 125 Misc. 2d 91, 477 N.Y.S.2d 975 (N.Y. Co. Sup. Ct. 1984); People v. Ananaba, 25 Misc.3d 1242(A), 906 N.Y.S.2d 781 (Queens Co. Sup. Ct. 2009); People v. Aquiar, 2003 WL 21739071 (Westchester Co. Ct. 2003);
15. Where the police lacked reasonable suspicion that criminal activity was afoot. People v. Layou, 71 A.D.3d 1382, 897 N.Y.S.2d 325 (4th Dep't 2010); People v. Solano, 46 A.D.3d 1223, 848 N.Y.S.2d 431 (3d Dep't 2007); People v. Brown, 112 A.D.2d 945, 492 N.Y.S.2d 625 (2d Dep't 1985); People v. Spicer, 105 A.D.2d 1100, 482 N.Y.S.2d 169 (4th Dep't 1984); People v. Corcoran, 89 A.D.2d 696, 453 N.Y.S.2d 877 (3d Dep't 1982); People v. La Borde, 66 A.D.2d 803, 410 N.Y.S.2d 886 (2d Dep't 1978);
16. Where the stop was based upon a claim that the vehicle was observed driving erratically almost an hour earlier. People v. Royko, 201 A.D.2d 863, 607 N.Y.S.2d 515 (4th Dep't 1994);
17. Where the stop was based upon the fact that the defendant was driving slowly, had an out-of-State license plate, or appeared to be lost. People v. Joe, 63 A.D.2d 737, 405 N.Y.S.2d 295 (2d Dep't 1978). See also People v. Conroy, 51 A.D.2d 1007, 380 N.Y.S.2d 766 (2d Dep't 1976); People v. Bergers, 50 A.D.2d 764, 377 N.Y.S.2d 67 (1st Dep't 1975);
18. Where the description of the vehicle/person the police were looking for was too vague. People v. Tindal, 231 A.D.2d 404, ___, 646 N.Y.S.2d 814, 814 (1st Dep't 1996) ("absent some additional information identifying the

vehicle involved in the alleged crime beyond its make and color or distinguishing the driver from other young black males with a commonly worn haircut, the information available to the officers fell far short of that required to justify a stop of defendant's vehicle 24 hours after receipt of this general, limited information provided by the complainant");

19. Where the stop was based upon a vague police radio transmission. People v. Nicodemus, 247 A.D.2d 833, ___, 669 N.Y.S.2d 98, 99 (4th Dep't 1998) ("The dispatch did not give a description of the robbers and did not mention a vehicle. It stated only that two males, one of whom wore a mask, had left the scene on foot"); People v. Crump, 217 A.D.2d 902, 629 N.Y.S.2d 602 (4th Dep't 1995) (a "dark-colored vehicle" -- possibly a Cadillac -- was seen speeding from a specified area); People v. Scheu, 177 Misc. 2d 922, 677 N.Y.S.2d 904 (Nassau Co. Dist. Ct. 1998) (a "part of a partial plate" of a "dark Ford");
20. Where the vehicle that was stopped did not sufficiently match the description of the vehicle that the officer was theoretically looking for. People v. Brooks, 266 A.D.2d 864, 697 N.Y.S.2d 804 (4th Dep't 1999);
21. Where the vehicle was stopped a second time, by a second set of officers, based upon their opinion that the first set of officers had conducted an inadequate search (even though they were apparently correct). People v. Major, 263 A.D.2d 360, 693 N.Y.S.2d 30 (1st Dep't 1999);
22. Where the stop was based upon the defendant's failure to signal a right turn upon leaving a parking lot. Matter of Byer v. Jackson, 241 A.D.2d 943, 661 N.Y.S.2d 336 (4th Dep't 1997); People v. Silvers, 195 Misc. 2d 739, 761 N.Y.S.2d 472 (Mount Vernon City Ct. 2003); People v. Mazzola, 2006 WL 1540297 (Suffolk Co. Dist. Ct. 2006);
23. Where the stop was based upon the fact that the defendant was leaving the parking lot of a closed group home shortly after midnight. People v. Stock, 57 A.D.3d 1424, 871 N.Y.S.2d 545 (4th Dep't 2008);
24. Where the defendant was driving through the parking lot of a closed car dealership -- where crimes had recently been committed -- at approximately 1:00 AM. Matter of Byer v. Jackson, 241 A.D.2d 943, 661 N.Y.S.2d 336 (4th Dep't 1997). See also People v. Buttitta, 2010 WL 1293759 (Pendleton Just. Ct. 2010) (similar facts);

25. Where the stop was based upon a claim that the defendant's vehicle had insufficient plate lamps, but there was insufficient proof supporting this claim at a probable cause hearing. People v. Lang, 2011 WL 539901 (Webster Just. Ct. 2011);
26. Where the stop was based upon an air freshener hanging from the defendant's rearview mirror that did not violate VTL § 375(30). People v. O'Hare, 73 A.D.3d 812, 900 N.Y.S.2d 400 (2d Dep't 2010);
27. Where the stop was based upon the fact that one of the defendant's passengers was hanging out of the vehicle's window apparently making a remark to a person on a nearby sidewalk. People v. Henry, 159 A.D.2d 990, 552 N.Y.S.2d 749 (4th Dep't 1990);
28. Where the stop was based upon the defendant's vehicle weaving within its own lane. People v. Culcross, 184 Misc. 2d 67, 706 N.Y.S.2d 605 (Monroe Co. Ct. 2000) (defendant's vehicle "swerved" within its lane twice and the front tire "struck" the center dotted line once); People v. Teall, 2011 WL 3198874 (Rochester City Court 2011); People v. Lochan, 2009 WL 944246 (N.Y. City Crim. Ct. 2009);
29. Where the defendant was stopped solely because his right front tire traveled partially onto the fog line 3 or 4 times. People v. Davis, 58 A.D.3d 896, 870 N.Y.S.2d 602 (3d Dep't 2009);
30. Where the stop was based upon the fact that the defendant briefly crossed the fog line. People v. Schoonmaker, 2014 WL 2863707 (Red Hook Just. Ct. 2014); People v. Luster, 35 Misc. 3d 735, 946 N.Y.S.2d 407 (Suffolk Co. Dist. Ct. 2012); People v. Bordeaux, 2008 WL 4700522 (Essex Co. Ct. 2008); People v. Fisher, 2008 WL 3865212 (Wappinger Just. Ct. 2008). Cf. People v. Wohlers, 138 A.D.2d 957, ___, 526 N.Y.S.2d 290, 290 (4th Dep't 1988) ("the court's finding that defendant's vehicle 'strayed slightly to the right of the driving lane' established a valid basis for the stop. Such conduct is a violation of Vehicle and Traffic Law § 1128(a), which requires drivers to remain in lane"). See generally People v. Morales, 2017 WL 487659, *3 (App. Term, 9th & 10th Jud. Dist. 2017) ("While crossing a single solid white line is discouraged, it is not prohibited. As the only proof in the record of defendant disobeying a traffic control device is that he apparently drove his vehicle across the solid white line marking the shoulder, the judgment convicting defendant of failing to obey a traffic control device

cannot stand") (citations omitted); People v. Hollinger, 2002 WL 31508863 (App. Term, 9th & 10th Jud. Dist. 2002) (same);

31. Where the stop was based upon an alleged "high beams" violation, but the defendant's conduct did not actually hinder or hamper the officer's ability to operate his vehicle. People v. Allen, 89 A.D.3d 742, 932 N.Y.S.2d 142 (2d Dep't 2011); People v. Rose, 67 A.D.3d 1447, 889 N.Y.S.2d 789 (4th Dep't 2009); People v. Garlock, 2010 WL 4670880 (Lockport Just. Ct. 2010);
32. Where the stop was based upon the fact that the defendant floored the gas pedal of his vehicle and squealed the tires, "leaving rubber." People v. Simmons, 58 A.D.2d 524, 395 N.Y.S.2d 188 (1st Dep't 1977);
33. Where the stop was based upon the fact that the defendant caused his moving vehicle to "fishtail." Matter of McDonell v. New York State Dep't of Motor Vehicles, 77 A.D.3d 1379, 908 N.Y.S.2d 507 (4th Dep't 2010); cf. People v. Petri, _____ A.D.3d _____, N.Y.S.3d _____, 2017 WL 3176236 (3d Dep't 2017);
34. Where the stop was based upon the fact that the defendant, who had been stopped at a red light, did not start until the light had turned from green to yellow. People v. Martinez, 31 Misc. 3d 201, 915 N.Y.S.2d 819 (Nassau Co. Dist. Ct. 2011);
35. Where the stop was based upon the fact that the defendant was driving below the posted speed limit. People v. Beeney, 181 Misc. 2d 201, 694 N.Y.S.2d 583 (Monroe Co. Ct. 1999);
36. Where the defendant technically committed an offense, but did so as the result of an involuntary act. PL § 15.10; People v. Marzulli, 76 Misc. 2d 971, 351 N.Y.S.2d 775 (App. Term, 2d & 11th Jud. Dist. 1973) (per curiam); People v. Soe, 9 Misc. 3d 1069, 805 N.Y.S.2d 262 (Valley Stream Just. Ct. 2005); People v. Shaughnessy, 66 Misc. 2d 19, 319 N.Y.S.2d 626 (Nassau Co. Dist. Ct. 1971);
37. Where a plainclothes police officer in his own private vehicle stopped defendant's vehicle and approached with gun drawn based upon the fact that the officer saw burning pieces of paper thrown from defendant's vehicle. People v. Steg, 51 A.D.2d 810, 380 N.Y.S.2d 270 (2d Dep't 1976);

38. Where the stop was based upon the fact that the defendant's car had a broken rear vent window. People v. Elam, 179 A.D.2d 229, 584 N.Y.S.2d 780 (1st Dep't 1992);
39. Where the stop was based upon an alleged cell phone violation that the Court found did not violate VTL § 1225-c. People v. Abdul-Akim, 2010 WL 1856007 (Kings Co. Sup. Ct. 2010); and
40. Where the stop was based upon suspicion that the defendant was driving while intoxicated. People v. Ball, 132 A.D.3d 1286, 17 N.Y.S.3d 358 (4th Dep't 2015).

In People v. Rice, 11 Misc. 3d 539, ___, 810 N.Y.S.2d 306, 311-12 (N.Y. Co. Sup. Ct. 2006), rev'd, 44 A.D.3d 247, 841 N.Y.S.2d 72 (1st Dep't 2007), the Court held that VTL § 1163 "does not require signaling when a lane change can be made in complete safety without such signal." The Appellate Division, First Department, reversed, holding that "[i]n view of the clear language of the statute, coupled with its unequivocal legislative history, we can only conclude that the hearing court erred when it determined that VTL 1163 does not require a signal, in all instances, when changing a lane." 44 A.D.3d at ___, 841 N.Y.S.2d at 76. In so holding, the Court reasoned that:

VTL 1163(d) unequivocally requires that a turn signal "*shall be used to indicate an intention to . . . change lanes*" (emphasis added). While the legislature's employment of mandatory language, such as "shall" or "must," is not, by itself, conclusive, "such a word of command is ordinarily construed as peremptory in the absence of circumstances suggesting a contrary legislative intent." Here, not only is there an absence of any contrary intent, but the absence of any such qualification or limitation is consistent with the wording of section 1163(a), which imposes a duty to signal a lane change under all circumstances. Indeed, if a duty to signal a lane change existed only under certain circumstances, as found by the hearing court, then a harmonizing reference to such a limitation would have been included in section 1163(d).

Id. at ___, 841 N.Y.S.2d at 75 (citations omitted). See also People v. Tamburrino, 26 Misc. 3d 930, 892 N.Y.S.2d 852 (Saratoga Springs City Ct. 2009); People v. James, 17 Misc. 3d 623, 842 N.Y.S.2d 859 (N.Y. City Crim. Ct. 2007); People v. Martinez-Lopez, 16 Misc. 3d 298, 834 N.Y.S.2d 852 (Nassau Co. Dist. Ct. 2007).

In People v. DeCerbo, 4 Misc. 3d 23, ___, 783 N.Y.S.2d 202, 203 (App. Term, 9th & 10th Jud. Dist. 2004), the Court held that:

Vehicle and Traffic Law § 1102 is "designed to compel obedience to an order of a police officer regulating the control or movement of traffic." The evidence adduced at trial failed to demonstrate that the officer's order directing the defendant to return to his vehicle involved regulating the control or movement of traffic. Consequently, defendant's actions did not fall within the scope of section 1102.

(Citation omitted).

§ 1:12 Mistake of law stop

In Matter of Byer v. Jackson, 241 A.D.2d 943, 661 N.Y.S.2d 336 (4th Dep't 1997), the petitioner's car was stopped by the police "after he turned right out of a parking lot without using his turn signal," which led to the petitioner being arrested for, among other things, DWI. Id. at ___, 661 N.Y.S.2d at 337. The petitioner thereafter refused to submit to a chemical test. A chemical test refusal hearing was held by DMV, following which the petitioner's driver's license was revoked.

On appeal, DMV conceded "that petitioner did not violate Vehicle and Traffic Law § 1163(a), the underlying predicate for the stop, because the statute does not require a motorist to signal a turn from a private driveway," but nonetheless contended "that the officer's good faith belief that there was a violation of the Vehicle and Traffic Law, coupled with the surrounding circumstances, provided reasonable suspicion of criminality to justify the stop." Id. at ___, 661 N.Y.S.2d at 337-38. The Appellate Division, Fourth Department, disagreed, holding that "[w]here the officer's belief is based on an erroneous interpretation of law, the stop is illegal at the outset and any further actions by the police as a direct result of the stop are illegal." Id. at ___, 661 N.Y.S.2d at 338.

Subsequent to Byer, numerous Courts have held that "mistake of law" stops are illegal, requiring the suppression of any evidence obtained as a direct result thereof. See, e.g., Matter of McDonell v. New York State Dep't of Motor Vehicles, 77 A.D.3d 1379, ___, 908 N.Y.S.2d 507, 508 (4th Dep't 2010) (causing a moving vehicle to "fishtail" does not violate VTL § 1162, "which [only] prohibits unsafely moving a stopped, standing or parked vehicle"); People v. Rose, 67 A.D.3d 1447, ___, 889 N.Y.S.2d 789, 791 (4th Dep't 2009) (the mere flashing of high beams does not

violate VTL § 375(3); rather, the high beams must interfere with the driver of an approaching vehicle); People v. Garlock, 2010 WL 4670880 (Lockport Just. Ct. 2010) (same); People v. Smith, 67 A.D.3d 1392, ___, 887 N.Y.S.2d 883, 883 (4th Dep't 2009) ("We conclude that County Court properly suppressed the evidence on the ground that the police officer made a mistake of law in stopping defendant's vehicle, which had in fact performed a legal pass on the right pursuant to Vehicle and Traffic Law § 1123(a)(1) and (2)"); People v. MacKenzie, 61 A.D.3d 703, ___, 875 N.Y.S.2d 908, 908 (2d Dep't 2009) ("the stop of the defendant's vehicle was unlawful, because reasonable suspicion to believe that he had violated Vehicle and Traffic Law § 375(2)(a)(1) was lacking"); People v. Smith, 1 A.D.3d 965, ___, 767 N.Y.S.2d 327, 328 (4th Dep't 2003) ("The lack of a license plate on a vehicle generally will justify a stop of the vehicle for violation of Vehicle and Traffic Law § 402. Here, however, upon stopping defendant's vehicle, the officer observed that it had a Florida rear license plate and realized that no front plate was required") (citations omitted); People v. Silvers, 195 Misc. 2d 739, ___, 761 N.Y.S.2d 472, 472 (Mount Vernon City Ct. 2003) ("nothing in [VTL § 1163(b)] requires a motorist to signal a turn when exiting a parking lot"); People v. Mazzola, 2006 WL 1540297 (Suffolk Co. Dist. Ct. 2006) (defendant's failure to signal right turn out of parking lot did not violate VTL § 1163(d)); People v. Yendo, 2011 WL 452974, *1 (App. Term, 9th & 10th Jud. Dist. 2011) ("Vehicle and Traffic Law § 1201(a) does not prohibit a motorist from stopping a vehicle within 'a business or residence district.' . . . [T]he trooper acknowledged that the spot where he had observed defendant's car stopped was 'a residential or business district'").

In People v. Guthrie, 25 N.Y.3d 130, 132, 8 N.Y.S.3d 237, 239 (2015), the Court of Appeals partially abrogated the mistake of law doctrine, holding that as long as "the officer's mistake about the law is reasonable, the stop is constitutional." In so holding, the Court reasoned that "the relevant question before us is not whether the officer acted in good faith, but whether his belief that a traffic violation had occurred was objectively reasonable. Recently, in Heien v. North Carolina, the Supreme Court of the United States clarified that the Fourth Amendment tolerates objectively reasonable mistakes supporting such a belief, whether they are mistakes of fact or mistakes of law." Id. at 134, 8 N.Y.S.3d at 240-41 (citations and footnote omitted).

Critically, in the footnote omitted from the above quote, the Guthrie Court stated:

This distinction is significant in that a mistake of law that is merely made in "good faith" will not validate a traffic stop; rather, unless the mistake is objectively

reasonable, any evidence gained from the stop -- whether based on a mistake of law or a mistake of fact -- must be suppressed. Thus, contrary to the dissent's suggestion, our holding in this case does not represent a limitation on the rule set forth in People v. Bigelow that there is no good faith exception to the exclusionary rule.

Id. at 134 n.2, 8 N.Y.S.3d at 240 n.2 (citation omitted). See also id. at 139, 8 N.Y.S.3d at 244-45 ("As the Supreme Court explained, the requirement that the mistake be objectively reasonable prevents officers from 'gain[ing] [any] Fourth Amendment advantage through a sloppy study of the laws [they are] duty-bound to enforce'") (citation omitted).

Thus, Guthrie clearly does not stand for the proposition that all mistake of law stops are now valid. It merely stands for the proposition that "objectively reasonable" mistake of law stops are valid. See generally People v. Abrucci-Kohan, 52 Misc. 3d 919, 37 N.Y.S.3d 816 (Monroe Just. Ct. 2016).

§ 1:13 Anonymous tip stops

In Florida v. J.L., 529 U.S. 266, 268, 120 S.Ct. 1375, 1377 (2000), the United States Supreme Court held that an anonymous tip that a person is carrying a gun, without more, is insufficient to justify a police officer's stop and frisk of the person. In so holding, the Court reasoned as follows:

The anonymous call concerning J.L. provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility. That the allegation about the gun turned out to be correct does not suggest that the officers, prior to the frisks, had a reasonable basis for suspecting J.L. of engaging in unlawful conduct: The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search. All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L. * * *

Florida contends that the tip was reliable because its description of the suspect's visible attributes proved accurate: There

really was a young black male wearing a plaid shirt at the bus stop. The United States as *amicus curiae* makes a similar argument, proposing that a stop and frisk should be permitted "when (1) an anonymous tip provides a description of a particular person at a particular location illegally carrying a concealed firearm, (2) police promptly verify the pertinent details of the tip except the existence of the firearm, and (3) there are no factors that cast doubt on the reliability of the tip" These contentions misapprehend the reliability needed for a tip to justify a Terry stop.

An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. *The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.*

Id. at 271-72, 120 S.Ct. at 1379 (emphasis added) (citations omitted). Notably, the J.L. Court declined the government's request that it create a "firearm exception" to the anonymous tip rules on the ground that firearms are dangerous. Id. at 272-73, 120 S.Ct. at 1379-80.

In People v. Moore, 6 N.Y.3d 496, 814 N.Y.S.2d 567 (2006), the Court of Appeals discussed the requirements for a valid anonymous tip stop in light of both J.L. and the Court's own post-J.L. decision in People v. William II, 98 N.Y.2d 93, 745 N.Y.S.2d 792 (2002):

An anonymous tip cannot provide reasonable suspicion to justify a seizure, except where that tip contains predictive information -- such as information suggestive of criminal behavior -- so that the police can test the reliability of the tip (see Florida v. J.L.; [People v.] William II). Indeed, in J.L., a unanimous United States Supreme Court held that an anonymous tip regarding a young Black male standing at a particular bus stop, wearing a plaid shirt and carrying a gun, was insufficient to provide the requisite reasonable suspicion to authorize a stop and frisk of the defendant.

The State argued in J.L. that the tip was sufficient to justify the police intrusion because the defendant matched the detailed description provided by the tipster. The Supreme Court held, however, that reasonable suspicion "requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." The Court further explained that an anonymous tip could demonstrate the tipster's reliability and thus provide reasonable suspicion of criminal activity only if it predicted actions subsequently engaged in by the suspect. * * *

[T]he anonymous tip triggered only the police officers' common-law right of inquiry. This right authorized the police to ask questions of defendant -- and to follow defendant while attempting to engage him -- but not to seize him in order to do so. Thus, defendant remained free to continue about his business without risk of forcible detention. * * *

*Under our settled DeBour jurisprudence, to elevate the right of inquiry to the right to forcibly stop and detain, the police must obtain additional information or make additional observations of suspicious conduct sufficient to provide reasonable suspicion of criminal behavior. * * **

[T]he Court's decision today is wholly in line with our precedent: a forcible stop requires reasonable suspicion that the suspect has committed a crime, not merely the founded suspicion -- triggering the officers' common-law right of inquiry -- present here.

Id. at 499, 500, 500-01, 501, 814 N.Y.S.2d at 569, 570 (emphasis added) (citations omitted). See also People v. William II, 98 N.Y.2d 93, 99, 745 N.Y.S.2d 792, 794-95 (2002) ("[a] tipster's reliability would be demonstrated only if the suspect subsequently engaged in actions, preferably suggestive of concealed criminal activity, which the anonymous tip predicted in detail. . . . [R]easonable suspicion 'requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person'" (emphasis added) (citations omitted); People v. Sampson, 68 A.D.3d 1455, 891 N.Y.S.2d 518 (3d Dep't 2009); People v. Hoffman, 224 A.D.2d 853, ___, 638 N.Y.S.2d 203, 205 (3d Dep't 1996) ("An anonymous telephone tip must be

viewed with undiluted suspicion, as it is a notoriously weak and unreliable source of information"); People v. Letts, 180 A.D.2d 931, 580 N.Y.S.2d 525 (3d Dep't 1992); People v. Vega, 178 A.D.2d 1018, 578 N.Y.S.2d 342 (4th Dep't 1991); People v. Burpee, 175 A.D.2d 585, 572 N.Y.S.2d 250 (4th Dep't 1991); People v. Clark, 133 A.D.2d 955, 520 N.Y.S.2d 668 (3d Dep't 1987).

In People v. Rance, 227 A.D.2d 936, ___, 644 N.Y.S.2d 447, 447 (4th Dep't 1996), a "police officer received a radio dispatch that an anonymous informant had reported that an intoxicated woman was leaving a business establishment . . . and was entering the driver's seat of a red Oldsmobile with a particular license plate number." The officer arrived at that location within minutes and observed the car backing out of a space in the parking lot. The officer blocked the car's path with his police car, and approached the defendant to request her license and registration. Only *after* stopping the defendant's vehicle did the officer observe indicia of intoxication and elicit an incriminating admission from the defendant, which led to her arrest for DWI and AUO 1st. In a memorandum decision, the Appellate Division, Fourth Department, held that:

The information in the radio dispatch provided reasonable suspicion to believe that defendant had committed or was about to commit a crime, thereby justifying a stop of the vehicle. Police action may be based upon information from an anonymous source where, as here, it relates to "matters gravely affecting personal or public safety."

Id. at ___, 644 N.Y.S.2d at 447 (citations omitted).

It is the authors' opinion that Rance has been effectively overruled by J.L., Moore, and/or William II. At the outset, the Rance Court's claim that "[t]he information in the radio dispatch provided reasonable suspicion to believe that defendant had committed or was about to commit a crime, thereby justifying a stop of the vehicle" was expressly rejected by J.L., Moore and William II. Specifically, these cases make clear that an anonymous tip must "be reliable in its assertion of illegality, not just in its tendency to identify a determinate person," and that the tip must accurately predict (*i.e.*, be corroborated by) behavior indicative of criminality. See also People v. Braun, 299 A.D.2d 246, ___, 750 N.Y.S.2d 58, 58-59 (1st Dep't 2002) ("we are constrained to reverse by recent precedent authoritatively holding that an anonymous tip alleging that a described person has engaged in criminal activity, unless corroborated so as to render it 'reliable in its assertion of illegality, not just in its tendency to identify a determinate person,' does not create reasonable suspicion sufficient to justify a stop and frisk") (citation omitted). See generally People v. Elwell, 50 N.Y.2d

231, 234-35, 428 N.Y.S.2d 655, 657 (1980) ("We affirm the Appellate Division's holding that for police observation to constitute the verification that will establish probable cause and permit a warrantless search or arrest predicated upon data from an informer who has not revealed the basis for his knowledge, it is not enough that a number, even a large number, of details of noncriminal activity supplied by the informer be confirmed. Probable cause for such an arrest or search will have been demonstrated only when there has been confirmation of sufficient details suggestive of or directly related to the criminal activity informed about to make reasonable the conclusion that the informer has not simply passed along rumor, or is not involved (whether purposefully or as a dupe) in an effort to 'frame' the person informed against").

Since the police observed no illegal conduct by Rance prior to stopping her, the stop clearly violated J.L., Moore and William II. See generally Harris v. Commonwealth, 276 Va. 689, 696, 698, 668 S.E.2d 141, 146, 147 (Va. 2008) ("An anonymous tip need not include predictive information when an informant reports readily observable criminal actions. However, the crime of driving while intoxicated is not readily observable unless the suspected driver operates his or her vehicle in some fashion objectively indicating that the driver is intoxicated; such conduct must be observed before an investigatory stop is justified. * * * Therefore, we hold that Officer Picard's observations, when considered together with the anonymous tip, were not sufficient to create a reasonable suspicion of criminal activity, and that, therefore, Harris was stopped in violation of his rights under the Fourth Amendment") (citation omitted). Cf. People v. Wright, 98 N.Y.2d 657, 746 N.Y.S.2d 273 (2002) (anonymous tip of reckless driving irrelevant in light of Trooper's own observations of traffic infraction); People v. Pealer, 89 A.D.3d 1504, 933 N.Y.S.2d 473 (4th Dep't 2011) (anonymous tip of intoxicated driver irrelevant in light of officer's own observations of traffic infraction); People v. Walters, 213 A.D.2d 810, 623 N.Y.S.2d 396 (3d Dep't 1995) (anonymous tip of erratic driving corroborated by Trooper's own observations of same).

J.L., Moore and William II further make clear that an uncorroborated anonymous tip only gives the police authority to engage in a DeBour level 2 common-law right of inquiry -- not a DeBour level 3 seizure. See also People v. Russ, 61 N.Y.2d 693, 694-95 472 N.Y.S.2d 601, 602 (1984) ("Finding defendant in a car meeting the description and the specific location indicated by the informant provided reasonable suspicion that a crime had occurred or was about to occur and warranted the officer's request that she step out of the car for inquiry. It did not, however, justify the frisk. . . . A frisk requires reliable knowledge of facts providing reasonable basis for suspecting that the individual to be subjected to that intrusion is armed and may be dangerous") (citations omitted).

As is noted in § 1:5, *supra*, a vehicle stop by the police is a DeBour level 3 seizure. See, e.g., People v. Ocasio, 85 N.Y.2d 982, 984, 629 N.Y.S.2d 161, 162 (1995); People v. Spencer, 84 N.Y.2d 749, 753, 622 N.Y.S.2d 483, 485-86 (1995); People v. May, 81 N.Y.2d 725, 727, 593 N.Y.S.2d 760, 761-62 (1992); People v. Sobotker, 43 N.Y.2d 559, 563-64, 402 N.Y.S.2d 993, 995-96 (1978). Indeed, in William II the Court of Appeals applied J.L. to a vehicle stop. See 98 N.Y.2d at 99, 745 N.Y.S.2d at 795 ("the only basis for reasonable suspicion advanced before the suppression court for stopping the vehicle in which defendant was a passenger was that he matched the physical description provided by an anonymous tipster. Without more, the tip could not provide reasonable suspicion to stop the car") (footnote omitted).

Further undermining the continued validity of Rance is the Rance Court's statement that "[p]olice action may be based upon information from an anonymous source where, as here, it relates to 'matters gravely affecting personal or public safety.'" 227 A.D.2d at ___, 644 N.Y.S.2d at 447 (quoting People v. Taggart, 20 N.Y.2d 335, 283 N.Y.S.2d 1 (1967)). However, it is clear that Taggart (i.e., the case cited by the Rance Court in support of its apparent creation of a "DWI exception" to the normal anonymous tip rules) was overruled by J.L. Indeed, the facts of Taggart are *strikingly* similar to the facts of J.L. -- yet the *Supreme Court reached the exact opposite conclusion of that reached by the Taggart Court.*

The facts of Taggart are as follows:

The detective, Richard Delaney, was the only witness at the hearing on the motion to suppress. He testified that on the day of the arrest he received an anonymous telephone call at the police station informing him that "there was a male, white youth on the corner of 135th and Jamaica Avenue * * * (who) had a loaded 32 calibre [sic] revolver in his left hand jacket pocket". The caller also stated that the youth was "eighteen", had "blue eyes, blond hair" and was wearing "white chino-type pants".

Delaney then proceeded to that location and observed from across the street an individual who "matched perfectly" the description given to Delaney by the informer. The youth (defendant) "was standing in the middle of a group of children that had just finished bowling". Thereupon, Delaney crossed the street, "took him (defendant) by the arm and put him against the wall and took the

revolver out of his left-hand jacket pocket". Delaney did not notice any bulge in the defendant's pocket prior to the search as the weapon "was inside the lining of the jacket".

20 N.Y.2d at 4, 283 N.Y.S.2d at 337-38.

The facts of J.L. are as follows:

On October 13, 1995, an anonymous caller reported to the Miami-Dade Police that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. So far as the record reveals, there is no audio recording of the tip, and nothing is known about the informant. Sometime after the police received the tip -- the record does not say how long -- two officers were instructed to respond. They arrived at the bus stop about six minutes later and saw three black males "just hanging out [there]". One of the three, respondent J.L., was wearing a plaid shirt. Apart from the tip, the officers had no reason to suspect any of the three of illegal conduct. The officers did not see a firearm, and J.L. made no threatening or otherwise unusual movements. One of the officers approached J.L., told him to put his hands up on the bus stop, frisked him, and seized a gun from J.L.'s pocket.

529 U.S. at 268, 120 S.Ct. at 1377 (citations omitted).

It is clear that Taggart and J.L. are factually indistinguishable, and thus Taggart is no longer good law. To make matters worse, Taggart created the very "firearm exception" to the normal anonymous tip rules that was expressly rejected by J.L. See J.L., 529 U.S. at 272, 120 S.Ct. at 1379-80 ("an automatic firearm exception to our established reliability analysis would rove too far. Such an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun. *Nor could one securely confine such an exception to allegations involving firearms*") (emphasis added). Thus, J.L. not only clearly overruled Taggart, but also foresaw - and disapproved of -- what the Rance Court did (which was to expand a "firearm exception" to include a "DWI exception").

Simply stated, since the Rance Court's reasoning has been expressly rejected by higher Courts in more recent cases, it is fair to say that Rance is no longer good law. The same Court's

post-J.L. decision in People v. Jeffery, 2 A.D.3d 1271, 769 N.Y.S.2d 675 (4th Dep't 2003), seems to literally defy J.L. and William II. In any event, Jeffery seems hard to reconcile with the Court of Appeals' subsequent decision in Moore, *supra*.

Notably, the Taggart Court stated that:

It is recognized . . . that using anonymous information as a basis for intrusive police action is highly dangerous. To limit its use to exigent circumstances the police action must relate to matters gravely affecting personal or public safety or irreparable harm to property of extraordinary value. As noted earlier, it should not extend to all contraband or criminal violations. And, of course, the credibility of the police in claiming anonymous information should be subject to the most careful and critical scrutiny, unless abuse should merit or lead to still greater restrictions on police actions. Moreover, the police should be required to make contemporaneous or reasonably prompt detailed records of any such communications which should be subject to inspection and examination on a suppression hearing on the issue of credibility. It would be unfortunate if the people must be subject to the mercy of the criminal because of the limited and non-lethal risks arising from the conduct of the anonymous informer or from the conduct of police too gullible or too crafty.

20 N.Y.2d at 9, 283 N.Y.S.2d at 343.

In Navarette v. California, ___ U.S. ___, ___, 134 S.Ct. 1683, 1686 (2014), the Supreme Court held as follows:

After a 911 caller reported that a vehicle had run her off the road, a police officer located the vehicle she identified during the call and executed a traffic stop. We hold that the stop complied with the Fourth Amendment because, under the totality of the circumstances, the officer had reasonable suspicion that the driver was intoxicated.

It remains to be seen whether the Court of Appeals will follow Navarette, as it has previously made clear that "[t]his Court, as a matter of State constitutional law, adheres to the Aguilar/Spinelli test and has expressly rejected the less

protective 'totality of the circumstances' standard which the United States Supreme Court adopted in Illinois v. Gates in lieu of Aguilar/Spinelli." People v. DiFalco, 80 N.Y.2d 693, 697 n.1, 594 N.Y.S.2d 679, 681 n.1 (1993) (citation omitted).

The Court had the opportunity to decide this issue in People v. Argyris, 24 N.Y.3d 1138, 3 N.Y.S.3d 711 (2014). In Argyris, the Court addressed the validity of two separate vehicle stops involving anonymous 911 calls. However, the Court sidestepped the issue of which test should be applied, holding that:

Regardless of whether we apply a totality of the circumstances test or the Aguilar-Spinelli standard, there is record support for the lower courts' findings that the stops were lawful in People v. Argyris and People v. DiSalvo. The police had reasonable suspicion to stop defendants' vehicle based on the contents of a 911 call from an anonymous individual and the confirmatory observations of the police. Specifically, because sufficient information in the record supports the lower courts' determination that the tip was reliable under the totality of the circumstances, satisfied the two-pronged Aguilar-Spinelli test for the reliability of hearsay tips in this particular context and contained sufficient information about defendants' unlawful possession of a weapon to create reasonable suspicion, the lawfulness of the stop of defendants' vehicle is beyond further review. Furthermore, under these circumstances, the absence of predictive information in the tip was not fatal to its reliability. On this record, the lower courts did not err in concluding that the police's other actions were lawful.

In People v. Johnson, whether evaluated in light of the totality of the circumstances or under the Aguilar-Spinelli framework, the reliability of the tip was not established. The caller's cursory allegation that the driver of the car was either sick or intoxicated, without more, did not supply the sheriff's deputy who stopped the car with reasonable suspicion that defendant was driving while intoxicated. Although the deputy observed defendant commit a minor traffic infraction, this did not authorize the vehicle stop because he was outside his geographical jurisdiction at the time of the

infraction, and defendant's actions in committing the violation did not elevate the deputy's suspicion sufficiently to justify the stop of defendant's car. The issue of whether suppression should be denied on the theory that the deputy's violation of the statutory limits on his jurisdiction does not warrant suppression is not before us.

Id. at 1140-41, 3 N.Y.S.3d at 712 (citations omitted). See also People v. Proper, 2016 WL 3963298 (Webster Just. Ct. 2016). Cf. People v. Wisniewski, 147 A.D.3d 1388, ___, 47 N.Y.S.3d 543, 544 (4th Dep't 2017) ("The evidence in the record establishes that the information provided by the identified citizen informant 'was reliable under the totality of the circumstances, satisfied the two-pronged Aguilar-Spinelli test for the reliability of hearsay tips in this particular context and contained sufficient information about' defendant's commission of the crime of driving while intoxicated").

§ 1:14 Stops based on tips from "known informant" or "identified citizen"

There is a critical distinction between a tip received from an anonymous tipster and a tip received from a "known informant" or an "identified citizen." The former "must be viewed with undiluted suspicion, as it is a notoriously weak and unreliable source of information." People v. Hoffman, 224 A.D.2d 853, ___, 638 N.Y.S.2d 203, 205 (3d Dep't 1996). See also previous section. By contrast, "[a]n identified citizen informant is presumed to be personally reliable." People v. Parris, 83 N.Y.2d 342, 350, 610 N.Y.S.2d 464, 468 (1994). See also People v. Hetrick, 80 N.Y.2d 344, 349, 590 N.Y.S.2d 183, 185 (1992) ("because Katy was an identified citizen informant, and not an unnamed informant, there was a 'built-in' basis for crediting her reliability"); People v. Cantre, 65 N.Y.2d 790, 493 N.Y.S.2d 127 (1985); People v. Hicks, 38 N.Y.2d 90, 94, 378 N.Y.S.2d 660, 664-65 (1975).

Tips received from a known informant or an identified citizen are nonetheless subject to the so-called Aguilar/Spinelli test. See, e.g., People v. DiFalco, 80 N.Y.2d 693, 696, 594 N.Y.S.2d 679, 680 (1993); Hetrick, 80 N.Y.2d at 348, 590 N.Y.S.2d at 185. In this regard, it should be noted that New York adheres to the Aguilar/Spinelli test despite a change in federal law. See, e.g., People v. Edwards, 95 N.Y.2d 486, 495 n.5, 719 N.Y.S.2d 202, 207 n.5 (2000); DiFalco, 80 N.Y.2d at 696 n.1, 594 N.Y.S.2d at 680 n.1; Hetrick, 80 N.Y.2d at 348, 590 N.Y.S.2d at 185; People v. Grimmer, 71 N.Y.2d 635, 637, 529 N.Y.S.2d 55, 55-56 (1988).

The Aguilar/Spinelli test provides that:

[B]efore probable cause based on hearsay is found it must appear . . . that the informant has some basis of knowledge for the information he transmitted to the police and that the information is reliable. The basis of the informant's knowledge must be demonstrated because the information related by an informant, even a reliable one, is of little probative value if he does not have knowledge of the events he describes. Conversely, no matter how solid his basis of knowledge, the information will not support a finding of probable cause unless it is reliable. Since police officers may not arrest a person on mere suspicion or rumor, they likewise may not arrest a suspect on the basis of an informant's tip, perhaps born of suspicion or rumor or intentional fabrication.

People v. Johnson, 66 N.Y.2d 398, 402-03, 497 N.Y.S.2d 618, 621 (1985) (citations omitted). See also People v. Ketcham, 93 N.Y.2d 416, 420, 690 N.Y.S.2d 874, 877 (1999); People v. Bigelow, 66 N.Y.2d 417, 497 N.Y.S.2d 630 (1985); People v. Rodriguez, 52 N.Y.2d 483, 438 N.Y.S.2d 754 (1981).

"[I]n the ordinary case where a police officer has obtained evidence from a third person providing probable cause, the defendant has the opportunity to question the officer about the third person's identity, relationship to the crime, basis of knowledge, past relationship to the police and criminal history. The defendant is thus able to raise any appropriate question about the officer's testimony to the suppression court." Edwards, 95 N.Y.2d at 491, 719 N.Y.S.2d at 205.

In People v. Washington, 50 A.D.3d 1539, ___, 856 N.Y.S.2d 783, 784 (4th Dep't 2008), the Appellate Division, Fourth Department, held that "[t]he police officer had reasonable suspicion for the initial stop of the vehicle based upon information from an identified citizen informant that the driver of the vehicle was drinking alcohol and driving erratically." See also People v. Kirkey, 17 A.D.3d 1149, ___, 793 N.Y.S.2d 856, 857 (4th Dep't 2005) ("The police had the requisite reasonable suspicion to stop the vehicle driven by defendant based on information provided by an identified citizen informant, and that information was corroborated by the personal observations of the officer who stopped the vehicle") (citation omitted); People v. Hoffman, 283 A.D.2d 928, ___, 725 N.Y.S.2d 494, 496 (4th Dep't 2001) ("the police had reasonable suspicion to stop his vehicle based on information from an identified citizen informant

concerning a hit-and-run accident. The identified citizen informant was presumed to be reliable and his basis of knowledge was his observation of the offense").

§ 1:15 Pretext stops

"A pretext stop has generally been defined as a police officer's use of a traffic infraction as a subterfuge to stop a motor vehicle in order to investigate the driver or occupant about an unrelated matter." People v. Robinson, 271 A.D.2d 17, ___, 711 N.Y.S.2d 384, 386 (1st Dep't 2000), aff'd, 97 N.Y.2d 341, 741 N.Y.S.2d 147 (2001). Although the terms "pretext stop" and "illegal stop" had tended to be synonymous, in Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769 (1996), the United States Supreme Court held that a police officer's underlying intent or motivation is irrelevant for 4th Amendment purposes. Thus, as long as a police officer possesses a legal basis to stop a vehicle for a traffic violation, the defendant cannot argue that the traffic violation was used as a mere pretext to investigate an unrelated crime. In other words, in determining whether the 4th Amendment has been violated, Courts must apply a standard of objective reasonableness, without regard to the underlying intent or motivation of the officer.

In People v. Robinson, 97 N.Y.2d 341, 741 N.Y.S.2d 147 (2001), a sharply divided Court of Appeals held that pretext stops are now legal in New York as well:

The issue here is whether a police officer who has probable cause to believe a driver has committed a traffic infraction violates article I, § 12 of the New York State Constitution when the officer, whose primary motivation is to conduct another investigation, stops the vehicle. We conclude that there is no violation, and we adopt Whren v. United States as a matter of state law. * * *

We hold that where a police officer has probable cause to believe that the driver of an automobile has committed a traffic violation, a stop does not violate article I, § 12 of the New York State Constitution. In making that determination of probable cause, neither the primary motivation of the officer nor a determination of what a reasonable traffic officer would have done under the circumstances is relevant. * * *

Because the Vehicle and Traffic Law provides an objective grid upon which to measure probable cause, a stop based on that standard is not arbitrary in the context of constitutional search and seizure jurisprudence.

Id. at 346, 349, 355, 741 N.Y.S.2d at 149, 151, 155 (citation omitted). See also People v. Wright, 98 N.Y.2d 657, 746 N.Y.S.2d 273 (2002); People v. Pealer, 20 N.Y.3d 447, 457 n.2, 962 N.Y.S.2d 592, 598 n.2 (2013).

Nonetheless, the Robinson Court did note that:

To be sure, the story does not end when the police stop a vehicle for a traffic infraction. Our holding in this case addresses only the initial police action upon which the vehicular stop was predicated. The scope, duration and intensity of the seizure, as well as any search made by the police subsequent to that stop, remain subject to the strictures of article I, § 12, and judicial review.

97 N.Y.2d at 353, 741 N.Y.S.2d at 154.

§ 1:16 Checkpoint stops

This topic is covered at length in Chapter 5, *infra*.

§ 1:17 Mistaken arrests

In People v. Jennings, 54 N.Y.2d 518, 520, 446 N.Y.S.2d 229, 230 (1981), the Court of Appeals held that:

An arrest is invalid when the arresting officer acts upon information in criminal justice system records which, though correct when put into the records, no longer applies and which, through fault of the system, has been retained in its records after it became inapplicable. Accordingly, an arrest made in reliance upon the computerized criminal record file of defendant, which showed as outstanding a parole violation warrant which had in fact been executed nine months before and vacated four months before the arrest, is made without probable cause.

See also People v. Watson, 100 A.D.2d 452, 474 N.Y.S.2d 978 (2d Dep't 1984); People v. Lent, 92 A.D.2d 941, 460 N.Y.S.2d 369 (2d Dep't 1983).

Notably, the Jennings Court "expressly reject[ed] the People's contention that Officer Enright's 'good faith' reliance upon the parole warrant 'hit' renders the exclusionary rule inapplicable," reasoning that:

An assessment of probable cause turns on what was reasonably and objectively in the mind of law enforcement authorities. It does not turn on such subjective considerations as the absence of malice against a suspect, the lack of intent to violate constitutional rights, or any other variation of what has been referred to in another context as the "white heart and empty head" standard. The good faith of the enforcement authorities cannot validate an arrest based upon a warrant which had been vacated four months before and had been executed nine months before the arrest was made.

54 N.Y.2d at 523, 446 N.Y.S.2d at 232 (citations omitted). Cf. Herring v. United States, 555 U.S. 135, 129 S.Ct. 695 (2009).

It should be noted that Herring utilized the "good faith" exception to the 4th Amendment exclusionary rule created by United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984). This exception to the exclusionary rule was expressly rejected by the Court of Appeals on State Constitutional law grounds in People v. Bigelow, 66 N.Y.2d 417, 497 N.Y.S.2d 630 (1985).

§ 1:18 Warrantless arrests in the home

This topic is covered at length in Chapter 4, *infra*.

§ 1:19 Out-of-state stops and arrests

Pursuant to CPL § 140.10(3), a police officer may only pursue a person out-of-state to arrest the person for a crime. By contrast, where the arrest is for a petty offense, the officer can "follow such person in continuous close pursuit, commencing either in the county in which the offense was or is believed to have been committed or in an adjoining county, in and through any county of the state, and may arrest him or her in any county in which he or she apprehends him or her." CPL § 140.10(2)(b).

In the context of a DWI case, the defendant is literally never arrested for DWI based upon his or driving. Rather, the defendant is typically stopped for a traffic infraction that

evolves into an arrest for DWI. Thus, where a motorist is pursued out-of-state for a traffic infraction which ultimately leads to an out-of-state arrest for DWI, the issue arises as to whether the arrest is lawful. In People v. Lane, 144 Misc. 2d 953, 550 N.Y.S.2d 529 (App. Term, 9th and 10th Jud. Dist. 1989), the Court reversed the defendant's conviction of DWI under these circumstances. In so holding, the Court reasoned that:

In the instant case, the record indicates that a deputy sheriff pursued defendant into Connecticut only for driving to the left of the pavement markings (Vehicle and Traffic Law § 1126[a]), a mere traffic infraction. The testimony is clear that he made no judgment or opinion as to whether defendant was intoxicated until after the completion of performance tests, all of which were done in Connecticut. Hence, the subject arrest violated CPL 140.10(3) because the deputy was not pursuing a person outside the state who he had probable cause to believe committed a crime. "'Crime' means a misdemeanor or a felony" (Penal Law § 10.00[6]). It does not mean a petty offense which is defined as ". . . a violation or a traffic infraction" (CPL 1.20[39]). * * *

Clearly, in the absence of the evidence unlawfully obtained, the court below could not have found defendant guilty beyond a reasonable doubt of driving while intoxicated pursuant to Vehicle and Traffic Law section 1192.

Id. at ___, 550 N.Y.S.2d at 530-31.

§ 1:20 Authority of out-of-state police officers to make arrests in New York

In People v. LaFontaine, 92 N.Y.2d 470, 682 N.Y.S.2d 671 (1998), the Court of Appeals made clear that, although "[o]ut-of-State police officers may be authorized to make arrests in New York, [they may] generally only [do so] when they are in hot pursuit." Id. at 475, 682 N.Y.S.2d at 674. See also CPL § 140.55. In so holding, the Court reversed the Appellate Division, First Department, decision reported at 235 A.D.2d 93, 664 N.Y.S.2d 587 (1st Dep't 1997).

§ 1:21 Even where initial stop is lawful, continued detention may not be

Even where the initial stop is lawful, the defendant's continued detention can be unlawful where the police immediately discover that the reason for the stop was invalid. See, e.g., People v. Smith, 1 A.D.3d 965, ___, 767 N.Y.S.2d 327, 328 (4th Dep't 2003) ("The lack of a license plate on a vehicle generally will justify a stop of the vehicle for violation of Vehicle and Traffic Law § 402. Here, however, upon stopping defendant's vehicle, the officer observed that it had a Florida rear license plate and realized that no front plate was required") (citations omitted); People v. Mowatt, 176 Misc. 2d 919, ___, 674 N.Y.S.2d 585, 586-87 (N.Y. City Crim. Ct. 1998) ("The initial stop of the defendant was justified based upon the fact that his car did not have front or rear license plates. . . . [However, h]aving seen the temporary license [affixed to the vehicle's rear window], P.O. Hibbert no longer had any reasonable suspicion that the defendant was violating any law or traffic regulation. There was, therefore, no longer any legal basis to further detain the defendant").

§ 1:22 Length of traffic stop must be reasonable

In People v. Banks, 85 N.Y.2d 558, 562, 626 N.Y.S.2d 986, 988 (1995), the Court of Appeals held that a lawful stop turned into an illegal detention under the following circumstances:

For a traffic stop to pass constitutional muster, the officer's action in stopping the vehicle must be justified at its inception and the seizure must be reasonably related in scope, including its length, to the circumstances which justified the detention in the first instance. While the stop was justified in the instant case, the length and circumstances of the detention were not. Consequently, the evidence ultimately seized must be suppressed.

Trooper Cuprill's observations of Jones' seat belt violation justified the initial stop of Jones and defendant in the vehicle. However, once Cuprill's license and stolen vehicle radio check came back negative and he prepared the traffic tickets for the seat belt violations, the initial justification for seizing and detaining defendant and Jones was exhausted. The Trooper nevertheless retained their licenses, effectively forcing them to remain at the scene while he awaited

the appearance of the backup Trooper he had requested. This continued involuntary detention of defendant and Jones and their vehicle constituted a seizure in violation of their constitutional rights, unless circumstances coming to Cuprill's attention following the initial stop furnished him with reasonable suspicion that they were engaged in criminal activity. Contrary to the holdings of the courts below, defendant's nervousness and the innocuous discrepancies in his and Jones' answers to the Trooper's questions regarding the origin, destination and timing of their trip did not alone, as a matter of law, provide a basis for reasonable suspicion of criminality.

(Citations omitted). See also People v. Milaski, 62 N.Y.2d 147, 156, 476 N.Y.S.2d 104, 108 (1984) ("The two different reasons given by defendant for his presence in the parking area, although at variance, along with defendant's nervousness and other inconsistencies in his statements, provided no indication of criminality on his part which would have justified further detention"); People v. May, 52 A.D.3d 147, 861 N.Y.S.2d 276 (1st Dep't 2008); People v. Barreras, 253 A.D.2d 369, 677 N.Y.S.2d 526 (1st Dep't 1998); People v. Turriago, 219 A.D.2d 383, 644 N.Y.S.2d 178 (1st Dep't 1996), aff'd as modified, 90 N.Y.2d 77, 659 N.Y.S.2d 183 (1997); People v. Pizzo, 144 A.D.2d 930, 534 N.Y.S.2d 249 (4th Dep't 1988). See generally People v. Major, 263 A.D.2d 360, 693 N.Y.S.2d 30 (1st Dep't 1999); People v. Chann, 221 A.D.2d 155, ___, 633 N.Y.S.2d 150, 150 (1st Dep't 1995) ("During a traffic stop, defendant made a hand motion as if to place an object in the back seat. This did not provide sufficient basis to search the vehicle"); People v. Antelmi, 196 A.D.2d 658, ___, 601 N.Y.S.2d 634, 635 (2d Dep't 1993) ("the record supports the hearing court's finding that the vehicle in which the defendant was a passenger was properly stopped by the police for a traffic violation. However, the police thereafter forcibly detained and searched the defendant when he attempted to leave. We find that this conduct exceeded that which is permissible during a normal traffic stop, as there was no showing of a reasonable suspicion on the part of the police that the defendant was committing, had committed, or was about to commit a crime") (citations omitted).

§ 1:23 When can the police request a person's driver's license and registration?

Whenever a person has been lawfully stopped for a traffic infraction, the police can validly request to see the person's driver's license and registration (and related information).

See, e.g., People v. Ellis, 62 N.Y.2d 393, 396, 477 N.Y.S.2d 106, 107 (1984) ("The police officers, observing a traffic infraction, properly followed and stopped defendant and asked him for his driver's license and the rental agreement for the car"); People v. Graham, 54 A.D.3d 1056, ___, 865 N.Y.S.2d 259, 262 (2d Dep't 2008) ("the officer's observation of traffic infractions justified the initial stop and gave him 'the right to ask questions relating to the defendant's destination, to request that he produce his license and registration, and to ask him to stand by momentarily pending further investigation'") (citation omitted); People v. Leiva, 33 A.D.3d 1021, ___, 823 N.Y.S.2d 494, 495-96 (2d Dep't 2006); People v. Derrell, 26 Misc. 3d 697, ___, 889 N.Y.S.2d 905, 913 (N.Y. Co. Sup. Ct. 2009).

Indeed, anyone approached pursuant to a valid DeBour level 1 request for information (involving a motor vehicle) can be asked to produce his or her driver's license. See People v. Thomas, 19 A.D.3d 32, ___, 792 N.Y.S.2d 472, 480 (1st Dep't 2005) ("it is well established by prior case law that a police officer, in directing a level I request for information to an occupant of an already-stationary vehicle, is entitled to ask such a person -- whether the driver or a passenger -- for documentary identification, such as a driver's license").

In People v. Hale, 75 A.D.2d 606, ___, 426 N.Y.S.2d 827, 828 (2d Dep't 1980), the Appellate Division, Second Department, rejected the defendant's claim "that the police had no right, where there had been no accident, to require production of an insurance identification card after defendant had already produced a valid license and registration." In so holding, the Court reasoned that "[a] New York motorist is required to carry an insurance identification card whenever operating a motor vehicle and to produce it upon request of any police officer, and this duty is not negated by the production of a valid license and registration. The purpose of this requirement is to insure that the highways of the State are utilized by insured vehicles." Id. at ___, 426 N.Y.S.2d at 828 (citations omitted).

§ 1:24 What if the person doesn't produce driver's license and registration?

A person who either fails or refuses to produce his or her driver's license and registration following a proper request therefor will generally be arrested. The reason why is simple: a person who does not have proper identification cannot be issued a traffic ticket. See, e.g., People v. Ellis, 62 N.Y.2d 393, 396, 477 N.Y.S.2d 106, 107-08 (1984) ("Once it became evident that defendant could not be issued a summons on the spot because of his inability to produce any identification, the officers were warranted in arresting him to remove him to the police station and in frisking him before doing so"); People v. Copeland, 39

N.Y.2d 986, 986-87, 387 N.Y.S.2d 234, 234 (1976) (same); United States v. Barber, 839 F. Supp. 193, 200-01 (W.D.N.Y. 1993); People v. Cooper, 38 A.D.3d 678, ___, 833 N.Y.S.2d 118, 120 (2d Dep't 2007); People v. Mezon, 228 A.D.2d 621, 644 N.Y.S.2d 763 (2d Dep't 1996); People v. Clark, 227 A.D.2d 983, ___, 643 N.Y.S.2d 836, 836-37 (4th Dep't 1996); People v. Miller, 149 A.D.2d 538, ___, 539 N.Y.S.2d 809, 812 (2d Dep't 1989); People v. Bohn, 91 Misc. 2d 132, ___, 397 N.Y.S.2d 514, 515 (App. Term, 9th & 10th Jud. Dist. 1977) (per curiam) ("The failure or refusal of a motorist to exhibit a license or registration when properly requested is not a violation that falls within the scope of section 1102. We note that where an operator of a motor vehicle fails to exhibit the required documents he may be charged with being an unlicensed operator or operating an unregistered vehicle. Moreover, if he fails or refuses to sufficiently identify himself, the operator may also be arrested"); People v. Alston, 9 Misc. 3d 1046, ___, 805 N.Y.S.2d 258, 261 (N.Y. City Crim. Ct. 2005) (although "refusal to comply with a request for documentation [justifies arrest, it] is not an independently unlawful act that amounts to obstruction of governmental administration"). See generally People v. Branigan, 67 N.Y.2d 860, 501 N.Y.S.2d 655 (1986).

It should be noted that the failure to produce a validly requested driver's license, registration or insurance card (a) violates the VTL, and (b) is presumptive evidence that the driver/vehicle is not validly licensed/registered/insured. See, e.g., VTL §§ 507(2), 401(4), 312(1)(b) & 319(3); Branigan, 67 N.Y.2d at 862, 501 N.Y.S.2d at 656; Cooper, 38 A.D.3d at ___, 833 N.Y.S.2d at 120.

§ 1:25 When can a police officer demand that the driver exit the vehicle?

"In Pennsylvania v. Mimms, the United States Supreme Court held that the inherent and inordinate risk of danger confronting an officer as he approaches the driver of an automobile that has been stopped for a traffic infraction justifies the minimal additional intrusion of ordering the driver out of the car." People v. McLaurin, 70 N.Y.2d 779, 781, 521 N.Y.S.2d 218, 219 (1987) (citation omitted). See also People v. Garcia, 20 N.Y.3d 317, 321-22, 959 N.Y.S.2d 464, 466 (2012); People v. Robinson, 74 N.Y.2d 773, 774, 545 N.Y.S.2d 90, 90 (1989); People v. Livigni, 88 A.D.2d 386, 453 N.Y.S.2d 708 (2d Dep't 1982), aff'd for the reasons stated in the opinion below, 58 N.Y.2d 894, 460 N.Y.S.2d 530 (1983).

In People v. Tittensor, 244 A.D.2d 784, 666 N.Y.S.2d 267 (3d Dep't 1997), the Appellate Division, Third Department, held that the defendant was properly requested to exit his vehicle and perform field sobriety tests after (1) the officer observed the

defendant commit a violation of the VTL, (2) the defendant failed to produce a driver's license at the officer's request, (3) the officer observed several indicia of intoxication (i.e., glassy eyes, slurred speech and strong odor of alcohol), and (4) the defendant admitted consuming 4 rum and coke drinks.

In People v. McCarthy, 135 A.D.2d 1113, 523 N.Y.S.2d 291 (4th Dep't 1987), the Appellate Division, Fourth Department, reversed the County Court's finding that the defendant was improperly requested to exit his vehicle. The Court's memorandum decision held as follows:

After a hearing, County Court dismissed the indictment charging defendant with driving while intoxicated. The court wrote that the arresting officer stopped defendant's car for an equipment violation at 3:00 A.M. and, other than that, there was no evidence of any moving violation. Without making any other findings, the court concluded, "On these facts we find there was no probable cause to require the defendant to exit his vehicle, retire to the back of the police vehicle and submit to a roadside sensor test." The arresting officer was the only witness who testified at the hearing. His testimony reveals that, after stopping the car, he talked to defendant, who was sitting in his car, and noticed that defendant's eyes were bloodshot, that his speech was slurred, and that there was a strong odor of alcohol coming from the car. Based on those facts, we conclude that the officer had probable cause to believe that defendant had been driving his automobile while at least his ability was impaired by the consumption of alcohol (Vehicle & Traffic Law § 1192[1]). The fact that the stop was based only on the officer's observation of an equipment violation does not preclude a finding that, after the lawful stop, the officer had reason to believe that defendant was guilty of driving while intoxicated or, at least, driving while his ability had been impaired by the consumption of alcohol.

Id. at ___, 523 N.Y.S.2d at 291.

What if the stop was for a reason other than a traffic infraction (e.g., a sobriety checkpoint)? In People v. Scott, 63 N.Y.2d 518, 522, 483 N.Y.S.2d 649, 650 (1984), the Court of Appeals held that:

A roadblock established pursuant to a written directive of the County Sheriff for the purpose of detecting and deterring driving while intoxicated or while impaired, and as to which operating personnel are prohibited from administering sobriety tests unless they observe listed criteria, indicative of intoxication, which give substantial cause to believe that the operator is intoxicated, is constitutionally permissible, notwithstanding that the location of the roadblock is moved several times during the three- to four-hour period of operation, and notwithstanding that legislative initiatives have also played a part in reducing the incidence of driving while intoxicated in recent years.

(Emphasis added). See also People v. Rios, 27 Misc. 3d 963, ___, 898 N.Y.S.2d 797, 803 (Kings Co. Sup. Ct. 2010) ("Normally, a police officer can direct a motorist to exit a vehicle as part of a routine traffic stop. However, as noted above, this case does not involve the stop of a moving vehicle; the police directed an individual to exit a vehicle that was stationary and parked alongside a curb. Under these circumstances, without reasonable suspicion, it is improper for the police to direct occupants out of a car"); People v. Harris, 173 Misc. 2d 49, ___, 660 N.Y.S.2d 792, 795 (Monroe Co. Sup. Ct. 1997) ("because there was no traffic violation, and because there was no reasonable suspicion of criminal activity, Sergeant Giaconia lacked the authority to order the defendant and his passengers out of the defendant's vehicle. As a result, he was not lawfully in the position to observe the handgun") (footnote omitted).

§ 1:26 When can a police officer demand that passengers exit the vehicle?

In People v. Robinson, 74 N.Y.2d 773, 774-75, 545 N.Y.S.2d 90, 90-91 (1989), the Court of Appeals held as follows:

The Fourth Amendment of the United States Constitution is not violated when a driver is directed to step out briefly from a lawfully stopped and detained vehicle because the inherent and inordinate danger to investigating police officers in completing their authorized official responsibilities in such circumstances justifies that precautionary action. The United States Supreme Court has reiterated that out of a concern for safety, "officers may, consistent with the Fourth Amendment, exercise their

discretion to require a driver who commits a traffic violation to exit the vehicle even *though they lack any particularized reason for believing the driver possesses a weapon.*"

Defendant was a passenger in a car which unquestionably was lawfully stopped by two officers because it made an unsignalled right turn from the left lane of a New York City street across the flow of right-lane traffic cutting off another car and motorist one and a half car lengths behind it in the right lane. After pulling the car over, the officers approached one on each side. While one officer spoke with the driver about the traffic infraction, the other directed the defendant passenger to step out onto the sidewalk. With the passenger door open, the butt of a loaded .357 magnum handgun was plainly visible protruding from beneath the seat. The gun was seized and defendant was arrested. A postarrest search disclosed an additional six rounds of ammunition in defendant's pocket.

We conclude, as to defendant's Federal constitutional argument, the only one preserved in this case, that precautionary police conduct directed at a passenger in a lawfully stopped vehicle is equally authorized, within Federal constitutional guideposts, as that applied to a driver. Inasmuch as the risks in these police/civilian vehicle encounters are the same whether the occupant is a driver or a passenger, "police may order persons out of an automobile during a stop for a traffic violation." Brief and uniform precautionary procedures of this kind are not per se unreasonable and unconstitutional.

(Citations omitted). See also People v. Garcia, 20 N.Y.3d 317, 321-22, 959 N.Y.S.2d 464, 466 (2012); People v. Mundo, 99 N.Y.2d 55, 750 N.Y.S.2d 837 (2002); People v. McLaurin, 70 N.Y.2d 779, 521 N.Y.S.2d 218 (1987); People v. Livigni, 88 A.D.2d 386, 453 N.Y.S.2d 708 (2d Dep't 1982), aff'd for the reasons stated in the opinion below, 58 N.Y.2d 894, 460 N.Y.S.2d 530 (1983).

§ 1:27 "Reasonable cause" and "probable cause" are synonymous

The CPL uses the phrase "reasonable cause" in lieu of the phrase "probable cause." See, e.g., CPL § 70.10(2). However, it is well settled that "[r]easonable cause means probable cause."

People v. Maldonado, 86 N.Y.2d 631, 635, 635 N.Y.S.2d 155, 158 (1995). See also People v. Johnson, 66 N.Y.2d 398, 402 n.2, 497 N.Y.S.2d 618, 621 n.2 (1985).

§ 1:28 Probable cause to arrest in a VTL § 1192 case

CPL § 70.10(2) provides, in pertinent part, that:

"Reasonable cause to believe that a person has committed an offense" exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it.

As the previous section demonstrates, although the CPL uses the phrase "reasonable cause" in lieu of the phrase "probable cause," it is well settled that "[r]easonable cause means probable cause." People v. Maldonado, 86 N.Y.2d 631, 635, 635 N.Y.S.2d 155, 158 (1995). See also People v. Johnson, 66 N.Y.2d 398, 402 n.2, 497 N.Y.S.2d 618, 621 n.2 (1985). The Court of Appeals has consistently made clear that:

In passing on whether there was probable cause for an arrest, . . . the basis for such a belief must not only be reasonable, but it must appear to be at least more probable than not that a crime has taken place and that the one arrested is its perpetrator, for conduct equally compatible with guilt or innocence will not suffice.

People v. Carrasquillo, 54 N.Y.2d 248, 254, 445 N.Y.S.2d 97, 100 (1981). See also People v. Vandover, 20 N.Y.3d 235, 237, 958 N.Y.S.2d 83, 84 (2013) (same); People v. DeBour, 40 N.Y.2d 210, 216, 386 N.Y.S.2d 375, 380 (1976) ("We have frequently rejected the notion that behavior which is susceptible of innocent as well as culpable interpretation, will constitute probable cause").

Interestingly, the Court of Appeals had never addressed the issue of what constitutes probable cause to arrest in a VTL § 1192 case until it decided Vandover, *supra*, in 2013. In Vandover, the Court held that "[t]he standard to be followed is that it is more probable than not that defendant is actually impaired." 20 N.Y.3d at 239, 958 N.Y.S.2d at 85. Vandover makes clear that probable cause is not established in a VTL § 1192 case where there is proof that the defendant consumed alcohol (or drugs) but no proof of actual impairment.

Applying the "more probable than not that defendant is actually impaired" standard to the facts of the case, the Court of Appeals affirmed the Appellate Term's determination that there was a lack of probable cause under the following circumstances:

On October 1, 2008, defendant appeared in Justice Court on an unrelated traffic ticket. While at the courthouse, defendant spoke with an Officer James who noticed that she had glassy, bloodshot eyes, an odor of alcohol on her breath and seemed lethargic. Concerned that defendant may well be intoxicated and intending to drive a vehicle, Officer James informed Officer Barry of his observations. Both officers proceeded to follow defendant to the parking lot where they observed her getting into her automobile and moving in reverse for approximately two feet as she exited the parking spot. Officer Barry stopped defendant. Upon her exiting the vehicle, Officer Barry administered a field sobriety test. Officer James had gone to the nearby police headquarters to retrieve a portable breath analyzer and did not observe the full field sobriety test given by Officer Barry. When Officer James returned with the equipment, he noticed, for the first time a young child in the back seat of the car without a seatbelt. Officer Barry also performed the portable breath test on defendant, which recorded a positive result. Defendant made statements, prior to her arrest, to the effect that she "had gotten off work at 8:00 [a.m.]" and "ha[d] a couple of drinks," but those were consumed several hours prior and that she was not currently under the influence of alcohol. * * *

Defendant moved to suppress her statements and other evidence obtained and a probable cause hearing was held at which Officer James and a Sergeant Metzger, who had come upon the scene, testified. Officer Barry, who administered the field sobriety test and the portable breathalyzer test, however, did not testify. Justice Court found the officers' testimony to be credible but that Sergeant Metzger's testimony was generally cumulative of Officer James' testimony. However, Sergeant Metzger did testify that the positive reading of the portable breath

analyzer, in this instance, was as consistent with an alcohol content below the statutory level of impairment as with a blood alcohol level above the limit. Justice Court noted Officer Barry's absence and stated that "without [his] testimony there is insufficient testimony in the record necessary for a finding that the arrest on any of the charges was based upon probable cause." Justice Court, citing the testimony of Officer James, that defendant had glassy bloodshot eyes, breath that smelled of alcohol and a generally fatigued demeanor, found that this was insufficient to establish probable cause to arrest defendant and accordingly dismissed the charges. The Appellate Term affirmed the dismissal.

Id. at 237-38, 958 N.Y.S.2d at 84-85 (citation omitted).

Although courts find a lack of probable cause to arrest in DWI cases on a somewhat regular basis, such decisions are almost never published. Since virtually every published decision has held that probable cause to arrest (as opposed to probable cause to stop) existed, there is little need to provide a comprehensive list of cases holding that a DWI arrest was lawful. Other than proof that it is more likely than not that the defendant was actually impaired, the key to a probable cause determination is that the People's proof must be credible. See, e.g., People v. Berrios, 28 N.Y.2d 361, 369, 321 N.Y.S.2d 884, 890 (1971) ("Where the Judge at the suppression hearing determines that the testimony of the police officer is unworthy of belief, he should conclude that the People have not met their burden of coming forward with sufficient evidence and grant the motion to suppress"); id. at 368, 321 N.Y.S.2d at 889 ("we are not oblivious to the problem that there is always a possibility that a witness will perjure himself. Indeed, this is why credibility is usually a crucial issue whenever facts are in dispute and courts have traditionally addressed themselves to the resolution of this basic question as a part of the fact-finding process"); People v. Clough, 70 A.D.3d 474, ___, 895 N.Y.S.2d 52, 52-53 (1st Dep't 2010) ("the People have the burden of going forward to show the legality of the police conduct in the first instance, and that burden cannot be met by testimony that the hearing court finds incredible") (citation omitted); People v. Burton, 130 A.D.2d 675, ___, 515 N.Y.S.2d 601, 602 (2d Dep't 1987) ("Since the court concluded that the Police witnesses were not credible, it should have concluded that the People had not met their burden of coming forward with sufficient evidence and granted the motion to suppress"); People v. Farrell, 89 A.D.2d 987, ___, 454 N.Y.S.2d 306, 308 (2d Dep't 1982) ("It is well settled that witnesses must be adjudged by their demeanor as well as their

testimony and that the trial judge, who saw and heard the witnesses, is in a much better position to judge their testimony than an appellate court"); People v. Smith, 77 A.D.2d 544, ___, 430 N.Y.S.2d 95, 97 (1st Dep't 1980) ("It is implicit in this concept that testimony offered by the People, such as that of the detective who was the sole witness in this motion to suppress evidence, must be credible").

Simply stated, anyone can take the witness stand and rattle off a list of indicia of impairment (e.g., odor of an alcoholic beverage, glassy/bloodshot eyes, slurred speech, impaired motor coordination, failure of field sobriety tests, etc.). The mere claim that these things were observed does not make it so. Indeed, the authors find that, where they exist, videos of a defendant's arrest for DWI often depict a very different series of events than what is portrayed in the arresting officer's paperwork and/or testimony. For example, in Matter of Fermin-Perea v. Swarts, 95 A.D.3d 439, ___, 943 N.Y.S.2d 96, 98-99 (1st Dep't 2012), which dealt with a motorist's appeal of a DMV chemical test refusal revocation:

The arresting officer's refusal report, admitted in evidence at the hearing, indicates that upon stopping petitioner because he was speeding, following too closely, and changing lanes without signaling, the officer observed that petitioner was unsteady on his feet, had bloodshot eyes, slurred speech and "a strong odor of alcoholic beverage on [his] breath." However, the field sobriety test, administered approximately 25 minutes later, a video of which was admitted in evidence at the hearing, establishes that petitioner was not impaired or intoxicated. Specifically, the video demonstrates that over the course of four minutes, petitioner was subjected to standardized field sobriety testing and at all times clearly communicated with the arresting officer, never slurred his speech, never demonstrated an inability to comprehend what he was being asked, and followed all of the officer's commands. Petitioner successfully completed the three tests he was asked to perform; thus never exhibiting any signs of impairment or intoxication.

Certainly, the contents of the arresting officer's refusal report, standing alone, establish reasonable grounds for the arrest under the Vehicle and Traffic Law. However, where, as here, a field sobriety test

conducted less than 30 minutes after the officer's initial observations, convincingly establishes that petitioner was not impaired or intoxicated, respondent's determination that there existed reasonable grounds to believe that petitioner was intoxicated has no rational basis and is not inferable from the record. . . . Here, the field sobriety test, conducted shortly after petitioner was operating his motor vehicle, which failed to establish that petitioner was intoxicated or otherwise impaired, leads us to conclude that respondent's determination is not supported by substantial evidence.

The dissent ignores the threshold issue here, namely, that refusal to submit to a chemical test only results in revocation of an operator's driver's license if there are reasonable grounds to believe that the operator was driving while under the influence of drugs or alcohol and more specifically, insofar as relevant here, while intoxicated or impaired. Here, while the officer's initial observations are indeed indicative of intoxication or at the very least, impairment, the results of the field sobriety test administered thereafter -- a more objective measure of intoxication -- necessarily precludes any conclusion that petitioner was operating his vehicle while intoxicated or impaired. Any conclusion to the contrary simply disregards the applicable burden which, as the dissent points out, requires less than a preponderance of the evidence, demanding only that "a given inference is reasonable and plausible." Even under this diminished standard of proof, it is simply unreasonable and uninferable that petitioner was intoxicated or impaired while operating his motor vehicle and yet, 25 minutes later he successfully and without any difficulty passed a field sobriety test.

(Citations omitted).

It seems clear that after reviewing the video, the majority in Fermin-Perea believed that the arresting officer's Report of Refusal was not credible.

§ 1:29 A valid arrest is a prerequisite to a lawful request to submit to a chemical test

VTL § 1194(2)(a) provides, in pertinent part:

2. Chemical tests. (a) When authorized. Any person who operates a motor vehicle in this state shall be deemed to have given consent to a chemical test of one or more of the following: breath, blood, urine, or saliva, for the purpose of determining the alcoholic and/or drug content of the blood provided that such test is administered by or at the direction of a police officer with respect to a chemical test of breath, urine or saliva or, with respect to a chemical test of blood, at the direction of a police officer:

(1) having reasonable grounds to believe such person to have been operating in violation of any subdivision of [VTL § 1192] and within two hours after such person has been placed under arrest for any such violation; or . . .

(2) within two hours after a breath [screening] test, as provided in [VTL § 1194(1)(b)], indicates that alcohol has been consumed by such person and in accordance with the rules and regulations established by the police force of which the officer is a member.

. . .

For underage offenders being requested to submit to a chemical test pursuant to the Zero Tolerance laws, see § 15:30, *infra*.

As VTL § 1194(2)(a) makes clear, either a lawful VTL § 1192 arrest, or a positive result from a lawfully requested breath screening test, is a prerequisite to a valid request that a DWI suspect submit to a chemical test. See, e.g., People v. Moselle, 57 N.Y.2d 97, 107, 454 N.Y.S.2d 292, 296 (1982); Matter of Gagliardi v. Department of Motor Vehicles, 144 A.D.2d 882, ___, 535 N.Y.S.2d 203, 204 (3d Dep't 1988) ("In order for the testing strictures of Vehicle and Traffic Law § 1194 to come into play, there must have been a lawful arrest for driving while intoxicated"); People v. Stisi, 93 A.D.2d 951, ___, 463 N.Y.S.2d 73, 74 (3d Dep't 1983); Matter of June v. Tofany, 34 A.D.2d 732, ___, 311 N.Y.S.2d 782, 783 (4th Dep't 1970); Matter of Burns v.

Hults, 20 A.D.2d 752, ___, 247 N.Y.S.2d 311, 312 (4th Dep't 1964); Matter of Leonard v. Melton, 58 A.D.2d 669, ___, 395 N.Y.S.2d 526, 527 (3d Dep't 1977) (proof that DWI suspect operated vehicle is necessary prerequisite to valid request to submit to chemical test pursuant to VTL § 1194). See also Welsh v. Wisconsin, 466 U.S. 740, 744, 104 S.Ct. 2091, 2095 (1984) ("It is not disputed by the parties that an arrestee's refusal to take a breath test would be reasonable, and therefore operating privileges could not be revoked, if the underlying arrest was not lawful. Indeed, state law has consistently provided that a valid arrest is a necessary prerequisite to the imposition of a breath test").

§ 1:30 Probable cause can generally consist of reliable hearsay

CPL § 70.10(2) provides that:

"Reasonable cause to believe that a person has committed an offense" exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it. *Except as otherwise provided in this chapter, such apparently reliable evidence may include or consist of hearsay.*

(Emphasis added). See also CPL § 710.60(4) (at a suppression hearing, "hearsay evidence is admissible to establish any material fact").

Critically, however, probable cause cannot be established based solely upon hearsay evidence. In this regard, in People v. Randall, 135 A.D.2d 915, ___, 522 N.Y.S.2d 314, 315 (3d Dep't 1987):

At the [suppression] hearing the People failed to produce any of the officers involved in the original street encounter with defendant to testify as to probable cause. The only evidence of the officers' probable cause to detain defendant on the street was the hearsay testimony of Sergeant Angel. As the Court of Appeals has held, probable cause cannot be established solely upon hearsay evidence.

See also People v. Gonzalez, 80 N.Y.2d 883, 587 N.Y.S.2d 607 (1992); People v. Havelka, 45 N.Y.2d 636, 641, 412 N.Y.S.2d 345, 347 (1978); People v. Mercado, 197 A.D.2d 898, 602 N.Y.S.2d 254 (4th Dep't 1993).

In Gonzalez, *supra*:

The issue [was] whether the hearsay testimony of Detective Grossman, the People's sole witness at the suppression hearing, was sufficient, standing alone, to meet the People's burden of showing that defendant voluntarily went to the police precinct where he allegedly made the inculpatory statements.

Detective Grossman testified at the suppression hearing that the three detectives present when defendant was taken from his house told him that defendant voluntarily accompanied them to the precinct. Defendant's wife, however, testified that although her husband was not arrested, the detectives said to him that if he did not come to the precinct voluntarily, he would be forced to do so. The People did not produce any of the three detectives. Nor did the People give any indication that the three detectives were unavailable or offer any reason for not producing at least one of them. The Appellate Division, with one Justice dissenting, affirmed Supreme Court's denial of defendant's suppression motion, holding that it was up to the hearing court to determine the weight and credibility of Detective Grossman's hearsay testimony.

We agree with the dissent at the Appellate Division that the People did not meet their burden of showing that defendant freely consented to go to the precinct. Although Detective Grossman's hearsay testimony was admissible (CPL 710.60[4]), it did not supply the necessary proof of consent. That Grossman, who had no personal knowledge of the relevant facts, testified truthfully as to what the detectives told him has no bearing on the pertinent issue of whether the other detectives' statements were true. Thus, the finding of the hearing court that Grossman was credible is irrelevant. * * *

The hearing evidence presented substantial questions concerning the legality of the non-testifying detectives' conduct. There is no basis for attributing reliability to the hearsay information related by Grossman or for assuming its truth. Thus, because the People produced no witness with firsthand knowledge of the police conduct in dispute, their proof was insufficient to meet their burden of showing that defendant's consent was voluntary.

80 N.Y.2d at 884-85, 587 N.Y.S.2d at 607-08 (citations omitted).

In People v. Moses, 32 A.D.3d 866, ___, 823 N.Y.S.2d 409, 410-11 (2d Dep't 2006):

At a combined Dunaway/Wade hearing, the prosecution presented only the testimony of the arresting officer, who stated that he received a radio communication regarding a robbery in progress and responded to the complainant's location. After speaking with the complainant, the officer received a second radio communication indicating that there was a person stopped in the vicinity of a nearby intersection. The officer then drove the complainant to that location, where the officer and the complainant observed the defendant leaning against an unmarked police car between two plainclothes police officers wearing "NYPD" jackets. The complainant identified the defendant as the man who broke into her home, and he was placed under arrest. The prosecution did not call either of the plainclothes officers to testify at the hearing regarding the circumstances by which the defendant came to be in their company near the intersection.

(Citations omitted).

Under these circumstances, the Appellate Division, Second Department, held as follows:

At a suppression hearing, the prosecution has the initial burden of going forward with evidence to demonstrate the legality of the police conduct in the first instance. The prosecution in this case failed to present any evidence to establish that the defendant was lawfully stopped and detained before the

complainant made her identification. In this regard, the original radio communication regarding a robbery in progress, assuming that it was heard by the plainclothes police officers, was insufficient by itself to provide the officers with a legal basis for stopping the defendant. Similarly, the vague and equivocal hearsay testimony of the arresting officer concerning a statement made by one of the plainclothes officers was inadequate to demonstrate that the defendant's presence at the scene was lawfully obtained. Accordingly, the prosecution failed to satisfy its burden of establishing the legality of the police conduct which led to the identification of the defendant, and the pretrial identification should have been suppressed.

Id. at ___, 823 N.Y.S.2d at 411 (citations omitted).

§ 1:31 Fellow officer rule

In People v. Ketcham, 93 N.Y.2d 416, 419-21, 690 N.Y.S.2d 874, 877-78 (1999), the Court of Appeals set forth a concise summary of the "fellow officer rule":

Under the fellow officer rule, a police officer can make a lawful arrest even without personal knowledge sufficient to establish probable cause, so long as the officer is acting "'upon the direction of or as a result of communication with'" a fellow officer or another police agency in possession of information sufficient to constitute probable cause for the arrest. Information received from another police officer is presumptively reliable. Where, however, an arrest is challenged by a motion to suppress, the prosecution bears the burden of establishing that the officer imparting the information had probable cause to act.

The People may, of course, establish probable cause for a warrantless arrest with hearsay information that satisfies Aguilar-Spinelli. To meet that two-part test, the prosecution must demonstrate the reliability of the hearsay informant and the basis of the informant's knowledge. In other words, there must be evidence that the informant is

generally trustworthy and that the information imparted was "obtained in a reliable way" -- that it constitutes more than unsubstantiated rumor, unfounded accusation or conclusory characterization. An unsubstantiated hearsay communication -- even when transmitted by a fellow officer -- will not satisfy the People's burden.

Where, however, the People demonstrate -- through direct or circumstantial evidence -- how a reliable hearsay informant acquired the information, both prongs of Aguilar-Spinelli may be satisfied. When, for example, the hearsay informant is a police officer who imparts to fellow officers information gathered while personally participating in or observing an undercover drug transaction, there is little doubt as to the reliability of the informant or the basis of knowledge (see, e.g., People v. Petralia [officer made lawful arrest on the basis of radio communication from undercover officer who had purchased heroin and then relayed information describing suspect and suspect's car]; People v. Maldonado [probable cause established based on transmission by primary undercover who engaged in a hand-to-hand drug transaction with a suspect, stating "positive buy," followed by description of individual]; People v. Washington [undercover officer charged with observing primary undercover transmitted "positive observation," a phrase commonly used to indicate exchange of drugs for money, and arresting officer understood those words to mean that the transmitting officer had personally witnessed a drug transaction]).

The prosecution may satisfy its burden even with "double hearsay," or "hearsay-upon-hearsay," so long as both prongs of Aguilar-Spinelli are met at every link in the hearsay chain. As such, police officers may rely on hearsay information derived from a trustworthy informant who did not personally observe a defendant's criminal activity, but came by that information in a reliable, albeit indirect, way. Where, however, there is no evidence indicating how the informant obtained the information passed from one officer to another, there is nothing by which

to measure the trustworthiness of that information (People v. Parris [police officer's conclusory characterization of informant as an "eyewitness" did not satisfy basis of knowledge requirement where there was no further evidence indicating how the informant obtained description of the suspected burglar]).

(Citations omitted). See also People v. Landy, 59 N.Y.2d 369, 465 N.Y.S.2d 857 (1983).

It has been held that the fellow officer rule applies to auxiliary police officers, see People v. Rosario, 78 N.Y.2d 583, 578 N.Y.S.2d 454 (1991), as well as to out-of-State law enforcement officers. See People v. Lypka, 36 N.Y.2d 210, 366 N.Y.S.2d 622 (1975).

§ 1:32 Probable cause must exist at time of arrest

In determining whether probable cause existed for a defendant's arrest, observations made, or evidence obtained, *subsequent* to the arrest (such as incriminating statements, the results of a chemical test, etc.) cannot be considered. See, e.g., People v. McCarthy, 14 N.Y.2d 206, 209, 250 N.Y.S.2d 290, 292 (1964) (per curiam); People v. O'Neill, 11 N.Y.2d 148, 153, 227 N.Y.S.2d 416, 419 (1962); People v. Loria, 10 N.Y.2d 368, 373, 223 N.Y.S.2d 462, 467 (1961); People v. Oquendo, 221 A.D.2d 223, ___, 633 N.Y.S.2d 492, 493 (1st Dep't 1995); People v. Feingold, 106 A.D.2d 583, ___, 482 N.Y.S.2d 857, 859 (2d Dep't 1984); People v. Bruno, 45 A.D.2d 1025, ___, 358 N.Y.S.2d 183, 184 (2d Dep't 1974); People v. Garafolo, 44 A.D.2d 86, ___, 353 N.Y.S.2d 500, 502 (2d Dep't 1974).

Similarly, "[t]he police may not justify a stop by a subsequently acquired suspicion resulting from the stop. This reasoning is the same which refuses to validate a search by what it produces." People v. DeBour, 40 N.Y.2d 210, 215-16, 386 N.Y.S.2d 375, 380 (1976). See also People v. Sobotker, 43 N.Y.2d 559, 565, 402 N.Y.S.2d 993, 996-97 (1978) ("Subsequent events did indeed demonstrate that the officers' hunch may well have been correct. But a search may not be justified by its avails alone. Constitutionally protected rights are not to be dispensed with in this case solely because the results of the improper search and seizure uncovered the fact that one or all of the persons who were its targets were armed with a deadly weapon. Almost any series of indiscriminate seizures is bound to produce some instances of criminality that might otherwise have gone undetected or unprevented. But were hindsight alone to furnish the governing criteria, a vital constitutional safeguard of our personal security would soon be gone").

§ 1:33 When is a probable cause hearing required?

A warrantless arrest is presumptively illegal. See, e.g., Broughton v. State of New York, 37 N.Y.2d 451, 458, 373 N.Y.S.2d 87, 94 (1975) ("Whenever there has been an arrest and imprisonment without a warrant, the officer has acted extrajudicially and the presumption arises that such an arrest and imprisonment are unlawful"); People v. Chaney, 253 A.D.2d 562, ___, 686 N.Y.S.2d 871, 873 (3d Dep't 1998) ("When the validity of a warrantless arrest is challenged, the presumption of probable cause disappears and the People bear the burden of coming forward with evidence showing that it was supported by probable cause").

In addition, "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." Mapp v. Ohio, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691 (1961). See also Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248 (1979); Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254 (1975). In this regard, obtaining a breath or blood sample from a DWI suspect for alcohol and/or drug analysis constitutes a "search" and "seizure" within the meaning of the 4th Amendment. See, e.g., Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616-17, 109 S.Ct. 1402, 1413 (1989); Schmerber v. California, 384 U.S. 757, 767, 86 S.Ct. 1826, 1834 (1966); People v. Kates, 53 N.Y.2d 591, 594-95, 444 N.Y.S.2d 446, 448 (1976).

In Brown v. Illinois, *supra*, the defendant "was arrested without probable cause and without a warrant. He was given, in full, the warnings prescribed by Miranda v. Arizona. Thereafter, while in custody, he made two inculpatory statements. The issue [was] whether evidence of those statements was properly admitted, or should have been excluded, in petitioner's subsequent trial for murder in state court. Expressed another way, the issue [was] whether the statements were to be excluded as the fruit of the illegal arrest, or were admissible because the giving of the Miranda warnings sufficiently attenuated the taint of the arrest." 422 U.S. at 591-92, 95 S.Ct. at 2256 (citation omitted). In other words, the issue in Brown was whether statements that were voluntarily made under the 5th Amendment were admissible at trial if the statements were the fruits of an illegal arrest without probable cause.

The United States Supreme Court held that:

The exclusionary rule, . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth. It is directed at all unlawful searches and

seizures, and not merely those that happen to produce incriminating material or testimony as fruits. In short, exclusion of a confession made without Miranda warnings might be regarded as necessary to effectuate the Fifth Amendment, but it would not be sufficient fully to protect the Fourth. Miranda warnings, and the exclusion of a confession made without them, do not alone sufficiently deter a Fourth Amendment violation.

Thus, even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains. In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, Wong Sun requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be "sufficiently an act of free will to purge the primary taint." Wong Sun thus mandates consideration of a statement's admissibility in light of the distinct policies and interests of the Fourth Amendment.

If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. Arrests made without warrant or without probable cause, for questioning or "investigation," would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving Miranda warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a "cure-all," and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to "a form of words."

422 U.S. at 601-03, 95 S.Ct. at 2260-61 (citations and footnotes omitted).

Brown is not a model of clarity, and it apparently confused the Appellate Division, Fourth Department, in People v. Dunaway, 61 A.D.2d 299, 402 N.Y.S.2d 490 (4th Dep't 1978) (as the United

States Supreme Court reversed it in Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248 (1979)). In Dunaway, the Supreme Court held that:

[D]etention for custodial interrogation -- regardless of its label -- intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest. We accordingly hold that the Rochester police violated the Fourth and Fourteenth Amendments when, without probable cause, they seized petitioner and transported him to the police station for interrogation.

442 U.S. at 216, 99 S.Ct. at 2258. This is where the so-called Dunaway hearing (a.k.a. probable cause hearing) comes from.

Since virtually every DWI arrest is warrantless -- and thus presumptively unconstitutional -- it would seem that probable cause hearings would be available for the asking. However, this is not the case. See, e.g., People v. Gruden, 42 N.Y.2d 214, 217, 397 N.Y.S.2d 704, 706 (1977) ("Generally hearings are not available merely for the asking"). Rather, CPL § 710.60 sets forth the procedure governing suppression motions. Critically, however, if the defendant's motion papers are sufficient, then the Court literally *must* grant a Dunaway (i.e., probable cause) and/or a Mapp (i.e., suppression) hearing. See *infra*.

The defendant's motion papers are sufficient when they (a) challenge the lawfulness of the defendant's arrest, and (b) assert sworn allegations of fact in support of such claim that raise a factual dispute on a material point. See CPL § 710.60(3), (4). In this regard, it is well settled that an attorney's affirmation signed by defense counsel is sufficient to satisfy the pleading requirements of CPL § 710.60 (i.e., an affidavit of the defendant is not required). See, e.g., CPL § 710.60(1) ("Such allegations may be based upon personal knowledge of the deponent or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief are stated"); People v. Mendoza, 82 N.Y.2d 415, 425, 604 N.Y.S.2d 922, 926 (1993); People v. Mabeus, 47 A.D.3d 1073, ___, 850 N.Y.S.2d 664, 666 (3d Dep't 2008); People v. Lopez, 263 A.D.2d 434, ___, 695 N.Y.S.2d 76, 77 (1st Dep't 1999); People v. Marquez, 246 A.D.2d 330, ___, 667 N.Y.S.2d 359, 360 (1st Dep't 1998); People v. Ayarde, 220 A.D.2d 519, ___, 632 N.Y.S.2d 174, 175 (2d Dep't 1995); People v. Bailey, 218 A.D.2d 569, ___, 630 N.Y.S.2d 499, 500 (1st Dep't 1995); People v. Vasquez, 200 A.D.2d 344, ___, 613 N.Y.S.2d 595, 596 (1st Dep't 1994); People v. Foster, 197 A.D.2d 411, ___, 602 N.Y.S.2d 395, 395 (1st Dep't 1993); People v. Aponte, 193 A.D.2d 529, ___, 598 N.Y.S.2d 937, 937 (1st Dep't 1993); People v. Moore, 186 A.D.2d

591, ___, 588 N.Y.S.2d 388, 389 (2d Dep't 1992); People v. Rodriguez, 185 A.D.2d 802, ___, 586 N.Y.S.2d 968, 968-69 (1st Dep't 1992); People v. Miller, 162 A.D.2d 248, ___, 556 N.Y.S.2d 607, 607 (1st Dep't 1990); People v. Huggins, 162 A.D.2d 129, ___, 556 N.Y.S.2d 75, 75-76 (1st Dep't 1990); People v. Marte, 149 A.D.2d 335, ___, 539 N.Y.S.2d 912, 913 (1st Dep't 1989); People v. Lee, 130 A.D.2d 400, ___, 515 N.Y.S.2d 260, 262 (1st Dep't 1987); People v. Patterson, 129 A.D.2d 527, ___, 514 N.Y.S.2d 378, 379 (1st Dep't 1987); People v. Marshall, 122 A.D.2d 283, ___, 504 N.Y.S.2d 782, 783 (2d Dep't 1986); People v. Sutton, 91 A.D.2d 522, ___, 456 N.Y.S.2d 771, 772 (1st Dep't 1982).

The Court of Appeals has made clear that:

A trial court is *required* to grant a hearing if the defendant "raise[s] a factual dispute on a material point which must be resolved before the court can decide the legal issue" of whether evidence was obtained in a constitutionally permissible manner.

People v. Burton, 6 N.Y.3d 584, 587, 815 N.Y.S.2d 7, 9 (2006) (emphasis added) (citation omitted). See also CPL § 710.60(3), (4); People v. Mendoza, 82 N.Y.2d 415, 426, 604 N.Y.S.2d 922, 926 (1993); People v. Gruden, 42 N.Y.2d 214, 215, 397 N.Y.S.2d 704, 705 (1977); People v. Bennett, 240 A.D.2d 292, ___, 659 N.Y.S.2d 260, 261 (1st Dep't 1997) ("It is not necessary that a moving defendant raise an issue of fact as to every factual allegation put forth by the prosecution in order for a hearing to be ordered").

Nonetheless, many prosecutors oppose the granting of a Dunaway/Mapp hearing in literally every single case, reflexively asserting that the defendant has failed to allege sufficient facts to entitle him/her to a hearing regardless of the facts alleged in the defendant's motion papers. In this regard, the People typically cite cases such as People v. Roberto H., 67 A.D.2d 549, 416 N.Y.S.2d 305 (2d Dep't 1979), in which the defendant failed to allege a single fact in support of his motion to suppress.

A review of Roberto H. demonstrates that defense counsel's affirmation in that case was patently inadequate to justify a suppression hearing. Specifically, as the Roberto H. Court noted:

With regard to the remaining portions of the motion to suppress, defense counsel submitted a supporting affirmation alleging:

"That your affirmant has been served with a notice, a copy of which is annexed hereto, by the District Attorney's office that testimony will be offered at the trial of this matter identifying the defendant as the perpetrator of the within crimes.

"That your affirmant submits that should it appear that the identification herein was made under circumstances highly suggestive, unfair and prejudicial to the defendant, so as to deny him due process of law in violation of the 'FOURTH', 'FIFTH', 'SIXTH' and 'FOURTEENTH' Amendments to the United States Constitution, that evidence should be suppressed from the trial of this matter and your affirmant requests a hearing to determine that issue.

* * * * *

"That upon information and belief, upon the date of his arrest an illegal and unlawful search was conducted by arresting law enforcement officials.

"That the District Attorney has failed to disclose the exact facts and circumstances surrounding the search and it is your affirmant's belief that contraband which is the subject of the within indictment was obtained therefrom.

"That your affirmant respectfully submits that if it should appear that the search conducted was an unreasonable search and seizure in violation of defendant's 'FOURTH', 'FIFTH' and 'FOURTEENTH' Amendment Rights of the United States Constitution, the contraband obtained therefrom should be suppressed from use upon the trial of this matter and your affirmant requests a hearing to determine that issue."

It is abundantly clear from these excerpts, which comprise the sum and substance of the allegations in support of the motion, that defendant failed to comply with the

requirements of CPL 710.60. The affirmation fails to allege any facts whatever, let alone facts in support of the grounds for the motion.

Id. at ___, 416 N.Y.S.2d at 306-07 (emphasis added).

Simply stated, there was literally not one single fact alleged by the attorney in Roberto H. that either (a) dealt with any of the specific facts of the case, and/or (b) stated a ground for suppression.

Another case that is frequently misapplied by the People is People v. Gruden, 42 N.Y.2d 214, 397 N.Y.S.2d 704 (1977). In Gruden, the defendants brought speedy trial motions pursuant to CPL § 30.30. The defendants' motion papers alleged sufficient facts which, if undisputed, would require that the motions be summarily *granted* without a hearing. "The People did not dispute the facts alleged in the defendants' motion papers. Instead they consented to a hearing." Id. at 215, 397 N.Y.S.2d at 705. The People claimed that the relevant statute should be construed "so as to preclude the court from summarily granting the motion to dismiss unless the facts are expressly conceded by the People to be true, arguing that a failure on the part of the People to controvert is not necessarily to be deemed a concession under the statute." Id. at 216, 397 N.Y.S.2d at 705.

In other words, in Gruden the People claimed that they were entitled to an evidentiary hearing on every speedy trial motion even if none of the defendants' factual allegations were in dispute. The specific holding in Gruden was as follows: "Generally hearings are not available merely for the asking. We therefore hold that the court may summarily grant a motion to dismiss unless the papers submitted by the prosecutor show that there is a factual dispute which must be resolved at a hearing." Id. at 217, 397 N.Y.S.2d at 706 (emphasis added). See also id. at 216, 397 N.Y.S.2d at 706 ("Obviously it is not the statutory language but the prosecution's interpretation of it which is unusual. Normally what is not disputed is deemed to be conceded. Generally a party opposing a motion cannot arbitrarily demand a hearing to conduct a fishing expedition") (emphases added). Simply stated, Gruden dealt with the sufficiency of the People's responding papers (not the defendant's motion papers); and, as in Roberto H., not one single fact was alleged in the relevant papers.

A fair reading of Gruden is that if the defendant's motion papers do not dispute any of the material factual allegations surrounding the stop, arrest, detention, search, etc., then the defendant should not expect a suppression hearing to be granted. On the other hand, if the defendant's motion papers do raise a "factual dispute on a material point," then a suppression hearing

must be granted. In other words, where the defendant contests material factual assertions raised by the People, a hearing is required as a matter of law (*i.e.*, discretion plays no part in the analysis).

Where material facts are in dispute, the Court is called upon to assess credibility -- which cannot be done in the absence of a hearing involving live witnesses and the opportunity for cross-examination. In this regard, the People frequently quote the "hearings are not available merely for the asking" line in Gruden out of context. Gruden makes clear that a party generally cannot demand a hearing without putting forth any facts whatsoever in support of its position. By contrast, Gruden clearly does not stand for the proposition that Courts should scour defense motions looking for any excuse to deny a suppression hearing. Indeed, the Court of Appeals has indicated that even where the defendant's motion papers are deficient, a Court should both (a) seriously consider granting the defendant a requested suppression hearing as a matter of discretion, see Mendoza, 82 N.Y.2d at 429-30, 604 N.Y.S.2d at 928-29, and (b) grant the defendant "the opportunity to seek leave to cure the defect, often a simple matter." Id. at 430, 604 N.Y.S.2d at 929. See also People v. Bonilla, 82 N.Y.2d 825, 827, 604 N.Y.S.2d 937, 938 (1993) (same).

Notably, CPL § 710.60(6) requires that "[r]egardless of whether a hearing [i]s conducted, the court, upon determining the motion, must set forth on the record its findings of fact, its conclusions of law and the reasons for its determination." See also Bonilla, 82 N.Y.2d at 827-28, 604 N.Y.S.2d at 938. Where material facts are disputed, a Court cannot fairly and impartially make the "findings of fact" required by CPL § 710.60(6) without holding a hearing, because:

The question of probable cause is a mixed question of law and fact. Determination of the facts and circumstances bearing on the issue, which hinges primarily on questions of witness credibility, is a question of fact. However, it is a question of law whether the facts found to exist are sufficient to constitute probable cause.

People v. Morales, 42 N.Y.2d 129, 134, 397 N.Y.S.2d 587, 590 (1977). More specifically, in People v. Oden, 36 N.Y.2d 382, 384, 368 N.Y.S.2d 508, 511 (1975), the Court of Appeals held that:

Probable cause exists if the facts and circumstances known to the arresting officer warrant a prudent man in believing that the offense has been committed. The question of

probable cause is a mixed question of law and fact: the truth and existence of the facts and circumstances bearing on the issue being a question of fact, and the determination of whether the facts and circumstances found to exist and to be true constitute probable cause being a question of law. If the facts and circumstances adduced as proof of probable cause are controverted so that conflicting evidence is to be weighed, if different persons might reasonably draw opposing inferences therefrom, or if the credibility of witnesses is to be passed upon, issues as to the existence or truth of those facts and circumstances are to be passed upon as a question of fact; however, when the facts and circumstances are undisputed, when only one inference can reasonably be drawn therefrom and when there is no problem as to credibility, or when certain facts and circumstances have been found to exist, the issue as to whether they amount to probable cause is a question of law.

(Citations omitted).

In the absence of a hearing, the "facts" alleged in the parties' motion papers are merely *allegations of fact* -- they do not constitute evidence. "While it may turn out that [the defendant's claims are not] borne out by the facts ultimately found, the existence of sworn allegations supporting . . . viable legal arguments mandates that a hearing be held." People v. Marshall, 122 A.D.2d 283, ___, 504 N.Y.S.2d 782, 783 (2d Dep't 1986).

The Court of Appeals has expressly rejected a prosecution claim that the "defendant must offer an innocent explanation for his conduct." People v. Hightower, 85 N.Y.2d 988, 990, 629 N.Y.S.2d 164, 166 (1995). See also People v. Bailey, 218 A.D.2d 569, ___, 630 N.Y.S.2d 499, 501 (1st Dep't 1995) (same); People v. Lopez, 263 A.D.2d 434, ___, 695 N.Y.S.2d 76, 77 (1st Dep't 1999) (defendant "need not prove his entire case in the motion papers").

Rather, the standard to be used in deciding whether the defendant's motion papers raise a factual dispute on a material point was set forth by the Court of Appeals in Mendoza: "We conclude that the sufficiency of defendant's factual allegations should be evaluated by (1) the face of the pleadings, (2) assessed in conjunction with the context of the motion, and (3) defendant's access to information." 82 N.Y.2d at 426, 604

N.Y.S.2d at 926. See also People v. Jones, 95 N.Y.2d 721, 723 N.Y.S.2d 761 (2001). In this regard, Mendoza makes clear that "[i]t would be unreasonable to construe the CPL to require precise factual averments when, in parallel circumstances, defendant . . . does not have access to or awareness of the facts necessary to support suppression." 82 N.Y.2d at 429, 604 N.Y.S.2d at 928.

In People v. Vasquez, 200 A.D.2d 344, 613 N.Y.S.2d 595 (1st Dep't 1994), the Appellate Division, First Department, stated that:

[I]t should be stressed that whether or not the defendant knew he had done something illegal was not the relevant issue in determining whether there had been an unreasonable search and seizure; it was rather whether the *police* knew a sufficient amount about any transgressions by the defendant to render their intrusion upon him legal. Plainly, the defendant was not obliged globally to assert his innocence of all wrongdoing as a condition of maintaining his motion to suppress. All that he was obliged to do was to raise an issue as to the legality of the arrest, and to do that no more could reasonably have been required than that he cast into question, to the extent possible given the nature of the factual context and the information made available to him, whether the arresting officers' knowledge of any wrongdoing by him was sufficient to constitute probable cause. * *

*

As Mendoza implicitly recognizes, and as is in any case obvious, it was not the Legislature's intention in enacting CPL § 710.60 to create an insuperable barrier to the assertion of possibly meritorious suppression claims.

Id. at ____-____, 613 N.Y.S.2d at 597-98.

Even if the defendant's factual allegations are deficient, the Court of Appeals has indicated a preference that a suppression hearing be granted where the defendant claims that the People's evidence was unlawfully obtained. In this regard, the Mendoza Court stated that, in addition to the three traditional factors used to decide the sufficiency of a defendant's motion papers, a fourth factor -- "(4) Court's Discretion to Conduct a Hearing" -- comes into play. See 82 N.Y.2d at 429, 604 N.Y.S.2d at 928.

In explaining why it is preferable for a Court to conduct suppression hearings where the defendant claims that evidence was unlawfully obtained, the Mendoza Court stated:

The CPL does not mandate summary denial of defendant's motion even if the factual allegations are deficient (see, CPL 710.60[3] ["The court *may* summarily deny the motion"] [emphasis added]). If the court orders a Huntley . . . hearing, and defendant's Mapp motion is grounded in the same facts involving the same police witnesses, the court may deem it appropriate in the exercise of discretion to consider the Mapp motion despite a perceived pleading deficiency. Indeed, considerations of judicial economy militate in favor of this procedure; an appellate court might conclude that summary denial of the Mapp motion was improper, requiring the parties and witnesses to reassemble for a new hearing, often months or years later.

Id. at 429-30, 604 N.Y.S.2d at 928-29. See also People v. Higgins, 124 A.D.3d 929, ___, 1 N.Y.S.3d 424, 428-29 (3d Dep't 2015) ("we wholly reject the People's contention that County Court erred in granting defendant's request for a Mapp/Dunaway hearing. Although a defendant seeking a suppression hearing must make sworn factual allegations supporting his or her motion, CPL 710.60 'does not mandate summary denial of defendant's motion even if the factual allegations are deficient.' Here, the People had consented to a Huntley hearing 'grounded in the same facts involving the same police witnesses.' Principles of judicial economy clearly weighed in favor of conducting any related suppression hearings, and we cannot find any error in so proceeding") (citations omitted).

In keeping with this stated preference that suppression hearings be granted where the defendant's motion papers are minimally sufficient, appellate courts in New York "have frequently criticized the practice of summarily denying suppression motions without a hearing where defendant sets forth a minimally sufficient showing to warrant a hearing on the suppression issue," People v. Harris, 160 A.D.2d 515, ___, 554 N.Y.S.2d 170, 171 (1st Dep't 1990), and routinely hold appeals in abeyance and order that improperly denied suppression hearings be conducted. See, e.g., People v. Hightower, 85 N.Y.2d 988, 629 N.Y.S.2d 164 (1995); People v. Mendoza, 82 N.Y.2d 415, 604 N.Y.S.2d 922 (1993); People v. White, 137 A.D.3d 1311, 28 N.Y.S.3d 423 (2d Dep't 2016); People v. Chamlee, 120 A.D.3d 417, 991 N.Y.S.2d 313 (1st Dep't 2014); People v. Atkinson, 111 A.D.3d

1061, 975 N.Y.S.2d 227 (3d Dep't 2013); People v. Jennings, 110 A.D.3d 738, 972 N.Y.S.2d 104 (2d Dep't 2013); People v. Jones, 73 A.D.3d 662, 901 N.Y.S.2d 274 (1st Dep't 2010); People v. Acosta, 66 A.D.3d 792, 887 N.Y.S.2d 187 (2d Dep't 2009); People v. Frank, 65 A.D.3d 461, 884 N.Y.S.2d 718 (1st Dep't 2009); People v. Trotter, 54 A.D.3d 1065, 863 N.Y.S.2d 924 (2d Dep't 2008); People v. Otero, 51 A.D.3d 553, 858 N.Y.S.2d 157 (1st Dep't 2008); People v. Mabeus, 47 A.D.3d 1073, 850 N.Y.S.2d 664 (3d Dep't 2008); People v. Joyner, 46 A.D.3d 473, 848 N.Y.S.2d 146 (1st Dep't 2007); People v. Bacon, 6 A.D.3d 241, 774 N.Y.S.2d 332 (1st Dep't 2004); People v. Phillips, 4 A.D.3d 233, 771 N.Y.S.2d 658 (1st Dep't 2004); People v. Muhammed, 290 A.D.2d 248, 736 N.Y.S.2d 19 (1st Dep't 2002); People v. Mathison, 282 A.D.2d 283, 722 N.Y.S.2d 872 (1st Dep't 2001); People v. Butler, 280 A.D.2d 399, 720 N.Y.S.2d 788 (1st Dep't 2001); People v. Lopez, 263 A.D.2d 434, 695 N.Y.S.2d 76 (1st Dep't 1999); People v. Nenni, 261 A.D.2d 900, 689 N.Y.S.2d 912 (4th Dep't 1999); People v. Wright, 256 A.D.2d 106, 682 N.Y.S.2d 154 (1st Dep't 1998); People v. Face, 247 A.D.2d 336, 669 N.Y.S.2d 289 (1st Dep't 1998); People v. Lewis, 247 A.D.2d 227, 668 N.Y.S.2d 356 (1st Dep't 1998); People v. Marquez, 246 A.D.2d 330, 667 N.Y.S.2d 359 (1st Dep't 1998); People v. Perilla, 240 A.D.2d 313, 660 N.Y.S.2d 113 (1st Dep't 1997); People v. Bennett, 240 A.D.2d 292, 659 N.Y.S.2d 260 (1st Dep't 1997); People v. Sanchez, 236 A.D.2d 243, 653 N.Y.S.2d 563 (1st Dep't 1997); People v. Vittegleo, 226 A.D.2d 1128, 642 N.Y.S.2d 827 (4th Dep't 1996); People v. Ayarde, 220 A.D.2d 519, 632 N.Y.S.2d 174 (2d Dep't 1995); People v. Bailey, 218 A.D.2d 569, 630 N.Y.S.2d 499 (1st Dep't 1995); People v. Youngblood, 210 A.D.2d 948, 621 N.Y.S.2d 265 (4th Dep't 1994); People v. Holmes, 206 A.D.2d 604, 614 N.Y.S.2d 474 (3d Dep't 1994); People v. Vasquez, 200 A.D.2d 344, 613 N.Y.S.2d 595 (1st Dep't 1994); People v. Altruz, 198 A.D.2d 423, 604 N.Y.S.2d 134 (1st Dep't 1993); People v. Foster, 197 A.D.2d 411, 602 N.Y.S.2d 395 (1st Dep't 1993); People v. Aponte, 193 A.D.2d 529, 598 N.Y.S.2d 937 (1st Dep't 1993); People v. Cole, 187 A.D.2d 873, 590 N.Y.S.2d 542 (3d Dep't 1992); People v. Moore, 186 A.D.2d 591, 588 N.Y.S.2d 388 (2d Dep't 1992); People v. Rodriguez, 185 A.D.2d 802, 586 N.Y.S.2d 968 (1st Dep't 1992); People v. Davis, 169 A.D.2d 379, 564 N.Y.S.2d 320 (1st Dep't 1991); People v. Miller, 162 A.D.2d 248, 556 N.Y.S.2d 607 (1st Dep't 1990); People v. Huggins, 162 A.D.2d 129, 556 N.Y.S.2d 75 (1st Dep't 1990); People v. Harris, 160 A.D.2d 515, 554 N.Y.S.2d 170 (1st Dep't 1990); People v. Zarate, 160 A.D.2d 466, 554 N.Y.S.2d 137 (1st Dep't 1990); People v. Whiten, 151 A.D.2d 708, 543 N.Y.S.2d 944 (2d Dep't 1989); People v. Alvarez, 151 A.D.2d 684, 543 N.Y.S.2d 935 (2d Dep't 1989); People v. Marte, 149 A.D.2d 335, 539 N.Y.S.2d 912 (1st Dep't 1989); People v. Astride, 147 A.D.2d 407, 538 N.Y.S.2d 5 (1st Dep't 1989); People v. Lee, 130 A.D.2d 400, 515 N.Y.S.2d 260 (1st Dep't 1987); People v. Patterson, 129 A.D.2d 527, 514 N.Y.S.2d 378 (1st Dep't 1987); People v. Marshall, 122 A.D.2d 283, 504 N.Y.S.2d 782 (2d Dep't 1986); People v. Sutton, 91 A.D.2d 522, 456 N.Y.S.2d 771 (1st Dep't

1982); People v. Calhoun, 73 A.D.2d 972, 424 N.Y.S.2d 247 (2d Dep't 1980); People v. Carter, 72 A.D.2d 963, 422 N.Y.S.2d 258 (4th Dep't 1979); People v. Carrasquillo, 70 A.D.2d 842, 418 N.Y.S.2d 3 (1st Dep't 1979); People v. Werner, 55 A.D.2d 317, 390 N.Y.S.2d 711 (4th Dep't 1977).

The Appellate Division, First Department's decision in People v. Estrada, 147 A.D.2d 407, ___, 538 N.Y.S.2d 5, 5-6 (1st Dep't 1989), is illustrative:

Defendant made a pretrial motion to suppress his confession, claiming that it was the product of an illegal arrest. In his motion papers, defendant alleged that prior to his arrest he had not been observed with any contraband or acting in a suspicious manner. He claimed, therefore, that there had not been probable cause for his arrest. As the People now concede, and as is in any case evident, defendant's allegations were sufficient to require that a Dunaway hearing be held. Justice Rothwax, however, summarily denied the defendant's Dunaway motion without a hearing. Although the summary denial may have appeared efficient at the time, its ultimate consequence will be unnecessarily to delay the adjudication of defendant's case. If this were an isolated case it would not merit comment but we have on at least six previous occasions had to hold appeals in abeyance and remand for hearings upon suppression motions inappropriately denied by the same judge.

(Citations omitted). Notably, following the remand the New York County Supreme Court "granted defendant-appellant's motion to suppress on the District Attorney's concession that it was unable to proceed. The prosecution concede[d] that without this confession it [was] unable to sustain its burden of proof. In view of this concession the indictment [was] dismissed." People v. Estrada, 152 A.D.2d 499, ___, 544 N.Y.S.2d 475, 475 (1st Dep't 1989).

In People v. Misuis, 47 N.Y.2d 979, 981, 419 N.Y.S.2d 961, 962-63 (1979), the Court of Appeals made clear that:

Clearly, statements obtained by exploitation of unlawful police conduct or detention must be suppressed, for their use in evidence under such circumstance violates the Fourth Amendment (Dunaway v. New York, ___ U.S. ___, 99 S.Ct. 2248, 60 L.Ed.2d 824). It is

therefore "incumbent upon the suppression court to permit an inquiry into the propriety of the police conduct." Unless the People establish that the police had probable cause to arrest or detain a suspect, and unless the defendant is accorded an opportunity to delve fully into the circumstances attendant upon his arrest or detention, his motion to suppress should be granted.

(Quoting People v. Wise, 46 N.Y.2d 321, 329, 413 N.Y.S.2d 334, 339 (1978)) (footnote omitted). See also People v. Chaney, 253 A.D.2d 562, ___, 686 N.Y.S.2d 871, 873 (3d Dep't 1998); People v. Sanchez, 236 A.D.2d 243, ___, 653 N.Y.S.2d 563, 564-65 (1st Dep't 1997). See generally People v. Gonzalez, 71 A.D.2d 775, ___, 419 N.Y.S.2d 322, 323-24 (3d Dep't 1979).

In Misuis, the Court of Appeals reversed the Appellate Division, vacated the defendant's guilty plea, and remitted the case for a probable cause hearing where:

At the hearing on defendant's motion to suppress [various] admissions, his counsel repeatedly attempted to interrogate the two officers in an effort to discover whether the police had probable cause to make the arrest. His avowed intention was to show that the detention was unlawful and thus any statements made as a result of the claimed unlawful arrest and detention tainted any admissions. However, at the insistent urging of the prosecutor the court refused to permit that inquiry and permitted only questions concerning the voluntariness of the statements themselves.

47 N.Y.2d at 980, 419 N.Y.S.2d at 962.

The same conclusion was reached in People v. Whitaker, 79 A.D.2d 668, ___, 433 N.Y.S.2d 849, 850 (2d Dep't 1980):

As the People concede, the suppression court erred in severely limiting the defendant's cross-examination of the sole arresting officer who testified, with respect to the issue of whether there was probable cause to arrest defendant. It is well-settled that on a motion to suppress a defendant's postarrest statements, the suppression court is required to permit the defendant to "delve fully into the circumstances attendant upon his arrest", for "[a] statement, voluntary under Fifth

Amendment standards, will nevertheless be suppressed if it has been obtained through the exploitation of an illegal arrest."

(Citations omitted). See also People v. Lopez, 56 A.D.3d 280, 867 N.Y.S.2d 83 (1st Dep't 2008); People v. Roberts, 81 A.D.2d 674, 441 N.Y.S.2d 408 (2d Dep't 1981); People v. King, 79 A.D.2d 1033, 437 N.Y.S.2d 931 (2d Dep't 1981); People v. Specks, 77 A.D.2d 669, 430 N.Y.S.2d 157 (2d Dep't 1980). See generally People v. Williamson, 79 N.Y.2d 799, 800, 580 N.Y.S.2d 170, 171 (1991) ("We agree that it was error to restrict cross-examination under these circumstances Unlike the Appellate Division, however, we conclude that the error requires a reversal") (citation omitted); People v. Garriga, 189 A.D.2d 236, ___, 596 N.Y.S.2d 25, 29 (1st Dep't 1993) ("We also find reversible error in the excessive constraints placed upon defense counsel in cross-examination of the People's witnesses both at the Mapp hearing and at trial").

Practically speaking, probable cause hearings are granted routinely as a matter of judicial and prosecutorial economy. In the authors' experience, many prosecutors are willing to stipulate to a so-called Huntley/Dunaway/Mapp hearing. Such hearings tend to resolve most of the issues that would arise at trial, and give both sides a preview of the case (which generally results in a pre-trial disposition). Thus, pre-trial hearings are often a very efficient use of scarce judicial resources.

Another factor warrants consideration. Many people accused of DWI have no prior experience with the criminal justice system. They expect to be treated fairly and impartially by both the People and the Court. When the People vehemently oppose the granting of a probable cause hearing, and the Court finds that an arrest was lawful based solely on a police officer's hearsay accusations, the defendant is often left with the perception that the system is biased and unfair, which undermines respect for the rule of law.

§ 1:34 Standing

In response to a defense motion to suppress, the People frequently claim that the defendant has failed to allege facts establishing his or her standing to pursue the motion. Such claims are generally frivolous when made in connection with DWI cases. In this regard, the doctrine of standing typically applies to cases where a search of *someone else's* property yields evidence that the People seek to use against the defendant. The doctrine is all but inapplicable to a typical DWI case, where the primary thing searched and seized is the defendant's person (including a sample of the defendant's breath and/or blood).

It is well settled that a defendant has a legitimate expectation of privacy in, and thus standing to contest, a search of his or her own "person" by the police. See, e.g., People v. Burton, 6 N.Y.3d 584, 588, 815 N.Y.S.2d 7, 10 (2006) ("Under the Fourth Amendment to the United States Constitution, individuals possess a legitimate expectation of privacy with regard to their persons"); People v. Wesley, 73 N.Y.2d 351, 361, 540 N.Y.S.2d 757, 763 (1989) (in case of search of defendant's person, "there plainly is standing"); People v. Moore, 186 A.D.2d 591, ___, 588 N.Y.S.2d 388, 389-90 (2d Dep't 1992) ("the defendant clearly had standing to contest the search of his person"); People v. Marte, 149 A.D.2d 335, ___, 539 N.Y.S.2d 912, 913 (1st Dep't 1989) ("There is no question that defendant had standing to challenge the legitimacy of the search and seizure of evidence from his person"); People v. Lee, 130 A.D.2d 400, ___, 515 N.Y.S.2d 260, 262 (1st Dep't 1987) ("since it was clear that defendant's person had been subjected to a search and seizure, no proprietary interest need be asserted").

Similarly, where the defendant is the driver of a vehicle stopped by the police, he or she has standing to challenge the lawfulness of the stop -- *even if the vehicle is stolen*. See People v. May, 81 N.Y.2d 725, 727, 593 N.Y.S.2d 760, 761 (1992).

§ 1:35 Proving the basis to stop at a suppression hearing

It is axiomatic that the People's burden of proof at a probable cause hearing is less onerous than their burden of proof at trial. In this regard, in People v. Saylor, 166 A.D.2d 899, ___, 560 N.Y.S.2d 560, 561 (4th Dep't 1990), the Appellate Division, Fourth Department, held that:

The issue at the hearing was not whether defendant was speeding, but whether the police officer had reasonable suspicion to believe that defendant was speeding. Although the officer did not testify in detail about his training, the court was entitled to assume, for purposes of this hearing, that a police officer with over a year's experience can visually estimate the speed of a moving vehicle. Moreover, the radar unit clocked defendant's speed at 54 miles per hour, adding additional support to the officer's estimate. Although at trial it would be necessary for the People to establish that the radar unit was in proper working order, the suppression court properly concluded that such detailed proof was not required at a probable cause hearing.

(Citation omitted). See also People v. Robinson, 97 N.Y.2d 341, 354, 741 N.Y.S.2d 147, 155 (2001) ("the decision to stop a vehicle is reasonable where the police have probable cause to believe that a traffic infraction has occurred"); id. at 350, 741 N.Y.S.2d at 152 ("This Court has always evaluated the validity of a traffic stop based on probable cause that a driver has committed a traffic violation"); People v. Guthrie, 25 N.Y.3d 130, 133, 8 N.Y.S.3d 237, 240 (2015).

§ 1:36 Prosecution generally only has one chance to prove probable cause

Where the People fail to call a necessary witness or witnesses at a pre-trial hearing, and/or fail to prove a necessary piece of evidence at the hearing, it is generally improper for a Court to re-open the proof to allow the People to "cure" the defect. Stated another way, Courts traditionally refrain from giving the People a "second bite at the apple" in such circumstances. See, e.g., People v. Kevin W., 22 N.Y.3d 287, 289, 295, 980 N.Y.S.2d 873, 873, 877-78 (2013); People v. Havelka, 45 N.Y.2d 636, 643, 412 N.Y.S.2d 345, 348-49 (1978); People v. Bryant, 37 N.Y.2d 208, 211, 371 N.Y.S.2d 881, 884 (1975) (per curiam); People v. Knapp, 57 N.Y.2d 161, 175, 455 N.Y.S.2d 539, 544 (1982); People v. Dodt, 474 N.Y.S.2d 441, 447, 61 N.Y.2d 408, 418 (1984).

An exception to this rule exists where "the People were 'deprived of an opportunity to fully present all the available evidence * * * because the hearing court made an incorrect ruling.'" People v. Serrano, 93 N.Y.2d 73, 79, 688 N.Y.S.2d 90, 94 (1999) (citation omitted). See also People v. Crandall, 69 N.Y.2d 459, 464, 515 N.Y.S.2d 745, 747 (1987) ("the People should not be deprived of one full opportunity to present evidence of the dispositive issues involved at the suppression hearing. If an error of law is committed by the hearing court which directly causes the People to fail to offer potentially critical evidence a rehearing should be ordered so that the evidence may be presented") (citation omitted); Havelka, 45 N.Y.2d at 643, 412 N.Y.S.2d at 348 (same).

§ 1:36A Where trial testimony conflicts with testimony at suppression hearing, defendant should move to reopen hearing

In People v. Badia, 130 A.D.3d 744, 14 N.Y.S.3d 73 (2d Dep't 2015), a pre-trial suppression hearing was held, following which the defendant's blood test results were found to be admissible. On appeal, "the defendant relie[d] on portions of the trial record in support of his contention that the blood test results should have been suppressed." Id. at ___, 14 N.Y.S.3d at 74. The Appellate Division, Second Department, held that:

[T]his Court is precluded from reviewing trial testimony in determining whether the hearing court acted properly. The propriety of the hearing court's ruling must be determined only in light of the evidence that was before that court. Since the defendant did not seek to reopen the hearing based on the trial testimony, or move for a mistrial, the question of whether the trooper's trial testimony undermined the hearing court's determination is not properly before this Court.

Id. at ___, 14 N.Y.S.3d at 74-75 (citations omitted).

§ 1:37 When can a police officer search the interior of a vehicle during a stop for a traffic infraction?

In People v. Class, 67 N.Y.2d 431, 503 N.Y.S.2d 313 (1986) (per curiam), after the U.S. Supreme Court held that the *Federal* Constitution was not violated, see New York v. Class, 475 U.S. 106, 106 S.Ct. 960 (1986), the Court of Appeals reconsidered the case under the *State* Constitution and held that a "police 'officer's nonconsensual entry into [defendant's] automobile to determine the vehicle identification number violates the . . . State Constitution[] where it is based solely on a stop for a traffic infraction.'" Id. at 432-33, 503 N.Y.S.2d at 314 (citation omitted). Similarly, in People v. Torres, 74 N.Y.2d 224, 226, 229-30, 544 N.Y.S.2d 796, 797, 800 (1989), the Court of Appeals held as follows:

A police officer acting on reasonable suspicion that criminal activity is afoot and on an articulable basis to fear for his own safety may intrude upon the person or personal effects of the suspect only to the extent that is actually necessary to protect himself from harm while he conducts the inquiry authorized by CPL 140.50(1). In People v. Lindsay, we left open the question whether under article I, § 12 of our State Constitution such an intrusion may extend to items within the passenger compartment of the suspects' vehicle solely on the theory that "if the suspect is not placed under arrest, he will be permitted to reenter his automobile, and will then have access to any weapons inside." Having been squarely presented with the issue by the parties' submissions on this appeal, we now answer that question in the negative and hold that,

despite the Supreme Court's approval of such intrusions in Michigan v. Long, our more protective State constitutional provisions prohibit them under the circumstances presented here (N.Y. Const. Art. I, § 12). *
* *

A police officer's entry into a citizen's automobile and his inspection of personal effects located within are significant encroachments upon that citizen's privacy interests. Under our own long-standing precedent, such intrusions must be both justified in their inception and reasonably related in scope and intensity to the circumstances which rendered their initiation permissible.

(Citations omitted). Cf. People v. Carvey, 89 N.Y.2d 707, 709, 657 N.Y.S.2d 879, 880 (1997) ("We agree with the courts below that the police action here was proper. Defendant was wearing an article uniquely indicative of his present readiness to use an available firearm -- a bulletproof vest. This salient fact, when coupled with the police observation of defendant furtively placing something beneath his seat, warranted the conclusion that a weapon located in the vehicle presented an actual and specific threat to the officers' safety. In these particular circumstances, the officers could lawfully reach into the vehicle, even after removing the driver and passengers").

§ 1:38 Search of vehicle incident to lawful arrest for traffic infraction

In People v. Marsh, 20 N.Y.2d 98, 100, 281 N.Y.S.2d 789, 791 (1967), the Court of Appeals made clear that:

There is no question, and the entire court agrees, that a police officer is not authorized to conduct a search every time he stops a motorist for speeding or some other ordinary traffic infraction. It is urged, however, that the officer is empowered to conduct a search, as incident to a lawful arrest, when the defendant is taken into custody for a traffic violation on a warrant of arrest, following his failure to appear in court pursuant to the summons initially issued. We find no basis for making such a

distinction, concluding as we do that it not only would offend against the legislative design for the treatment of traffic offenders but would also exceed constitutional limits on search and seizure.

See also id. at 101, 281 N.Y.S.2d at 792 ("Although, as a general rule, when an individual is lawfully arrested, the police officer may conduct a contemporaneous search of his person 'for weapons or for the fruits of or implements used to commit the crime', we do not believe that the Legislature intended the rule to cover arrests for traffic violations. It is obvious that, except in the most rare of instances, there can be no 'fruits' or 'implements' of such infractions and the search, to be upheld, would have to be justified as one for weapons. But there is something incongruous about treating traffic offenders as noncriminals, on the one hand, and subjecting them, on the other, to the indignity of a search for weapons") (citation omitted); People v. Erwin, 42 N.Y.2d 1064, 1065, 399 N.Y.S.2d 637, 638 (1977) ("Although there may have been reasonable cause to effectuate an arrest for a traffic infraction, no such arrest was made and indeed, Officer Bennett testified that he did not even intend to issue a summons, but was merely 'going to give him a warning'. There being no arrest the subsequent search of defendant's person and his automobile can be justified only if independent reasonable cause existed"); People v. Adams, 32 N.Y.2d 451, 455, 346 N.Y.S.2d 229, 232 (1973) ("We hold in this case that a violation of [former] section 422 of the Vehicle and Traffic Law, without more, will not sustain [the warrantless] search" of the defendant's person, followed by a search incident to his arrest for such charge (even though the charge was a misdemeanor)). Cf. People v. Troiano, 35 N.Y.2d 476, 478, 363 N.Y.S.2d 943, 945 (1974) ("so long as an arrest is lawful, the consequent exposure to search is inevitable. If the unnecessarily intrusive personal search is to be restricted, the cure must be by limiting the right to arrest or to take into custody"). See generally Knowles v. Iowa, 525 U.S. 113, 119 S.Ct. 484 (1998) (police cannot, consistent with the 4th Amendment, conduct a full search of motorist's car where motorist is stopped for speeding and issued citation in lieu of arrest).

§ 1:38A Search of defendant's person incident to arrest

In People v. Reid, 24 N.Y.3d 615, 2 N.Y.S.3d 409 (2014), although probable cause existed to arrest the defendant for DWI, the officer had no intention of placing the defendant under arrest. Nonetheless, the officer "asked defendant to step out of the car and patted him down. In the course of doing so, he found a switchblade knife in defendant's pocket. Defendant was then arrested." Id. at 618, 2 N.Y.S.3d at 410. "The People ma[d]e no claim that the pat down in this case was justified either by

reasonable suspicion that defendant presented a danger to the officer or by probable cause to believe contraband would be discovered. The only justification the People offer[ed] for the search [was] that it was incident to a lawful arrest, and exempt for that reason from the general rule that searches require a warrant." Id. at 618, 2 N.Y.S.3d at 411.

Under these circumstances, the Court of Appeals held as follows:

It is not disputed that, before conducting the search, [the officer] could lawfully have arrested defendant for driving while intoxicated. And it is clear that the search was not unlawful solely because it preceded the arrest, since the two events were substantially contemporaneous. Nor is it decisive that the police chose to predicate the arrest on the possession of a weapon, rather than on driving while intoxicated. The problem is that, as [the officer] testified, but for the search there would have been no arrest at all.

Where that is true, to say that the search was incident to the arrest does not make sense. It is irrelevant that, because probable cause existed, there *could* have been an arrest without a search. A search must be incident to an actual arrest, not just to probable cause that might have led to an arrest, but did not. * * *

The incident to arrest exception is a "bright-line rule" that does not depend on whether there is a threat of harm to the officer or destruction of evidence in a particular case -- but the rule is inapplicable to cases that fall, as does this one, outside the bright line. * * *

[T]he "search incident to arrest" doctrine, by its nature, requires proof that, at the time of the search, an arrest has already occurred or is about to occur. Where no arrest has yet taken place, the officer must have intended to make one if the "search incident" exception is to be applied.

Id. at 618-19, 619, 620, 2 N.Y.S.3d at 411, 412 (citations omitted). See also People v. Mangum, 125 A.D.3d 401, 3 N.Y.S.3d 332 (1st Dep't 2015); People v. Hoffman, 135 A.D.2d 299, 525 N.Y.S.3d 376 (3d Dep't 1988).

§ 1:39 Search of vehicle incident to lawful DWI arrest

One of the exceptions to the 4th Amendment's warrant requirement is a search incident to a lawful arrest. See, e.g., Weeks v. United States, 232 U.S. 383, 392, 34 S.Ct. 341, 344 (1914). In Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 2040 (1969), the Supreme Court held that the scope of such a search is limited to:

[A] search of the arrestee's person and the area "within his immediate control" -- construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs -- or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant.

In New York v. Belton, 453 U.S. 454, 460-61, 101 S.Ct. 2860, 2864 (1981), the Court applied Chimel to a situation where the arrested person was the occupant of a motor vehicle, and held that:

[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.

It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach. Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.

(Citations and footnotes omitted). The Belton Court defined the term "container" as:

[A]ny object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like. *Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk.*

Id. at 460 n.4, 101 S.Ct. at 2864 n.4 (emphasis added).

In Arizona v. Gant, 556 U.S. 332, 349, 129 S.Ct. 1710, 1722-23 (2009), the Supreme Court concluded that a broad reading of Belton had resulted in countless unconstitutional searches in the 28 years since Belton was decided. In this regard, the Court stated that:

Although we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home, the former interest is nevertheless important and deserving of constitutional protection. It is particularly significant that Belton searches authorize police officers to search not just the passenger compartment but every purse, briefcase, or other container within that space. A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment -- the concern about giving police officers unbridled discretion to rummage at will among a person's private effects. * * *

Construing Belton broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis. * * *

Although it appears that the State's reading of Belton has been widely taught in police academies and that law enforcement officers have relied on the rule in conducting vehicle searches during the past 28 years, many of these searches were not justified by the reasons underlying the Chimel exception. Countless individuals guilty of nothing more serious than a traffic violation have had their constitutional right to the security of their private effects violated as a result. . . . If it is clear that a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement "entitlement" to its persistence.
* * *

The experience of the 28 years since we decided Belton has shown that the generalization underpinning the broad reading of that decision is unfounded. We now know that articles inside the passenger compartment are rarely "within 'the area into which an arrestee might reach,'" and blind adherence to Belton's faulty assumption would authorize myriad unconstitutional searches. The doctrine of *stare decisis* does not require us to approve routine constitutional violations.

Id. at 345, 347, 349, 350-51, 129 S.Ct. at 1720, 1721, 1722-23, 1723 (citations and footnote omitted).

Accordingly, the Gant Court held that:

Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Id. at 351, 129 S.Ct. at 1723-24. See also id. at 335, 129 S.Ct. at 1714 ("we hold that Belton does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle"); id. at 335, 129 S.Ct. at 1714 ("we also conclude that circumstances

unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle"); id. at 343, 129 S.Ct. at 1719 ("we . . . hold that the Chimel rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search"); id. at 343, 129 S.Ct. at 1719 ("Although it does not follow from Chimel, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.' In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence") (citation omitted). Compare People v. Belton, 55 N.Y.2d 49, 55, 447 N.Y.S.2d 873, 876 (1982) ("we hold, that where police have validly arrested an occupant of an automobile, and they have reason to believe that the car may contain evidence related to the crime for which the occupant was arrested or that a weapon may be discovered or a means of escape thwarted, they may contemporaneously search the passenger compartment, including any containers found therein"); Wyoming v. Houghton, 526 U.S. 295, 307, 119 S.Ct. 1297, 1304 (1999) ("We hold that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search").

In assessing Gant's applicability to DWI cases, two issues immediately come to mind. First, will the courts create a "DWI exception" to Gant, concluding that it is *always* reasonable to believe that relevant evidence (e.g., open containers of alcohol) might be found in the vehicle of a person arrested for DWI? Second, if such a search-incident-to-arrest is permissible, will its scope be limited to locations where it is likely that relevant evidence might be found; or rather will a full-blown Belton search of every container in the vehicle be authorized?

Regardless, a critical aspect of Gant is the Court's comment that even where a search-incident-to-arrest would be improper, a warrantless vehicle search can nonetheless be conducted where "another exception to the warrant requirement applies." In DWI cases, such a search can generally be conducted pursuant to the "inventory search" exception to the warrant requirement. See, e.g., Florida v. Wells, 495 U.S. 1, 110 S.Ct. 1632 (1990); Colorado v. Bertine, 479 U.S. 367, 107 S.Ct. 738 (1987). See also Maryland v. Dyson, 527 U.S. 465, 119 S.Ct. 2013 (1999) (discussing the "automobile exception" to the warrant requirement). An inventory search is easier to challenge, however, as such a search must be conducted pursuant to

"standardized criteria" or an "established routine" limiting the "latitude" and "discretion" of the officer(s) conducting it, and "must not be a ruse for a general rummaging in order to discover incriminating evidence." Wells, 495 U.S. at 4, 110 S.Ct. at 1635.

In People v. Johnson, 1 N.Y.3d 252, 771 N.Y.S.2d 64 (2003), the Court of Appeals found an inventory search to be invalid where, *inter alia*:

[T]he evidence adduced at the [suppression] hearing was clearly insufficient to satisfy the prosecutor's initial burden of establishing a valid inventory search. Although the officer testified that he knew of the general objectives of an inventory search, and declared that his search of the glove compartment box fulfilled those objectives, the People offered no evidence to establish the existence of any *departmental policy* regarding inventory searches. Even assuming such a policy existed, the People failed to produce evidence demonstrating either that the procedure itself was "rationally designed to meet the objectives that justify inventory searches in the first place," or that this particular officer conducted this search properly and in compliance with *established procedures*.

1 N.Y.3d at 256, 771 N.Y.S.2d at 66-67 (emphases added) (citation omitted). See also People v. Gomez, 13 N.Y.3d 6, 884 N.Y.S.2d 339 (2009); People v. Galak, 80 N.Y.2d 715, 719, 594 N.Y.S.2d 689, 692 (1993); People v. Francisco, 63 A.D.3d 1554, 880 N.Y.S.2d 806 (4th Dep't 2009); People v. Elpenord, 24 A.D.3d 465, 806 N.Y.S.2d 675 (2d Dep't 2005).

More recently, in People v. Padilla, 21 N.Y.3d 268, 272-73, 970 N.Y.S.2d 486, 488-89 (2013), the Court of Appeals held that:

Our jurisprudence in this area is clear. Following a lawful arrest of a driver of a vehicle that is required to be impounded, the police may conduct an inventory search of the vehicle. The search is "designed to properly catalogue the contents of the item searched." However, an inventory search must not be "a ruse for a general rummaging in order to discover incriminating evidence." To guard against this danger, the search must be conducted pursuant to an established procedure "clearly limiting the conduct of

individual officers that assures that the searches are carried out consistently and reasonably." "While incriminating evidence may be a consequence of an inventory search, it should not be its purpose." The People bear the burden of demonstrating the validity of the inventory search.

Here the People proffered written guidelines, the officer's testimony regarding his search of the vehicle, and the resulting list of items retained. Although defendant takes issue with the officer's removal of the speakers by arguing that such action was a ruse designed to search for drugs, the officer's testimony that it was police protocol to remove any owner-installed equipment, was accepted by the hearing court and we perceive no grounds upon which to overturn that determination. Thus, the People met their burden of establishing that the search was in accordance with procedure and resulted in a meaningful inventory list.

The fact that the officer did not follow the written police procedure when he gave some of the contents of the vehicle to defendant's sister without itemizing that property, did not invalidate the search. Notably, it was defendant himself who called his sister to come to the precinct to retrieve his property. The primary objectives of the search -- to preserve the property of defendant, to protect the police from a claim of lost property and to protect the police and others from dangerous instruments -- were met when the officer complied with defendant's request and gave the items to his sister and then prepared a list of the other items retained by the police.

Finally, it is clear the officer's intention for the search was to inventory the items in the vehicle. It was reasonable for the officer to check in the seat panels that were askew as part of his inventory. The fact that the officer knew that contraband is often hidden by criminals in the panels did not invalidate the entire search.

(Citations omitted).

In People v. Walker, 20 N.Y.3d 122, 124, 957 N.Y.S.2d 272, 273 (2012), the Court of Appeals held as follows:

Having decided to arrest defendant for driving with a revoked license, a police officer also decided to impound the car he was driving. The officer did not inquire whether defendant's passenger, who was not the registered owner of the car, was licensed and authorized to drive it. We hold that such an inquiry was not constitutionally required. We also hold that the officer's search of the car after he decided to impound it was a valid inventory search.

In so holding, the Court reasoned as follows:

When the driver of a vehicle is arrested, the police may impound the car, and conduct an inventory search, where they act pursuant to "reasonable police regulations relating to inventory procedures administered in good faith." Here, the trooper testified that it is state police procedure to "tow the vehicle" if the operator's license "is either suspended or revoked" and the registered owner is not present. We hold this to be a reasonable procedure, at least as applied to this case, where no facts were brought to the trooper's attention to show that impounding would be unnecessary.

Neither defendant nor his girlfriend asked the trooper if the girlfriend could drive the car, or told him that she had a driver's license and the owner's permission to drive it. The trooper was not required, as a matter of constitutional law, to raise the question, or to initiate a phone call to the owner. To impose such a requirement on police in such situations would not only create an administrative burden, but would involve them in making (and the courts in reviewing) difficult decisions in borderline cases. If a person present claims to have the owner's permission to drive, must the police take her word for it? If the owner is called and does not answer immediately, must police wait for a call back? It is reasonable for the police to institute clear and easy-to-follow procedures that avoid such questions.

Id. at 125, 957 N.Y.S.2d at 273-74 (citation omitted).

Regarding the inventory search itself, the Court found that:

We have held that, even where a vehicle has been lawfully impounded, the inventory search itself must be conducted pursuant to "an established procedure" that is related "to the governmental interests it is intended to promote" and that provides "appropriate safeguards against police abuse." Defendant argues that the inventory search in this case failed to meet this requirement. We reject the argument.

Defendant's argument focuses on several alleged deficiencies in the proof relating to the inventory search: the written policy that governed the search was never produced; the state trooper's description of the policy was very vague; and the descriptions of the returned property on the inventory form -- "MISC ITEMS" and "PAPERWORK" -- would be of limited usefulness in the event the car's owner claimed that some of her property was missing. These criticisms are not without force. Certainly, it would be better for a prosecutor seeking to prove the existence of a written policy to put a copy of the policy into evidence. On the other hand, defense counsel could have demanded that the policy be produced to help her cross-examine the trooper. She did not do so.

When a car has been lawfully impounded, the reasonable expectation of the person who was driving it that its contents will remain private is significantly diminished. In such a case, the driver presumably expects the police to find whatever is in the car. Galak, Johnson and Gomez establish that this does not give the police carte blanche to conduct any search they want and call it an "inventory search." The police must follow a reasonable procedure, and must prepare a "meaningful inventory list." But it would serve little purpose for courts to micromanage the procedures used to search properly impounded cars. The United States Supreme Court implicitly recognized as much in Bertine by upholding as constitutionally valid a search producing what a trial court

had found to be a "somewhat slipshod" inventory. The inventory here, while not a model, was sufficient to meet the constitutional minimum.

Id. at 126-27, 957 N.Y.S.2d at 275-76 (citations omitted).

In People v. Wells, 21 N.Y.3d 716, 977 N.Y.S.2d 712 (2014), the Court of Appeals held that the defendant's guilty plea was invalid where it was induced by the trial court's erroneous ruling upholding an improper inventory search.

§ 1:40 Use of GPS device to track suspect's movements

In People v. Weaver, 12 N.Y.3d 433, 447, 882 N.Y.S.2d 357, 365 (2009), the Court of Appeals held that "[u]nder our State Constitution, in the absence of exigent circumstances, the installation and use of a GPS device to monitor an individual's whereabouts requires a warrant supported by probable cause." See also United States v. Jones, ___ U.S. ___, 132 S.Ct. 945 (2012) (attachment of GPS tracking device to vehicle and use of such device to monitor vehicle's movements on public streets is search within meaning of 4th Amendment). The Weaver Court reasoned as follows:

Here, we are not presented with the use of a mere beeper to facilitate visual surveillance during a single trip. GPS is a vastly different and exponentially more sophisticated and powerful technology that is easily and cheaply deployed and has virtually unlimited and remarkably precise tracking capability. With the addition of new GPS satellites, the technology is rapidly improving so that any person or object, such as a car, may be tracked with uncanny accuracy to virtually any interior or exterior location, at any time and regardless of atmospheric conditions. Constant, relentless tracking of anything is now not merely possible but entirely practicable, indeed much more practicable than the surveillance conducted in Knotts. GPS is not a mere enhancement of human sensory capacity, it facilitates a new technological perception of the world in which the situation of any object may be followed and exhaustively recorded over, in most cases, a practically unlimited period. The potential for a similar capture of information or "seeing" by law enforcement would require, at a minimum,

millions of additional police officers and cameras on every street lamp.

That such a surrogate technological deployment is not -- particularly when placed at the unsupervised discretion of agents of the state "engaged in the often competitive enterprise of ferreting out crime" -- compatible with any reasonable notion of personal privacy or ordered liberty would appear to us obvious. One need only consider what the police may learn, practically effortlessly, from planting a single device. The whole of a person's progress through the world, into both public and private spatial spheres, can be charted and recorded over lengthy periods possibly limited only by the need to change the transmitting unit's batteries. Disclosed in the data retrieved from the transmitting unit, nearly instantaneously with the press of a button on the highly portable receiving unit, will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on. What the technology yields and records with breathtaking quality and quantity is a highly detailed profile, not simply of where we go, but by easy inference, of our associations -- political, religious, amicable and amorous, to name only a few -- and of the pattern of our professional and avocational pursuits. When multiple GPS devices are utilized, even more precisely resolved inferences about our activities are possible. And, with GPS becoming an increasingly routine feature in cars and cell phones, it will be possible to tell from the technology with ever increasing precision who we are and are not with, when we are and are not with them, and what we do and do not carry on our persons -- to mention just a few of the highly feasible empirical configurations.

12 N.Y.3d at 441-42, 882 N.Y.S.2d at 361-62 (citation omitted).

§ 1:41 Lawfulness of canine sniff of automobile

In People v. Devone, 15 N.Y.3d 106, 110, 905 N.Y.S.2d 101, 102 (2010), the Court of Appeals held both (a) that "a canine sniff of the exterior of a lawfully stopped vehicle constitutes a search under article I, § 12 of our State Constitution," and (b) that, to be lawful, such search requires "founded suspicion that criminal activity is afoot." In so holding, the Court reasoned as follows:

[W]hether a canine sniff constitutes a search is necessarily dependent upon whether it constitutes an intrusion into a place where a person has a reasonable expectation of privacy. One clearly has a greater expectation of privacy in one's home than in an automobile, but that does not render the latter interest undeserving of constitutional protection. There is a legitimate, albeit reduced, expectation of privacy in an automobile. But that expectation is greater than the significantly reduced expectation of privacy one has in luggage turned over to a common carrier. We therefore hold that a canine sniff of the exterior of an automobile constitutes a search under article I, § 12.

In both of these cases the Appellate Division properly concluded that the officers' "founded suspicion" that criminality was afoot provided sufficient grounds for the search. While the more demanding "reasonable suspicion" standard applies to a canine sniff outside the door of one's residence, there is a "diminished expectation of privacy attributed to individuals and their property when traveling in an automobile." It follows that law enforcement need only meet a lesser standard before conducting a canine sniff of the exterior of a lawfully stopped vehicle. Given that diminished expectation of privacy, coupled with the fact that canine sniffs are far less intrusive than the search of a residence and provide "significant utility to law enforcement authorities," application of the founded suspicion standard in these cases is appropriate.

Id. at 113, 905 N.Y.S.2d at 104-05 (citations omitted).

§ 1:42 Lawfulness of stop based on automated license plate scanning device

In People v. Davila, 27 Misc. 3d 921, 901 N.Y.S.2d 787 (Bronx Co. Sup. Ct. 2010), the Court addressed the lawfulness of a vehicle stop based on information obtained via an automated license plate scanning device. In Davila, the Court held a lengthy suppression hearing at which the NYPD procedures regarding "plate reader" stops were spelled out in considerable detail. According to the hearing testimony:

In 2007, the NYPD issued departmental guidelines for the "use, maintenance and accountability," of plate readers (NYPD Operations Order No. 33). The guidelines set forth a [2]-step process to ensure the reliability of plate reader information. First, before operating the device, officers are required to update the plate reader's database by downloading the hot list issued within the last [24] hours. Second, if the plate reader alarm sounds, before "initiating any law enforcement action", an officer must consult the NYSPIN database to check whether the plate reader information is accurate.

Id. at ___, 901 N.Y.S.2d at 789 (citation omitted).

Although the police officers in Davila failed to follow either of the steps in the Department's guidelines (*i.e.*, they failed to either update the plate reader's database within the past 24 hours or consult the NYSPIN database to confirm that the plate reader's information was accurate), the Court upheld the lawfulness of the stop. Id. at ___, 901 N.Y.S.2d at 791.

Topic 4:

Blood Test Issues

BLOOD TESTING
EDWARD L. FIANDACH
FIANDACH & FIANDACH
ROCHESTER, NEW YORK

§ 27:2. Testing methods

Vehicle and Traffic Law § 1192(2) prohibits operation of a motor vehicle with .08% or more of alcohol by weight in the blood. Additionally, Vehicle and Traffic Law § 1195(2)(a–c) create a series of presumptions based upon blood alcohol content. It is for this reason that blood testing is generally regarded as the most persuasive form of testing. The overwhelming impact that a blood test can have upon the trier of fact requires that those litigating in this crucial area thoroughly understand the means through which a blood sample is collected and analyzed.

Although alcohol in the body appears in many body fluids and tissues, its concentration is almost always expressed in terms of blood. There are two basic kinds of tests of blood alcohol concentration, direct and indirect.

A direct test of blood is just that, a quantitative test usually of the percent weight of alcohol in a measured volume of blood, as determined by actual analysis of that blood.

All else being equal, if one desires to measure blood alcohol concentration, it is best that one simply obtain a sample of blood for that purpose, rather than some supposedly comparable substitute such as breath.

But obtaining a blood sample is not always practical. A police officer is not qualified to perform the phlebotomy. At the minimum, it requires the assistance of a doctor or registered nurse, meaning, typically, that an accused will have to be transported to a hospital or doctor's office for the sample to be drawn. The person who draws the blood, then, usually becomes a necessary witness at trial.

Prevailing upon a qualified person to extract the blood may itself be a problem. Motorists are not generally overjoyed at the prospect of having their blood withdrawn for forensic purposes. Fearing a lawsuit, medical personnel are sometimes reluctant to draw blood samples at the request of the police. This is a reasonable concern, except in those states, such as New York, that have legislation absolving such persons for any act done or omitted in the course of withdrawing blood at police request.¹

Further, some persons, squeamish about having blood drawn, will refuse a blood test for that reason, though they would willingly submit to a less invasive method of alcohol determination.

¹

§ 27:3. Blood testing—Basic principles

Understanding the theory behind blood testing requires a brief review of how alcohol effects the body. When a person consumes an alcoholic beverage, the liquid passes down the esophagus into the stomach where a slight quantity of the alcohol may be absorbed into the blood. By and large, the bulk of alcoholic absorption occurs within the intestinal tract where it thereafter proceeds to the brain and impacts upon the psychomotor skills in a proportion roughly equivalent to the quantity absorbed as a result of its presence in the fluids that bathe the brain. Alcohol will then pass out of the brain via the venous system where it is sent to the liver, partially destroyed and then moves on to the lungs, the heart and back to the brain.

If a blood alcohol sample is withdrawn immediately after the intoxicant is first consumed, no alcohol will be found. The initial location of alcohol will be in the arterial system with appearance in the venous system sometime thereafter. While alcohol is being consumed and absorbed, the arterial system will display a higher concentration of alcohol, whereas during the elimination phase a greater percentage will be found in the venous system. During the period of time that the subject is in equilibrium, equal amounts will be found in both systems. It should, therefore, be apparent that just as with breath testing, knowledge as to whether the subject tested was in the absorptive, elimination, or equilibrium phases, should not be ignored.

§ 27:4. Withdrawing blood

The optimal location for the removal of blood is the carotid artery which is located on the side of the neck. Inasmuch as this is neither safe nor practical, the overwhelming tendency is to withdraw blood from the venous system, more particularly the cubital vein which is located in the medial cubital space below the biceps at the interior of the elbow. The site from which the blood is withdrawn in a particular case should be ascertained since the type of blood, i.e., arterial or venous, could impact upon the results of the test in the event that the subject was in the absorptive or elimination phases.

Mechanically, blood is commonly withdrawn through one of two techniques. Formerly employed to a much larger extent than at the present time is a technique known as venipuncture.

Venipuncture involves cleaning the selected site with a suitable antiseptic and piercing the vein with the hollow point of a needle to which there has been affixed a syringe. The plunger of the syringe is then withdrawn and the vacuum thereby created serves to extract the blood. Thereafter, the needle is placed in the tube or vessel which will contain the sample for analysis into which there has been deposited a suitable preservative.

More recent in development is the vacutainer system. The vacutainer system consists of a cradle to which there has been affixed a hollow needle. After piercing the selected and sterilized site, a special tube containing a preservative which is sealed by a valve and in which there exists a vacuum is attached to the cradle whereupon the vacuum will serve to withdraw the blood. When withdrawn for forensic purposes, the tubes, generally two, will be sealed and marked by the requesting officer, and they will thereafter be placed in a locked refrigerator until they are turned

over to the lab for analysis. Becton-Dickenson manufactures a standard vacutainer kit for use by police officers in the field. This kit consists of the tube, needle, cradle, prepackaged sight cleansing swabs, a rubber tube for tying off the artery, and seals for both the tubes and the inner plastic tray as well as adhesive pads for closing the wound. If the kit has been specifically prepared for use by a particular police department, it may also contain the rules and regulations of that department as the same pertain to the administration of chemical tests. This kit is packaged in a sturdy box which becomes a mailer.

§ 27:5. Site cleansing and contamination

Careful attention should be paid to the manner in which the site is cleansed. Use of an alcohol based cleansing agent may result in inaccuracies as a result of a small amount of the cleansing solution being drawn up with the sample. Fitzgerald notes that "swabs" and certain solutions containing Benzalkonium chloride (trade name Zephiran) used for site cleansing have been reported to be contaminated with a 2 percent concentration of ethanol.¹ Moreover, this writer, upon having minor surgery, was intrigued by the fact that his arm, prior to a draw, was prepped with a Webcol® prepackaged Alcohol swab manufactured by the Kendall Healthcare Products Company which contained 70% isopropyl alcohol.

In the ordinary course of events, the arresting agency will utilize the Becton-Dickenson® blood collection kit, in which the swabs are impregnated with a compound of povidone iodine known commercially as Betadine®. Neither povidone iodine nor Betadine contain alcohol. Therefore, if the prepared kit and self-contained swab are used there will be little room for site contamination. In the event that such a kit is unavailable or the Betadine swab is not used enormous difficulties can arise.

In an article appearing in Abstracts and Reviews in Alcohol & Driving, forensic alcohol expert Dr. Kurt M. Dubowski, undertook to see the magnitude of the problem, if any, that site contamination represents.

At the outset Dubowski notes that in the early days of venipuncture utilizing reusable syringes, sterilization through the means of 70% alcohol solutions was found capable of producing false positives up to 20% w/v.² In the seventy's the use of partially evacuated specimen tubes with disposable needles changed the focus of the forensic contamination debate. Rather than addressing the possibility of alcohol being introduced during the sterilization process, attention was turned to the nature of the antiseptic used immediately before the draw. Accordingly,

¹Fitzgerald, E.F., Intoxication Test Evidence 2d, § 18:4 (citing, Drinking/Driving Law Letter (Vol. 8, No. 25, December 8, 1989).

²See, Beeman, J., Determination of Ethyl Alcohol Levels. J. Amer Med. Assoc., 1979; 170; 1108–1109; Heise, Ethyl Alcohol Levels in the Blood, J, Amer Med. Assoc. 1960; 172 1197; Rabinowitch, Ethyl Alcohol Levels in the Blood, J, Amer Med. Assoc. 1960; 173: 576 [unless otherwise noted all technical references in this article were cited by Dubowski].

Dubowski, utilizing a venipuncture training arm³ filled with a 10% w/v aqueous solution, tested ten different blood draw scenarios ranging from cleansing the site with a 70% w/v solution and using a pad over the puncture site which had been saturated with a like solution to cleansing with a Povidone-Iodine pad and drawing in the expected fashion.

The control group was an uncleaned draw from the mechanical arm which, of course, had little concern for sterility and infection.

The results were far from what one would otherwise expect. When the site was cleaned, or flooded with an ethanol solution the results were nearly identical to those obtained under controlled conditions, varying in most cases by a mere 0.003%. Only one technique showed potentially prejudicial deviation. When the puncture site was cleansed with a gauze sponge saturated with a 70% w/v ethanol solution and a sponge similarly saturated is used over the location of the draw, the results spanned from 0.206% w/v to 0.248% w/v.

Even so, the results were not as clear cut as the numerical results would otherwise seem to say. While Dubowski notes that no contamination can occur during arm penetration while the inner needle is occluded by the impaled specimen collection tube, he finds it equally obvious that "major contamination of specimens can occur during needle withdrawal with a partially evacuated collection tube attached, if the withdrawal occurs through a pad or sponge saturated with ethanol or isopropanol."⁴ Moreover, according to Dubowski, "the actual volumes of aspirate need not be large to exert considerable effect: only 18 microliters of 70% v/v ethanol will increase any pre-existing ethanol concentration of 10 ml of blood by 0.10% w/v.

Reduced to its barest essentials, Dubowski seems to be saying that we've been examining the wrong stage of the collection process for error. Overwhelmed with the means in which the site is cleansed the seemingly mundane task of removing the needle has been ignored. If medical personnel engaging in the draw have used an alcohol saturated swab, commercial or otherwise, in withdrawing the needle, the results are immediately and seriously suspect. Counsel should seriously undertake to determine the exact materials used in both the draw and in effecting needle removal.

The American Medical Association suggests the following procedures be utilized:

- Hypodermic needles and syringes be sterile and disposable. When reusable equipment is utilized, it should neither be cleaned with nor stored in alcohol or other volatile solvent.

- Only a chemically clean, dry tube or vial with inert stopper should be used.

- Neither alcohol nor volatile solvents should be used to clean them.

- The tubes and vials shall contain an anticoagulant (recommended are fluoride, citrate, oxalate and heparin), and a preservative (recommended are fluoride and

³Mercifully this is a mechanical device manufactured by Becton-Dickenson.

⁴Dubowski at p. 7.

mercury salts).⁵

§ 27:6. Plasma vs. Whole Blood

Reported by Fitzgerald a major source of error in blood testing is the variance between the alcohol content of blood plasma as against that of whole blood. It will be recalled that Jones had reported significant differences between the partition coefficients of water, air and plasma.¹ This is due to the fact that alcohol is primarily to be found in the aqueous component of blood. Recognizing this fact, Fitzgerald points out:

The alcohol content of "whole blood" (the "BAC") is not the same as the alcohol content of either the plasma or serum portion of the blood, if either is separately tested. Plasma or serum values are higher than whole blood values, on the average about 16% higher and may be 18 to 20% higher, or more, in some cases. Whenever plasma or serum values are reported, a conversion (reduction) to "whole blood" values must be performed.²

It is therefore vitally important, prior to trial, to determine exactly what has been reported. In the event that a conversion factor has been employed, it must be recognized that no absolutes exist. Although 10 NYCRR 59.2(2) imposes a rule whereby "[n]ine tenths of the determined concentration of alcohol in the serum or plasma shall be equivalent to the corresponding whole blood alcohol concentration," conversion factors are merely convenient averages and to a large degree are dependent upon the hematocrit ratio which represents the ratio of plasma to cellular material. Averaging 47 percent in a normal healthy male, the percentage will range from 40–54 percent while females fall in an expected range of 36–47 percent and average 42 percent.³ Therefore, an individual with a higher hematocrit would have less plasma and a higher conversion factor must be employed. It may therefore be argued that, in the absence of a simultaneous test to determine the hematocrit ratio of the subject being tested, any BAC derived from the application of a conversion factor is suspect and fails to meet the requirements set forth in 10 NYCRR § 59.2(b)(2).

Even the nine-tenths ratio may be questioned. As reported by Fitzgerald:

[16% is] a good workable number for converting plasma alcohol values to whole blood alcohol values. However it must be remembered that the actual range is

⁵AMA Manual, page 69.

¹Jones, A.W., "Determination of Liquid/Air Partition Coefficients for Dilute Solutions of Ethanol in Water, Whole Blood and Plasma", *Journal of Analytical Toxicology*, Vol. 7, July/August 1983, p. 193–197.

²Fitzgerald, at § 19:12.

³Fitzgerald, at § 19:13, p. 19-12.

greater, and in some cases, a 20 to 25% conversion factor might be appropriate.⁴

One writer has noted that laboratories do not always report whether they have analyzed whole blood or blood in one of its concentrated forms. In the latter instance there have been cases where the laboratory has not adjusted its result after testing blood in its concentrated form, thereby reporting the result in a falsely high fashion. Moreover, even applying the 16 percent factor will not always result in an accurate report because not all persons have a normal hematocrit, the percentage of the volume of a blood sample occupied by cellular material. The generally accepted 16 percent conversion figure assumes a person with a normal hematocrit. For persons with a greater hematocrit than that, use of the 16 percent conversion figure will result in a falsely high test result.⁵

§ 27:7. Preservatives

While some hospitals and agencies may have available commercially adapted vacutainer kits to which a preservative has been added, a standard collection tube may not. Normally such preservation involves the addition of a blood preservative such as potassium oxalate and sodium fluoride (at least a 1 percent concentration). Fitzgerald reports that the failure to add such a preservative may result in neo-formation of alcohol (essentially a process of fermentation). Likewise reported is that a clotted sample can result in false values.¹

As a biological product, it must be firmly recognized that blood which is improperly preserved may undergo a process known as neo-formation of alcohol.² This process has been reported to result in a BAC of .20 or .30 percent in a sample which was alcohol free when drawn.³ Originally activated by the presence of bacteria, the use of a sterile collection device will minimize the possibility to a significant extent. Even so, absolutely sterile conditions are impossible to achieve; therefore, other techniques such as refrigeration, and preservatives such as sodium fluoride are employed. As reported by Nichols, Brown et. al.⁴ has reported the quantity of the preservative must be at least 1 percent of the total weight of the sample to prevent

⁴Fitzgerald, at § 19:13, p. 19-12.

⁵

See Fitzgerald, A Major Source of Error in Blood Alcohol Cases: Laboratory Reporting of Plasma and Serum Values as Whole Blood Values, 2 DWI Journal: Law and Science, Number 6 at 1 (June 1987).

¹Fitzgerald, E.F., Chemical Test Evidence 2d § 19:3, p. 19-3.

²Fitzgerald, E.F., Chemical Test Evidence 2d § 19:3, p. 19-3.

³Erwin, Richard D., Defense of Drunk Driving Cases, Criminal/Civil, § 17.07(2), Matthew Bender & Co. [1990 Rev.] p. 17-97.

⁴Brown, Neylan, Reynolds & Smalldon, "The Stability of Ethanol in Stored Blood, Part I: Important Variables and Interpretation of Results," Anal. Chem. Acta. Vol. 66. p. 274 [1973].

decomposition, while Hayden et. al.⁵ and others have reported the need for 2 percent to insure the absence of bacterial growth. Of more than minor importance, although regulations frequently provide that "solid anticoagulant" must be used, neither the type nor the concentration may be specified.⁶

§ 27:8. Storage temperature

Of frequent concern in the area of blood testing is the effect of storage temperature. In other words, is it possible for a properly preserved sample of blood to produce alcohol if it is stored in an unfavorable environment?

Assuming that the sample is immediately placed under refrigeration, temperature of storage should be of little concern. Such ideal conditions, however, are not always to be found. In the usual situation, blood will be drawn into two vacutainer tubes containing both sodium fluoride (a preservative) and potassium oxalate (an anti-coagulant), which tubes are contained within a sealed Becton-Dickenson® blood test kit. Sealed into the cardboard box which is designed to be used as a mailer, the kit may thereafter remain in the physical possession of the officer who was responsible for taking the sample for an indeterminate period of time prior to being turned over to the lab. The problem, therefore, becomes one of temperature. The temperature of a sample left on the sunlit dashboard of a patrol car may exceed 100 degrees centigrade. Further, although mailing is an approved method of submission, no control can be exercised over the temperatures in which the sample is stored during mailing.

The question, therefore, is the degree to which storage temperature can affect the validity of the results.

Conventional and, perhaps somewhat, anecdotal wisdom is that sugars and bacteria in an unpreserved blood sample will eventually cause a process known as neo-formation or fermentation, therefore increasing the reported blood alcohol results in a fashion which has nothing to do with the motorist's consumption.¹

While studies by Winek (C.L.) and Paul² showed that with periods of storage of to 14 days there occurred no appreciable change in the ethanol content, this study did not address what may be the

⁵Hayden, Layden & Hickey, "The Stability of Alcohol Content in Samples of Blood and Urine," Irish J. Med. Sci Vol. 146 p. 48 [1977].

⁶See, 10 NYCRR § 59.2(b)(2).

¹See, Fitzgerald, E.F., Intoxication Test Evidence 2d, § 19:3, p. 19-3; and see, Erwin, Richard D., Defense of Drunk Driving Cases, Criminal/Civil, § 17.07(2), Matthew Bender & Co. [1990 Rev.] p. 17-97.

²C.L. Winek and L.J. Paul, "Effect of Short-Term Storage Conditions on Alcohol in Blood From Living Human Subjects," Clinical Chemistry 29 pp. 1959–1960 (1983).

most critical issue, extended storage at elevated temperature.

In her doctoral thesis entitled "The Effect of Temperature and Storage Time on Blood Ethanol Concentrations in Living Human Subjects," T. A. Winek addressed this precise issue.

In undertaking her examination, Winek took 288 tubes containing serum, 144 of which contained potassium oxalate and sodium fluoride and 144 of which contained solely potassium oxalate.

These were further divided into three groups containing 48 tubes which contained the preservative and 48 which did not. Alcohol was thereafter added to the tubes in each group so that one group measured 150mg%, the second 205mg%, and the third, 320 mg%.

The three groups were further subdivided into three subgroups and stored in controlled temperatures of 80 degrees F, 90 degrees F and 100 degrees F. The samples were thereafter analyzed incrementally over the course of 35 days on a Perkin-Elmer model 3920 gas chromatograph employing a hydrogen flame detector and a commercial carbopack column. When reviewed, the results are interesting indeed. The serum samples containing the sodium fluoride preservative, elevated to 150 mg% and stored at 80 degrees F showed results of 155 mg% to 134 mg%³ which translates to a difference of -10.7% to +3.3% and an average difference of 4% + 2.9%. Those samples, identical in every respect except the preservative, ranged from 160 mg% to 145 mg% or -2.0% to 6.7% with an average difference of 3.18% + 1.98%.

At 150 mg% and 90 degrees F, preserved samples ranged from -5.3% to +3.3% with an average of 2.42 + 1.99%. Unpreserved samples, otherwise meeting the same criteria, showed variances of -3.3% to 6.7% with an average of 2.46% + 2.04%.

At 100 degrees F the trend toward moderately heightened results continued, with the preserved group ranging from -6.0% to +4.0% with an average of 2.46 + 2.10 and the unpreserved group displaying -8.0% to +5.3% with an average of 2.75 + 2.0.

The remaining ethanol groups set out in tabular format below displayed similar trends.

Serum at 205 mg% (preserved)

| | Low | High | Average |
|------|------------|-------------|----------------|
| 80F | -6.3% | +3.4% | 1.84% + 1.75% |
| 90F | -5.4% | +2.4% | 2.09% + 1.62% |
| 100F | -6.3% | +2.4% | 2.41% + 1.59% |

Serum at 205 mg% (unpreserved)

| | | | |
|------|-------|-------|---------------|
| 80F | -7.3% | +2.4% | 1.81% + 1.73% |
| 90F | -5.4% | +3.9% | 2.85% + 1.69% |
| 100F | -7.8% | +1.5% | 3.02% + 1.59% |

Serum at 320 mg% (preserved)

| | | | |
|-----|-------|-------|---------------|
| 80F | -6.2% | +4.7% | 3.02% + 1.97% |
| 90F | -6.9% | +4.9% | 3.41% + 2.13% |

³This would be the equivalent of 155 to 134 as would be reported at trial. For an enlightening discussion as to the translation of the various means used to report blood alcohol levels, see the decision of the Honorable Donald Mark in *People v. Ritchie*, 134 Misc. 2d 494, 511 N.Y.S.2d 482 (Sup 1987).

| | | | |
|--------------------------------|-------|-------|---------------|
| 100F | -5.0% | +5.3% | 2.66% + 1.54% |
| Serum at 320 mg% (unpreserved) | | | |
| 80F | -6.6% | +1.9% | 2.76% + 2.39% |
| 90F | -6.9% | +4.4% | 3.41% + 2.13% |
| 100F | -6.9% | +2.2% | 2.87% + 1.93% |

From a review of these results, it appears that differences outside of experimental error were indeed negligible. This seems to dispel the commonly held notion that storage for extended periods, even at elevated temperatures, will cause elevation of blood alcohol content, at least when the serum is involved.

In the words of the researcher:

This data tends to confirm the study of Winek and Paul in that changes in [blood ethanol] concentrations were within experimental error even though higher temperatures were used in this study. However the data was unexpected inasmuch as losses were anticipated with storage at higher temperatures for a higher period. The data suggests that even at temperatures of 100 degrees F for longer than a month, the average per cent falls within experimental error.⁴

While the above results were based upon serum supplied by a commercial supplier and reputed to be alcohol free, the second part of the study employed a similar examination of whole blood samples collected by hospitals and law enforcement agencies in the field.

Varying in blood alcohol contents, each sample was divided in two and tested upon receipt. The second portion was thereafter stored in conditions identical to those described in the first portion of the experiment.

The results were far different than those reported when serum was employed.

For 13 samples stored at 80 degrees for 35 days, the differences varied from -67% to -2.4%. For one sample containing a preservative, the reported decrease was 7.5%.

At 90 degrees F, the results were inexplicably less pronounced, ranging from a low of -17.7% to a high or increase of 2.0%. The average change was -10.29% + 5.03%.

Whole blood samples stored at 100 degrees F decreased from -24.4% to -3.4% with an average of -15.6% + 6.99%.⁵

Accounting for the dramatic reductions in the ethanol content contained in the stored whole blood samples Winek notes:

A difference between the controlled [serum] and uncontrolled [whole blood] study was the presence of red blood cells in the noncontrolled study. This allows for the

⁴Winek, at 34.

⁵These results were compiled from just eight samples as the remaining became hemolyzed during storage.

presence of oxidase type systems from the red blood cells to oxidize alcohol present in the sample. The data suggests that the loss of alcohol from stored clinical samples was not due to the effect of temperature because no losses beyond experimental error were seen in the controlled study.⁶ Peroxidase systems in red blood cells are capable of oxidizing ethanol and therefore it would appear that the losses in stored clinical samples were due to a chemical oxidation rather than physical evaporation.⁷

The upshot of all this is that in the face of greater willingness of the courts to permit inspection by the defense of blood alcohol samples, the traditional approach of drawing and preserving whole blood deserves examination anew. Winek acknowledges the problem created by apparent ethanol oxidation and accordingly comes to the conclusion that:

The clinical study does demonstrate the loss of ethanol at elevated temperatures with time and that the percent lost ranges between 10–20%. This indicates that if a blood sample is left at elevated temperature for an extended period of time (ie: a month) one would anticipate a 10–20% reduction in blood ethanol concentration.

Since the culprit appears to be red blood cells, it therefore seems that an effort be made to obtain and store serum.

§ 27:9. Oxidation

Contrary to popular belief, preservatives such as sodium fluoride (NaF) will not prevent oxidation of the hemoglobin and the formation of acetaldehyde. As noted by Whited,¹ this can have the effect of reducing the BAC in an unpreserved sample.

§ 27:10. Effect of preservatives

In a highly significant study appearing in the American Journal of Toxicology¹ conclusions drawn by Prouty and Anderson seem to indicate that preservatives can interact with sample size and affect the blood alcohol content of a particular sample. Originally undertaking to determine whether or not variances in the blood alcohol content could occur as a result of site selection, the authors withdrew and analyzed post mortem blood samples from the heart and femur. While the mean of the difference between heart blood concentration and the femoral blood concentration was .0019 percent w/v, the study nevertheless noted that in a significant number of cases the

⁶Indeed, as noted by Winek, there was no relationship between temperature and alcohol loss. The sample stored at 80 degrees F "lost" more alcohol than that stored at 90 degrees.

⁷Winek, at 36.

¹Whited, Drunk Driving Litigation Criminal/Civil, § 32-20.

¹American Journal of Toxicology, Vol. 11, p. 191 [1987].

results differed by as much as 81.1 percent. In attempting to isolate possible causes of the reported differences, the authors turned to an examination as to whether or not the volume of the sample played a role in the results.

In undertaking this aspect of the study, freshly drawn whole blood was used to prepare a 500mL stock solution with a target value of .20 percent. After assaying ten "day zero" samples, 30mL screw cap containers containing 20 mg of sodium fluoride were then filled to 4mL, 8mL and 30mL respectively. The samples were then tightly sealed and placed in a refrigerator nominally kept at 5°C. The samples were then analyzed with a headspace analysis using a Perkin-Elmer F-45 gas chromatograph. Additionally, a set of samples was also prepared in which there was placed 4mL of solution but no preservative.

The results showed interesting disparities. Ranging from a mean of .165 percent w/v for the 4mL preserved sample tested on day three to a .206 percent w/v for the 28mL preserved sample tested on day one, it appeared that the smaller the sample the greater the change that occurred with time. While observing that "[t]he exact mechanism for the observed loss of alcohol in small volume samples may be complex," one possible explanation which was offered was the "salting out effect" of the relatively high sodium fluoride content in the 4mL samples. Noting that Jones and others had reported that sodium fluoride will increase the ethanol vapor pressure in whole blood specimens, it appeared likely to the authors that the concentration of sodium fluoride was sufficient to influence the headspace analysis of the blood alcohol content.

Recalling that in a headspace analysis the vapor above the solution is what is analyzed, it must be recognized that the conclusions drawn by Prouty and Anderson essentially mean that with the passage of time application of the "correct" partition ratio may not be proper. Also, it would be necessary to know precisely the means through which the headspace sample was withdrawn. If the vessel remained sealed prior to being raised to temperature with a water bath and the vapor sample withdrawn in a means which did not permit the escape of the alcohol which had "salted out" during storage, the test would necessarily be high. On the other hand, a contrary result would be achieved when the sample is first opened and then added to a vessel prior to warming and analysis.

A.W. Jones, in a 1983 similarly concluded that a 10 mg/mL concentration of sodium fluoride could increase blood alcohol results by 8.9% when compared with heparinized blood. Solanky,² of the New Jersey State Police, however, concluded that sodium fluoride did not significantly affect the alcohol concentration determined by headspace gas chromatography using n-propanol as the internal standard.

§ 27:11. Clotting

Frequently the result of an analysis conducted upon a sample of blood will indicate that the sample has become clotted. If properly preserved the overall alcohol content of the sample will

²A. Solanky, "Effect of Different Concentrations of Sodium Fluoride on Blood Alcohol Determination by Headspace Gas Chromatography Using the Internal Standard Method," *Journal of Analytical Toxicology*, vol. 18 (January/February 1994).

not have changed. Nevertheless, as noted elsewhere herein, alcohol, as a water soluble substance, will tend to migrate to the liquid component of the sample. This means that any test conducted upon the liquid will be intolerably high, whereas a test conducted of the clotted portion will likewise be unacceptably low. Once the sample has been clotted, the only reliable technique is to reconstitute the sample.

An alternative to the expense and handling of reconstitution is to add an anti-coagulant such as heparin, frequently employed as a blood thinner in heart patients, potassium oxalate, aluminum citrate or potassium citrate.¹ The use of such preservatives has been made mandatory by 10 NYCRR 59.2(b)(2) which provides that the sample shall be drawn "into a vacuum container containing a solid anticoagulant." In *People v Snyder*,² the failure to show "the sufficiency or identity of the preservative," was considered as one branch in a series of cumulative errors which ultimately rendered the evidence inadmissible.

Of some surprise, it has been held, however, that even where the rules and regulations of the state health department provide that blood samples must be collected in a container having an anticoagulant and a preservative in it, the failure to satisfy those regulations goes to the weight of the evidence, not its admissibility.

In *People v Boyst*,³ the Fourth Department rejected a challenge founded squarely upon the failure to utilize the necessary anticoagulant. The Court found the conversion factor provided by 10 NYCRR § 59.2(a)(1) to expressly provide for the testing of serum.

While this issue will most certainly be refined upon further appeal, it would seem that the *Boyst* logic was flawed in that a fair reading of the regulation does not seem to indicate that the conversion factor was intended to operate as an alternative to the addition of a solid anticoagulant, a requirement for which the statute does not appear to create an exception. A far more probable basis for the addition of a conversion factor was avoid overstating results in those instances where clotting had occurred notwithstanding the addition of the anticoagulant. Additionally the decision ignored the well established principle that administrative regulations "have the force and effect of law" and that they ought not be disturbed absent a showing that they are "so lacking in reason for their promulgation that [they are] essentially arbitrary."⁴ More to the point, in *People v Emrich*,⁵ a blood sample was found to be properly suppressed under statute which provided chemical analysis of blood would be considered valid only if

¹Flem H. Whited, *Drunk Driving Litigation Criminal/Civil*, § 32:23, p. 32–40.

²*People v. Snyder*, 90 A.D.2d 894, 456 N.Y.S.2d 536 (3d Dep't 1982).

³*People v. Boyst*, 177 A.D.2d 962, 577 N.Y.S.2d 1007 (4th Dep't 1991).

⁴*Molina v. Games Management Services*, 58 N.Y.2d 523, 529, 462 N.Y.S.2d 615, 449 N.E.2d 395, 40 A.L.R.4th 655 (1983).

⁵*People v. Emrich*, 132 Ill. App. 3d 547, 87 Ill. Dec. 867, 478 N.E.2d 6 (1st Dist. 1985).

performed according to standards promulgated by Department of Public Health in consultation with Department of Law Enforcement. Such standards called for the use of an anticoagulant which was never used.

§ 27:12. Direct analysis of blood; General principles

Even if direct and accurate, analysis of the blood is not as conclusive on the issue of intoxication as one might suppose. Because some people tolerate alcohol better than others, two persons with, for example, identical .11 percent blood alcohol concentration (BAC) might in fact show significant differences in intoxication.

Strictly speaking, it is not the alcohol in the blood that affects us, but the alcohol in the brain. Ideally, then, the most meaningful place to obtain a sample of body tissue for analysis would be the brain, rather than the blood. The problem is there exists no practical way to do that without injuring or killing the subject.

Because the next best source is the blood, BAC is almost the universal measuring standard. Thus, even when the quantity of alcohol in other body parts, such as kidneys or lungs, is measured, the result is typically converted into an equivalent measurement of the blood and expressed as that. Even a properly measured BAC can be ambiguous. Not all the blood present in a person's body at a given time is necessarily at a uniform BAC.

Studies show that at least during the absorption phase, there may be significant differences in the concentration of alcohol taken simultaneously from different parts of the body. It has been demonstrated that blood taken from the veins at the extremities may be as much as .03 percent lower than a sample taken simultaneously from the arteries. This, however, is only true shortly after drinking. Once equilibrium is reached, the difference becomes practically nil.¹

§ 27:13. Methods of analysis—Introduction

Although there are many ways to identify and measure BAC using blood and other body fluids, three commonly employed methods are gas chromatography, enzymatic oxidation, and chemical oxidation.

Here is a brief introduction to each:

Gas Chromatography - More than any other method capable of analyzing specifically for alcohol to the exclusion of all interfering substances, gas chromatography is the method of choice. As laboratory techniques go, it is fast, and requires minimal sample preparation. It is sensitive to small changes in alcohol concentration. Either the diluted whole blood specimen can be injected into the chromatograph, or the headspace vapor above the specimen can be

¹Watts, Some Observations on Police Administered Tests for Intoxication, 45 NC Law Review 35, 49 (1966).

injected. Use of headspace vapor eliminates problems of syringe plugging, but it requires 15 to 30 minutes for the sample to be equilibrated at a given controlled temperature. Further, when headspace chromatography is used, it is not the blood but the gas above the blood that is analyzed, with an assumed partition ratio between the two employed. In this case, the analysis becomes more like an indirect test of breath than a direct one of blood. The method requires a gas chromatograph and a recorder, expensive equipment that requires significant maintenance.

Enzymatic Oxidation - This method as usually practiced employs alcohol dehydrogenase (ADA), the body enzyme which breaks down ethyl alcohol. A sensitive method that does not require much preparation, it is, however, subject to interference by methanol, isopropanol, acetone and similar substances.

Chemical Oxidation - This usually involves oxidation of alcohol with potassium dichromate in an acid solution, employing a chemistry similar to that of the wet chemical Breathalyzer. Time consuming in most variations, the method usually requires separation of the alcohol from its matrix before reaction with the acid and dichromate reagent. The method is nonspecific for alcohol unless combined with complex additional chemical manipulations.

Osmometry - Occasionally encountered, Osmometry employs the measurement of diffusion of a substance through a semipermeable membrane. Fast and easy to use, it is nonetheless an undesirable method because it is neither specific nor precise.

§ 27:14. Traditional (wet chemistry) methods

Traditionally, analysis of blood required separation of the suspected alcohol from the remaining blood components. This was accomplished by means of diffusion, where the alcohol is permitted to evaporate and is absorbed into a capturing medium such as potassium dichromate; aeration, a similar method where air which is passed through the sample of blood is passed through a solution partially composed of an oxidizing agent;¹ and distillation, perhaps the most reliable of the older techniques where the alcohol is distilled from the blood and quantitatively measured.² As with wet-chemistry breath analysis, use of reagents such as potassium dichromate which are employed in all three techniques, renders these procedures subject to the problems of non-specificity which plagued outmoded devices such as the Breathalyzer 900.

¹Erwin, Richard D., *Defense of Drunk Driving Cases*, Criminal/Civil, § 17.02(1), Matthew Bender & Co. [1990 Rev.] p. 17-05.

²See, F.L. Kozelka and C.H. Hine, "Method of Determination of Ethyl Alcohol for Medicolegal Purposes", *Ind. Eng. Chem. Anal. Ed.* 13, 905-907 [1941], reported by Erwin at § 17.03(1), p. 17-7.

§ 27:15. Gas chromatography

In its simplest form, the gas chromatograph consists of a long column or tube filled with an inert substance which has been coated with a non-volatile liquid. An inert gas, such as helium or nitrogen, is passed through the column which is heated in an oven to a constant temperature to which the substance being tested has been added. The basic principle of the gas chromatograph is that all substances will not pass through the column at a uniform rate, but that different substances will be slowed by the non-volatile liquid surrounding the inert granular substance with which the tube has been filled. A detector, placed at the end of the column, records the emergence of the various substances.

In attempting to determine the quantity of alcohol contained in a sample, the operator will first inject a known quantity of ethyl alcohol into the column and electronically record the output of the detector which will automatically generate a graph known as a chromatogram.¹ The operator will then make up a mixture of ethanol and a standard such as n-propyl alcohol or t-butyl alcohol. The standard will then be run, a graph produced, and the proportionate difference between the known ethanol and the known n-propyl or t-butyl determined. The operator then adds an identical amount of the n-propyl or t-butyl to the blood to be tested and it is run in the same fashion and a graph produced. The operator will then calculate the amount of ethanol in the sample by applying the known proportion to the second analysis. In some cases this calculation is accomplished either internally by the chromatograph or by a computer attached thereto. In any event, the calculation may be verified by counsel through the utilization of the "Peak Height" formula provided counsel has been able to obtain copies of the individual chromatograms. Discussed extensively by Fitzgerald, the formula that may be utilized is as follows:

$$\text{"KNOWN" ETOH} = \frac{\text{Q.C. I.S.}}{\text{Q.C. ETOH}} \times \frac{\text{TEST ETOH}}{\text{TEST I.S.}} = \text{ETOH \% OF UNKNOWN PEAK}$$

WHERE:

Q.C. I.S. =

Quality control internal standard (n-propyl or t-butyl)

Q.C. ETOH =

Quality control ethanol

TEST ETOH =

Amount (height) of ethanol found in test sample

TEST I.S. =

Amount (height) of internal standard (n-propyl or t-butyl) found in test sample.

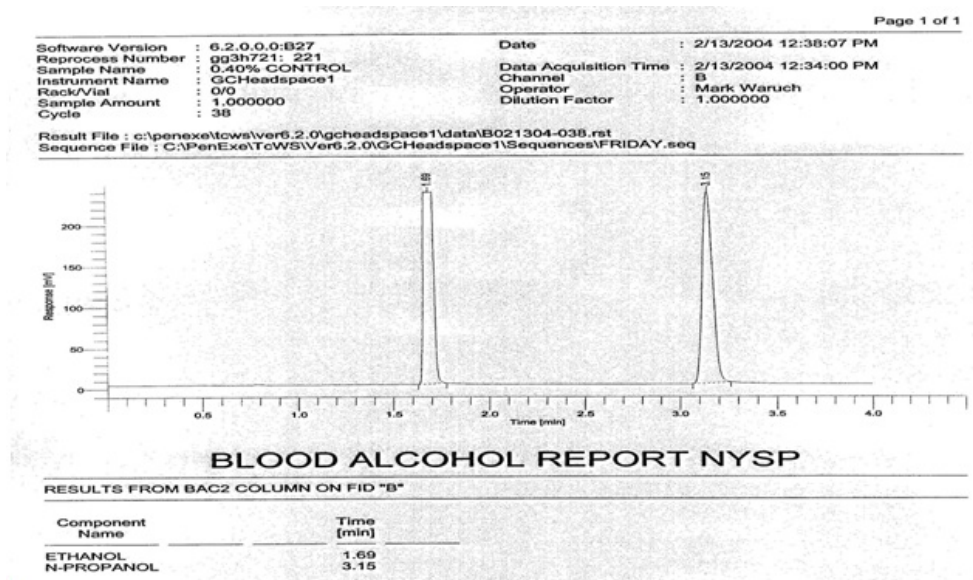
The practitioner should not overly rely upon the calculations performed by the forensic lab. Just as with the software employed by the various infrared breath testing devices, there is no assurance that the peak heights as utilized by the instrument have been properly determined or that the calculations employed are valid. Clearly, a chalkboard and an overhead projector will be

¹The procedure described herein is that set forth by Fitzgerald in *Intoxication Test Evidence* 2d, Lawyers Cooperative Publishing: Rochester New York, 1995 § 19:8, p. 19-7.

of far greater significance than the somewhat sterile printout from a printer.

Counsel is also advised to determine whether or not the internal standard was actually run at all. In a chromatographic analysis of cocaine observed by this writer, the laboratory had utilized a computerized standard, the source and accuracy of which was unknown. While this may or may not be done with alcohol, it should definitely be determined. As noted by Fitzgerald, the column of a chromatograph tends to age. Gas flow, column temperature and clogging all change performance characteristics.² While this would not alter the proportions if the tests were run back to back, a computerized standard run at some earlier point in time would not be subject to the cumulative effect of any such changes.

Below is a typical graphical printout from an evidentiary gas chromatograph:



The peak on the left represents the ethyl alcohol sample being analyzed and the peak on the left indicates the isopropyl standard that was used for a marker. Of interest in this particular graph is that the ethyl alcohol peak shows a flattening at the top. This indicates that the gain control on the detector may have been set to high.

§ 27:16. Gas chromatography—Headspace analysis

Most popular among laboratories conducting alcohol analysis is headspace analysis. A variant of the chromatographic technique discussed above is the headspace analysis. As described by Fitzgerald, the sample to be tested is placed in a sealed container and brought to a constant temperature by a water bath whereupon a sample of the vapor existing in the "headspace" is removed and directly injected into the chromatograph. Advantages include injection of much larger samples and elimination of the fouling of the column with the byproducts of blood. It is

²Fitzgerald, at § 19:8.

also possible to use a mass analysis device known as an auto-sampler which permits the laboratory to automatically run 80 or more samples in succession without human involvement. The true disadvantage is that it turns a blood test into what is essentially a breath test and requires application of a blood/gas coefficient such as the 2100:1 blood/breath ratio. As discussed in Chapter 22, such an assumption may be fraught with error.

§ 27: 16 Auto-samplers

In principle, there is nothing wrong with an auto-sampler. Nevertheless, the use of such devices may create an area ripe with possibilities for cross-examination. The problem is this. Prior to the use of the device, each sample must be placed in a sample bottle and loaded into the carousel of the machine. Generally, the device will record each sample by number. The issue that arises is the degree of accuracy employed by laboratory personnel in placing the various samples into the machine. Should a sample be improperly placed or recorded, the results will be meaningless regardless of the accuracy and precision employed in the analysis of the sample.

§ 27:17. Automated methods

Overwhelmingly popular in hospitals as a result of their outward simplicity and speed are automated systems such as the DuPont® ACA blood analyzer. Such techniques employ the use of enzymes which convert the blood to substances which can be measured spectrographically. In *People v Campbell*,¹ the New York Court of Appeals rejected four tests performed upon the DuPont ACA analyzer. Of interest is Judge Simons' comments concerning accuracy:

State regulations require that a blood alcohol test reading be accurate within .01 grams per 100 milliliters [Chemical Analysis of Blood, Urine, Breath or Saliva for Alcoholic Content, 10 NYCRR § 59.2(b)(2)]. In the cases before us no scientific evidence was presented to establish that the DuPont ACA is reliable for determining blood alcohol content generally or with sufficient accuracy to meet that standard. Indeed, in *People v Campbell* a technologist testified that the acceptable range set by the manufacturers for the DuPont ACA was outside this .01 standard. Moreover, the State Health Department's permit does not satisfy the accuracy requirement. Although the machine may be accurate to show alcohol toxicity or possible drug interactions for general purposes, there is no proof that it is "capable of accurately discerning the critical distinction between a legally permissible blood alcohol content and that which is statutorily proscribed" (*People v. Freeland*, 68 N.Y.2d 699, 506 N.Y.S.2d 306, 497 N.E.2d 673 (1986)).²

§ 27:18. Testing facilities and their methods

¹*People v. Campbell*, 73 N.Y.2d 481, 541 N.Y.S.2d 756, 539 N.E.2d 584 (1989).

²*People v. Campbell*, 73 N.Y.2d 481, 486, 541 N.Y.S.2d 756, 539 N.E.2d 584 (1989); followed in *People v. Dean*, 74 N.Y.2d 643, 542 N.Y.S.2d 512, 540 N.E.2d 707 (1989).

Blood alcohol measurements are only as reliable as the facilities performing the analyses. In most cases, those facilities operate pursuant to statutes and regulations setting out the standards under which they are licensed and pursuant to which the tests must be performed. Also the laboratories may be subject to inspection and evaluation from time to time. Accordingly it is a good idea for counsel to review the statutory and regulatory provisions under which the laboratory functions, and to obtain a copy of the procedure describing how the test in question is supposed to be performed. It is also useful to obtain copies of any relevant evaluations of the laboratory in question, and information as to whether it is certified or accredited. The information obtained may be especially helpful to the defense counsel in discrediting the laboratory's test result.

§ 27:19. Compliance with rules and regulations

Administrative regulations governing the administration of blood tests are published at 10 NYCRR 59.5 and are reprinted in full herein. They provide for numerous methods and assumptions governing the analysis of blood. Essential among these is 59.2(a)(2). It provides a conversion ratio between plasma and whole blood by providing that nine tenths of the determined concentration of alcohol in the serum or plasma shall be equivalent to the corresponding whole blood alcohol concentration. Further set out are basic laboratory practices such as a "blank" analysis¹ and analysis of a reference or control sample of known alcoholic content of greater than 0.08 grams per 100 milliliters.² The result of this must agree with the reference sample value within the limits of plus or minus 0.01 grams per 100 milliliters or such limits as specified by the commissioner.

Of some interest is the means in which the blood is to be drawn. 10 NYCRR § 59.2(4) sets forth that the blood can be drawn by means of a sterile dry needle into a vacuum container or a sterile dry needle and syringe and deposited into a clean container. In either case, the regulation requires the use of a solid anticoagulant. Despite the seemingly mandatory nature of the preservative in *People v. Boyst*,³ the Fourth Department refused to find that the trial court erred by admitting a test conducted in the absence of a preservative. Of note, the Court found that 10 NYCRR § 59.2(a)(1), providing as it does for the testing of blood serum with a conversion factor of .9 specifically authorized the procedure.

§ 27:20. Practice considerations

Don't be afraid of blood tests. Blood tests usually present at trial what most other forms of testing do not, a living and breathing expert at no cost to you or your client. Properly cross-examined, the defense can establish the existence of reasonable doubt entirely through the State's expert. Thematically, the course that should be followed is that which is used to examine the "independent" physician in the personal injury case. Stay with established medical and scientific

¹10 NYCRR § 59.2(2)(b)(1).

²10 NYCRR § 59.2(2)(b)(2).

³*People v. Boyst*, 177 A.D.2d 962, 577 N.Y.S.2d 1007 (4th Dep't 1991).

principles which present no alternative for dispute.

Preparation of a trial which will involve the admission of a blood test requires special attention. You should become intimately familiar with the particular means employed in drawing and analyzing your client's sample. If your client has been injured, it will be wise to obtain a copy of his or her medical record to determine whether or not a blood test was performed. If this is the case, you obviously must determine whether or not a blood alcohol test was run. While such a test would not be admissible absent a waiver, the hematocrit may also be shown. If this level was inordinately high, counsel may wish to consult with an expert to determine what the true BAC would have been. It should be recognized, however, that this is an area fraught with potential for disaster; admission of the hematocrit level may constitute a waiver and result in admission of the hospital BAC determination.

Perhaps a better way to treat questions evolving as a result of an unknown hematocrit is to use this factor as a means of cross examination. Using figures set forth by Fitzgerald¹ the following technique may be employed:

Q: Would you explain for me the term hematocrit ratio?

A: The Hematocrit Ratio is the proportion of blood plasma to cellular material.

Q: The solid to liquid?

A: Roughly.

Q: Now, when alcohol is analyzed in a sample of blood, where is it to be found?

A: Could you explain that further?

Q: Will the alcohol be found in the liquid or solid particles of the blood?

A: Oh, the liquid.

Q: And why is that?

A: Because alcohol is for the most part water soluble.

Q: And the results of an alcohol blood analysis are reported how?

A: As a ratio of the weight to volume or w/v.

Q: Now to return to the hematocrit ratio, you said that it is a means of describing the percentage of blood which is composed of cellular material?

A: That's correct.

Q: Then a person who has a ratio of 47 would have blood made up of 47 percent cellular material and 53 percent plasma?

A: That's correct.

Q: And the higher the hematocrit the higher the more non-alcohol absorbing cellular material is present?

A: That's correct.

Q: By the way, do you know what Mr. Hadenough's hematocrit ratio was at the time of his arrest and test?

A: I do not.

Q: Then when you calculated your results you assumed a particular hematocrit ratio?

A: Correct.

Q: But if the hematocrit value was higher than that which you assumed, to get an accurate

¹Fitzgerald, at § 19:13.

result you would have to use a higher conversion factor?

A: That's correct.

Q: Then without assuming Mr. Hadenough's ratio as it existed on August 11, 1991 you cannot determine what his true blood alcohol content was, can you?

A: I can only do the calculations.

Q: That's not what I asked you; without assuming Mr. Hadenough's ratio as it existed on August 11, 1991, you cannot determine what his true blood alcohol content was, can you?

Q: Well not without the assumption, no I cannot.

Likewise, it is important to verify whether or not the sample that was tested was clotted or unclotted. In the event that it was clotted, a productive avenue of cross-examination can be as follows:

Q: Tell me, was the sample, at the time you tested it clotted or unclotted.

A: A little of both.

Q Now, when you say a little of both do you know the percentages?

A: I do not.

Q: Now you previously testified that the alcohol will be found in the liquid, non-cellular portion of the blood?

A: That's correct.

Q: How about a clot, will the alcohol go into a clot?

A: Not generally.

Q: And what portion of the blood is heavier, the cellular material or the liquid?

A: The cellular material.

Q: In what percentage?

A: That depends upon the hematocrit ratio.

Q: When blood coagulates or clots, what occurs?

A: The cellular material draws together and hardens.

Q: And you tested the liquid portion?

A: I did.

Q: Which was but a portion of the overall weight of the sample?

A: If that's a question the answer is correct.

Q: But even though it was but a portion of the weight it contained almost all of the alcohol, did it not?

A: That's correct.

Q: Then the concentration of the alcohol in the plasma was higher than that contained in the entire sample of the blood when drawn, was it not?

A: In the plasma, yes.

Arguably a non-issue, even the addition of the preservatives can be used to some advantage.

Q: Now, the heparin, why was that added?

A: To prevent clotting.

Q: It did not, did it?

A: No, not completely, it did not.

Q: There was also added some sodium fluoride?

A: Correct.

Q: Why was that?

A: Sodium fluoride is a preservative.

Q: Why is a preservative used?

A: Because an unpreserved alcohol sample can undergo a process of neo-alcohol formation.

Q: Could you explain that for me?

A: Yes, neo-alcohol formation is when bacteria acts upon material naturally present in the blood and causes it to ferment or form alcohol on its own.

Q: Can you, in the course of your testing differentiate between this fermented alcohol and that which may have been present in the sample when drawn?

A: No, I can not.

Q: And theoretically the preservative is supposed to prevent this process from occurring?

A: Not theoretically, it does prevent such formation.

Q: Well, theoretically the heparin was to prevent the formation of clots?

A: That's correct.

Q: All clots?

A: Theoretically.

Q: In this case it did not did it?

A: Well, no.

Q: But you know that because the clot can be visibly verified and we know it was not present in the blood when drawn.

A: That's correct.

Q: But you cannot visibly verify the formation of alcohol through fermentation can you?

A: No, no one can.

Q: For that matter you can't tell whether that occurred at all can you?

Finally, if you're confronted with a headspace analysis, don't miss the opportunity to convert the blood test into a less reliable breath test:

Q: Now, this Perkin-Elmer F-45 gas chromatograph, did it directly measure Ms. Client's blood?

A: You mean did I put it directly into the instrument?

Q: Yes.

A: No, it did not.

Q: Could you explain what you did?

A: I withdrew a sample of the vapor which had accumulated above the sample and injected that into the column.

Q: And the amount of alcohol contained in that vapor is the same as the amount of alcohol in the sample of blood, how can that be?

A: It's not, but it bears a relationship to the overall alcoholic content by means of Henry's Law.

Q: Is that the 2100 to one rule?

A: Yes it is.

Q: But that rule relies on certain assumptions such as Mr. Hadenough's hematocrit ratio does it not?

A: Yes it does.

Q: And preservatives play a role in altering the ratio, do they not?

A: They might.

Q: And temperature?

Q: It might.

Q: Even barometric pressure?

A: Unlikely, but it could.

Q: Just so I understand, you did not utilize the alcohol present in the sample of blood but in the air above it, is that correct?

A: That's correct.

Compulsory Chemical Tests and Hospital Blood Seizure

§ 11:60. Generally

Due to its personal injury or death requirement, court ordered testing is the least utilized, although it presents the most procedurally reliable method, surmounting as it does the crucial issue of consent.

Keeping with the theme of placing all chemical tests within § 1194, court ordered blood alcohol tests are described by Vehicle and Traffic Law § 1194(3). As an enactment in derogation of the common law, it is to be strictly construed. Generally, it creates an expedient means through which an officer, investigating what he or she reasonably believes to be a serious alcohol related motor vehicle accident resulting in personal injury or death, can obtain a blood alcohol sample from an otherwise non-consenting motorist. The procedure as designed is a balance between the practicalities of police accident investigation and the Fourth Amendment rights of the motorist.

§ 11:61. Vehicle and Traffic Law § 1194(3)

Established by Vehicle and Traffic Law § 1194(3), a request to initiate court ordered compulsory chemical testing requires as a threshold that a police officer or a district attorney set forth reasonable cause to believe that:

3. Compulsory chemical tests. (a) Court ordered chemical tests. Notwithstanding the provisions of subdivision two of this section, no person who operates a motor vehicle in this state may refuse to submit to a chemical test of one or more of the following: breath, blood, urine or saliva, for the purpose of determining the alcoholic and/or drug content of the blood when a court order for such chemical test has been issued in accordance with the provisions of this subdivision.

(b) When authorized. Upon refusal by any person to submit to a chemical test or any portion thereof as described above, the test shall not be given unless a police officer or a district attorney, as defined in subdivision thirty-two of section 1.20 of the criminal procedure law, requests and obtains a court order to compel a person to submit to a chemical test to determine the alcoholic or drug content of the person's blood upon a

finding of reasonable cause to believe that:

(1) such person was the operator of a motor vehicle and in the course of such operation a person other than the operator was killed or suffered serious physical injury as defined in section 10.00 of the penal law; and

(2) a. either such person operated the vehicle in violation of any subdivision of section eleven hundred ninety-two of this article, or

b. a breath test administered by a police officer in accordance with paragraph (b) of subdivision one of this section indicates that alcohol has been consumed by such person; and

(3) such person has been placed under lawful arrest; and

(4) such person has refused to submit to a chemical test or any portion thereof, requested in accordance with the provisions of paragraph (a) of subdivision two of this section or is unable to give consent to such a test.

Choosing not to remain with the definition of reasonable cause as contained at CPL § 70.10(2), Vehicle and Traffic Law § 1194(3)(c) rather liberally defines the term "reasonable cause" as used in that section:

(c) Reasonable cause; definition. For the purpose of this subdivision "reasonable cause" shall be determined by viewing the totality of circumstances surrounding the incident which, when taken together, indicate that the operator was driving in violation of section eleven hundred ninety-two of this article. Such circumstances may include, but are not limited to: evidence that the operator was operating a motor vehicle in violation of any provision of this article or any other moving violation at the time of the incident; any visible indication of alcohol or drug consumption or impairment by the operator; the existence of an open container containing an alcoholic beverage in or around the vehicle driven by the operator; any other evidence surrounding the circumstances of the incident which indicates that the operator has been operating a motor vehicle while impaired by the consumption of alcohol or drugs or intoxicated at the time of the incident.

Reference to "the totality of the circumstances" and the time of enactment suggest that it may have been the Legislature's intent to free this search warrant application procedure from the "reliability" and "basis" requirements commonly referred to as the Aguilar-Spinelli² test, and substitute instead the more liberal Fourth Amendment interpretation afforded by the 1983 decision of the United States Supreme Court in *Illinois v. Gates*.³ In any event, rejection of this

²See, *Aguilar v. State of Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 [1964]; *Spinelli v. U.S.*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 [1969].

³*Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

rule by the New York Court of Appeals, as a matter of State constitutional law in *People v. Griminger*,⁴ most likely renders this effort of little more than academic interest; hearsay will have to meet the earlier test.⁵

In determining whether or not a warrant, oral or otherwise should issue,⁶ Vehicle and Traffic Law § 1192(3) initially requires a determination that there has occurred a motor vehicle accident in which an individual other than the driver thereof has been killed or suffered "serious physical injury" as that term is further defined by Penal Law § 10.00. Having achieved this threshold, the police officer applicant must have reasonable cause to believe that the driver was operating in violation of any subdivision of § 1192 or that a preliminary breath test has shown the consumption of alcohol by the motorist. While the ready accessibility of the operator should usually render the "reasonable cause" the product of non-hearsay observations, in the event that they are not, the transcript of the application should be carefully perused to determine whether or not the information supplied satisfied the familiar two-prong test. As noted by the Court of Appeals:

The basis of the informant's knowledge must be demonstrated because the information related by an informant, even a reliable one, is of little probative value if he does not have knowledge of the events he describes (*People v. Rodriguez*). Conversely, no matter how solid his basis of knowledge, the information will not support a finding of probable cause unless it is reliable. Since police officers may not arrest a person on mere suspicion or rumor, they likewise may not arrest a suspect on the basis of an informant's tip, perhaps born of suspicion or rumor or intentional fabrication.⁷

In *People v. Walsh*,⁸ police officers investigating a serious automobile accident contacted the assistant district attorney at his home and informed him of the status of their investigation at that point. From his home the assistant district attorney phoned a County Court Judge who thereupon proceeded to grant an application to withdraw a sample of the operator's blood. At no time did

⁴*People v. Griminger*, 71 N.Y.2d 635, 529 N.Y.S.2d 55, 524 N.E.2d 409 (1988).

⁵See, *People v. Argyris*, 24 N.Y.3d 1138, 27 N.E.3d 425, 3 N.Y.S.3d 711 [2014].

⁶While the concept of an "oral" warrant may be distasteful to some, Vehicle and Traffic Law § 1194(3) does create such a warrant. Unlike the oral application procedure established under CPL § 690.36, which pursuant to CPL § 690.40(3) requires the applicant to prepare the warrant and read it verbatim to the judge, no such requirement is imposed by Vehicle and Traffic Law § 1194(3).

⁷*People v. Johnson*, 66 N.Y.2d 398, 497 N.Y.S.2d 618, 488 N.E.2d 439 (1985); see also, *People v. Cassella*, 143 A.D.2d 192, 531 N.Y.S.2d 639 (2d Dep't 1988); and see, *People v. McGriff*, 130 A.D.2d 141, 518 N.Y.S.2d 795 (1st Dep't 1987).

⁸*People v. Walsh*, 137 Misc. 2d 1073, 523 N.Y.S.2d 752 (County Ct. 1988).

the investigating officers or others with personal knowledge of the facts give sworn testimony prior to the granting of the court ordered blood test, nor did the Judge have contact with anyone other than the assistant district attorney.

Suppressing the use of the results at trial, the trial court found the hearsay character of the statements to be dispositive:

In this case the Assistant District Attorney had no personal knowledge of facts to support the application for the court-ordered blood test. Those with personal knowledge, which they apparently provided to the Assistant District Attorney, not only gave no sworn allegations of fact in support of the application, but they gave no statement whatever to the Judge considering the application. Therefore, section 1194-a (3) (b) and (c) were not complied with, in that they require the court to place under oath the applicant and any other person providing information in support of the application. The applicant must make specific allegations of fact. The statute makes no provision for an application based on hearsay, which in this case would amount to an application based on solely hearsay information provided by the Assistant District Attorney.⁹

In *People v Whelan*,¹⁰ the Second Department had an opportunity to extensively discuss the role of hearsay, double hearsay, and the "two-pronged test" of Aguilar-Spinelli in the context of an oral application for a blood seizure order:

[I]t is clear that the application consisted entirely of hearsay and double hearsay. However, this fact does not render it defective. Search warrants based on hearsay information have long been held to be valid where there is "a substantial basis for crediting the hearsay statement." The procedure for evaluating the hearsay statements of informants involves the two-pronged Aguilar-Spinelli test This court has recently held that probable cause to arrest may be established by double hearsay as long as each informant in the chain of narration passes the Aguilar-Spinelli test. By parity of reasoning, an application under Vehicle and Traffic Law § 1194(3) based on double hearsay would be valid if each informant passes the Aguilar-Spinelli test.¹¹

The availability of hearsay notwithstanding, however, the failure to specify the basis of such hearsay will prove fatal:

[T]here is merit to the defendant's contention that the application herein was defective in that it

⁹*People v. Walsh*, 137 Misc. 2d 1073, 1074, 523 N.Y.S.2d 752 (County Ct. 1988).

¹⁰*People v. Whelan*, 165 A.D.2d 313, 567 N.Y.S.2d 817 (2d Dep't 1991).

¹¹*People v. Whelan*, 165 A.D.2d 313, 321, 567 N.Y.S.2d 817 (2d Dep't 1991) [internal citations omitted].

failed to disclose that it consisted of hearsay and further failed to state the sources of the hearsay statements. In enacting the provisions of Vehicle and Traffic Law § 1194(3), the Legislature was continuing the fundamental policy of having the adequacy of applications for search warrants, and orders affecting unarrested suspects passed upon by a neutral, detached Judge. An essential element in each of these procedures is that a Judge, rather than a prosecutor or a police officer, decides whether or not the documents submitted are sufficient to support the requested relief. By failing to set forth the sources of his hearsay information, Assistant District Attorney Grennan deprived the County Court of the opportunity to make the determinations required under the statute.¹²

In *People v. Isaac*,¹³ an automobile driven by defendant collided with another automobile while being pursued by Syracuse police officers. The driver of the other automobile was killed. Following his arrest, the defendant refused to submit to a blood test. Thereafter, an oral application was made by telephone to an Onondaga County Court Judge for an order compelling defendant to submit to a blood test (see, Vehicle and Traffic Law § 1194[3]). The Judge granted the application and the blood test was administered. The test results indicated the presence of marihuana and cocaine.

At the time of the application, the officer advised the issuing Judge that "[t]he reasons ... for his belief that defendant was operating the automobile in violation of Vehicle and Traffic Law § 1192 (4) were 'the manner in which [defendant] operated the vehicle, his general demeanor after the crash and the statements of witnesses who saw defendant smoking marihuana shortly before the crash at the apartment [of another individual].'"

Finding the application to be insufficient, the Fourth Department observed:

The officer failed, however, to specify whether he personally observed defendant's 'general demeanor' and what that demeanor was, and also failed to identify the sources of the hearsay statements. Those failures rendered the application defective (see, *People v. Whelan*, 165 A.D.2d 313, 321 to 322, 567 N.Y.S.2d 817 (2d Dep't 1991)).

Irrespective of the fact that the County Court refused to suppress, the Court nonetheless affirmed:

[T]he error [was] harmless, as the proof of defendant's impairment is overwhelming and there is no significant probability that the error infected the verdict.¹⁴ In addition to the evidence of the manner in which defendant's automobile was operated, defendant's brother, a passenger in the automobile,

¹²*People v. Whelan*, 165 A.D.2d 313, 321 to 322, 567 N.Y.S.2d 817 (2d Dep't 1991) [internal citations omitted].

¹³*People v. Isaac*, 224 A.D.2d 993, 637 N.Y.S.2d 827 (4th Dep't 1996).

¹⁴Internal citations omitted.

testified that defendant had smoked three or four marihuana cigarettes one hour before the accident, the other passenger in the automobile testified that, shortly before the accident, she smelled marihuana coming from a room where defendant, his brother and another individual were, and defendant testified that he had smoked marihuana earlier in the day.

Essential to the mechanics of § 1194(3) is that it is not a test of first choice, for even if the injury and "reasonable cause" or field test requirements have been met, it is still necessary that the motorist is placed under a lawful arrest¹⁵ and either refuse or be unable to give consent to a test offered pursuant to § 1194(2).¹⁶

In the event that such arrest and refusal has not occurred, the warrant should not be issued.

In *People v. Freeman*,¹⁷ the Fourth Department voided a warrant as a result of double hearsay which was contained therein. In *Freeman*, the Defendant appealed from a judgment convicting him, upon a jury verdict, of Vehicular Manslaughter in the second degree (Penal Law former § 120.03(1), (2)), assault in the second degree (§ 120.05(4)), leaving the scene of a personal injury incident without reporting (Vehicle and Traffic Law § 600(2)) and two counts of Driving While Intoxicated as a misdemeanor (§ 1192(2), (3)). Among other things the defendant appealed the denial of his motion to suppress the results of a compulsory blood test. In *Freeman*, the evidence at the hearing established that the Trooper who applied for a court-ordered blood test relied upon double hearsay, i.e., statements made by civilian witnesses to a fellow Trooper, to support his belief that the accident in question occurred "in the course of" the defendant's operation of a motor vehicle (see Vehicle and Traffic Law § 1194(3)(b)(1)). In setting aside the determination of the trial court (*Reed, J*), the Fourth Department, with citation to *Whelan*, observed:

[a]lthough an application for a court-ordered blood test may contain hearsay and double hearsay statements that satisfy the Aguilar-Spinelli test, the application must disclose that it is supported by hearsay and identify the source or sources of the hearsay (see *People v. Whelan*, 165 A.D.2d 313, 321–322, 567 N.Y.S.2d 817, lv. denied 78 N.Y.2d 927, 573 N.Y.S.2d 480, 577 N.E.2d 1072; see also *People v. Isaac*, 224 A.D.2d 993, 994, 637 N.Y.S.2d 827, lv. denied 88 N.Y.2d 937, 647

¹⁵See generally, *People v. Alejandro*, 70 N.Y.2d 133, 517 N.Y.S.2d 927, 511 N.E.2d 71 (1987).

¹⁶Vehicle and Traffic Law § 1194(3)(b)(4), in light of *People v. Kates*, 53 N.Y.2d 591, 444 N.Y.S.2d 446, 428 N.E.2d 852 (1981), is surplusage. Under *Kates*, the consent of an unconscious individual is presumed. Problems are envisioned, however, when § 1194(3) is used to authorize a test beyond the two hour limitation created by § 1194(2)(1) upon an unconscious individual. Such a situation creates an unduly broad field of choices for the authorities and in such a situation should be rejected.

¹⁷*People v. Freeman*, 46 A.D.3d 1375, 848 N.Y.S.2d 800 (4th Dep't 2007), leave to appeal denied, 10 N.Y.3d 840, 859 N.Y.S.2d 399, 889 N.E.2d 86 (2008).

N.Y.S.2d 170, 670 N.E.2d 454). Here, the application did not disclose that any of its information was based upon statements from civilian witnesses, nor did the application set forth that the Trooper had an independent basis for a finding of reasonable cause to believe that the accident occurred in the course of the operation by defendant of his vehicle (see Whelan, 165 A.D.2d at 322, 567 N.Y.S.2d 817). We thus conclude that the application and the ensuing order for a compulsory blood test were defective and that the evidence obtained therefrom should have been suppressed (see Whelan, 165 A.D.2d at 322, 567 N.Y.S.2d 817). Because a conviction of driving while intoxicated per se must be proved by chemical analysis (see Vehicle and Traffic Law § 1192(2)), we further modify the judgment by reversing that part convicting defendant of driving while intoxicated under count four of the indictment and dismissing that count of the indictment.

§ 11:62. Procedural requirements

Vehicle and Traffic Law § 1194(3) creates a procedure which is both unique and somewhat at odds with established methods.

Upon initiating a connection and having been informed of the purpose of the communication, the court shall place the applicant, and any other individual with knowledge, under oath. At this point, the court also incurs the simultaneous obligation of either activating recording apparatus, causing transcription by means of verbatim stenographic notes, or commencing to take verbatim longhand notes. The applicant, either a police officer or district attorney, must then inform the court that the person from whom the sample is sought was the operator of a motor vehicle and that "in the course of such operation" a person, other than the operator, was killed or seriously injured and that based upon the totality of circumstances, there is "reasonable cause" to believe that such person was operating a motor vehicle in violation of any subdivision of Vehicle and Traffic Law section eleven hundred ninety-two. The applicant must further set forth that after being placed under arrest the operator refused to submit to a chemical test or any portion thereof, or was unconscious or otherwise incapable of consent.

In the absence of an amendment tracking the provisions of Criminal Procedure Law § 690.40, preparation as well as determination of the application would best take place with an eye toward implementation of the "reasonable cause" standard as found and employed throughout the Criminal Procedure Law.

In the event the Court determines that issuance of the warrant is appropriate, it shall so instruct the applicant who then incurs the statutory duty of preparing the warrant which shall include the name of the issuing judge or justice, the name of the applicant, as well as the date and time it was issued. A signature is required; however, it need only be that of the applicant if the warrant is not issued upon a personal appearance.

§ 11:63. Warrant preparation

Of some debate is whether or not the warrant must be prepared at the time it is issued. Crucially

lacking from Vehicle and Traffic Law § 1194(3) is a legislative declaration that the warrant be read verbatim to the judge such as required under Criminal Procedure Law § 690.40(3). The absence of such a directive compels the conclusion that immediate preparation is not required. While the issuance of a warrant under Criminal Procedure Law Article 690 is an exceedingly complex affair requiring description of persons, places, times and the particular items to be seized, a blood seizure order encounters no such problems. Essentially a yes or no affair, the scope of the search is implied by operation of law. Literally all that is needed is a document memorializing the judicial authority, a function which need not be fulfilled to insure compliance with the judicial mandate.

In *People v Scalzo*,¹ the defendant contended that the results of a compulsory blood alcohol test should be suppressed as a result of the failure of the authorities to make a blood seizure order available to the defendant or the personnel performing the chemical test. Rejecting this argument, the court found "great significance" in the fact that Vehicle and Traffic Law § 1194-a, the predecessor to present § 1194(3) does not require such a presentation. Noting that the Vehicle and Traffic provision is in clear contrast to Criminal Procedure Law § 690.50(1) which requires that in certain situations a copy of the warrant be displayed, the Court felt this omission was not without consequence:

That provision of CPL § 690.50 is a logical requirement in view of the fact that such search warrant is limited in scope as to where and to what the issuing Judge has ordered and can be for a number of different places (e.g., house, garage, room, apartment, etc.) and for a number of different items (e.g., narcotics, stolen property, forged instruments, weapons, etc.). However, under § 1194-a of the Vehicle and Traffic Law, the court order issued thereunder is for one purpose only, the taking of blood. In the opinion of this court, § 1194-a of the Vehicle and Traffic Law was enacted to ensure speed in a situation where time is of the utmost essence and to promptly take blood before the alcohol level has deteriorated and the crucial evidence is lost.²

In affirming this aspect of the lower court's order, the Second Department found no merit to the defendant's contention inasmuch as "[t]he controlling provision of the statute, Vehicle and Traffic Law § 1194-a [now Vehicle and Traffic Law § 1194(3)], does not contain any such requirement."

Reaching a contrary conclusion, *People v Walsh*³ determined that the mandate of the statute for preparation and signature clearly indicated a legislative intent which could not be ignored:

The statutory language clearly contemplates a written order prepared by the

¹*People v. Scalzo*, 139 Misc. 2d 539, 529 N.Y.S.2d 236 (County Ct. 1988).

²*People v. Scalzo*, 139 Misc. 2d 539, 548, 529 N.Y.S.2d 236 (County Ct. 1988).

³*People v. Walsh*, 137 Misc. 2d 1073, 523 N.Y.S.2d 752 (County Ct. 1988).

applicant on the other end of the phone line and signed by the applicant at that time because obviously the Judge is not present to do it in person. The Legislature must have felt that the taking of blood from a person without consent was of sufficient importance to require written documentation.⁴

Likewise, in *People v White*,⁵ a three-way conversation involving the officer, the assistant district attorney, and the judge, was established and stenographically recorded. Although the transcript of the conversation was subscribed and filed, at no point was a written warrant prepared and filed as otherwise required. Citing *People v Crandall*⁶ for the proposition that present Vehicle and Traffic Law § 1194(3), like its Criminal Procedure Law counterpart,⁷ "were intended only to authorize oral applications, not verbal search warrants," the court felt that such an interpretation was mandated by "a long, unbroken common-law tradition that a judicial fiat must be in writing before it can impinge upon important rights."⁸

Finding that in either enactment the Legislature had not intended to "take that drastic step," the court refused to do so under the auspices of substantial compliance.⁹

Often cited is *People v Armstrong*,¹⁰ in which the Jefferson County Court similarly suppressed upon the failure of the authorities to promptly prepare a warrant:

It is incumbent upon the People to show that the order authorizing the chemical test was available to both the defendant and the personnel performing the chemical test. Such action is dictated by the procedure provided in Vehicle and Traffic Law § 1194-a. The section specifically provides that the order be prepared in accordance with the instructions of the Judge and, if issued orally, "must be signed ... by the applicant" [Vehicle and Traffic Law § 1194-a (3)(d)]. The only possible rationale for this provision is to make available to the defendant, and to the medical personnel, executed and timely authority to compel the chemical test. Anything short of actual delivery of the order would place total reliance upon the

⁴*People v. Walsh*, 137 Misc. 2d 1073, 1075, 523 N.Y.S.2d 752 (County Ct. 1988).

⁵*People v. White*, 133 Misc. 2d 386, 506 N.Y.S.2d 815 (Sup 1986).

⁶*People v. Crandall*, 108 A.D.2d 413, 489 N.Y.S.2d 614 (3d Dep't 1985).

⁷CPL §§ 690.36 et seq.

⁸*People v. White*, 133 Misc. 2d 386, 391, 506 N.Y.S.2d 815 (Sup 1986) (citing *People v. Crandall*, 108 A.D.2d 413, 418, 489 N.Y.S.2d 614 (3d Dep't 1985)).

⁹*People v. White*, 133 Misc. 2d 386, 506 N.Y.S.2d 815 (Sup 1986).

¹⁰*People v. Armstrong*, 134 Misc. 2d 800, 512 N.Y.S.2d 323 (County Ct. 1987).

applicant's oral representation that such an order exists.¹¹

The problem with *Armstrong* is that it chooses to view the issuance of a blood seizure order in a vacuum. Surely the issuing magistrate will have made a contemporaneous record of the transaction, and indeed transcription or verbatim recording are required. Such notes and recording will set forth the time the application was made as well as the time the application was granted. At the other end, the hospital records will clearly denote the time of the procedure and the individual who withdrew the blood. Recognizing these realities, it seems hard indeed to imagine a scenario where an order postdates acquisition of the sample.

While *Armstrong* is also concerned that administration in the absence of an order "opens the door to possible misrepresentation and potential liability,"¹² such a fear plainly ignores the fact that under *Kates* and § 1194(2) such tests are a daily occurrence.

Perhaps the greatest weakness of those cases holding that a warrant must be presented is that nowhere in the statute is there created such a requirement. Indeed in *People v Whelan*,¹³ the Second Department, in so holding, rejected *Armstrong* in favor of *Scalzo* and refused to suppress as a result of the failure to present a written warrant:

We find the reasoning of *People v Scalzo*, which rejected the argument advanced by the defendant herein, far more persuasive than that in *People v Armstrong* and hold that there was no requirement in this case to show the court order to the defendant or medical personnel before blood was extracted.¹⁴

§ 11:64. Applicability of two hour requirement

Unlike Vehicle and Traffic Law § 1194(2)(a)(2), Vehicle and Traffic Law § 1194(3) fails to contain any requirement that the test be administered within a two hour period. This lack of any temporal requirement in the statute has proven dispositive in resolving potential two hour challenges.

In *People v McGrath*,¹ the defendant was involved in a motor vehicle accident which occurred at approximately 7:00 p.m. Several people were seriously injured and the defendant was arrested at a hospital at approximately 8:15 p.m. where he was asked to consent to a blood test to determine his blood alcohol level. Following the defendant's refusal, the arresting officer began to telephone

¹¹*People v. Armstrong*, 134 Misc. 2d 800, 803–804, 512 N.Y.S.2d 323 (County Ct. 1987).

¹²*People v. Armstrong*, 134 Misc. 2d 800, 804, 512 N.Y.S.2d 323 (County Ct. 1987).

¹³*People v. Whelan*, 165 A.D.2d 313, 567 N.Y.S.2d 817 (2d Dep't 1991).

¹⁴*People v. Whelan*, 165 A.D.2d 313, 324, 567 N.Y.S.2d 817 (2d Dep't 1991).

¹*People v. McGrath*, 135 A.D.2d 60, 524 N.Y.S.2d 214 (2d Dep't 1988).

various Judges in order to obtain a court order for a blood test pursuant to present Vehicle and Traffic Law § 1194(3). At 10:20 p.m. an application for a compulsory chemical test was granted and at 10:35 p.m. a test was performed which indicated a blood alcohol level of .23 of 1%.

Upon the defendant's motion to dismiss that count of the indictment based on the results of the blood test, the County Court found the test to be inadmissible inasmuch as it was taken more than two hours after arrest. The Appellate Division thereafter reversed, holding:

Nothing in the unambiguous language of [present § 1194(3)] indicates that the Legislature intended to impose a specific time limitation on the performance of court-ordered chemical tests. The omission of such a restriction reflects a rational legislative determination that it was unnecessary. It is reasonable to assume that the intervention of an impartial Magistrate in the issuance of an order for a chemical test insures that the test will not be administered at a time so remote that the results are irrelevant to the central question of the driver's blood alcohol count at the time of the automobile accident.²

* * *

The elapsed time between the incident and the request for a court order is one of the circumstances which a court must consider before issuing an order. ... A claim that delay in the administering of the test following the issuance of the court order negates the finding of reasonable cause is ... reviewable. The omission of a specific time limitation for performance of court-ordered chemical tests also reflects a reasonable legislative concern with the practicality of applying the statute. The absence of an absolute time limit permits the flexibility which is sometimes necessary to obtain a court order during hours when court is not in session.³

On Appeal, the Court of Appeals affirmed upon the decision of the Appellate Division.

While only dicta, in *People v Atkins*,⁴ the Court reaffirmed the stance taken in *McGrath* by noting the absence of any requirement in the statute:

Defendant's contention that the two hour limitation in section 1194(2)(a) was intended by the Legislature to be a absolute rule of relevance, proscribing admission of the results of any chemical test administered after that period regardless of the nature of the driver's consent, is unpersuasive. This argument is completely undermined by the lack of a corresponding time limit for

²*People v. McGrath*, 135 A.D.2d 60, 62, 524 N.Y.S.2d 214 (2d Dep't 1988).

³*People v. McGrath*, 135 A.D.2d 60, 63, 524 N.Y.S.2d 214 (2d Dep't 1988).

⁴*People v. Atkins*, 85 N.Y.2d 1007, 630 N.Y.S.2d 965, 654 N.E.2d 1213 (1995).

court-ordered chemical testing under section 1194(3).⁵

§ 11:65. Application transcription

Pursuant to Vehicle and Traffic Law § 1194(3)(d)(3), upon being advised that an application for a blood seizure order is being made, the obligation arises to immediately commence the recording of the oaths and all subsequent communications. This recordation may take the form of an audio recording, a verbatim stenographic record or verbatim long hand notes. In the event that the first two are employed, the issuing judge has the obligation to have the record transcribed, certify to the accuracy of the transcription, and file the original record and transcription with the court within seventy-two hours of the issuance of the order. In the event that the proceeding is transcribed in longhand, the judge shall subscribe a copy and file it with the court within twenty-four hours of the issuance of the order.

As used in § 1194(3)(d)(3), interposition of the terms "judge" and "court" is not without significance since, in all likelihood, the issuing judge will not preside upon a trial of the matter, and indeed the charges may not even be filed in his or her court. Filing, therefore, means that the transcript shall, within seventy-two hours, be filed with the clerk of the court in which he or she presides.

While § 1194(3)(d)(3) places the duty of transcribing and filing the record of the proceedings upon the shoulders of the issuing judge. Unlitigated is whether the applicant or the District Attorney's office may undertake transcription and filing. In reality, what will undoubtedly occur is that the applicant, upon the order of the court, will have the tape or stenographic record transcribed, after which the transcription will be presented to the judge for his or her certification and filing.¹

While in the larger counties such a seemingly simple task may require herculean effort, elsewhere, the exercise of due diligence should suffice to enable statutory compliance. Difficulties can enure, however, in those instances where the transcript is either lost, inaudible, or not timely filed.

In *People v Whelan*,² a seizure order was issued at 10:58 A.M. on March 12, 1988. The transcript was certified by the issuing judge and filed with the court at 1:29 P.M. on March 15, 1988, or seventy-four hours and thirty-one minutes after the issuance of the order. In finding that

⁵Atkins at 966 [internal citation omitted].

¹While not provided, a reasonable interpretation of the certification process would be to have the applicant present both the tape and the transcript for the judge's comparison and ultimate certification. Although this comparison will be lacking in those instances when the proceedings are taken down stenographically, it must be remembered that the shorthand reporter certifies that he or she has compared the notes and transcription and that they are correct.

²*People v. Whelan*, 165 A.D.2d 313, 567 N.Y.S.2d 817 (2d Dep't 1991).

sufficient compliance was had, the Second Department held:

It is obvious that the legislative intent underlying the foregoing statutory provision is twofold: (1) to ensure that the sworn testimony of the applicant and any supporting witnesses is recorded, thereby assuring the regularity of the application process, and (2) to preserve the application for appellate review. It is equally obvious that both of these purposes have been fulfilled in this case, so that substantial rather than literal compliance with the statutory standards herein is sufficient.³

A slightly different problem was presented by *People v Scalzo*.⁴ In *Scalzo*, portions of the application were incapable of transcription due to the inaudibility of certain segments of the tape. Noting that no audibility hearing was held, the Court nonetheless found that "those portions of the recording believed to be inaudible [did] not constitute a material defect [and did] not in any way demonstrate prejudice to the defendant, or lead to a conclusion that his constitutional rights were violated."⁵

Presenting a more troublesome situation, in *People v Stratis*,⁶ a seizure order was authorized by the judge at 6:25 A.M. on February 13th. At approximately 3:00 P.M. the applicant assistant district attorney learned that the voices of the officer and judge were largely unintelligible. He thereupon prepared typewritten affirmations for himself, the judge, and the officer, which ostensibly set forth the substance of the telephone conversation. At 3:00 A.M. on February 14th, the assistant district attorney presented the typewritten affidavits as well as a handwritten affidavit and order from which the officer had earlier read to the judge for his signature and certification. These documents were thereafter filed with the court.

Moving to suppress, the defendant alleged that the contents of the affidavits which were ultimately filed did not meet the transcription and filing requirements of the statute. Finding that "the problem of inaudibility was the result of an inadvertent mechanical breakdown," the court noted that the defendant "established no real prejudice based on the lack of a transcription." While the typewritten affidavit which the district attorney prepared for the officer's signature failed to contain a reference to reading the warrant found in the handwritten version, the court held that the fact that such an order was prepared and read obviated the need for reference in the earlier affidavit.

³*People v. Whelan*, 165 A.D.2d 313, 323, 567 N.Y.S.2d 817 (2d Dep't 1991) [internal citations omitted].

⁴*People v. Scalzo*, 139 Misc. 2d 539, 529 N.Y.S.2d 236 (County Ct. 1988).

⁵*People v. Scalzo*, 139 Misc. 2d 539, 545, 529 N.Y.S.2d 236 (County Ct. 1988).

⁶*People v. Stratis*, 137 Misc. 2d 661, 520 N.Y.S.2d 904 (Sup 1987), judgment aff'd, 148 A.D.2d 557, 540 N.Y.S.2d 186 (2d Dep't 1989) .

§ 11:66. Requirement of an oath

While initially strict adherence to the requirement set forth in § 1194(3)(d)(2) may seem trivial, it must be remembered that non-compliance with this section cuts to the quick of the command found in both Federal and State Constitutions that "no warrants shall issue, but upon probable cause, supported by oath or affirmation"¹

People v Walsh,² while suppressing primarily upon the fact that the application was largely hearsay, nonetheless took note of the fact that the applicant had not been placed under oath.³ Likewise, in *People v Dunn*,⁴ an application that contained no proof that it had been sworn was rejected as the basis for the issuance of a blood seizure order.

Perhaps coming as close as should be constitutionally permitted, *People v Rollins*⁵ found a blood seizure order properly given upon the transcript of the application which showed that the trooper began his request by stating "being duly sworn," notwithstanding that the trooper was not sworn prior to the making of an application.

§ 11:72. Seizure of hospital blood

Seizure of hospital blood, that is blood drawn by medical personnel for diagnostic purposes highlights a conflict between CPLR § 4504 and Vehicle and Traffic Law § 1194(3). The first governs venerable New York's physician patient privilege and the second controls those situations when the state attempts to compel the production of a blood sample by the defendant. In the usual situation, a conflict between the two will arise when the District Attorney, for one reason or another, fails to secure a timely post arrest warrant for acquisition of the sample and instead seeks to obtain this valuable evidence through the auspices of a warrant served upon a hospital where the defendant is treated seeking any sample the institution may have drawn for treatment purposes.

CPLR § 4504 provides as follows:

(a) Confidential information privileged. Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry, podiatry or chiropractic shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which

¹U.S. Const. Amend. IV; N.Y. Const. Art. I, § 12.

²*People v. Walsh*, 137 Misc. 2d 1073, 523 N.Y.S.2d 752 (County Ct. 1988).

³*People v. Walsh*, 137 Misc. 2d 1073, 523 N.Y.S.2d 752 (County Ct. 1988).

⁴*People v. Dunn*, 117 A.D.2d 863, 498 N.Y.S.2d 577 (3d Dep't 1986).

⁵*People v. Rollins*, 118 A.D.2d 949, 499 N.Y.S.2d 817 (3d Dep't 1986).

was necessary to enable him to act in that capacity. The relationship of a physician and patient shall exist between a medical corporation, as defined in article forty-four of the public health law, a professional service corporation organized under article fifteen of the business corporation law to practice medicine, a university faculty practice corporation organized under section fourteen hundred twelve of the not-for-profit corporation law to practice medicine or dentistry, and the patients to whom they respectively render professional medical services.

A patient who, for the purpose of obtaining insurance benefits, authorizes the disclosure of any such privileged communication to any person shall not be deemed to have waived the privilege created by this subdivision. For purposes of this subdivision:

1. "person" shall mean any individual, insurer or agent thereof, peer review committee, public or private corporation, political subdivision, government agency, department or bureau of the state, municipality, industry, co-partnership, association, firm, trust, estate or any other legal entity whatsoever; and
2. "insurance benefits" shall include payments under a self-insured plan.

Vehicle and Traffic Law § 1194(3) provides, in part:

3. Compulsory chemical tests. (a) Court ordered chemical tests. Notwithstanding the provisions of subdivision two of this section, no person who operates a motor vehicle in this state may refuse to submit to a chemical test of one or more of the following: breath, blood, urine or saliva, for the purpose of determining the alcoholic and/or drug content of the blood when a court order for such chemical test has been issued in accordance with the provisions of this subdivision. (b) When authorized. Upon refusal by any person to submit to a chemical test or any portion thereof as described above, the test shall not be given unless a police officer or a district attorney, as defined in subdivision thirty-two of section 1.20 of the criminal procedure law, requests and obtains a court order to compel a person to submit to a chemical test to determine the alcoholic or drug content of the person's blood upon a finding of reasonable cause to believe that: (1) such person was the operator of a motor vehicle and in the course of such operation a person other than the operator was killed or suffered serious physical injury as defined in section 10.00 of the penal law; and (2) a. either such person operated the vehicle in violation of any subdivision of section eleven hundred ninety-two of this article, or b. a breath test administered by a police officer in accordance with paragraph (b) of subdivision one of this section indicates that alcohol has been consumed by such person; and (3) such person has been placed under lawful arrest; and (4) such person has refused to submit to a chemical test or any portion thereof, requested in accordance with the provisions of paragraph (a) of subdivision two of this section or is unable to give consent to such a test.

Thus the issue is joined. The first provision protects "any information which was acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity," while the second permits acquisition of a sample drawn for forensic purposes

when there has been a serious motor vehicle accident.

In *People v. Drayton*,¹ the defendant appealed from a judgment convicting him upon a jury verdict of, inter alia, two counts of Endangering the Welfare of a Child (Penal Law § 260.10(1)) and one count of Driving While Ability Impaired by Drugs (Vehicle and Traffic Law § 1192(4)). On appeal, the defendant contended that the County Court (Keenan, J.) erred in refusing to suppress his blood sample, which was collected by hospital staff and then obtained by the police in purported violation of the physician-patient privilege (CPLR 4504(a)).

The Fourth Department rejected that contention. Initially, the court observed that the blood sample was obtained pursuant to a search warrant that was supported by probable cause.² Further, the court observed that “unlike hospital records and diagnostic test results concerning a defendant's blood content, a blood sample does not constitute information communicated to a physician from a patient to invoke the physician-patient privilege.”³ Assuming, arguendo, however that the seizure of the blood sample by the police constituted a violation of the physician-patient privilege under CPLR 4504(a), the court nonetheless concluded that the court properly refused to suppress the evidence results. It did so by turning to *People v. Greene*.⁴ In *Greene*, the Court of Appeals observed in a similar situation that:

even if there was a violation of the physician-patient privilege, the suppression of the evidence found as a result is not required. The physician-patient privilege is based on statute, not the State or Federal Constitution (*Klein v. Prudential Insurance Company*, 221 N.Y. 449, 117 N.E. 942 [1917]). Our decisions make clear that a violation of a statute does not, without more, justify suppressing the evidence to which that violation leads (*People v. Patterson*, 78 N.Y.2d 711, 716–717, 579 N.Y.S.2d 617, 587 N.E.2d 255 [1991]).

Accordingly, the conviction was affirmed.

Without citation to *Drayton*, in *People v. Elysee*,⁵ the Court of Appeals agreed. To be sure,

¹*People v. Drayton*, 56 A.D.3d 1278, 867 N.Y.S.2d 825 (4th Dep't 2008), leave to appeal granted, 12 N.Y.3d 783, 879 N.Y.S.2d 59, 906 N.E.2d 1093 (2009).

²See, *People v. Casadei*, 66 N.Y.2d 846, 848, 498 N.Y.S.2d 357, 489 N.E.2d 244 (1985); see, generally *Matter of Abe A.*, 56 N.Y.2d 288, 291, 452 N.Y.S.2d 6, 437 N.E.2d 265 (1982).

³See, generally, *People v. Elysee*, 49 A.D.3d 33, 38, 847 N.Y.S.2d 654 (2d Dep't 2007), leave to appeal granted, 10 N.Y.3d 840, 859 N.Y.S.2d 398, 889 N.E.2d 85 (2008) and *aff'd*, 12 N.Y.3d 100, 876 N.Y.S.2d 677, 904 N.E.2d 813 (2009); *Dillenbeck v. Hess*, 73 N.Y.2d 278, 289, 539 N.Y.S.2d 707, 536 N.E.2d 1126 (1989).

⁴9 N.Y.3d 277, 280, 849 N.Y.S.2d 461, 879 N.E.2d 1280 (2007).

⁵12 N.Y.3d 100, 876 N.Y.S.2d 677, 904 N.E.2d 813 (2009).

neither Drayton nor of course Elysee represent the first word on this issue. To one degree or another, this question has been kicking around, both as to permissibility and method, for some time. Accordingly, Elysee is helpful in that it provides definitive resolution on several key issues surrounding this type of seizure.

The facts of Elysee are fairly straight forward. On the morning of December 25, 2003, the defendant was involved in a four-vehicle car accident in Brooklyn, New York. As a result, a passenger in a pick-up truck was killed and several other people, including the defendant, were injured. At approximately 5:30 a.m., the defendant was taken to Kings County Hospital where, upon his arrival and in accordance with the hospital's routine practice for treating trauma victims, blood samples were drawn solely for treatment purposes.⁴ Thereafter, and pursuant to a Supreme Court Order issued at approximately 1:50 p.m. that day, the defendant was compelled to submit to a chemical test of the alcohol or drug content of his blood (see, Vehicle and Traffic Law § 1194(3); CPL §§ 690.35, 690.36). To effect this order, a registered nurse, in the presence of a New York City Police Officer, drew a second set of blood samples at approximately 2:50 p.m.⁵ (see, Vehicle and Traffic Law § 1194(4)(a)). On December 26, 2003, the 2:50 p.m. samples were forwarded by the New York City Police Department to Dr. Elizabeth Marker, a forensic toxicologist employed by the New York City Office of the Chief Medical Examiner, to perform a court-ordered test in order to determine defendant's blood alcohol level at the time of the accident. On December 29, 2003, a search warrant for the seizure of the 5:30 a.m. samples from the hospital was issued and executed pursuant to CPL § 690.10(4). The New York City Police Department, in turn, submitted the 5:30 a.m. samples to Dr. Marker.

Prior to trial, the defendant brought an omnibus motion to, among other things, controvert the search warrant and suppress the results of the blood alcohol test performed on the 5:30 a.m. samples, arguing that the seizure of his blood, pursuant to CPL § 690.10, violated the physician-patient privilege defined by CPLR 4504.6 The court denied the motion to controvert, finding the facts alleged in the search warrant application were sufficient to establish probable cause to believe that defendant was operating a motor vehicle while under the influence of alcohol. The court also denied that branch of the omnibus motion which sought to suppress the results of the blood alcohol test performed on the 5:30 a.m. samples. The court determined that CPLR 4504 “has no application to vials of blood, which were the objects of the search warrant.”

At defendant's jury trial, Dr. Marker thereafter testified that she tested both the 2:50 p.m. and 5:30 a.m. samples. Regarding the 2:50 p.m. samples, she noted that the results revealed defendant's blood alcohol “concentration [to be] .05 gram percent.” Dr. Marker opined that it is scientifically possible, through reverse extrapolation, to reliably determine what a person's blood alcohol content was at an earlier time based upon a later blood alcohol test when certain assumptions are made; e.g., assuming that the alcohol in defendant's system was fully absorbed at the time of the accident, going back a period of 10 hours from the time the 2:50 p.m. blood samples were taken, defendant's blood alcohol level range at the time of the accident would have been “between .20 [gram] percent and .25 [gram] percent.” Dr. Marker further testified that the 5:30 a.m. samples revealed a blood alcohol concentration of .23 gram percent and .21 gram percent, respectively. She opined that these results were consistent with, and substantiated, the results of the reverse extrapolation analysis of the 2:50 p.m. samples. Reviewing the evidence,

the court was quite correct to opine that, “[p]ut another way, the test of the two separate blood samples reached nearly identical results.”

At the charge conference, both the People and defense asked the court to charge Criminally Negligent Homicide as a lesser included offense of Second Degree Manslaughter. The court refused, concluding that there was no reasonable view of the evidence to support the charge of Criminally Negligent Homicide.

The jury subsequently convicted the defendant of Manslaughter in the Second Degree, Assault in the Second Degree, Assault in the Third Degree, and Driving While Intoxicated. Defendant appealed from Supreme Court's judgment of conviction. The defendant thereafter appealed that portion of his omnibus motion seeking to suppress physical evidence as well as the court's refusal to charge criminally negligent homicide.

The Appellate Division affirmed the judgment, holding that a blood specimen taken from a patient by a medical professional is not “information” protected by the physician-patient privilege as defined in CPLR 4504(a) and, accordingly, is subject to seizure. The Appellate Division also held that “the trial court properly refused to charge the jury with Criminally Negligent Homicide as a lesser included offense of Manslaughter in the Second Degree” because there was no reasonable view of the evidence which would support a finding that the lesser offense but not the greater offense was committed by the defendant. Ultimately, the Court of Appeals granted leave to appeal.

Affirming, the court, per Judge Jones, found that the defendant's motion to suppress the 5:30 a.m. (hospital) samples was properly denied. Interestingly, and unlike prior case law discussing this issue, the court saw no need to consider the applicability of CPLR 4504. The court turned, instead, to New York's statutory implied consent provision, Vehicle and Traffic Law § 1194(2)(a). The section provides:

Any person who operates a motor vehicle in this state shall be deemed to have given consent to a chemical test of one or more of the following: breath, blood, urine, or saliva, for the purpose of determining the alcoholic and/or drug content of the blood provided that such test is administered by or at the direction of a police officer with respect to a chemical test of breath, urine or saliva or, with respect to a chemical test of blood, at the direction of a police officer:

- (1) having reasonable grounds to believe such person to have been operating in violation of any subdivision of section eleven hundred ninety-two of this article and within two hours after such person has been placed under arrest for any such violation; or having reasonable grounds to believe such person to have been operating in violation of section eleven hundred ninety-two-a of this article and within two hours after the stop of such person for any such violation,
- (2) within two hours after a breath test, as provided in paragraph (b) of subdivision one of this section, indicates that alcohol has been consumed by such person and

in accordance with the rules and regulations established by the police force of which the officer is a member;

Given this section, the court found:

it is illogical to conclude that a blood sample taken at 5:30 a.m. cannot be seized pursuant to a properly issued court order, merely because the order issued after the blood was actually drawn by an authorized person. Furthermore, inasmuch as the [Vehicle and Traffic Law] authorizes a chemical test under the circumstances of this case, and a court order issued compelling “that the defendant shall submit to a chemical test of the alcohol or drug content of his blood,” the seizure of the earlier blood sample was in accord with the statute.

Blood Testing Issues

by

Edward L. Fiandach, Esq.

Rochester, New York



Obtaining the blood

- **Obviously blood can be given by consent.**
- **Vehicle and Traffic Law section 1194(3) creates a compulsory test where a warrant is obtained.**
 - **a person other than the operator was killed or suffered serious physical injury as defined in section 10.00 of the penal law.**
 - **Reasonable cause to believe the defendant was the operator.**

Obtaining the blood

- **Reasonable cause to believe the defendant operated in violation of Vehicle and Traffic Law section 1192.**
- **The person has been placed under arrest.**
- **The person refused to submit to a chemical test.**

Obtaining the blood

- **Hospital blood may also be obtained via a warrant.**
 - ***People v. Elysee*, 12 N.Y.3d 100, 876 N.Y.S.2d 677, 904 N.E.2d 813 (2009).**
 - **No physician patient privilege.**
 - **The Court of Appeals found that the authority granted under Vehicle and Traffic Law § 1194(2)(a) obviated consideration of CPLR 4504, the Physician Patient Privilege.**

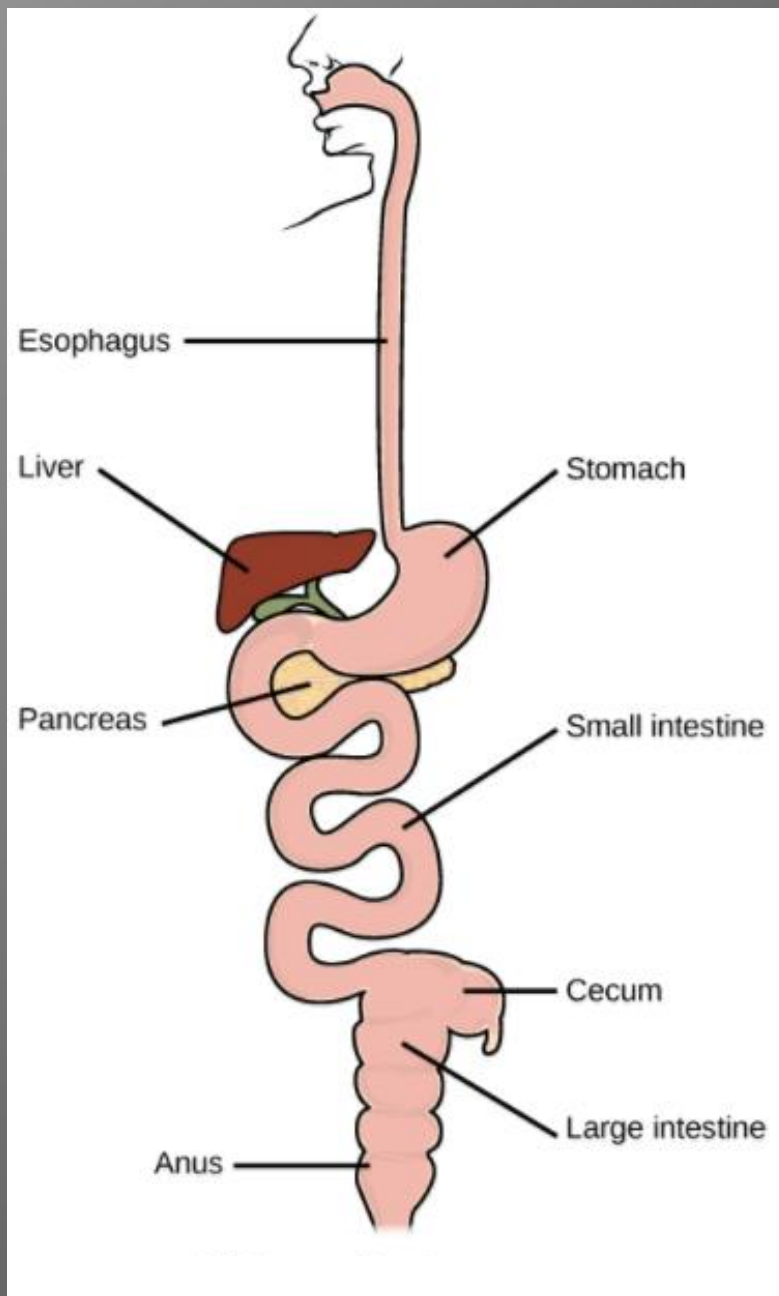
Absorption

- **Alcohol is ingested in the common manner.**



Absorption

- It then passes through the esophagus, to the stomach.
- In the stomach it is exposed to ethyl dehydrogenase where up to 20% can be *destroyed, not absorbed.*
 - This is important when we talk about reverse extrapolation.
- It then passes into the small intestine where it is absorbed.



Destruction

- **Thereafter, it is systematically destroyed in the liver by ethyl dehydrogenase.**
- **Under *laboratory conditions*, alcohol is destroyed at the rate of .015% per hour.**

Detection

- **When our clients get into trouble, a sample is generally withdrawn from the antecubital space.**



Collection

- **Two samples are withdrawn into two Vacutainer tubes.**
- **One tube generally contains potassium oxalate and sodium fluoride as an anti-coagulant and a preservative.**
- **The remaining tube will contain whole blood.**





Preservatives

- **Vacutainers used in alcohol blood testing contain preservatives. The preservative is identified by the color of the tube.**
- **Grey: These tubes contain Sodium Fluoride to prevent neo-formation of alcohol and Potassium Oxalate which is an anticoagulant.**
- **Red: No additive.**



Inversion

- **The tube MUST be inverted at least twenty times at the time of collection for the additives to be properly mixed and become operative.**
- **Failure to do so may result in clotting and/or neo-formation of alcohol through the process of fermentation.**

Preservative Issues

- **The lack of a preservative can create real problems.**
- **A blood sample with no alcohol can generate a reading of 0.25% or even higher as it decays.**
- **This is known as neo-fermentation or neo-formation.**
- **Further, refrigeration is not a substitute for sodium fluoride. While it will slow the process, it will not prevent it.**

Preservative Issues

- **Likewise too much preservative can result in an inaccurate test.**
- **Sodium fluoride naturally increases the ethanol vapor pressure in whole blood specimens analyzed by headspace chromatography.**
- **Hence too much sodium fluoride has been reported to artificially increase the reported BAC.**

The Sodium Fluoride Conundrum

- **It has been reported the commonly used quantity of sodium fluoride (20 mg) may not be enough to prevent neo-fermentation.**
- **Studies have shown that 100 mg is required to prevent fermentation.**
- **However, while it prevents neo-fermentation, it may produce artificially high readings due to increased vapor pressure.**

Preservative Issues

- **Hence, it may be wise to demand the production of an unused tube of the same lot and have the same tested to determine the amount of the preservative.**
- **This is particularly helpful when a considerable period of time has transpired from the draw to analysis.**

How Blood is Tested

- **All modern forensic blood testing is accomplished by means of gas chromatography.**

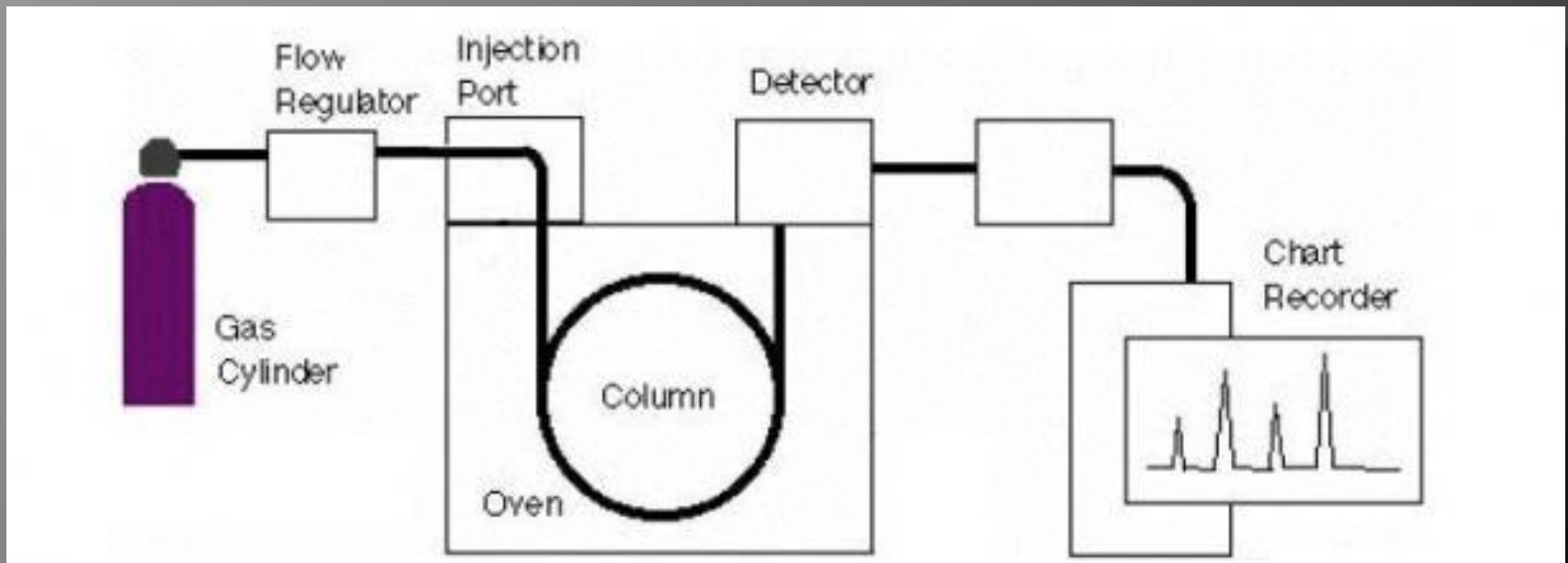
How Blood is Tested



How Blood is Tested

- Reduced to its *barest* essentials, a gas chromatograph compares the time it takes a sample to travel through a long carbowax column with a sample of a known time value.
 - Identity.
- It thereafter burns the substance and measures the intensity of that burn.
 - Quantity.

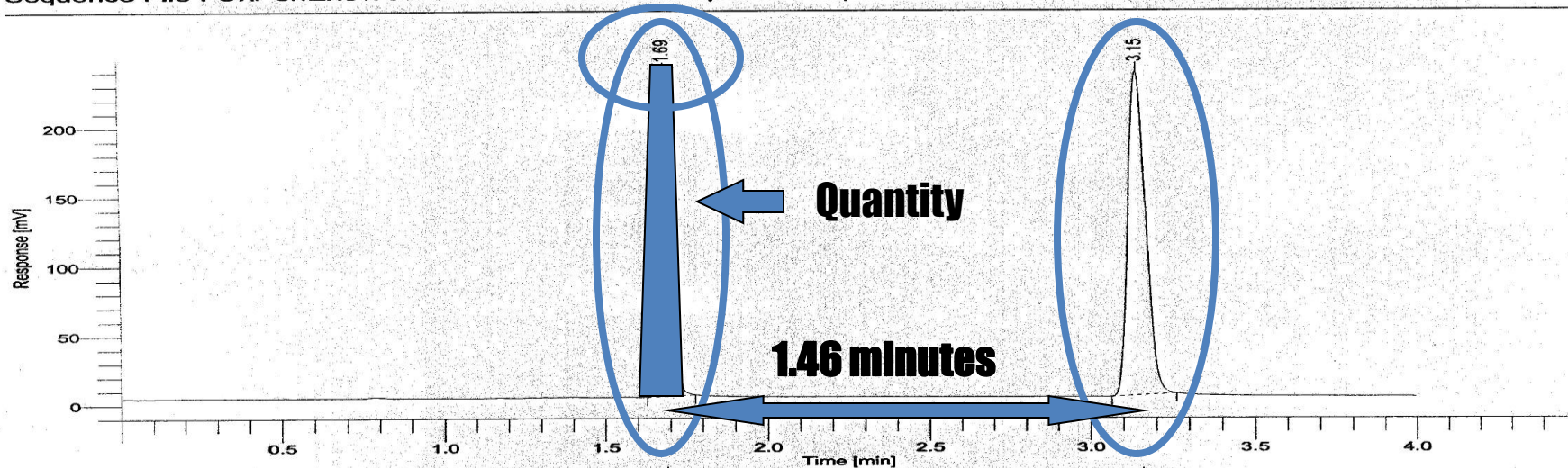
How Blood is Tested



Software Version : 6.2.0.0.0:B27
Reprocess Number : gg3h721: 221
Sample Name : 0.40% CONTROL
Instrument Name : GCHeadspace1
Rack/Vial : 0/0
Sample Amount : 1.000000
Cycle : 38

Date : 2/13/2004 12:38:07 PM
Data Acquisition Time : 2/13/2004 12:34:00 PM
Channel : B
Operator : Mark Waruch
Dilution Factor : 1.000000

Result File : c:\penexe\tcws\ver6.2.0\gcheadspace1\data\B021304-038.rst
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BLOOD ALCOHOL REPORT NYS

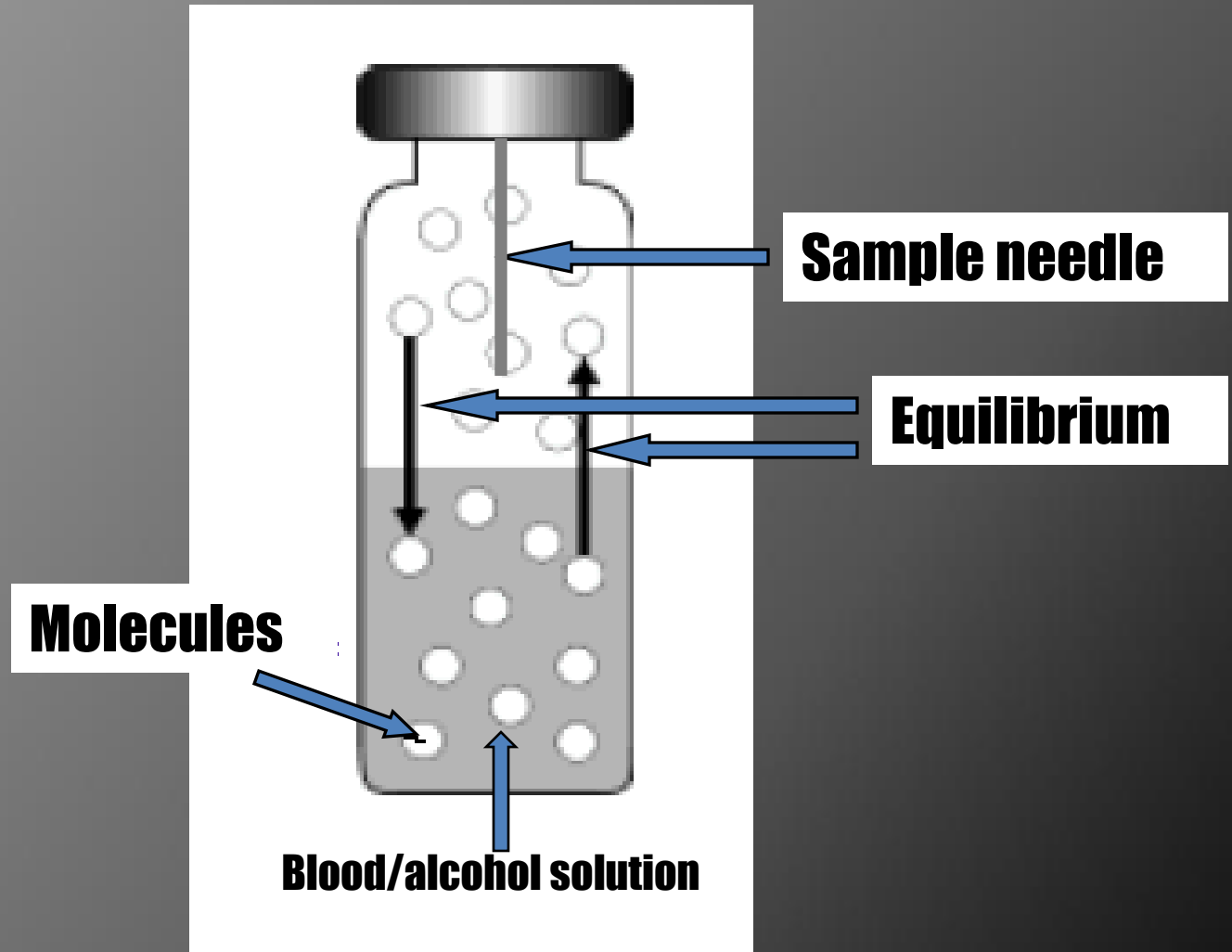
RESULTS FROM BAC2 COLUMN ON FID "B"

| Component Name |
|----------------|
| ETHANOL |
| N-PROPANOL |

| Time [min] |
|------------|
| 1.69 |
| 3.15 |

Chromatograph Issues

- **Headspace analysis — The vapor space above the liquid sample is analyzed.**





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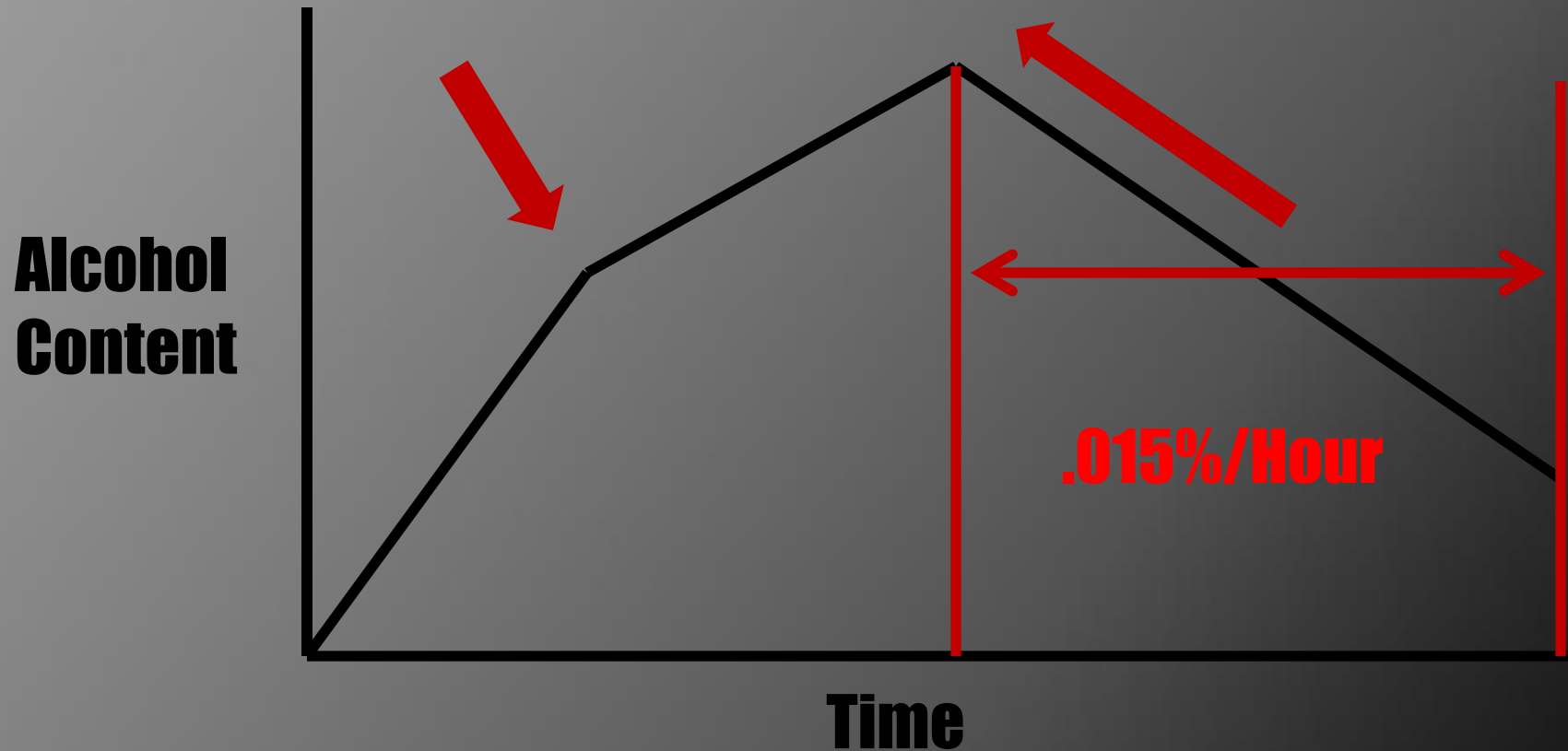
Chromatograph Issues

- **This essentially turns a blood test into a breath test with all the attendant issues.**
- **The presence of preservatives in the sample may cause the alcohol to be artificially forced into the headspace.**
- **Aliquoting from the raw sample to the headspace container creates a separate chain issue to ensure identity of the sample.**

Reverse Extrapolation

- **Predicting an earlier (time of event) BAC from a result obtained many hours later.**
- **Reverse Extrapolation can be deeply flawed.**
- **This is a typical alcohol absorption/metabolization curve.**

Typical Alcohol Curve



Reverse Extrapolation

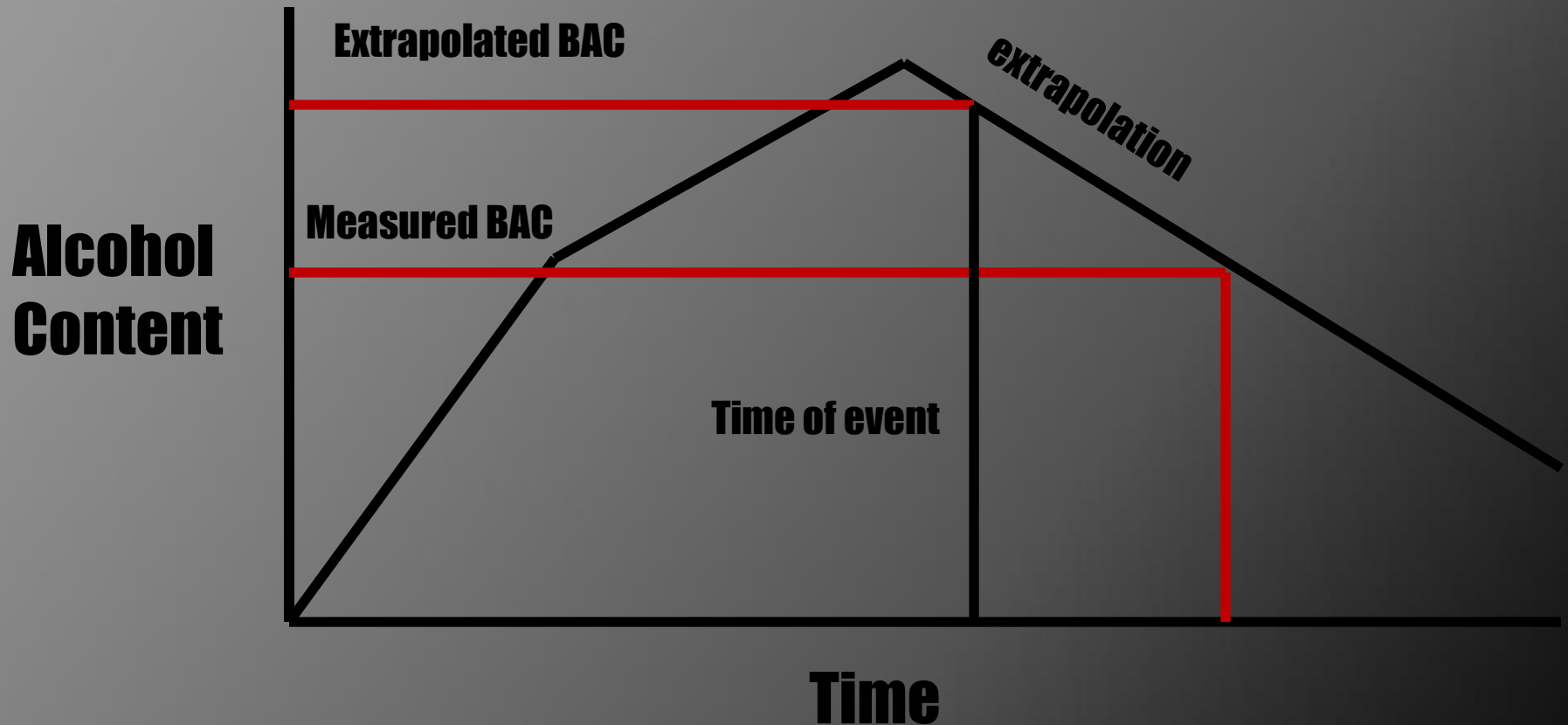
- **Reverse Extrapolation adds .015% for every hour that has transpired between the sample and the event.**



Reverse Extrapolation

- **But this presumes that the Defendant has peaked and his or her blood alcohol has begun the presumably predictable decline.**
- **Note the following “acceptable” extrapolation:**

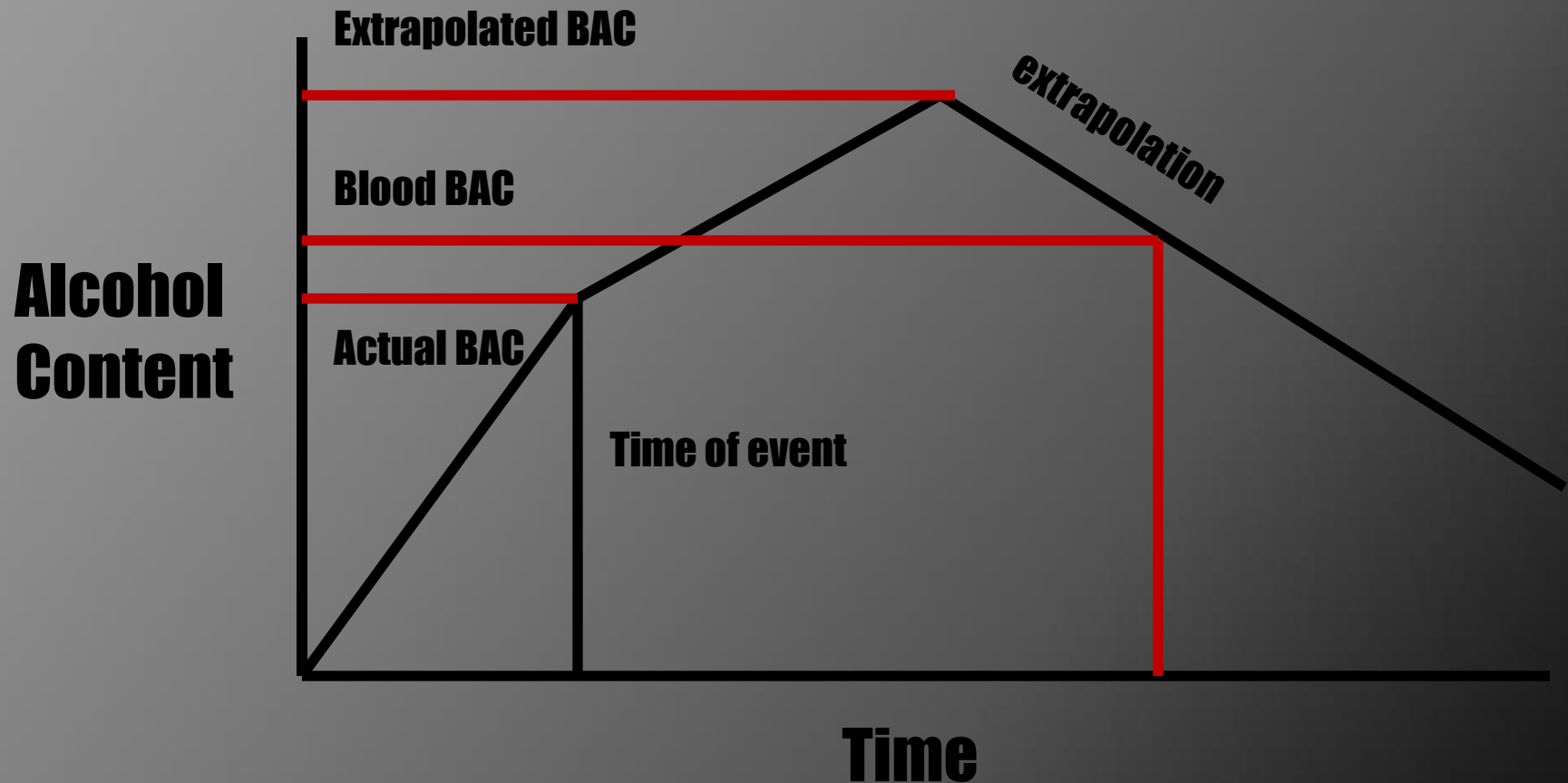
Reverse Extrapolation



Reverse Extrapolation

- ***However*, to work, the peak alcohol level *has* to be reached *prior* to the incident to be extrapolated.**
- **Note the following:**

Pre-Absorption Extrapolation

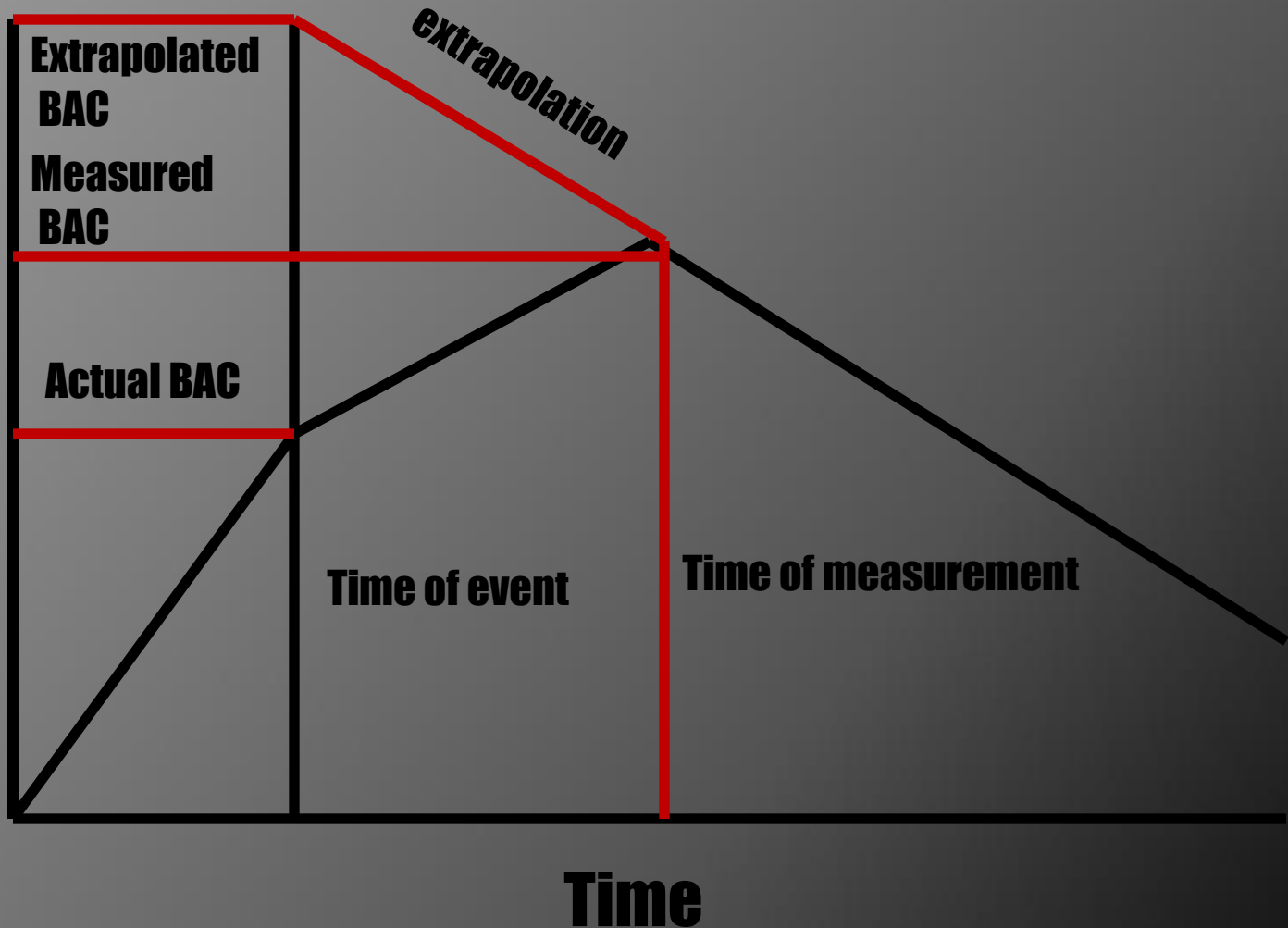


Reverse Extrapolation

- **The situation becomes even worse when the sample is drawn at the peak.**
- **Note the following:**

At Peak Extrapolation

**Alcohol
Content**



Reverse Extrapolation

- **Assuming that the Defendant is post absorptive will overstate the BAC if he or she is not fully absorbed.**
- **Absorption is highly unpredictable.**

Reverse Extrapolation

- **“A person who has not eaten will hit a peak BAC typically between 1/2 hour to two hours of drinking. A person who has eaten will hit a peak BAC typically between 1 and 6 hours, depending on the amount of alcohol consumed.”**

– <http://mcwell.nd.edu/your-well-being/physical-well-being/alcohol/absorption-rate-factors/>

Reverse Extrapolation

- **The matter becomes more complicated when we realize that on a full stomach upward of 20% of the alcohol may be destroyed by the presence of ethyl dehydrogenase in the stomach *before* absorption.**

Reverse Extrapolation

- **To even roughly know whether the individual has peaked you have to know a myriad of factors such as, but not limited to:**
 - **What type of alcohol was consumed;**
 - **When each drink was consumed;**
 - **The type of food that was consumed;**
 - **When that food was consumed.**

Reverse Extrapolation

- **Reverse Extrapolation results in Burden Shifting and seriously implicates the Defendant's Fifth Amendment Right to Remain Silent since it virtually obligates the Defendant to testify regarding these factors.**

Persons entitled to Draw Blood

- **(1) At the request of a police officer:**
 - **a physician;**
 - **a registered professional nurse;**
 - **a registered physician assistant;**
 - **a certified nurse practitioner;**
 - **an advanced emergency medical technician as certified by the department of health;**
 - **under the supervision and at the direction of a physician, registered physician assistant or certified nurse practitioner acting within his or her lawful scope of practice, or**

Persons entitled to Draw Blood

- **At the request of a police officer and under the supervision and at the direction of a physician:**
 - **A registered physician assistant or certified nurse practitioner acting within his or her lawful scope of practice.**

Persons entitled to Draw Blood

- **At the request of a police officer and under the supervision and at the direction of a physician *and* upon the express consent of the person eighteen years of age or older from whom such blood is to be withdrawn:**
 - **A clinical laboratory technician or clinical laboratory technologist licensed pursuant to article one hundred sixty-five of the education law;**
 - **A phlebotomist;**
 - **A medical laboratory technician or medical technologist employed by a clinical laboratory approved under title five of article five of the public health law.**

Persons entitled to Draw Blood

- These requirements have been strictly construed (*People v. Ebner*, 195 A.D.2d 1006, 600 N.Y.S.2d 569 (4th Dep't 1993); *People v. Olmstead*, 233 A.D.2d 837, 649 N.Y.S.2d 624 (4th Dep't 1996)).

Admissibility

- **Don't automatically assume that a blood sample will be admissible.**
- **Simply because it is scientifically recognized is not enough. The People must lay a foundation for the accuracy of the technique. *People v Baker*, 51 AD3d 1047, 1048–49 [3d Dept 2008]; *People v Campbell*, 73 NY2d 481, 485 [1989].**

Admissibility

- **Reference samples obtained from independent sources require certification, but that may not be enough.**
- **Generally, they must be diluted for use in the device. There must be a showing that the diluted samples were proper.**
- **Lastly, do not disregard the need to establish that the auto sampled solutions were properly tracked and aliquoted.**



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Admissibility

- **It is always necessary to establish a chain of custody of the sample, however, it has been dispensed with in mere technical situations such as a postal employee where a sample has been mailed.**



Blood Testing Issues

by

Edward L. Fiandach, Esq.

Rochester, New York



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Topic 5:

Disposition Issues

DEFENDING DWI CASES - THE CRITICAL ISSUES

DISPOSITION ISSUES

Sponsored by

THE NEW YORK STATE BAR ASSOCIATION

September 8, 2017 -- Buffalo/Amherst
September 14, 2017 -- New York City
September 28, 2017 -- Albany

Materials Submitted By

JONATHAN D. COHN, ESQ.
GERSTENZANG, SILLS, COHN & GERSTENZANG
210 Great Oaks Boulevard
Albany, New York 12203
Tel: (518) 456-6456

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CHAPTER 46

PENALTIES FOR VTL § 1192 OFFENSES

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§ 46:1 In general

VTL § 1192 convictions carry a multitude of direct and collateral consequences. In addition to fines, surcharges, civil penalties and fees -- as well as possible jail time, probation and treatment -- such a conviction will appear on a person's publicly available DMV driving abstract for 10 years, will appear in DMV's internal records forever, will in most cases permanently appear on the person's DCJS record (*i.e.*, "rap sheet"), can affect a person's ability to travel abroad, and will in all likelihood result in a substantial increase in the person's automobile insurance premiums for several years.

This chapter addresses a wide range of penalties and related issues associated with VTL § 1192 convictions.

§ 46:1A "New" DMV regulations dramatically increase the license revocation periods for repeat DWI offenders

Effective September 25, 2012, DMV enacted new regulations that *dramatically* increase the license revocation periods for repeat DWI offenders. In addition, the look-back period for DWI-related offenses increased from 10 years to a minimum of 25 years (and sometimes lifetime). As a result, a person can have what appears to be a "clean" DMV driving abstract yet be facing a lifetime driver's license revocation for (a) a VTL § 1192 offense, (b) a chemical test refusal, or even (c) a traffic infraction carrying 5 or more points. See, e.g., 15 NYCRR § 136.5 and Part 132. It is thus absolutely critical that anyone handling a DWI case in New York be familiar with these new regulations, which are discussed at length in Chapter 55, *infra*.

§ 46:2 Driving While Ability Impaired -- First offense

Driving While Ability Impaired ("DWAI") in violation of VTL § 1192(1) is generally a traffic infraction. VTL § 1193(1)(a). A person who is convicted of DWAI as a first offense is subject to the following consequences:

1. A fine of between \$300 and \$500, up to 15 days in jail, or both. VTL § 1193(1)(a);
2. Mandatory suspension of the person's driver's license for 90 days. VTL § 1193(2)(a)(1);
3. Discretionary suspension of the person's registration for 90 days. VTL § 1193(2)(a)(1);
4. A mandatory surcharge of \$250. VTL § 1809(1)(c); VTL § 1809-c(1); VTL § 1809-e(1)(b). If the case is in either a Town or Village Court, the Court must add an additional \$5 to this surcharge. VTL § 1809(9). See Chapter 47, *infra*;
5. A mandatory crime victim assistance fee of \$5. VTL § 1809(1)(c);
6. A mandatory driver responsibility assessment of \$250 a year for 3 years. VTL § 1199. See § 46:47, *infra*; and
7. Discretionary imposition of a requirement that the person attend a Victim Impact Panel. VTL § 1193(1)(f). See § 46:28, *infra*.

In addition, the person will most likely be eligible for a conditional license. See Chapter 50, *infra*.

§ 46:3 DWAI -- Second offense

Unless 15 NYCRR § 136.5 applies, see § 46:1A, *supra*, a person who is convicted of DWAI after having been convicted of any subdivision of VTL § 1192 within the preceding 5 years is subject to the following consequences:

1. A fine of between \$500 and \$750, up to 30 days in jail, or both. VTL § 1193(1)(a);
2. Mandatory revocation of the person's driver's license for at least 6 months. VTL § 1193(2)(b)(1). In addition, DMV will require evidence of alcohol evaluation and/or rehabilitation before it will relicense the person. See Chapter 50, *infra*;
3. Discretionary revocation of the person's registration for at least 6 months. VTL § 1193(2)(b)(1);
4. A mandatory surcharge of \$250. VTL § 1809(1)(c); VTL § 1809-c(1); VTL § 1809-e(1)(b). If the case is in either a Town or Village Court, the Court must add an additional \$5 to this surcharge. VTL § 1809(9). See Chapter 47, *infra*;
5. A mandatory crime victim assistance fee of \$5. VTL § 1809(1)(c);
6. A mandatory driver responsibility assessment of \$250 a year for 3 years. VTL § 1199. See § 46:47, *infra*; and
7. Discretionary imposition of a requirement that the person attend a Victim Impact Panel. VTL § 1193(1)(f). See § 46:28, *infra*.

In addition, the person will *not* be eligible for a conditional license. See Chapter 50, *infra*.

Where the date of the arrest for the second offense occurs more than 5 years after the date of the conviction for the first, a person convicted of a second DWAI will be penalized as a first offender (unless 15 NYCRR § 136.5 applies). See VTL § 1193(1)(a); VTL § 1193(2)(b)(1).

It is critical to note, however, that eligibility for a conditional license is based upon the date of the person's prior Drinking Driver Program completion, *not* the date of the prior conviction. See Chapter 50, *infra*. Thus, a person charged with

a violation of VTL § 1192 more than 5 years after having been convicted of a violation of VTL § 1192 but less than 5 years after having completed the Drinking Driver Program will not be eligible for a conditional license.

§ 46:4 DWAI -- Third and subsequent offenses

A person who is charged with DWAI after having been convicted of 2 or more violations of any subdivision of VTL § 1192 within the preceding 10 years can be charged with a misdemeanor, and, if so charged, is subject to the following consequences:

1. A fine of between \$750 and \$1,500, up to 180 days in jail, or both. VTL § 1193(1)(a);
2. A period of probation of 2 or 3 years. PL § 65.00(3)(d);
3. Mandatory revocation of the person's driver's license for at least 6 months. VTL § 1193(2)(b)(1-a). However, pursuant to 15 NYCRR § 136.5 a person who has 3 DWI-related convictions/incidents within the past 25 years and whose driver's license is revoked for a DWI-related offense (a) will be ineligible for a conditional license, and (b) will be revoked for at least 5½ years (followed by 5 more years on a restricted license with an ignition interlock device requirement), and possibly for life. See Chapter 55, *infra*;
4. Discretionary revocation of the person's registration for at least 6 months. VTL § 1193(2)(b)(1-a);
5. A mandatory surcharge of \$370. VTL § 1809(1)(b)(ii); VTL § 1809-c(1); VTL § 1809-e(1)(b). If the case is in either a Town or Village Court, the Court must add an additional \$5 to this surcharge. VTL § 1809(9). See Chapter 47, *infra*;
6. A mandatory crime victim assistance fee of \$25. VTL § 1809(1)(b);
7. A mandatory driver responsibility assessment of \$250 a year for 3 years. VTL § 1199. See § 46:47, *infra*;
8. Discretionary imposition of a requirement that the person attend a Victim Impact Panel. VTL § 1193(1)(f). See § 46:28, *infra*; and
9. A mandatory requirement that the person install and

maintain a functioning ignition interlock device in any motor vehicle that the person owns or operates for at least 6 months. VTL § 1198(2)(a); PL § 65.10(2)(k-1). See Chapter 48, infra.

In People v. Powlowski, 172 Misc. 2d 240, ___, 658 N.Y.S.2d 558, 560 (Rochester City Ct. 1997), the Court held that where the People seek to charge a person with DWAI as a misdemeanor under VTL § 1193(1)(a), the person's prior convictions "become an element of the higher level offense," and thus "must be pled in the accusatory instrument." See also People v. Lazzar, 3 Misc. 3d 328, 771 N.Y.S.2d 863 (Webster Just. Ct. 2004); People v. Jamison, 170 Misc. 2d 974, 652 N.Y.S.2d 495 (Rochester City Ct. 1996). See generally People v. Cooper, 78 N.Y.2d 476, 478, 577 N.Y.S.2d 202, 203 (1991) ("When a defendant's prior conviction raises the grade of an offense, and thus becomes an element of the higher grade offense, the Criminal Procedure Law -- reflecting a concern for potential prejudice and unfairness to the defendant in putting earlier convictions before the jury -- specifies a procedure for alleging and proving the prior convictions (CPL 200.60)").

If this was not the case, a person could be tried for DWAI as a traffic infraction (in which case the person would not be entitled to a jury trial), but sentenced for a misdemeanor. As the Powlowski Court pointed out, "[t]his interpretation would deny a defendant facing a criminal conviction the right to a jury trial." 172 Misc. 2d at ___, 658 N.Y.S.2d at 561.

Insofar as the mechanics of alleging the prior convictions are concerned, the Powlowski Court found that the People need only comply with the requirements of CPL § 100.40, and thus need not (and indeed cannot) file a CPL § 200.60 "special information." Id. at ___-___, 658 N.Y.S.2d at 561-62. The Court pointed out that, if the prior convictions are properly alleged, the defendant can avoid the potential prejudice of reference to such convictions in the presence of the jury by admitting to same. Id. at ___, 658 N.Y.S.2d at 562. "However, if the defendant denies the prior conviction[s] or remains mute, the People may prove that element before the jury as part of their case." Id. at ___, 658 N.Y.S.2d at 562. See also People v. Kinney, 66 A.D.3d 1238, ___, 888 N.Y.S.2d 260, 261 (3d Dep't 2009).

In People v. Greer, 189 Misc. 2d 310, 731 N.Y.S.2d 323 (App. Term, 2d Dep't 2001), the defendant, who had 2 prior DWAI convictions within the previous 10 years, was charged with DWI but, following a jury trial, was only found guilty of DWAI. Although the People had not taken the appropriate steps to charge the defendant with misdemeanor DWAI prior to trial, the trial court concluded "that it could utilize the procedure prescribed by CPL 400.40 to enhance the grade of [the] offense from [a]

traffic infraction to [a] misdemeanor." Id. at ___, 731 N.Y.S.2d at 324.

On appeal, the Appellate Term, Second Department, held that the elevation of the defendant's DWAI conviction from a traffic infraction to a misdemeanor was improper. In so holding, the Court reasoned that:

CPL 400.40 provides a "Procedure for determining prior convictions *for the purpose of sentence* in certain cases" (emphasis added). Said provision does not authorize an elevation of the grade of [the] offense from [a] traffic infraction to [a] crime, irrespective of what was decided by a jury verdict. . . .

[I]f the People had desired a misdemeanor conviction for driving while impaired, it would have been incumbent upon them to establish at trial through legally sufficient evidence that defendant had the prior convictions for driving while impaired. The jury would then have been in a position to convict defendant of driving while impaired as a misdemeanor.

Id. at ___, 731 N.Y.S.2d at 324 (citations omitted). See also People v. Harris, 23 Misc. 3d 250, 870 N.Y.S.2d 859 (Monroe Co. Ct. 2008), rev'g 14 Misc. 3d 497, 828 N.Y.S.2d 832 (Rochester City Ct. 2006). Cf. People v. Peacock, 193 Misc. 2d 672, ___, 751 N.Y.S.2d 676, 677 (App. Term, 2d Dep't 2002).

It should be noted that *misdemeanor* DWAI is not a lesser included offense of misdemeanor DWI. Harris, 23 Misc. 3d at ___, 870 N.Y.S.2d at 865; Jamison, 170 Misc. 2d at ___, 652 N.Y.S.2d at 496.

It is critical to be aware that even if the defendant is indisputably convicted of a third DWAI within 10 years as a traffic infraction -- and even if the Court suspends the defendant's driver's license for 90 days pursuant to VTL § 1193(2)(a)(1) -- DMV will nonetheless (a) determine that VTL § 1193(2)(b)(1-a) (which is entitled "*Driving while ability impaired; misdemeanor offense*" (emphasis added)) is applicable, (b) utilize its authority under VTL § 1193(2)(b)(10) to "correct" the Court's "error," (c) convert the 90-day suspension into a 6-month revocation, and (d) thereafter apply 15 NYCRR § 136.5 to any application for relicensure -- which means that the person's license will be revoked for at least 5½ years (followed by 5 more years on a restricted license with an ignition interlock device requirement), and possibly for life. See Chapter 55, *infra*.

§ 46:5 Driving While Intoxicated -- First offense

Driving While Intoxicated ("DWI") in violation of VTL § 1192(2) or (3) is a misdemeanor. VTL § 1193(1)(b). Unless 15 NYCRR § 136.5 applies, see § 46:1A, *supra*, a person who is convicted of DWI as a first offense is subject to the following consequences:

1. A fine of between \$500 and \$1,000, up to 1 year in jail, or both. VTL § 1193(1)(b);
2. A period of probation of 2 or 3 years. PL § 65.00(3)(d);
3. Mandatory revocation of the person's driver's license for at least 6 months. VTL § 1193(2)(b)(2);
4. Discretionary revocation of the person's registration for at least 6 months. VTL § 1193(2)(b)(2);
5. A mandatory surcharge of \$370. VTL § 1809(1)(b)(ii); VTL § 1809-c(1); VTL § 1809-e(1)(b). If the case is in either a Town or Village Court, the Court must add an additional \$5 to this surcharge. VTL § 1809(9). See Chapter 47, *infra*;
6. A mandatory crime victim assistance fee of \$25. VTL § 1809(1)(b);
7. A mandatory driver responsibility assessment of \$250 a year for 3 years. VTL § 1199. See § 46:47, *infra*;
8. Discretionary imposition of a requirement that the person attend a Victim Impact Panel. VTL § 1193(1)(f). See § 46:28, *infra*; and
9. A mandatory requirement that the person install and maintain a functioning ignition interlock device in any motor vehicle that the person owns or operates for at least 6 months. VTL § 1193(1)(b)(ii); VTL § 1198. See Chapter 48, *infra*.

In addition, the person may be eligible for a conditional license. See Chapter 50, *infra*.

§ 46:6 DWI -- Second offense

Unless 15 NYCRR § 136.5 applies, see § 46:1A, *supra*, a person who is convicted of DWI as a misdemeanor after having been convicted of VTL § 1192(2), (2-a), (3), (4) or (4-a) within the preceding 10 years is subject to the following consequences:

1. A fine of between \$500 and \$1,000, up to 1 year in jail, or both. VTL § 1193(1)(b);
2. A period of probation of 2 or 3 years. PL § 65.00(3)(d);
3. Mandatory revocation of the person's driver's license for at least 1 year (at least 18 months where the prior conviction was for Aggravated DWI). VTL § 1193(2)(b)(3). In addition, DMV will require evidence of alcohol evaluation and/or rehabilitation before it will relicense the person. See Chapter 50, *infra*;
4. Discretionary revocation of the person's registration for at least 1 year (at least 18 months where the prior conviction was for Aggravated DWI). VTL § 1193(2)(b)(3);
5. A mandatory surcharge of \$370. VTL § 1809(1)(b)(ii); VTL § 1809-c(1); VTL § 1809-e(1)(b). If the case is in either a Town or Village Court, the Court must add an additional \$5 to this surcharge. VTL § 1809(9). See Chapter 47, *infra*;
6. A mandatory crime victim assistance fee of \$25. VTL § 1809(1)(b);
7. A mandatory driver responsibility assessment of \$250 a year for 3 years. VTL § 1199. See § 46:47, *infra*;
8. Discretionary imposition of a requirement that the person attend a Victim Impact Panel. VTL § 1193(1)(f). See § 46:28, *infra*; and
9. A mandatory requirement that the person install and maintain a functioning ignition interlock device in any motor vehicle that the person owns or operates for at least 6 months. VTL § 1193(1)(b)(ii); VTL § 1198. See Chapter 48, *infra*.

A person who is convicted of DWI as a misdemeanor after having been convicted of VTL § 1192(2) or (3) within the preceding 5 years is subject to the following additional mandatory penalties:

1. "[A] term of imprisonment of [5] days or, as an alternative to such imprisonment, . . . [30] days of service for a public or not-for-profit corporation, association, institution or agency as set forth in [PL § 65.10(2)(h)]." VTL § 1193(1-a)(a); and

2. The sentencing Court also must:

(i) order the installation of an ignition interlock device approved pursuant to [VTL § 1198] in any motor vehicle owned or operated by the person so sentenced. Such devices shall remain installed during any period of license revocation required to be imposed pursuant to [VTL § 1193(2)(b)], and, upon the termination of such revocation period, for an additional period as determined by the court; and

(ii) order that such person receive an assessment of the degree of their alcohol or substance abuse and dependency pursuant to the provisions of [VTL § 1198-a]. Where such assessment indicates the need for treatment, such court is authorized to impose treatment as a condition of such sentence except that such court shall impose treatment as a condition of a sentence of probation or conditional discharge pursuant to the provisions of [VTL § 1198-a(3)].

Any person ordered to install an ignition interlock device pursuant to [VTL § 1193(1-a)] shall be subject to the provisions of [VTL § 1198(4), (5), (7), (8) and (9)].

VTL § 1193(1-a)(c). See also Chapter 48, *infra*.

If the person is not subject to VTL § 1193(1-a), the person may be eligible for a conditional license. See Chapter 50, *infra*.

Where the date of the *arrest* for the second offense occurs more than 10 years after the date of the *conviction* for the first, a person convicted of a second DWI will be penalized as a first offender (unless 15 NYCRR § 136.5 applies). See VTL § 1193(2)(b)(3).

§ 46:7 Misdemeanor Aggravated DWI -- First offense

Aggravated DWI in violation of VTL § 1192(2-a)(a) is a misdemeanor. VTL § 1193(1)(b). Unless 15 NYCRR § 136.5 applies, see § 46:1A, *supra*, a person who is convicted of Aggravated DWI as a first offense is subject to the following consequences:

1. A fine of between \$1,000 and \$2,500, up to 1 year in jail, or both. VTL § 1193(1)(b);

2. A period of probation of 2 or 3 years. PL § 65.00(3)(d);
3. Mandatory revocation of the person's driver's license for at least 1 year. VTL § 1193(2)(b)(2);
4. Discretionary revocation of the person's registration for at least 1 year. VTL § 1193(2)(b)(2);
5. A mandatory surcharge of \$370. VTL § 1809(1)(b)(ii); VTL § 1809-c(1); VTL § 1809-e(1)(b). If the case is in either a Town or Village Court, the Court must add an additional \$5 to this surcharge. VTL § 1809(9). See Chapter 47, *infra*;
6. A mandatory crime victim assistance fee of \$25. VTL § 1809(1)(b);
7. A mandatory driver responsibility assessment of \$250 a year for 3 years. VTL § 1199. See § 46:47, *infra*;
8. Discretionary imposition of a requirement that the person attend a Victim Impact Panel. VTL § 1193(1)(f). See § 46:28, *infra*; and
9. A mandatory requirement that the person install and maintain a functioning ignition interlock device in any motor vehicle that the person owns or operates for at least 6 months. VTL § 1193(1)(b)(ii); VTL § 1198. See Chapter 48, *infra*.

In addition, the person may be eligible for a conditional license. See Chapter 50, *infra*.

§ 46:8 Misdemeanor Aggravated DWI -- Second offense

Unless 15 NYCRR § 136.5 applies, see § 46:1A, *supra*, a person who is convicted of Aggravated DWI as a misdemeanor after having been convicted of VTL § 1192(2), (2-a), (3), (4) or (4-a) within the preceding 10 years is subject to the following consequences:

1. A fine of between \$1,000 and \$2,500, up to 1 year in jail, or both. VTL § 1193(1)(b);
2. A period of probation of 2 or 3 years. PL § 65.00(3)(d);
3. Mandatory revocation of the person's driver's license for at least 18 months. VTL § 1193(2)(b)(3). In addition, DMV will require evidence of alcohol

evaluation and/or rehabilitation before it will relicense the person. See Chapter 50, *infra*;

4. Discretionary revocation of the person's registration for at least 18 months. VTL § 1193(2)(b)(3);
5. A mandatory surcharge of \$370. VTL § 1809(1)(b)(ii); VTL § 1809-c(1); VTL § 1809-e(1)(b). If the case is in either a Town or Village Court, the Court must add an additional \$5 to this surcharge. VTL § 1809(9). See Chapter 47, *infra*;
6. A mandatory crime victim assistance fee of \$25. VTL § 1809(1)(b);
7. A mandatory driver responsibility assessment of \$250 a year for 3 years. VTL § 1199. See § 46:47, *infra*;
8. Discretionary imposition of a requirement that the person attend a Victim Impact Panel. VTL § 1193(1)(f). See § 46:28, *infra*; and
9. A mandatory requirement that the person install and maintain a functioning ignition interlock device in any motor vehicle that the person owns or operates for at least 6 months. VTL § 1193(1)(b)(ii); VTL § 1198. See Chapter 48, *infra*.

In addition, the person may be eligible for a conditional license. See Chapter 50, *infra*.

Where the date of the *arrest* for the second offense occurs more than 10 years after the date of the *conviction* for the first, a person convicted of a second Aggravated DWI will be penalized as a first offender (unless 15 NYCRR § 136.5 applies). See VTL § 1193(2)(b)(3).

§ 46:8A Felony Aggravated DWI -- Leandra's Law

Chapter 496 of the Laws of 2009 is called "Leandra's Law" -- in memory of a child killed by a drunk driver. One portion of this law made it a class E felony to commit what would otherwise be a misdemeanor violation of VTL § 1192 if the offense is committed with a child under the age of 16 in the vehicle. See VTL § 1192(2-a)(b).

With one exception, the consequences of a violation of Leandra's Law are the same as the consequences of every other class E felony DWI. See VTL § 1193(1)(c)(i); VTL § 1193(2)(b)(2), (3). See also § 46:13, *infra*. The exception is that where a Leandra's Law violation is committed by the child's

parent, guardian, custodian or other person "legally responsible for" the child, the police are required to report the case to Child Protective Services. See VTL § 1192(12)(b).

Where a Leandra's Law violation is charged via simplified traffic information, the ticketing officer is required to make the notation "C.I.V." (*i.e.*, Child In Vehicle) on the ticket. See VTL § 1192(12)(a).

§ 46:9 Driving While Ability Impaired by Drugs -- First offense

Driving While Ability Impaired by Drugs ("DWAI Drugs") in violation of VTL § 1192(4) is a misdemeanor. VTL § 1193(1)(b). Unless 15 NYCRR § 136.5 applies, see § 46:1A, *supra*, a person who is convicted of DWAI Drugs as a first offense is subject to the following consequences:

1. A fine of between \$500 and \$1,000, up to 1 year in jail, or both. VTL § 1193(1)(b);
2. A period of probation of 2 or 3 years. PL § 65.00(3)(d);
3. Mandatory revocation of the person's driver's license for at least 6 months. VTL § 1193(2)(b)(2). See also VTL § 510(2)(b)(v)-(vii);
4. Discretionary revocation of the person's registration for at least 6 months. VTL § 1193(2)(b)(2). See also VTL § 510(2)(b)(v)-(vii);
5. A mandatory surcharge of \$370. VTL § 1809(1)(b)(ii); VTL § 1809-c(1); VTL § 1809-e(1)(b). If the case is in either a Town or Village Court, the Court must add an additional \$5 to this surcharge. VTL § 1809(9). See Chapter 47, *infra*;
6. A mandatory crime victim assistance fee of \$25. VTL § 1809(1)(b);
7. A mandatory driver responsibility assessment of \$250 a year for 3 years. VTL § 1199. See § 46:47, *infra*; and
8. Discretionary imposition of a requirement that the person attend a Victim Impact Panel. VTL § 1193(1)(f). See § 46:28, *infra*.

In addition, the person will *not* be eligible for a conditional license, but may be eligible for a restricted use license. See 15 NYCRR § 134.7(a)(10); Chapter 50, *infra*.

A person who is convicted of DWAI Drugs is not subject to the ignition interlock device law (but may nonetheless be subject to an IID requirement if 15 NYCRR § 136.5 applies). See, e.g., § 48:7, *infra*; PL § 65.10(2)(k-1) ("The court may require [the IID] condition only where a person has been convicted of a violation of [VTL § 1192(2), (2-a) or (3)], or any crime defined by the [VTL] or this chapter of which an alcohol-related violation of any provision of [VTL § 1192] is an essential element"); VTL § 1193(1)(b)(iii); VTL § 1198(2)(a); VTL § 1198(3)(d); 9 NYCRR § 358.1; 15 NYCRR § 140.2; People v. Levy, 91 A.D.3d 793, ___, 938 N.Y.S.2d 315, 316 (2d Dep't 2012) ("We agree with the defendant that the County Court improperly directed, as a condition of probation, that the defendant install an ignition interlock device on her motor vehicle. . . . Here, the defendant's conviction for operating a motor vehicle while under the influence of drugs pursuant to Vehicle and Traffic Law § 1192(4) falls outside the scope of Penal Law § 65.10(2)(k-1)").

§ 46:10 DWAI Drugs -- Second offense

Unless 15 NYCRR § 136.5 applies, see § 46:1A, *supra*, a person who is convicted of DWAI Drugs as a misdemeanor after having been convicted of VTL § 1192(2), (2-a), (3), (4) or (4-a) within the preceding 10 years is subject to the following consequences:

1. A fine of between \$500 and \$1,000, up to 1 year in jail, or both. VTL § 1193(1)(b);
2. A period of probation of 2 or 3 years. PL § 65.00(3)(d);
3. Mandatory revocation of the person's driver's license for at least 1 year (at least 18 months where the prior conviction was for Aggravated DWI). VTL § 1193(2)(b)(3). See also VTL § 510(2)(b)(v)-(vii). In addition, DMV will require evidence of alcohol/drug evaluation and/or rehabilitation before it will relicense the person. See Chapter 50, *infra*;
4. Discretionary revocation of the person's registration for at least 1 year (at least 18 months where the prior conviction was for Aggravated DWI). VTL § 1193(2)(b)(3). See also VTL § 510(2)(b)(v)-(vii);
5. A mandatory surcharge of \$370. VTL § 1809(1)(b)(ii); VTL § 1809-c(1); VTL § 1809-e(1)(b). If the case is in either a Town or Village Court, the Court must add an additional \$5 to this surcharge. VTL § 1809(9). See Chapter 47, *infra*;

6. A mandatory crime victim assistance fee of \$25. VTL § 1809(1)(b);
7. A mandatory driver responsibility assessment of \$250 a year for 3 years. VTL § 1199. See § 46:47, *infra*; and
8. Discretionary imposition of a requirement that the person attend a Victim Impact Panel. VTL § 1193(1)(f). See § 46:28, *infra*.

In addition, the person will *not* be eligible for a conditional license, but may be eligible for a restricted use license. See 15 NYCRR § 134.7(a)(10); Chapter 50, *infra*.

A person who is convicted of DWAI Drugs is not subject to the ignition interlock device law (but may nonetheless be subject to an IID requirement if 15 NYCRR § 136.5 applies). See, e.g., § 48:7, *infra*; PL § 65.10(2)(k-1) ("The court may require [the IID] condition only where a person has been convicted of a violation of [VTL § 1192(2), (2-a) or (3)], or any crime defined by the [VTL] or this chapter of which an alcohol-related violation of any provision of [VTL § 1192] is an essential element"); VTL § 1193(1)(b)(iii); VTL § 1198(2)(a); VTL § 1198(3)(d); 9 NYCRR § 358.1; 15 NYCRR § 140.2; People v. Levy, 91 A.D.3d 793, ___, 938 N.Y.S.2d 315, 316 (2d Dep't 2012) ("We agree with the defendant that the County Court improperly directed, as a condition of probation, that the defendant install an ignition interlock device on her motor vehicle. . . . Here, the defendant's conviction for operating a motor vehicle while under the influence of drugs pursuant to Vehicle and Traffic Law § 1192(4) falls outside the scope of Penal Law § 65.10(2)(k-1)").

Where the date of the *arrest* for the second offense occurs more than 10 years after the date of the *conviction* for the first, a person convicted of a second DWAI Drugs will be penalized as a first offender (unless 15 NYCRR § 136.5 applies). See VTL § 1193(2)(b)(3).

§ 46:11 DWAI Combined Influence of Drugs or of Alcohol and Any Drug or Drugs -- First offense

DWAI Combined Influence of Drugs or of Alcohol and Any Drug or Drugs ("DWAI Combined Influence") in violation of VTL § 1192(4-a) is a misdemeanor. VTL § 1193(1)(b). Unless 15 NYCRR § 136.5 applies, see § 46:1A, *supra*, a person who is convicted of DWAI Combined Influence as a first offense is subject to the following consequences:

1. A fine of between \$500 and \$1,000, up to 1 year in jail, or both. VTL § 1193(1)(b);

2. A period of probation of 2 or 3 years. PL § 65.00(3)(d);
3. Mandatory revocation of the person's driver's license for at least 6 months. VTL § 1193(2)(b)(2);
4. Discretionary revocation of the person's registration for at least 6 months. VTL § 1193(2)(b)(2);
5. A mandatory surcharge of \$370. VTL § 1809(1)(b)(ii); VTL § 1809-c(1); VTL § 1809-e(1)(b). If the case is in either a Town or Village Court, the Court must add an additional \$5 to this surcharge. VTL § 1809(9). See Chapter 47, *infra*;
6. A mandatory crime victim assistance fee of \$25. VTL § 1809(1)(b);
7. A mandatory driver responsibility assessment of \$250 a year for 3 years. VTL § 1199. See § 46:47, *infra*; and
8. Discretionary imposition of a requirement that the person attend a Victim Impact Panel. VTL § 1193(1)(f). See § 46:28, *infra*.

In addition, the person may be eligible for a conditional license. See Chapter 50, *infra*.

A person who is convicted of DWAI Combined Influence is not subject to the ignition interlock device law (but may nonetheless be subject to an IID requirement if 15 NYCRR § 136.5 applies). See, e.g., § 48:7, *infra*; PL § 65.10(2)(k-1) ("The court may require [the IID] condition only where a person has been convicted of a violation of [VTL § 1192(2), (2-a) or (3)], or any crime defined by the [VTL] or this chapter of which an alcohol-related violation of any provision of [VTL § 1192] is an essential element"); VTL § 1193(1)(b)(ii); VTL § 1198(2)(a); VTL § 1198(3)(d); 9 NYCRR § 358.1; 15 NYCRR § 140.2. See generally *People v. Levy*, 91 A.D.3d 793, ___, 938 N.Y.S.2d 315, 316 (2d Dep't 2012) ("We agree with the defendant that the County Court improperly directed, as a condition of probation, that the defendant install an ignition interlock device on her motor vehicle. . . . Here, the defendant's conviction for operating a motor vehicle while under the influence of drugs pursuant to Vehicle and Traffic Law § 1192(4) falls outside the scope of Penal Law § 65.10(2)(k-1)").

In *People v. Gonzalez*, 90 A.D.3d 1668, 935 N.Y.S.2d 826 (4th Dep't 2011), the defendant was convicted of both DWI and DWAI Drugs. On appeal, he claimed that the convictions should be reversed on the ground that he was really guilty of -- but not charged with -- DWAI Combined Influence. The Appellate Division,

Fourth Department, disagreed, holding that "the evidence presented at trial is sufficient to establish that he was separately impaired by alcohol and by drugs." Id. at ___, 935 N.Y.S.2d at 827.

§ 46:12 DWAI Combined Influence -- Second offense

Unless 15 NYCRR § 136.5 applies, see § 46:1A, *supra*, a person who is convicted of DWAI Combined Influence as a misdemeanor after having been convicted of VTL § 1192(2), (2-a), (3), (4) or (4-a) within the preceding 10 years is subject to the following consequences:

1. A fine of between \$500 and \$1,000, up to 1 year in jail, or both. VTL § 1193(1)(b);
2. A period of probation of 2 or 3 years. PL § 65.00(3)(d);
3. Mandatory revocation of the person's driver's license for at least 1 year (at least 18 months where the prior conviction was for Aggravated DWI). VTL § 1193(2)(b)(3). In addition, DMV will require evidence of alcohol/drug evaluation and/or rehabilitation before it will relicense the person. See Chapter 50, *infra*;
4. Discretionary revocation of the person's registration for at least 1 year (at least 18 months where the prior conviction was for Aggravated DWI). VTL § 1193(2)(b)(3);
5. A mandatory surcharge of \$370. VTL § 1809(1)(b)(ii); VTL § 1809-c(1); VTL § 1809-e(1)(b). If the case is in either a Town or Village Court, the Court must add an additional \$5 to this surcharge. VTL § 1809(9). See Chapter 47, *infra*;
6. A mandatory crime victim assistance fee of \$25. VTL § 1809(1)(b);
7. A mandatory driver responsibility assessment of \$250 a year for 3 years. VTL § 1199. See § 46:47, *infra*; and
8. Discretionary imposition of a requirement that the person attend a Victim Impact Panel. VTL § 1193(1)(f). See § 46:28, *infra*.

The person may be eligible for a conditional license. See Chapter 50, *infra*.

A person who is convicted of DWAI Combined Influence is not subject to the ignition interlock device law (but may nonetheless be subject to an IID requirement if 15 NYCRR § 136.5 applies). See, e.g., § 48:7, *infra*; PL § 65.10(2)(k-1) ("The court may require [the IID] condition only where a person has been convicted of a violation of [VTL § 1192(2), (2-a) or (3)], or any crime defined by the [VTL] or this chapter of which an alcohol-related violation of any provision of [VTL § 1192] is an essential element"); VTL § 1193(1)(b)(ii); VTL § 1198(2)(a); VTL § 1198(3)(d); 9 NYCRR § 358.1; 15 NYCRR § 140.2. See generally *People v. Levy*, 91 A.D.3d 793, ___, 938 N.Y.S.2d 315, 316 (2d Dep't 2012) ("We agree with the defendant that the County Court improperly directed, as a condition of probation, that the defendant install an ignition interlock device on her motor vehicle. . . . Here, the defendant's conviction for operating a motor vehicle while under the influence of drugs pursuant to Vehicle and Traffic Law § 1192(4) falls outside the scope of Penal Law § 65.10(2)(k-1)").

Where the date of the *arrest* for the second offense occurs more than 10 years after the date of the *conviction* for the first, a person convicted of a second DWAI Combined Influence will be penalized as a first offender (unless 15 NYCRR § 136.5 applies). See VTL § 1193(2)(b)(3).

§ 46:13 DWI, Aggravated DWI, DWAI Drugs or DWAI Combined Influence -- Class E felony

A person who is charged with DWI, Aggravated DWI, DWAI Drugs or DWAI Combined Influence after having been convicted of VTL § 1192(2), (2-a), (3), (4) or (4-a) (or Vehicular Assault in the 1st or 2nd degree, Vehicular Manslaughter in the 1st or 2nd degree, Aggravated Vehicular Assault or Aggravated Vehicular Homicide) within the preceding 10 years can be charged with a class E felony, and is subject to the following consequences:

1. A fine of between \$1,000 and \$5,000, up to 4 years in state prison, or both. VTL § 1193(1)(c)(i);
2. A period of probation of 3, 4 or 5 years. PL § 65.00(3)(a)(i);
3. Mandatory revocation of the person's driver's license for at least 1 year (at least 18 months where either of the convictions was for Aggravated DWI). VTL § 1193(2)(b)(3). See also 15 NYCRR § 136.5. In addition, DMV will require evidence of alcohol evaluation and/or rehabilitation before it will relicense the person. See Chapter 50, *infra*;

4. Discretionary revocation of the person's registration for at least 1 year (at least 18 months where either of the convictions was for Aggravated DWI). VTL § 1193(2) (b) (3);
5. A mandatory surcharge of \$495. VTL § 1809(1) (b) (i); VTL § 1809-c(1); VTL § 1809-e(1) (b). See Chapter 47, *infra*;
6. A mandatory crime victim assistance fee of \$25. VTL § 1809(1) (b);
7. A mandatory driver responsibility assessment of \$250 a year for 3 years. VTL § 1199. See § 46:47, *infra*;
8. Discretionary imposition of a requirement that the person attend a Victim Impact Panel. VTL § 1193(1) (f). See § 46:28, *infra*; and
9. If the conviction is for VTL § 1192(2), (2-a) or (3), a mandatory requirement that the person install and maintain a functioning ignition interlock device in any motor vehicle that the person owns or operates for at least 6 months. VTL § 1193(1) (c) (iii); VTL § 1198. See Chapter 48, *infra*.

A person who is convicted of DWI after having been convicted of VTL § 1192(2) or (3) within the preceding 5 years is subject to the following additional mandatory penalties:

1. "[A] term of imprisonment of [5] days or, as an alternative to such imprisonment, . . . [30] days of service for a public or not-for-profit corporation, association, institution or agency as set forth in [PL § 65.10(2)(h)]." VTL § 1193(1-a) (a); and
2. The sentencing Court also must:
 - (i) order the installation of an ignition interlock device approved pursuant to [VTL § 1198] in any motor vehicle owned or operated by the person so sentenced. Such devices shall remain installed during any period of license revocation required to be imposed pursuant to [VTL § 1193(2)(b)], and, upon the termination of such revocation period, for an additional period as determined by the court; and
 - (ii) order that such person receive an assessment of the degree of their alcohol or

substance abuse and dependency pursuant to the provisions of [VTL § 1198-a]. Where such assessment indicates the need for treatment, such court is authorized to impose treatment as a condition of such sentence except that such court shall impose treatment as a condition of a sentence of probation or conditional discharge pursuant to the provisions of [VTL § 1198-a(3)].

Any person ordered to install an ignition interlock device pursuant to [VTL § 1193(1-a)] shall be subject to the provisions of [VTL § 1198(4), (5), (7), (8) and (9)].

VTL § 1193(1-a) (c).

If the person is not subject to VTL § 1193(1-a), the person may be eligible for a conditional license. See Chapter 50, *infra*.

It should be noted that a prior conviction or convictions of DWAI in violation of VTL § 1192(1) -- including DWAI as a misdemeanor -- cannot serve as a predicate for a felony DWI charge. See VTL § 1193(1)(c). In addition, VTL § 1193(1-a) is only applicable to convictions of VTL §§ 1192(2) and (3) (*i.e.*, it does not apply to convictions of VTL §§ 1192(2-a), (4) and/or (4-a)).

§ 46:14 DWI, Aggravated DWI, DWAI Drugs or DWAI Combined Influence -- Class D felony

A person who is charged with DWI, Aggravated DWI, DWAI Drugs or DWAI Combined Influence after having been convicted of VTL § 1192(2), (2-a), (3), (4) or (4-a) (or Vehicular Assault in the 1st or 2nd degree, Vehicular Manslaughter in the 1st or 2nd degree, Aggravated Vehicular Assault or Aggravated Vehicular Homicide) twice within the preceding 10 years -- or 3 or more times within the preceding 15 years -- can be charged with a class D felony, and is subject to the following consequences:

1. A fine of between \$2,000 and \$10,000, up to 7 years in state prison, or both. VTL § 1193(1)(c)(ii); VTL § 1193(1)(c)(ii-a);
2. A period of probation of 3, 4 or 5 years. PL § 65.00(3)(a)(i);
3. Mandatory revocation of the person's driver's license for at least 1 year. VTL § 1193(2)(b)(3). However, pursuant to 15 NYCRR § 136.5 a person who has 3 or 4

DWI-related convictions/incidents within the past 25 years and whose driver's license is revoked for a felony DWI offense (a) will be ineligible for a conditional license, and (b) will be revoked for at least 6 years (followed by 5 more years on a restricted license with an ignition interlock device requirement), and possibly for life. See Chapter 55, *infra*;

4. Discretionary revocation of the person's registration for at least 1 year. VTL § 1193(2)(b)(3);
5. A mandatory surcharge of \$495. VTL § 1809(1)(b)(i); VTL § 1809-c(1); VTL § 1809-e(1)(b). See Chapter 47, *infra*;
6. A mandatory crime victim assistance fee of \$25. VTL § 1809(1)(b);
7. A mandatory driver responsibility assessment of \$250 a year for 3 years. VTL § 1199. See § 46:47, *infra*;
8. Discretionary imposition of a requirement that the person attend a Victim Impact Panel. VTL § 1193(1)(f). See § 46:28, *infra*; and
9. If the conviction is for VTL § 1192(2), (2-a) or (3), a mandatory requirement that the person install and maintain a functioning ignition interlock device in any motor vehicle that the person owns or operates for at least 6 months. VTL § 1193(1)(c)(iii); VTL § 1198. See Chapter 48, *infra*.

A person who is convicted of DWI after having been convicted of VTL § 1192(2) or (3) two or more times within the preceding 5 years is subject to the following additional mandatory penalties:

1. "[A] term of imprisonment of [10] days or, as an alternative to such imprisonment, . . . [60] days of service for a public or not-for-profit corporation, association, institution or agency as set forth in [PL § 65.10(2)(h)]." VTL § 1193(1-a)(b); and
2. The sentencing Court also must:
 - (i) order the installation of an ignition interlock device approved pursuant to [VTL § 1198] in any motor vehicle owned or operated by the person so sentenced. Such devices shall remain installed during any period of license revocation required to be imposed pursuant to [VTL § 1193(2)(b)], and, upon the

termination of such revocation period, for an additional period as determined by the court; and

(ii) order that such person receive an assessment of the degree of their alcohol or substance abuse and dependency pursuant to the provisions of [VTL § 1198-a]. Where such assessment indicates the need for treatment, such court is authorized to impose treatment as a condition of such sentence except that such court shall impose treatment as a condition of a sentence of probation or conditional discharge pursuant to the provisions of [VTL § 1198-a(3)].

Any person ordered to install an ignition interlock device pursuant to [VTL § 1193(1-a)] shall be subject to the provisions of [VTL § 1198(4), (5), (7), (8) and (9)].

VTL § 1193(1-a) (c).

In People v. Smith, 57 A.D.3d 1410, 870 N.Y.S.2d 209 (4th Dep't 2008), the defendant was convicted, following a jury trial, of DWI as a class D felony. As it turns out, however, one of the defendant's predicate DWI convictions fell outside the 10-year window specified in VTL § 1193(1)(c)(ii) by 3 days. Although the defendant had failed to preserve this issue, the Appellate Division, Fourth Department, reduced the conviction to DWI as a class E felony, see previous section, "as a matter of discretion in the interest of justice." Id. at ___, 870 N.Y.S.2d at 210. It should be noted that the unofficial (*i.e.*, West Publishing) version of this case incorrectly states that the date of the *commission* of the predicate DWI charge -- as opposed to the date of *conviction* -- fell outside the 10-year window. The authors would like to thank Albany County Assistant District Attorney Matthew Peluso for bringing this discrepancy to our attention.

In People v. Ritter, 124 A.D.3d 1133, 2 N.Y.S.3d 693 (3d Dep't 2015), the defendant was sentenced to 1½ to 6 years in prison for a class D felony Aggravated DWI. The defendant challenged the legality of the sentence. The Appellate Division, Third Department, held that:

[T]here is no merit to defendant's argument that his sentence was unlawful because County Court imposed a minimum term that was less than one third of the maximum on his conviction of aggravated driving while intoxicated, a class D felony. Penal Law § 70.00(3)(b) provides that, for a class D

felony, the minimum period "shall not be less than one year *or more than* one-third of the maximum term imposed."

Id. at ___, 2 N.Y.S.3d at 694 (citations omitted).

§ 46:15 Commercial drivers and "special vehicles"

For specific penalties regarding commercial drivers and "special vehicles," see Chapter 14.

§ 46:16 Underage offenders -- First offense

Where a person under the age of 21 is found guilty of violating VTL § 1192-a (the so-called "Zero Tolerance law"), the person's driver's license will be suspended, and the person's registration may be suspended, for 6 months. VTL § 1193(2)(a)(2). The person will also be liable for a civil penalty in the amount of \$125. VTL § 1194-a(2).

In addition, the person will most likely be eligible for a conditional license. See Chapter 15, *supra*.

Where a person under the age of 21 is convicted of, or adjudicated a youthful offender for, violating any subdivision of VTL § 1192, the person's driver's license will be revoked, and the person's registration may be revoked, for at least 1 year. VTL § 1193(2)(b)(6). The person will otherwise be subject to the same consequences as a person over the age of 21.

In this situation, the person will most likely be eligible for the Drinking Driver Program and a conditional license. See Chapter 50, *infra*. However, successful completion of the Drinking Driver Program will *not* result in full restoration of the person's driving privileges prior to the expiration of the minimum revocation period. VTL § 1193(2)(b)(9). See also Chapter 15, *supra*.

§ 46:17 Underage offenders -- Second offense

Where a person under the age of 21 is either (a) found guilty of violating VTL § 1192-a, or (b) convicted of, or adjudicated a youthful offender for, violating any subdivision of VTL § 1192, and the person has previously been either (a) found guilty of violating VTL § 1192-a, or (b) convicted of, or adjudicated a youthful offender for, violating any subdivision of VTL § 1192 *not arising out of the same incident*, the person's driver's license will be revoked, and the person's registration may be revoked, for at least 1 year or until the person reaches the age of 21, *whichever is longer*. VTL § 1193(2)(b)(7).

In addition, the person will *not* be eligible for conditional license. See Chapter 50, *infra*.

§ 46:18 Effect of prior "Zero Tolerance law" adjudication

For purposes of determining the length of a license suspension or revocation to be imposed for a subsequent offense committed after a person has been found guilty of violating VTL § 1192-a, the effect of the prior Zero Tolerance law adjudication is the same as a conviction of DWAI in violation of VTL § 1192(1), *provided that the subsequent offense is committed during the retention period set forth in VTL § 201(1)(k)*. VTL § 1192(8-a). VTL § 201(1)(k) provides, in pertinent part, that the Commissioner may destroy:

[A]ny records, including any reproductions or electronically created images of such records and including any records received by the commissioner from a court pursuant to [VTL § 1192(10)(c)] or [Navigation Law § 49-b], relating to a finding of a violation of [VTL § 1192-a] or a waiver of the right to a hearing under [VTL § 1194-a] or a finding of a refusal following a hearing conducted pursuant to [VTL § 1194-a(3)] or a finding of a violation of [Navigation Law § 49-b] or a waiver of the right to a hearing or a finding of refusal following a hearing conducted pursuant to [Navigation Law § 49-b], after remaining on file for [3] years after such finding or entry of such waiver or refusal or until the person that is found to have violated such section reaches the age of [21], whichever is the greater period of time.

§ 46:19 Out-of-state convictions

Prior to November 1, 2006, VTL § 1192(8) provided that, for purposes of determining the consequences of a violation of VTL § 1192, a prior out-of-state conviction for operating a motor vehicle while under the influence of alcohol or drugs was deemed to be a prior conviction of DWAI in violation of VTL § 1192(1). Effective November 1, 2006, VTL § 1192(8) provides as follows:

Effect of prior out-of-state conviction. A prior out-of-state conviction for operating a motor vehicle while under the influence of alcohol or drugs shall be deemed to be a prior conviction of a violation of this section for purposes of determining penalties

imposed under this section or for purposes of any administrative action required to be taken pursuant to [VTL § 1193(2)]; provided, however, that such conduct, had it occurred in this state, would have constituted a misdemeanor or felony violation of any of the provisions of [VTL § 1192]. Provided, however, that if such conduct, had it occurred in this state, would have constituted a violation of any provisions of [VTL § 1192] which are not misdemeanor or felony offenses, then such conduct shall be deemed to be a prior conviction of a violation of [VTL § 1192(1)] for purposes of determining penalties imposed under this section or for purposes of any administrative action required to be taken pursuant to [VTL § 1193(2)].

Thus, a prior out-of-state DWI conviction can now potentially be used as a predicate conviction for a felony DWI charge.

Critically, however, the enabling portion of this change to VTL § 1192(8) expressly provides that it only applies to out-of-state convictions that occurred on or after November 1, 2006. See also People v. Ballman, 15 N.Y.3d 68, 70, 904 N.Y.S.2d 361, 362 (2010) ("This appeal raises the issue whether Vehicle and Traffic Law § 1192(8) allows an out-of-state conviction occurring prior to November 1, 2006 to be considered for purposes of elevating a charge of driving while intoxicated from a misdemeanor to a felony. We hold that it does not").

In addition, where a New York licensee is convicted of operating a motor vehicle while under the influence of alcohol or drugs in another State, the person's driver's license will be revoked, and the person's registration may be revoked, for at least:

- (a) 90 days, if the licensee is over 21. VTL § 1193(2)(b)(8);
- (b) 1 year, if the licensee is under 21 and is a "first offender." VTL § 1193(2)(b)(6); VTL § 1193(2)(b)(8); or
- (c) 1 year or until age 21, *whichever is longer*, if the licensee is under 21 and is a "repeat offender." VTL § 1193(2)(b)(7); VTL § 1193(2)(b)(8).

In Matter of Woods, 56 A.D.3d 184, 867 N.Y.S.2d 45 (1st Dep't 2008), the Appellate Division, First Department, held that

Michigan's felony DWI laws are sufficiently analogous to New York's felony DWI laws to require respondent's disbarment for his conviction of felony DWI in Michigan.

§ 46:20 License suspension or revocation begins at sentencing

Where a license suspension or revocation is required to be imposed pursuant to VTL § 1193(2)(a) or (b), the Court must issue an Order suspending or revoking the person's driver's license at the time of sentencing, at which time the person must surrender his or her license to the Court. VTL § 1193(2)(d)(1).

The suspension or revocation imposed pursuant to VTL § 1193(2)(d)(1) takes effect immediately. Id. However, with certain exceptions, the sentencing Court may issue a so-called "20-day Order," which makes the "license suspension or revocation take effect [20] days after the date of sentencing." VTL § 1193(2)(d)(2). See also Chapter 49, *infra*; VTL § 510(2)(b)(vi).

§ 46:21 Periods of revocation are *minimum* periods

Where a driver's license is revoked pursuant to VTL § 1193(2)(b), "no new license shall be issued after the expiration of the minimum period specified in such paragraph, except in the discretion of the commissioner." VTL § 1193(2)(c)(1). See also VTL § 510(5); VTL § 510(6)(a); VTL § 1194(2)(d)(1). In light of the Court of Appeals' decision in Matter of Acevedo v. New York State Dep't of Motor Vehicles, 29 N.Y.3d 202, ___ N.Y.S.3d ___ (2017), this statutory language should be taken very seriously.

In People v. Demperio, 86 N.Y.2d 549, 552, 634 N.Y.S.2d 672, 673 (1995), the Court of Appeals held that this statute provides a person with "reason to know that upon revocation of his license, a new license application [is] required."

§ 46:22 Court cannot impose sentence of unconditional discharge

Where a person is convicted of any violation of VTL § 1192, a Court cannot impose a sentence of unconditional discharge. VTL § 1193(1)(e).

§ 46:23 Court must impose fine unless defendant sentenced to incarceration

Where a person is convicted of any violation of VTL § 1192, a Court cannot impose a sentence of conditional discharge or probation "unless such conditional discharge or probation is accompanied by a sentence of a fine as provided in this subdivision." VTL § 1193(1)(e).

On the other hand, where a person convicted of any violation of VTL § 1192 is sentenced to incarceration, there is no mandatory fine. In People v. Moore, 212 A.D.2d 1062, 623 N.Y.S.2d 42 (4th Dep't 1995), the Appellate Division, Fourth Department, vacated a felony DWI sentence and remitted the case to County Court for resentencing on the ground that "County Court's statement that there was a mandatory minimum fine was based upon a misapprehension that the court did not have discretion in sentencing," id. at ___, 623 N.Y.S.2d at 43, and that such misapprehension was "a departure from the 'essential nature' of the right to be sentenced as provided by law." Id. at ___, 623 N.Y.S.2d at 43 (citation omitted). See also People v. York, 123 A.D.3d 1155, 999 N.Y.S.2d 520 (2d Dep't 2014); People v. Olmstead, 111 A.D.3d 1063, ___, 975 N.Y.S.2d 359, 359-60 (3d Dep't 2013); People v. Figueroa, 17 A.D.3d 1130, ___, 794 N.Y.S.2d 262, 264 (4th Dep't 2005); People v. Fehr, 303 A.D.2d 1039, ___, 757 N.Y.S.2d 205, 207 (4th Dep't 2003); People v. John, 288 A.D.2d 848, ___, 732 N.Y.S.2d 505, 508 (4th Dep't 2001); People v. Domin, 284 A.D.2d 731, ___, 726 N.Y.S.2d 503, 505 (3d Dep't 2001); People v. Swan, 277 A.D.2d 1033, 716 N.Y.S.2d 194 (4th Dep't 2000); People v. Thomas, 245 A.D.2d 1136, 667 N.Y.S.2d 536 (4th Dep't 1997). See generally People v. Gemboys, 270 A.D.2d 847, 705 N.Y.S.2d 925 (4th Dep't 2000) (even where defendant sentenced to incarceration, fine of \$1,000 for class D felony DWI is illegal; although imposition of fine is optional, if fine is imposed the minimum amount is \$2,000); People v. Sudbrink, 35 A.D.3d 635, ___, 825 N.Y.S.2d 762, 763-64 (2d Dep't 2006) (same); People v. Barber, 31 A.D.3d 1145, ___, 818 N.Y.S.2d 391, 392 (4th Dep't 2006); People v. Jimerson, 13 A.D.3d 1140, 788 N.Y.S.2d 526 (4th Dep't 2004); People v. Castellano, 6 A.D.3d 278, 774 N.Y.S.2d 703 (1st Dep't 2004); People v. Smith, 309 A.D.2d 1282, 764 N.Y.S.2d 732 (4th Dep't 2003).

In People v. Neal, 148 A.D.3d 1699, ___, 50 N.Y.S.3d 666, 667 (4th Dep't 2017), the Appellate Division, Fourth Department, held that:

[T]he court erred in imposing a \$1,500 fine. Vehicle and Traffic Law § 1193(1)(c)(ii) provides that a person convicted of driving while intoxicated as a class D felony "shall be punished by a fine of not less than [\$2,000] nor more than [\$10,000] or by a period of imprisonment as provided in the penal law, or by both such fine and imprisonment." The court therefore had the authority to impose a fine and a sentence of imprisonment, but was required to impose a minimum fine of \$2,000 if it chose to impose any fine. We cannot allow the \$1,500 illegal fine to stand and, as a matter of discretion

in the interest of justice, we conclude that no fine should be imposed. We therefore modify the judgment by vacating the fine.

(Citation omitted).

§ 46:24 DMV required to correct improper license suspension/revocation

Where a Court fails to impose, or incorrectly imposes, a license suspension or revocation required pursuant to VTL § 1193(2)(b), the Commissioner is required, upon receipt of a Certificate of Conviction filed pursuant to VTL § 514, to "impose such mandated suspension or revocation, which shall supersede any such order which the court may have imposed." VTL § 1193(2)(b)(10).

This statute, which was enacted in 1990, appears to legislatively overrule Matter of Sovik v. State of New York Dep't of Motor Vehicles, 143 Misc. 2d 941, 542 N.Y.S.2d 462 (Onondaga Co. Sup. Ct. 1989). In Sovik, the petitioner received a second DWAI conviction arising out of an arrest that occurred within 5 years of his first conviction. However, the sentencing Court improperly imposed a 90-day license *suspension* rather than the 6-month *revocation* required by VTL § 1193(2)(b)(1). The Commissioner thereafter imposed the requisite revocation.

Petitioner filed an Article 78 petition seeking to nullify the revocation of his driver's license by the Commissioner. Supreme Court agreed that the sentencing Court "impermissibly suspended petitioner's license contrary to the express provisions of [VTL] section 1193," but nonetheless held that the Commissioner was not authorized to impose the mandated revocation. Id. at ___, 542 N.Y.S.2d at 464.

Conversely, a Court can "correct" a revocation period improperly imposed by DMV. See People v. Eberhardt, 277 A.D.2d 1044, 715 N.Y.S.2d 349 (4th Dep't 2000).

§ 46:25 Relicensure of person sentenced to probation

Where a person's driver's license has been revoked pursuant to VTL § 1193(2)(b) and the person has been sentenced to a period of probation, and a condition of such probation is that the person not operate a motor vehicle or apply for a driver's license during the period of probation, "the commissioner may not restore such license until the period of the condition of probation has expired." VTL § 1193(2)(e)(5).

Many standard "Conditions of Probation" forms include one or more provisions prohibiting the probationer from either (a) operating a motor vehicle without the approval of the Court, and/or (b) reapplying for a driver's license without permission

from the Court. In any event, regardless of whether such conditions are in fact a part of the person's conditions of probation, DMV will presume them to be.

As a result, if the person's sentence is not intended to include these conditions, the Court must strike them from the "Conditions of Probation" form and replace them with language to the effect that "the defendant is not to operate a motor vehicle and/or reapply for a driver's license *unless authorized to do so by the Department of Motor Vehicles. The authorization of the Court and/or the Department of Probation is not required.*"

In order to avoid unnecessary delay at the time of reapplication, the document containing the above-referenced language can be mailed to DMV ahead of time, at which point the person's DMV file will be "coded" to reflect that VTL § 1193(2)(e)(5) does not preclude the person from being relicensed.

Modern DMV "Order of Suspension or Revocation" forms (*i.e.*, DMV form MV-1192) contain the following check box questions:

"Is motorist sentenced to ☐ Probation . . .
☐ Conditional Discharge . . ."

[If the motorist is sentenced to probation:]

"Must the motorist obtain permission before applying for a license? . . . ☐ Yes ☐ No"

"If yes, do they need permission from: ☐ Court ☐
Probation Department ☐ Both"

This self-explanatory form makes life much easier in cases where the person is sentenced to probation.

§ 46:26 Reapplication after revocation -- 45-day rule

Where a person's driver's license has been revoked pursuant to VTL § 1193(2)(b) or the person is subject to a condition of probation that the person not operate a motor vehicle or apply for a driver's license during the period of probation, "application for a new license may be made within [45] days prior to the expiration of such minimum period of revocation or condition of probation, whichever expires last." VTL § 1193(2)(e)(6).

In light of the fact that DMV is understaffed and handles a large volume of cases, it is important that defense counsel advise the client to take advantage of this section and reapply for a driver's license as soon as the person is eligible to do so. In this regard, it is the authors' understanding that DMV currently accepts reapplications up to 60 days prior to the expiration of the minimum revocation period.

§ 46:27 Reinstatement/reapplication fee

Where a person's driver's license has been *suspended* for a violation of VTL § 1192(1), "such suspension shall remain in effect until a termination of a [sic] suspension fee of [\$50] is paid to the commissioner." VTL § 503(2)(j).

Where a person's driver's license has been *revoked* pursuant to VTL § 510, VTL § 1193 or VTL § 1194, the person must, "upon application for issuance of a driver's license, pay to the commissioner a fee of [\$100]." VTL § 503(2)(h).

Where a person's driver's license has been either suspended or revoked for a violation of VTL § 1192-a, "the fee to be paid to the commissioner shall be [\$100]." VTL §§ 503(2)(h)-(j).

Where a non-resident's driving *privileges* have been revoked pursuant to VTL § 510, VTL § 1193 or VTL § 1194, the person must, "upon application for reinstatement of such driving privileges, pay to the commissioner of motor vehicles a fee of [\$100]." VTL § 503(2)(i).

It is critical that a person pay the applicable reinstatement/reapplication fee and secure the return of his or her driver's license (or driving privileges) from DMV following an alcohol- or drug-related suspension/revocation, as driving without doing so constitutes AUO. See Chapter 13, supra. In addition, since it appears that DMV can change the rules at any time, see Matter of Acevedo v. New York State Dep't of Motor Vehicles, 29 N.Y.3d 202, ____ N.Y.S.3d ____ (2017), delaying the reinstatement of one's driving privileges can have profound consequences.

§ 46:28 Victim Impact Panel

Where a Court imposes a sentence for a violation of VTL § 1192, it may require the defendant, as a part of or as a condition of such sentence, to attend a single session of a Victim Impact Panel. VTL § 1193(1)(f). This is a program in which presentations are made concerning the harm caused by, and the impact of, driving while intoxicated. See id. The presentations are generally made by people who have lost friends and/or family members as a result of alcohol- or drug-related accidents.

§ 46:29 Lifetime revocation -- Two convictions of DWI, DWAI Drugs or DWAI Combined Influence involving accidents causing physical injury

The "new" DMV regulations, see § 46:1A, *supra*, & Chapter 55, *infra*, create numerous lifetime driver's license revocations. In addition, where a driver's license is revoked pursuant to VTL § 1193(2)(b):

[I]n no event shall a new license be issued where a person has been twice convicted of a violation of [VTL § 1192(3), (4) or (4-a)] or of driving while intoxicated or of driving while ability is impaired by the use of a drug or of driving while ability is impaired by the combined influence of drugs or of alcohol and any drug or drugs where physical injury, as defined in [PL § 10.00], has resulted from such offense in each instance.

VTL § 1193(2)(c)(3). See also 15 NYCRR § 136.5(b)(6); 15 NYCRR § 136.5(d).

This section was declared to be constitutional in Matter of Hauptman v. New York State Dep't of Motor Vehicles, 158 A.D.2d 600, 551 N.Y.S.2d 572 (2d Dep't 1990). In order to invoke the lifetime revocation set forth in VTL § 1193(2)(c)(3), DMV must provide the motorist with notice of its intent to permanently revoke the person's driver's license, and the opportunity for a factfinding hearing. See Matter of Leader v. Adduci, 144 Misc. 2d 497, 544 N.Y.S.2d 414 (Westchester Co. Sup. Ct. 1989).

With regard to the "physical injury" requirement, the injury can be to anyone, including the person charged with DWI. See Matter of Quealy v. Passidomo, 124 A.D.2d 955, 508 N.Y.S.2d 706 (3d Dep't 1986). See also Hauptman, 158 A.D.2d at ___, 551 N.Y.S.2d at 574; Leader, 144 Misc. 2d at ___, 544 N.Y.S.2d at 417. In this regard, the Quealy Court held that "[t]he fact that petitioner fortuitously did not cause injury to anyone other than himself does not mitigate the fact that he has, on more than one occasion, been involved in an alcohol-related accident of such a magnitude that personal injury resulted." 124 A.D.2d at ___, 508 N.Y.S.2d at 708.

In the past, virtually any personal injury, including minor cuts or bruises, could serve as the requisite "personal injury." See, e.g., Matter of Johnston v. Adduci, 177 A.D.2d 773, 576 N.Y.S.2d 60 (3d Dep't 1991). The statute was amended in 1994, however, to require the injury to be "physical injury" as defined in PL § 10.00. Penal Law § 10.00(9) defines physical injury as "impairment of physical condition or substantial pain." See generally § 12:4, *supra*.

In Matter of Rosato v. New York State Dep't of Motor Vehicles, 7 A.D.3d 718, ___, 777 N.Y.S.2d 186, 187 (2d Dep't 2004), the Appellate Division, Second Department, held that:

The appellant's contention that the respondent New York State Department of Motor Vehicles (hereinafter the DMV) should have used the definition of "serious physical injury" under Penal Law § 10.00(10), instead

of the lesser standard of "physical injury" contained in Penal Law § 10.00(9), in deciding whether to reissue his driver's license after a prior revocation is without merit. Vehicle and Traffic Law § 1193(2)(c)(3) requires the DMV to use the definition of "physical injury" contained in Penal Law § 10.00. When a statute contains a clear mandate, its plain language must be followed.

§ 46:29A Accidents involving death or serious physical injury

15 NYCRR § 136.4(c) provides that:

An application for a driver's license may be denied if the applicant has been convicted of a violation of section 125.10, 125.12, 125.13, 125.14, 125.15, 125.20, 125.22, 125.25, 125.26 or 125.27 of the Penal Law arising out of the operation of a motor vehicle, or if the applicant has been convicted of a violation of [VTL § 1192] where death or serious physical injury, as defined in section 10.00 of the Penal Law, has resulted from such offense.

§ 46:30 "Permanent" driver's license revocation

VTL § 1193(2)(b)(12) requires "permanent" driver's license revocation for certain repeat offenders. In many cases, however, "permanent" does not actually mean *permanent*. Cf. § 46:29, *supra* (a "lifetime" driver's license revocation imposed pursuant to VTL § 1193(2)(c)(3) is truly permanent). Prior to the September 25, 2012 amendments to 15 NYCRR §§ 136.5 and 136.10, *see* Chapter 55, *infra*, "permanent" revocation generally meant either 5 years or 8 years (depending on the person's prior record). It currently means at least 10 years or 13 years (followed by 5 more years on a restricted license with an ignition interlock device requirement), and possibly *permanent*. The various subdivisions of VTL § 1193(2)(b)(12) are set forth in the sections that follow.

§ 46:31 10-year "permanent" revocation

VTL § 1193(2)(b)(12)(a) provides as follows:

(12) Permanent revocation. (a) Notwithstanding any other provision of this chapter to the contrary, whenever a revocation is imposed upon a person for the refusal to submit to a chemical test pursuant to the provisions of [VTL § 1194] or

conviction for any violation of [VTL § 1192] for which a sentence of imprisonment may be imposed, and such person has:

(i) within the previous [4] years been twice convicted of any provisions of [VTL § 1192] or a violation of the penal law for which a violation of [VTL § 1192] is an essential element and at least [1] such conviction was for a crime, or has twice been found to have refused to submit to a chemical test pursuant to [VTL § 1194], or has any combination of [2] such convictions and findings of refusal not arising out of the same incident; or

(ii) within the previous [8] years been convicted [3] times of any provision of [VTL § 1192] for which a sentence of imprisonment may be imposed or a violation of the penal law for which a violation of [VTL § 1192] is an essential element and at least [2] such convictions were for crimes, or has been found, on [3] separate occasions, to have refused to submit to a chemical test pursuant to [VTL § 1194], or has any combination of such convictions and findings of refusal not arising out of the same incident,

such revocation shall be permanent.

Although VTL § 1193(2)(b)(12)(a) provides that a revocation pursuant thereto is "permanent," VTL § 1193(2)(b)(12)(b) provides that:

(b) The permanent driver's license revocation required by [VTL § 1193(2)(b)(12)(a)] *shall be waived* by the commissioner after a period of [5] years has expired since the imposition of such permanent revocation, provided that during such [5]-year period such person has not been found to have refused a chemical test pursuant to [VTL § 1194] while operating a motor vehicle and has not been convicted of a violation of any subdivision of [VTL § 1192] or [VTL § 511] or a violation of the

penal law for which a violation of any subdivision of [VTL § 1192] is an essential element and either:

(i) that such person provides acceptable documentation to the commissioner that such person has voluntarily enrolled in and successfully completed an appropriate rehabilitation program; or

(ii) that such person is granted a certificate of relief from disabilities as provided for in [Correction Law § 701] by the court in which such person was last sentenced.

Provided, however, that the commissioner may, on a case by case basis, refuse to restore a license which otherwise would be restored pursuant to this item, in the interest of the public safety and welfare.

(Emphasis added).

Despite the seemingly mandatory 5-year waiver requirement in VTL § 1193(2)(b)(12)(b), DMV regulation 15 NYCRR § 136.10(b) provides that after 5 years DMV will either:

- (a) impose a non-waivable permanent lifetime license revocation (if the person also has 1 or more "serious driving offenses" within the past 25 years). See 15 NYCRR § 136.5(b)(2); Chapter 55, *infra*; or
- (b) impose an *additional* 5-year "waiting period" (with no driving privileges), plus *another 5 years* with restricted driving privileges and a mandatory IID requirement for the entire time. See 15 NYCRR § 136.5(b)(3).

In addition, although VTL § 1193(2)(b)(12)(b) provides that a 5-year "permanent" license revocation generally must be waived as long as the person:

- (1) has *either* completed treatment or obtained a certificate of relief from disabilities (or a certificate of good conduct); *and*
- (2) has not been found guilty of violating VTL § 511, VTL § 1192, VTL § 1194 or a VTL § 1192-related Penal Law offense during the revocation period;

15 NYCRR § 136.10(b) provides that the revocation will only be waived:

- (a) after *another 5 years; and*
- (b) only if the person:
 - (1) has completed treatment; *and*
 - (2) has obtained a certificate of relief from disabilities (or a certificate of good conduct); *and*
 - (3) isn't denied relicensure pursuant to 15 NYCRR § 136.4 or 15 NYCRR § 136.5; *and*
 - (4) hasn't been found guilty of violating VTL § 511, VTL § 1192, VTL § 1194 or a VTL § 1192-related Penal Law offense during the revocation period; *and*
 - (5) hasn't driven during the revocation period -- as indicated by accidents, convictions or pending tickets.

In the event that these additional requirements are met and *10 years* has elapsed, DMV will then impose *an additional 5 years* with restricted driving privileges *and* a mandatory IID requirement for the entire time. See 15 NYCRR § 136.5(b)(3). Critically, however, if the person had a "serious driving offense" within 25 years of the offense that led to "permanent" revocation under VTL § 1193(2)(b)(12), the person's driver's license *will* never be restored. See 15 NYCRR § 136.5(b)(2). See also Chapter 55, *infra*.

§ 46:32 Conditional license during period of "permanent" revocation

VTL § 1193(2)(b)(12)(c) provides that:

(c) For revocations imposed pursuant to [VTL § 1193(2)(b)(12)(a)], the commissioner may adopt rules to permit conditional or restricted operation of a motor vehicle by any such person after a mandatory revocation period of not less than [3] years subject to such criteria, terms and conditions as established by the commissioner.

Pursuant to DMV regulation 15 NYCRR § 134.7(a)(11)(i), however, a person who has 3 DWI-related convictions/incidents within the past 25 years is ineligible for a conditional license. In other words, no one will ever be issued a conditional license pursuant to VTL § 1193(2)(b)(12)(c).

§ 46:33 13-year "permanent" revocation

VTL § 1193(2)(b)(12)(d) provides that upon:

(i) a finding of refusal after having been convicted [3] times within [4] years of a violation of any subdivision of [VTL § 1192] or of the penal law for which a violation of any subdivision of [VTL § 1192] is an essential element or any combination of [3] such convictions not arising out of the same incident within [4] years or

(ii) a fourth conviction of any subdivision of [VTL § 1192] after having been convicted of any such subdivision of [VTL § 1192] or of the penal law for which a violation of any of such subdivisions of [VTL § 1192] is an essential element or any combination of [3] such convictions not arising out of the same incident within [4] years or

(iii) a finding of refusal after having been convicted [4] times within [8] years of a violation of any subdivision of [VTL § 1192] or of the penal law for which a violation of any of such subdivisions of [VTL § 1192] is an essential element or any combination of [4] such convictions not arising out of the same incident within [8] years or

(iv) a fifth conviction of any subdivision of [VTL § 1192] after having been convicted of such subdivision or of the penal law for which a violation of any of such subdivisions of [VTL § 1192] is an essential element or any combination of [4] such convictions not arising out of the same incident within [8] years,

such revocation shall be permanent.

Although VTL § 1193(2)(b)(12)(d) provides that a revocation pursuant thereto is "permanent," VTL § 1193(2)(b)(12)(e) provides that DMV can waive such permanency after 8 years, under the following circumstances:

(e) The permanent driver's license revocation required by [VTL § 1193(2)(b)(12)(d)] may be waived by the commissioner after a period of [8] years has expired since the imposition of such permanent revocation provided:

(i) that during such [8]-year period such person has not been found to have refused a chemical test pursuant to [VTL § 1194] while operating a motor vehicle and has not been convicted of a violation of any subdivision of [VTL § 1192] or [VTL § 511] or a violation of the penal law for which a violation of any such subdivision[] of [VTL § 1192] is an essential element; and

(ii) that such person provides acceptable documentation to the commissioner that such person has voluntarily enrolled in and successfully completed an appropriate rehabilitation program; and

(iii) after such documentation is accepted, that such person is granted a certificate of relief from disabilities as provided for in [Correction Law § 701] by the court in which such person was last sentenced.

Notwithstanding the provisions of this clause, nothing contained in this clause shall be deemed to require the commissioner to restore a license to an applicant who otherwise has complied with the requirements of this item, in the interest of the public safety and welfare.

However, pursuant to DMV regulation 15 NYCRR § 136.10(b), DMV will *never* grant a waiver after 8 years. Rather, 15 NYCRR § 136.10(b) provides that the revocation will only be waived:

(a) *after another 5 years; and*

(b) *only if the person:*

(1) *has completed treatment; and*

- (2) has obtained a certificate of relief from disabilities (or a certificate of good conduct);
and
- (3) isn't denied relicensure pursuant to 15 NYCRR § 136.4 or 15 NYCRR § 136.5; *and*
- (4) hasn't been found guilty of violating VTL § 511, VTL § 1192, VTL § 1194 or a VTL § 1192-related Penal Law offense during the revocation period;
and
- (5) hasn't driven during the revocation period -- as indicated by accidents, convictions or pending tickets.

In the event that these additional requirements are met and 13 years has elapsed, DMV will then impose *an additional 5 years* with restricted driving privileges *and* a mandatory IID requirement for the entire time. See 15 NYCRR § 136.5(b)(3). Critically, however, if the person had a "serious driving offense" within 25 years of the offense that led to "permanent" revocation under VTL § 1193(2)(b)(12), the person's driver's license *will* never be restored. See 15 NYCRR § 136.5(b)(2). See also Chapter 55, *infra*.

A person who is permanently revoked pursuant to VTL § 1193(2)(b)(12)(d) is not eligible for any type of conditional or restricted driving privileges during the revocation period. See 15 NYCRR § 134.7(a)(11)(i).

§ 46:34 VTL § 1193(2)(b)(12) will not reduce other mandatory revocation

VTL § 1193(2)(b)(12)(f) provides that "[n]othing contained in [VTL § 1193(2)(b)(12)] shall be deemed to reduce a license revocation period imposed pursuant to any other provision of law." Thus, for example, a lifetime driver's license revocation imposed pursuant to VTL § 1193(2)(c)(3), see § 46:29, *supra*, will not be reduced by either VTL § 1193(2)(b)(12)(b) or VTL § 1193(2)(b)(12)(e). See generally Matter of Acevedo v. New York State Dep't of Motor Vehicles, 29 N.Y.3d 202, ___ N.Y.S.3d ___ (2017).

§ 46:35 Court cannot impose "scarlet letter" penalty

In People v. Letterlough, the sentencing Court imposed a condition of probation that, if the defendant regained his driving privileges, he would have to affix a fluorescent sign stating "CONVICTED DWI" to the license plates of any vehicle that he operated. The Court of Appeals reversed, holding that "the

condition is not reasonably related to defendant's rehabilitation, and, more generally, because, in the absence of more specific legislation, such a condition is outside the authority of the court to impose." 86 N.Y.2d 259, 261, 631 N.Y.S.2d 105, 106 (1995). In addition, the Court noted that "[t]he distraction occasioned by special judicially ordered 'scarlet letter' plates and the reactions of other motorists upon seeing them also poses a potential safety threat." *Id.* at 268, 631 N.Y.S.2d at 110. See also *Bursac v. Suozzi*, 22 Misc. 3d 328, 868 N.Y.S.2d 470 (Nassau Co. Sup. Ct. 2008) (Court granted DWI defendant's petition seeking a permanent injunction enjoining and restraining County Executive from posting petitioner's name, picture and identifying information on "Wall of Shame" Internet website and directing the removal of same).

Similarly, a condition of probation that the defendant must attend A.A. meetings, which are religious in nature, without offering a choice of other alcohol treatment providers, has been held to violate the Establishment Clause of the First Amendment. See *Warner v. Orange County Dep't of Probation*, 115 F.3d 1068 (2d Cir. 1997).

§ 46:36 Sentencing policies

In general, it is improper for a Court to establish sentencing policies with regard to particular categories of defendants. For example, "a policy of incarcerating those who refuse to take a breathalyzer test and are thereafter convicted of driving while impaired . . . is arbitrary, capricious and unauthorized by statute." *People v. McSpirit*, 154 Misc. 2d 784, ___, 595 N.Y.S.2d 660, 661 (App. Term, 9th & 10th Jud. Dist. 1993). Such a policy "ignores . . . other criteria warranting an impartial and judicious evaluation, e.g., 'the crime charged, the particular circumstances of the individual before the court, and the purpose of a penal sanction, i.e., societal protection, rehabilitation and deterrence.'" *Id.* at ___, 595 N.Y.S.2d at 661 (citation omitted). See also *People v. Nicholson*, 237 A.D.2d 973, 654 N.Y.S.2d 906 (4th Dep't 1997).

In *People v. Wilson*, 245 A.D.2d 161, 666 N.Y.S.2d 164 (1st Dep't 1997), the defendant pled guilty to various charges after the Court made the following statement:

It's my policy that should a defendant who is a predicate felon on a drug case go to trial and if that defendant is found guilty by the jury, that it is my policy to sentence the defendant to the high end of the sentencing chart which would be [12½] to [25].

That has been, and barring any unforeseen circumstances, will be my policy, subject, of course, to mitigating circumstances that might develop during the trial or in the probation report. And I think it's important that the defendant be aware of that policy. I'm not making the statement to suggest that a defendant not go to trial and exercise his or her constitutional rights. I'm just talking about sentencing guidelines.

Id. at ___, 666 N.Y.S.2d at 165. On appeal, the Appellate Division, First Department, held that:

The inescapable effect of the court's statement, under the circumstances in which the plea was taken, was to coerce defendant into pleading guilty, and we find therefore, that the plea was not a voluntary one. * * *

In the instant case, the court did not "threaten" to impose a greater sentence -- it virtually promised to do so, according to its stated "policy" in such cases. Accordingly, defendant's motion to withdraw his plea should have been granted.

Id. at ___, 666 N.Y.S.2d at 166. See also People v. Flinn, 60 A.D.3d 1304, 875 N.Y.S.2d 364 (4th Dep't 2009).

Similarly, a guilty plea will be vacated where the Court incorrectly advises the defendant of the maximum sentence that he or she faces if found guilty after trial. See People v. Min, 249 A.D.2d 130, 671 N.Y.S.2d 480 (1st Dep't 1998); People v. Hurd, 220 A.D.2d 454, 631 N.Y.S.2d 871 (2d Dep't 1995).

By contrast, it is not coercive for a Court to accurately inform the defendant of the possible sentences available. See People v. Tien, 228 A.D.2d 280, 643 N.Y.S.2d 345 (1st Dep't 1996); People v. Crafton, 159 A.D.2d 271, 552 N.Y.S.2d 273 (1st Dep't 1990).

§ 46:37 Consecutive sentences

Penal Law § 70.25(2) provides that:

When more than one sentence of imprisonment is imposed on a person for two or more offenses committed through a single act or omission, or through an act or omission which

in itself constituted one of the offenses and also was a material element of the other, the sentences . . . must run concurrently.

In People v. Catone, 65 N.Y.2d 1003, 494 N.Y.S.2d 97 (1985), the defendant drove into and killed a teenage girl as she was crossing the road. After briefly reducing his speed, the defendant sped off. The defendant was subsequently convicted of Manslaughter in the Second Degree and felony Leaving the Scene of an Accident, and sentenced to consecutive terms of imprisonment. On appeal, the Court of Appeals found that "[t]he relevant law and facts of this case demonstrate that the offense of manslaughter in the second degree was a material element of the offense of felony leaving the scene without reporting." Id. at 1005, 494 N.Y.S.2d at 98. Accordingly, the Court modified defendant's sentences to run concurrently.

However, the Court noted that "it appears anomalous that the crime of leaving the scene of an accident should be essentially unpunished under these circumstances," and invited the Legislature to "reexamine" the language of VTL § 600. Id. at 1005, 494 N.Y.S.2d at 98. In 1986, the Legislature followed this suggestion and amended VTL § 600 to permit consecutive sentences for similar crimes in the future. See, e.g., People v. Chambers, 257 A.D.2d 418, 683 N.Y.S.2d 238 (1st Dep't 1999); People v. Isaac, 224 A.D.2d 993, ___, 637 N.Y.S.2d 827, 829 (4th Dep't 1996); People v. Levy, 157 Misc. 2d 941, 599 N.Y.S.2d 898 (Kings Co. Sup. Ct. 1993).

In People v. Backus, 56 A.D.3d 1119, ___, 867 N.Y.S.2d 290, 291 (4th Dep't 2008), rev'd on other grounds, 14 N.Y.3d 876, 903 N.Y.S.2d 333 (2010), the Appellate Division, Fourth Department, held that "[a]s defendant correctly contends, the offense of driving while intoxicated is a material element of the offense of vehicular assault in the second degree and thus the sentence is illegal insofar as County Court imposed consecutive sentences."

In People v. Clemens, 177 A.D.2d 1053, ___, 578 N.Y.S.2d 296, 296 (4th Dep't 1991), the Appellate Division, Fourth Department, held that "[t]he trial court erred in ordering that the sentence imposed on defendant's conviction for driving while intoxicated be served consecutively to the sentence of aggravated unlicensed operation of a motor vehicle in the first degree," (citation omitted), and modified defendant's sentences to run concurrently. See also People v. Stewart, 148 A.D.3d 1060, 48 N.Y.S.3d 619 (2d Dep't 2017) (same); People v. Milo, 235 A.D.2d 552, 654 N.Y.S.2d 146 (2d Dep't 1997) (same); People v. Magistro, 156 A.D.2d 1029, 550 N.Y.S.2d 875 (4th Dep't 1989) (same).

In People v. Richburg, 287 A.D.2d 790, ___, 731 N.Y.S.2d 256, 258 (3d Dep't 2001), the Appellate Division, Third Department, stated that sentences imposed for felony DWI and AUO

1st could run consecutively without running afoul of PL § 70.25(2). Critically, however, in People v. DeMaio, 304 A.D.2d 988, ___, 760 N.Y.S.2d 558, 559 (3d Dep't 2003), the Court clarified its position in Richburg:

Although there are numerous factual circumstances that can comprise both the crimes of first degree aggravated unlicensed operation (see Vehicle and Traffic Law § 511[3][a][i], [ii]) and felony driving while intoxicated (see Vehicle and Traffic Law § 1193[1][c][i], [ii]), *it is apparent that driving while intoxicated can constitute a material element of first degree aggravated unlicensed operation.* It was thus incumbent upon the People to show either that defendant's felony driving while intoxicated was not, in fact, a material element of his first degree aggravated unlicensed operation (see e.g. Vehicle and Traffic Law § 511[3][a][ii] [authorizing such charge based upon nonalcohol-related elements]) or that the two offenses were based upon separate and distinct acts. Here, the indictment alleges defendant's driving while under the influence as an element of the charge of first degree aggravated unlicensed operation. Both the offenses to which defendant eventually pleaded guilty are alleged in the indictment to have occurred on the same date, place and time. The plea allocution confirms such facts and, indeed, further reveals that the same prior offenses provided the basis for both the previous revocation of defendant's license and the elevation of the driving while intoxicated to felony status. It is thus clear that defendant's felony driving while intoxicated charge was a material element of his first degree aggravated unlicensed operation and the People failed to show that the two offenses arose from separate and distinct acts.

The People's reliance upon People v. Richburg, with no concomitant case-specific factual analysis, is misplaced. Richburg *should not be construed as holding that felony driving while intoxicated and first degree aggravated unlicensed operation cannot fall within the parameters of Penal Law § 70.25(2).* To the contrary, since felony driving while intoxicated can constitute a

material element of first degree aggravated unlicensed operation, the People bear the burden when advocating consecutive sentences of showing identifiable separate acts sustaining such sentences. The People failed to make such a showing in this case and, therefore, the sentences must be modified to run concurrently.

(Emphases added) (citation and footnote omitted). See also People v. Khan, 291 A.D.2d 898, 737 N.Y.S.2d 738 (4th Dep't 2002) (PL § 70.25(2) requires concurrent sentences where defendant convicted of AUO 1st and DWAI); People v. Fleenor, 162 A.D.2d 832, 557 N.Y.S.2d 735 (3d Dep't 1990) (concurrent sentences required where defendant convicted of criminally negligent homicide and DWAI); People v. Coleman, 138 A.D.2d 963, 526 N.Y.S.2d 296 (4th Dep't 1988) (concurrent sentences required where defendant convicted of criminally negligent homicide and DWI).

Shortly after DeMaio was decided, the Third Department upheld consecutive sentences in a felony DWAI Drugs/AUO 1st case *where the defendant's only challenge to such sentence was that it was harsh and excessive*. See People v. Clark, 309 A.D.2d 1076, 766 N.Y.S.2d 710 (3d Dep't 2003). Thus, it is absolutely critical that defense counsel in a felony DWI/AUO 1st case expressly object to consecutive sentences on the specific ground that such sentences violate PL § 70.25(2).

In this regard, where the issue was preserved, the Third Department invalidated consecutive sentences imposed upon the defendant for a VOP involving charges of misdemeanor DWI and AUO 2nd. See People v. Borush, 39 A.D.3d 890, 834 N.Y.S.2d 340 (3d Dep't 2007). In so holding, the Court stated that "[b]ecause the act of driving a motor vehicle while intoxicated and while suspended was a single act, concurrent sentences should have been imposed." Id. at ___, 834 N.Y.S.2d 341. Cf. People v. Skarczewski, 287 N.Y. 826 (1942) (per curiam).

In People v. Goldstein, 12 N.Y.3d 295, 300, 879 N.Y.S.2d 814, 817 (2009), the Court of Appeals stated that "it is clear . . . that the conduct underlying the count alleging aggravated unlicensed operation of a motor vehicle was distinct from that involved in the ensuing reckless endangerment offenses and thus permitted a consecutive sentence."

In People v. Crane, 129 A.D.3d 741, ___, 8 N.Y.S.3d 924, ___ (2d Dep't 2015), the Appellate Division, Second Department, held that:

Contrary to the defendant's contention, the imposition of a consecutive term of imprisonment for his conviction of unauthorized use of a vehicle in the first degree (Penal Law § 165.08) was not illegal. Although the defendant's conviction of unauthorized use of a vehicle in the first degree, and his convictions of aggravated [DWI] and two counts of [DWI] arose out of a single, extended transaction, the plea colloquy establishes that the convictions of the unauthorized use of a vehicle offense and the above-mentioned [DWI] offenses arose out of separate acts.

(Citations omitted).

§ 46:38 Where fine not part of plea bargain, it may not be imposed without offer to withdraw plea

In People v. Youngs, 156 A.D.2d 885, 550 N.Y.S.2d 106 (3d Dep't 1989), defendant was charged with two counts of felony DWI. At the time, VTL § 1192(5) provided for a mandatory fine. Pursuant to a plea agreement, defendant was to be sentenced to 1 to 3 years imprisonment with no fines. However, the sentencing Court imposed the prison sentence, together with the then-mandatory fine.

On appeal, the Appellate Division, Third Department, held (a) that the defendant was entitled to specific performance of his plea bargain, and (b) that County Court should have informed defendant that the plea bargain could not be kept, and afforded defendant an opportunity to withdraw his plea. Id. at ___, 550 N.Y.S.2d at 107. See also People v. Sirabella, 148 A.D.3d 1186, ___, 50 N.Y.S.3d 511, 512-13 (2d Dep't 2017); People v. Rockwell, 137 A.D.3d 1586, ___, 27 N.Y.S.3d 754, 756 (4th Dep't 2016); People v. Legette, 131 A.D.3d 546, ___, 14 N.Y.S.3d 697, 698 (2d Dep't 2015); People v. Barber, 31 A.D.3d 1145, ___, 818 N.Y.S.2d 391, 392 (4th Dep't 2006); People v. Cote, 265 A.D.2d 681, 697 N.Y.S.2d 184 (3d Dep't 1999) (fine imposed at sentencing vacated where it was not part of plea bargain or plea allocution); People v. Fulton, 238 A.D.2d 439, 657 N.Y.S.2d 348 (2d Dep't 1997).

The same rule applies to restitution. See, e.g., People v. Sirico, 135 A.D.3d 19, ___, 18 N.Y.S.3d 430, 436-37 (2d Dep't 2015); Legette, *supra*.

§ 46:39 Court must advise defendant of direct consequences of plea

Prior to accepting a guilty plea from a defendant, the Court is required to advise the defendant of "direct" consequences of the plea -- but is *not* required to advise the defendant of

"collateral" consequences thereof. See, e.g., People v. Cornell, 16 N.Y.3d 801, 921 N.Y.S.2d 641 (2011); People v. Harnett, 16 N.Y.3d 200, 205, 920 N.Y.S.2d 246, 248 (2011); People v. Gravino, 14 N.Y.3d 546, 553, 902 N.Y.S.2d 851, 855 (2010); People v. Catu, 4 N.Y.3d 242, 244, 792 N.Y.S.2d 887, 888 (2005); People v. Ford, 86 N.Y.2d 397, 403, 633 N.Y.S.2d 270, 272 (1995).

In this regard, a fine is a direct consequence that the defendant must be advised of prior to the entry of a plea. If the defendant is not so advised, then an appellate court will "remit the matter to [the trial court] to impose a sentence that does not include a fine . . . or, in the alternative, afford [the defendant] an opportunity to withdraw his guilty plea" People v. Stewart, 92 A.D.3d 1146, ___, 940 N.Y.S.2d 178, 180 (3d Dep't 2012). See also People v. Jones, 118 A.D.3d 1360, 988 N.Y.S.2d 316 (4th Dep't 2014); People v. Lafferty, 60 A.D.3d 1318, 875 N.Y.S.2d 395 (4th Dep't 2009); People v. McCarthy, 56 A.D.3d 904, 867 N.Y.S.2d 281 (3d Dep't 2008); People v. Barber, 31 A.D.3d 1145, 818 N.Y.S.2d 391 (4th Dep't 2006).

In Harnett, the Court of Appeals summarized the law in this area:

Our cases have drawn a line between the direct and collateral consequences of a plea. The importance of the distinction is that a trial court "*must* advise a defendant of the direct consequences." A court's failure to comply with that obligation "requires reversal" because harmless error analysis is inapposite. * * *

Direct consequences, as we explained in Ford, are those that have "a definite, immediate and largely automatic effect on defendant's punishment." Consequences that are "peculiar to the individual's personal circumstances and . . . not within the control of the court system" have been held to be collateral. The direct consequences of a plea -- those whose omission from a plea colloquy makes the plea per se invalid -- are essentially the core components of a defendant's sentence: a term of probation or imprisonment, a term of post-release supervision, a fine. Our cases have identified no others.

16 N.Y.3d at 205, 920 N.Y.S.2d at 248-49 (citations omitted).

In this regard, the Harnett Court held that "failing to warn a defendant who pleads guilty to a sex offense that he may be subject to the Sex Offender Management and Treatment Act (SOMTA)" is a collateral consequence of the plea. Id. at 206, 920

N.Y.S.2d at 249. See also Gravino, 14 N.Y.3d at 550, 902 N.Y.S.2d at 852 ("We hold that because they are collateral rather than direct consequences of a guilty plea, Sex Offender Registration Act (SORA) registration and the terms and conditions of probation are not subjects that a trial court must address at the plea hearing. Put another way, a trial court's neglect to mention SORA or identify potential stipulations of probation during the plea colloquy does not undermine the knowing, voluntary and intelligent nature of a defendant's guilty plea").

In Catu, the defendant accepted a plea bargain pursuant to which he would be sentenced to a 3-year determinate prison sentence and a \$1,000 fine. The Court of Appeals vacated the plea on the ground that the Court failed to advise the defendant that, as a second felony offender, his sentence would include a mandatory period of 5 years' post-release supervision. 4 N.Y.3d at 244, 792 N.Y.S.2d at 887.

In Ford, the Court of Appeals held that neither Trial Judges nor defense counsel are required to advise a defendant of the possible deportation consequences of his or her plea. 86 N.Y.2d at 401, 633 N.Y.S.2d at 271-72. Critically, while the Ford Court held that defense counsel's failure to advise the defendant of such consequences did not constitute ineffective assistance, id. at 404-05, 633 N.Y.S.2d at 273-74, the U.S. Supreme Court reached the opposite conclusion in Padilla v. Kentucky, 559 U.S. 356, 374, 130 S.Ct. 1473, 1486 (2010):

It is our responsibility under the Constitution to ensure that no criminal defendant -- whether a citizen or not -- is left to the "mercies of incompetent counsel." To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.

(Citation omitted).

Another aspect of Ford has been called into question. Specifically, the Ford Court commented in *dicta* that:

Illustrations of collateral consequences are loss of the right to vote or travel abroad, loss of civil service employment, *loss of a driver's license*, loss of the right to possess firearms or an undesirable discharge from the Armed Services. The failure to warn of such collateral consequences will not

warrant vacating a plea because they are peculiar to the individual and generally result from the actions taken by agencies the court does not control.

86 N.Y.2d at 403, 633 N.Y.S.2d at 272-73 (emphasis added) (citations omitted).

In support of its claim that the loss of a driver's license is a collateral consequence, the Ford Court cited Moore v. Hinton, 513 F.2d 781 (5th Cir. 1975), a federal class action lawsuit challenging the manner in which DWI cases were being handled in Tuscaloosa, Alabama. Critically, however, the Moore Court pointed out that:

Of crucial importance here . . . is the fact that the Alabama Department of Public Safety, not the court, deprives the defendant of his license, acting under authority of 36 Ala.Code § 68. The court merely accepts the defendant's plea, and sentences him to a fine and/or imprisonment. The Department of Public Safety then institutes a separate proceeding for suspension of his license; this suspension is not, therefore, punishment imposed by the court as a result of the guilty plea, but a collateral consequence of the defendant's conviction.

Id. at 782 (emphasis added).

In stark contrast to the situation addressed in Moore, a definite, immediate and mandatory component of every DWI-related sentence in New York is that *the Court* is required to suspend or revoke the defendant's driver's license. See VTL § 1193(2)(d)(1). In this regard, in People v. Castellini, 24 Misc.3d 66, ___, 884 N.Y.S.2d 550, 551 (App. Term, 1st Dep't 2009), the Appellate Term vacated the defendant's guilty plea to DWAI where the trial court misinformed the defendant with regard to the length of the mandatory driver's license revocation she would receive, reasoning as follows:

In order for a guilty plea to be entered knowingly, intelligently and voluntarily, a defendant must be advised of the direct consequences of the plea. Although there is no mandatory catechism, a minimum requirement for a valid plea is that the defendant understands the direct penal consequences. Here, the plea minutes show that the court misinformed defendant of the nature and duration of the requisite driver's license sanction, erroneously stating that the

sentence would include a 90-day license suspension, when in fact the mandatory sanction was a one-year license revocation. While in some jurisdictions the loss of a driver's license "result[s] from the actions taken by agencies the court does not control," and thus is considered a collateral consequence (People v. Ford, 86 N.Y.2d at 403, 633 N.Y.S.2d 270, 657 N.E.2d 265, citing Moore v. Hinton, 513 F.2d 781 [5th Cir.1975]), the license sanction here involved constituted punishment directly imposed by the court as a result of defendant's guilty plea (see Vehicle and Traffic Law § 1193[2][a], [b]), and was thus a direct consequence of the plea. The court's error is not subject to harmless error analysis, and renders the plea invalid.

(Citations omitted). Cf. People v. Trathen, 121 A.D.3d 1594, 993 N.Y.S.2d 426 (4th Dep't 2014).

In People v. Lancaster, 260 A.D.2d 660, ___, 688 N.Y.S.2d 711, 712 (3d Dep't 1999), the Appellate Division, Third Department, held that a Court sentencing a defendant for DWI is not required to advise him or her "that a subsequent conviction of the crime of driving while intoxicated would constitute a felony[, as] [i]t is abundantly clear that the fact that a defendant is subject to enhanced criminal treatment for an offense that he or she may commit in the future is a collateral consequence of the plea, about which a defendant need not be advised." In this regard, "[a] second D.W.I. conviction leading to felony sanctions can be avoided simply by not drinking and driving." People v. Butler, 96 A.D.2d 140, ___, 468 N.Y.S.2d 274, 277 (4th Dep't 1983).

In People v. Smith, 136 A.D.3d 1107, ___, 25 N.Y.S.3d 395, 396 (3d Dep't 2016), the Appellate Division, Third Department, held that the length of time that the defendant would be required to remain in "alcohol or substance abuse treatment" as part of a judicial diversion program was a collateral consequence of the defendant's plea.

In People v. Garcia-Collado, 151 A.D.3d 982, ___, 54 N.Y.S.3d 322, ___ (2d Dep't 2017), the Appellate Division, Second Department, held that "[t]he defendant . . . did not object to the added component of the sentence when the sentence was imposed, and thus, his claim is not preserved for appellate review."

§ 46:40 Prosecutor must honor promise with respect to sentencing recommendation made during plea negotiations

In People v. Oakes, 252 A.D.2d 663, 675 N.Y.S.2d 407 (3d Dep't 1998), the defendant pled guilty to felony DWI. As part of the plea, the District Attorney agreed to recommend that County Court follow the sentencing recommendation of the pre-sentence investigation report. Nonetheless, at defendant's sentencing the District Attorney made a recommendation of a State prison sentence, and County Court imposed the maximum sentence allowable by law.

On appeal, the Appellate Division, Third Department, vacated the sentence and remitted the matter for re-sentencing before a different Judge. In so holding, the Court reasoned that the District Attorney's comments at defendant's sentencing "violate the clear mandate of the U.S. Supreme Court in Santobello v. New York (404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427) that a prosecutor must honor a promise with respect to a sentencing recommendation made during plea negotiations. 'Such a promise is breached not only by the recommendation of a specific sentence but also by the implicit conveyance of the People's position as to the appropriate punishment.'" Id. at ___, 675 N.Y.S.2d at 408-09 (citation omitted). Notably, the Court commented that this was the third time that it had confronted this precise issue involving the same Court and District Attorney. Id. at ___, 675 N.Y.S.2d at 408.

§ 46:41 Appellate Division limits trial court's ability to enhance negotiated sentence based on defendant's conduct between plea and sentencing

In People v. Parker, 271 A.D.2d 63, ___, 711 N.Y.S.2d 656, 658 (4th Dep't 2000) (per curiam), four defendants appealed:

[F]rom judgments of conviction entered upon their negotiated guilty pleas. The plea agreement in each case included a sentencing promise from County Court, conditioned upon the defendant's cooperating with the Probation Department in the preparation of a presentence investigation report and being truthful with the court and the Probation Department. On appeal, defendants challenge the enhancement of their sentences based upon their violation of one or more of those conditions. We conclude in all four cases that the violation of those conditions does not warrant the additional punishment imposed by the court.

In so holding, the Court reasoned as follows:

Our analysis is guided by an understanding that plea bargaining plays a vital role in the criminal justice system, and that "an integral part of the plea bargaining process is the negotiated sentence." To say that plea bargaining relieves court congestion and conserves prosecutorial, judicial and penal resources is to understate its significance. Plea bargaining does not merely aid in the administration of criminal justice; it "literally staves off collapse of the law enforcement system." * * *

Sentencing conditions that are typically imposed and that have been consistently upheld include requirements that the defendant appear for sentencing, complete a drug rehabilitation program and avoid being arrested between the plea and sentencing. Courts have also approved the condition requiring the defendant to meet and cooperate with the Probation Department to enable the preparation of a presentence investigation report. In addition, the Legislature has authorized the imposition of several conditions of probation as presentence conditions (see, CPL 400.10[4]).

The conditions that have been expressly approved by the courts and the Legislature offer a sharp contrast to the conditions imposed upon defendants in these four appeals. A defendant's compliance with conditions requiring no arrests between the plea and sentencing, timely appearance for sentencing, completion of a drug rehabilitation program or attendance at a scheduled Probation Department interview can be objectively determined on the basis of verifiable conduct by the defendant. * * *

The conditions imposed in the four cases before us do not satisfy the requirements of due process because they permit the court to depart from a negotiated sentence based upon its subjective interpretation of a defendant's conduct rather than verifiable factual information. Reasonable minds could reach different conclusions regarding each defendant's compliance with the sentencing conditions imposed by the court. * * *

We conclude, therefore, that the court improperly enhanced defendants' sentences. We further conclude that enforcement of the plea agreement and imposition of the negotiated sentence is the appropriate remedy in each case. * * *

We emphasize that our decision is compelled by the need to safeguard the integrity of the plea bargaining process. Plea bargains are attractive to defendants because of the "reasonable assurance of certainty" provided by the negotiated sentence. "[T]o the extent that the assurance of certainty is diluted the bargaining process becomes less acceptable to defendants, to the detriment of the criminal justice system as a whole." In our view, the sentencing conditions imposed in these four cases dilute the assurance of certainty and transform the plea bargaining process into precisely the type of gamble that a pleading defendant seeks to avoid. We disapprove of the enhancement of these sentences, therefore, not merely to protect the expectations of these defendants but to maintain confidence in the plea bargaining process itself.

Id. at ____-____, 711 N.Y.S.2d at 660-63 (emphasis added) (citations omitted). See also People v. Rushlow, 137 A.D.3d 1482, 28 N.Y.S.3d 476 (3d Dep't 2016); People v. Denegar, 130 A.D.3d 1140, 14 N.Y.S.3d 527 (3d Dep't 2015); People v. Emerson, 42 A.D.3d 751, 840 N.Y.S.2d 635 (3d Dep't 2007); People v. Covell, 276 A.D.2d 824, 714 N.Y.S.2d 370 (3d Dep't 2000). Cf. People v. Hicks, 98 N.Y.2d 185, 746 N.Y.S.2d 441 (2002).

The Parker Court also "reject[ed] the People's contention that the challenges of defendants to the enhancement of their negotiated sentences are encompassed by their waivers of the right to appeal." 271 A.D.2d at ____, 711 N.Y.S.2d at 660.

§ 46:42 Indigent defendants -- Inability to pay fine

In Bearden v. Georgia, 461 U.S. 660, 103 S.Ct. 2064 (1983), the Supreme Court held that:

[I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and

sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment. *Only if alternative measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay.* To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.

Id. at 672-73, 103 S.Ct. at 2072-73 (emphases added).

A defendant who cannot afford to pay a Court-imposed fine can apply to the Court for resentencing. See CPL § 420.10(5). CPL § 420.10(5) was formerly designated CPL § 420.10(4). For an excellent discussion of the application of this statute, see People v. Goddard, 108 Misc. 2d 742, 439 N.Y.S.2d 71 (N.Y. City Crim. Ct. 1981).

In People v. Montero, 124 Misc. 2d 1020, ___, 480 N.Y.S.2d 70, 72 (App. Term, 2d Dep't 1984), the Court held that "inasmuch as subdivision 4 of CPL 420.10 permits the court to consider all available sentencing alternatives and does not mandate imprisonment, the section, as construed within the limits set by Bearden, cannot be deemed unconstitutional." On the other hand, in People v. Ingham, 115 Misc. 2d 64, 453 N.Y.S.2d 325 (Rochester City Ct. 1982), the Court held the mandatory fine excessive and thus unconstitutional as applied to an indigent defendant convicted of DWI in violation of VTL § 1192(3).

A defendant cannot be subjected to a term of incarceration that exceeds the statutory maximum based upon an inability to pay the fine. See Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 2018 (1970). See also People v. Laurino, 205 A.D.2d 556, ___, 613 N.Y.S.2d 206, 207 (2d Dep't 1994); People v. Levine, 167 A.D.2d 484, ___, 562 N.Y.S.2d 155, 156 (2d Dep't 1990); People v. Baker, 130 A.D.2d 582, ___, 515 N.Y.S.2d 297, 298 (2d Dep't 1987). Cf. People v. Alleyne, 214 A.D.2d 575, ___, 625 N.Y.S.2d 77, 78 (2d Dep't 1995). Similarly, a defendant cannot be incarcerated under a "fine only" statute based solely upon an inability to immediately pay the fine in full. See Tate v. Short, 401 U.S. 395, 91 S.Ct. 668 (1971).

Unless the issue of a defendant's indigency is raised in the trial court, an appellate court may find that the issue is unpreserved for appellate review. See, e.g., Baker, 130 A.D.2d at ___, 515 N.Y.S.2d at 298-99; People v. Aloma, 92 A.D.2d 572, ___, 459 N.Y.S.2d 327, 328-29 (2d Dep't 1983); People v. Head, 145 Misc. 2d 984, ___, 554 N.Y.S.2d 751, 752 (App. Term, 9th & 10th Jud. Dist. 1990).

In People v. Pagan, 176 A.D.2d 472, ___, 574 N.Y.S.2d 518, 518 (1st Dep't 1991), the Appellate Division, First Department, held that "[t]he defendant's application for waiver of the mandatory surcharge due to indigency is premature. If, at the conclusion of his imprisonment, the defendant is unable to pay the surcharge, he may at that time move for a waiver thereof." (Citation omitted). See also CPL §§ 420.10(5)(d), 420.35, 420.40; VTL § 1809(5).

By contrast, where "a probationer has willfully refused to pay restitution when he or she can pay, the State is justified in revoking probation and using imprisonment as an appropriate penalty for the offense." People v. Amorosi, 96 N.Y.2d 180, 184, 726 N.Y.S.2d 339, 342 (2001).

§ 46:43 Defendant entitled to copy of pre-sentence investigation report

In light of the confidential nature of the material contained in a pre-sentence investigation report ("PSIR"), many Courts will deny the defendant or defense counsel access to a copy of the PSIR. However, CPL § 390.50(2)(a) expressly states that:

Not less than one court day prior to sentencing, unless such time requirement is waived by the parties, the pre-sentence report or memorandum shall be made available by the court for examination and for copying by the defendant's attorney, the defendant himself, if he has no attorney, and the prosecutor.

Although the Court may, in its discretion, preclude the disclosure of a part or parts of the PSIR, CPL § 390.50(2)(a) mandates that "[i]n all cases where a part or parts of the report . . . are not disclosed, the court shall state for the record that a part or parts of the report . . . have been excepted and the reasons for its action."

§ 46:44 Service of order commences time period to take appeal

In People v. Washington, 86 N.Y.2d 853, 854, 633 N.Y.S.2d 476, 477 (1995), the Court of Appeals held that "service by the prevailing party is necessary under CPL 460.10 in order to commence the time period for the other party to take an appeal." See also People v. Jones, 22 N.Y.3d 53, 56-57, 977 N.Y.S.2d 739, 741 (2013) (same).

§ 46:45 DWI "conviction" complete upon plea or verdict of guilty

A prior VTL § 1192 conviction can, depending upon its timing, be used to enhance the level of a new VTL § 1192 charge (e.g., raise the level of a DWI charge from a misdemeanor to a felony), and/or increase the fine and license revocation imposed. As such, the precise date of a prior conviction can be critical. In this regard, CPL § 1.20(13) defines the term "conviction" as:

[T]he entry of a plea of guilty to, or a verdict of guilty upon, an accusatory instrument other than a felony complaint, or to one or more counts of such instrument.

See also Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711 (1969) ("A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction"); id. at 242, 89 S.Ct. at 1712 ("as we have said, a plea of guilty is more than an admission of conduct; it is a conviction"); People v. Montilla, 10 N.Y.3d 663, 668, 862 N.Y.S.2d 11, 14 (2008) (CPL § 1.20(13) definition of "conviction" applies to Penal Law offenses); People v. Cunningham, 182 Misc. 2d 790, 702 N.Y.S.2d 523 (Dutchess Co. Ct. 1999). See generally Matter of Jones v. Kelly, 9 A.D.2d 395, 194 N.Y.S.2d 585 (4th Dep't 1959) (for purposes of statute requiring revocation of driver's license for 3 speeding and/or misdemeanor convictions within 18 months, "conviction" complete upon plea of guilty).

In Cunningham, the defendant was convicted after a bench trial of misdemeanor DWI. He appealed the conviction, and obtained a stay of the "judgment of conviction" pending appeal. See CPL § 460.50(1). While the appeal was pending, the defendant received another DWI, which the prosecution charged as a felony (using the "stayed" misdemeanor conviction as the predicate). In finding the enhanced charge proper, the Court held that "[a] 'conviction' is complete upon an adjudication of guilt or the entry of a plea of guilty, and cannot be stayed or suspended by operation of CPL 460.50(1)." 182 Misc. 2d at ___, 702 N.Y.S.2d at 525 (citations omitted).

Interestingly, the DWI conviction used as the predicate in Cunningham was subsequently reversed on appeal! See People v. Cunningham, 95 N.Y.2d 909, 717 N.Y.S.2d 68 (2000). See generally

People v. Frieary, 144 A.D.2d 382, ___, 533 N.Y.S.2d 935, 936 (2d Dep't 1988) ("On appeal the defendant contends that the vacatur of his prior [DWI] conviction removes the predicate misdemeanor underpinning on which the instant felony convictions rest. We agree. Since an essential element of these aggravated charges no longer exists, the defendant must be deemed to have pleaded guilty to [2] misdemeanor counts of driving while intoxicated").

§ 46:46 Mandatory jail or community service in certain cases

Effective September 30, 2003, VTL § 1193(1-a) provides for the following additional DWI penalties:

(a) Except as provided for in [VTL § 1193(1-a)(b)], a person who operates a vehicle in violation of [VTL § 1192(2) or (3)] after having been convicted of a violation of [VTL § 1192(2) or (3)] within the preceding [5] years shall, in addition to any other penalties which may be imposed pursuant to [VTL § 1193(1)], be sentenced to a term of imprisonment of [5] days or, as an alternative to such imprisonment, be required to perform [30] days of service for a public or not-for-profit corporation, association, institution or agency as set forth in [PL § 65.10(2)(h)] as a condition of sentencing for such violation. Notwithstanding the provisions of this paragraph, a sentence of a term of imprisonment of [5] days or more pursuant to the provisions of [VTL § 1193(1)] shall be deemed to be in compliance with this subdivision.

(b) A person who operates a vehicle in violation of [VTL § 1192(2) or (3)] after having been convicted on [2] or more occasions of a violation of any of such subdivisions within the preceding [5] years shall, in addition to any other penalties which may be imposed pursuant to [VTL § 1193(1)], be sentenced to a term of imprisonment of [10] days or, as an alternative to such imprisonment, be required to perform [60] days of service for a public or not-for-profit corporation, association, institution or agency as set forth in [PL § 65.10(2)(h)] as a condition of sentencing for such violation. Notwithstanding the provisions of this paragraph, a sentence of a term of imprisonment of [10] days or more

pursuant to the provisions of [VTL § 1193(1)] shall be deemed to be in compliance with this subdivision.

VTL § 1193(1-a)(a), (b). See also §§ 46:6, 46:13 & 46:14, *supra*.

It should be noted that VTL § 1193(1-a) is only applicable to convictions of VTL §§ 1192(2) and (3) (*i.e.*, it does not apply to convictions of VTL §§ 1192(2-a), (4) and/or (4-a)).

§ 46:47 Driver responsibility assessment

Effective November 18, 2004, any person who either (a) is convicted of a violation of any subdivision of VTL § 1192, or (b) is found to have refused to submit to a chemical test in accordance with VTL § 1194, is liable to DMV for payment of a "driver responsibility assessment." VTL § 1199(1). Such driver responsibility assessment applies "[i]n addition to any fines, fees, penalties and surcharges authorized by law." Id.

The amount of the driver responsibility assessment is \$250 a year for 3 years. VTL § 1199(2). In the event that the person is both convicted of a violation of VTL § 1192 *and* found to have refused a chemical test in accordance with VTL § 1194 in connection with the same incident, only one driver responsibility assessment will be imposed. VTL § 1199(1).

When DMV receives evidence of the qualifying conviction/refusal, it will notify the person, by 1st class mail, at the person's address on file with DMV (or at the person's current address provided by the U.S. Postal Service), of:

1. The amount of the driver responsibility assessment;
2. The time and manner of making required payments; and
3. That the failure to make such payments will result in the suspension of the person's driver's license (or privilege of obtaining a driver's license).

VTL § 1199(3).

If the person fails to pay the driver responsibility assessment, DMV will suspend the person's driver's license (or privilege of obtaining a driver's license). VTL § 1199(4). "Such suspension shall remain in effect until any and all outstanding driver responsibility assessments have been paid in full." Id.

The provisions of VTL § 1199 regarding driver responsibility assessments are also applicable to (a) any person convicted of a violation of Navigation Law § 49-a, (b) any person convicted of a violation of PRHPL § 25.24, or (c) any person found to have

refused to submit to a chemical test in accordance with the applicable provisions of either the Navigation Law or the PRHPL (not arising out of the same incident). VTL § 1199(5).

§ 46:48 Jurisdiction over CPL Article 440 motion

Where a person is sentenced to probation, and such probation is transferred to the County in which the person resides, which Court has jurisdiction over a subsequently filed CPL Article 440 motion to vacate? In this regard, the language of CPL § 410.80(2) conflicts with that of CPL §§ 440.10 and 440.20. See People v. Mitchell, 15 N.Y.3d 93, 97-98, 905 N.Y.S.2d 115, 117 (2010). In resolving the conflict, the Mitchell Court held that:

In sum, the amendments to section 410.80(2) were meant to transfer from sentencing courts to receiving courts the full range of powers and duties necessary for the judiciary to carry out its responsibilities to enforce the terms and conditions of probationers, and to deal with relief from forfeitures and disabilities. There is no suggestion in the statute's text or legislative history that the Legislature intended, in addition, to divest sentencing courts of their jurisdiction under article 440 of the Criminal Procedure Law.

Id. at 98-99, 905 N.Y.S.2d at 118.

In other words, jurisdiction to entertain the CPL Article 440 motion rests with the sentencing Court.

§ 46:49 Plea bargain reducing DWI to Reckless Driving is not improper

In People v. Crandall, 39 A.D.3d 1077, 832 N.Y.S.2d 828 (3d Dep't 2007), the defendant was able to negotiate a plea bargain reducing the DWI charges against him to Reckless Driving. He nonetheless appealed, claiming that "his guilty plea was improper because reckless driving is not a lesser included offense of driving while intoxicated." Id. at ___, 832 N.Y.S.2d at 828. In rejecting this claim, the Appellate Division, Third Department, held that:

While defendant is correct in his assertion that the plea entered here does not constitute a lesser included offense as defined by CPL 1.20(37), such error is not jurisdictional in nature. Indeed, conviction of a different offense by plea will only be set aside on jurisdictional grounds if, insofar as is relevant to the instant appeal,

"the offense of conviction is not transactionally related to the offense specified in the accusatory instrument." Such clearly is not the case here. Moreover, Vehicle and Traffic Law § 1192(10)(a) specifically provides for a plea other than to Vehicle and Traffic Law § 1192(2), (3), (4) or (4-a) where, as here, the prosecutor has determined that the charges laid are not warranted and the basis for the proposed disposition has been set forth on the record.

(Citations omitted).

§ 46:50 "Split" sentences

"Authorized by Penal Law § 60.01(2)(d), a 'split sentence' is one consisting of a term of imprisonment, intermittent or definite, combined with a term of probation or conditional discharge." Matter of Pirro v. Angiolillo, 89 N.Y.2d 351, 353, 653 N.Y.S.2d 237, 238 (1996). In this regard, PL § 60.01(2)(d) provides that:

In any case where the court imposes a sentence of imprisonment not in excess of [60] days, for a misdemeanor or not in excess of [6] months for a felony or in the case of a sentence of intermittent imprisonment not in excess of [4] months, it may also impose a sentence of probation or conditional discharge provided that the term of probation or conditional discharge together with the term of imprisonment shall not exceed the term of probation or conditional discharge authorized by [PL Article 65]. The sentence of imprisonment shall be a condition of and run concurrently with the sentence of probation or conditional discharge.

In Angiolillo, the Court of Appeals addressed the issue of "whether a definite sentence that was imposed in conjunction with a term of probation is a condition of or is subsumed within the probationary part of the sentence so that it can be modified, reduced or even eliminated pursuant to the discretionary authority conferred by CPL 410.20," 89 N.Y.2d at 353, 653 N.Y.S.2d at 238, and held that "[h]aving reviewed the statutory language and relevant legislative history, we conclude that the imprisonment part of a split sentence is a penalty that exists separate and apart from the probationary term and that,

accordingly, it may not be altered once its service has begun." Id. at 353, 653 N.Y.S.2d at 238. As a result of Angiolillo, People v. Cohen, 222 A.D.2d 447, 635 N.Y.S.2d 38 (2d Dep't 1995), should no longer be followed.

In People v. Cerilli, 80 N.Y.2d 1016, 592 N.Y.S.2d 660 (1992), the Court of Appeals addressed the issue of whether, in a multi-accusatory instrument case, a sentencing court can bypass the requirements of PL § 60.01(2)(d) by, for example, sentencing the defendant to a year in jail on one accusatory instrument and 5 years' probation on another accusatory instrument in the same case. The Court of Appeals held that such a sentence is impermissible, reasoning as follows:

That there is no single-accusatory-instrument requirement is confirmed by the legislative history:

"The proposed subdivision does not permit use of the sentence of probation where the court imposes a sentence of imprisonment for some other crime * * * The use of the sentence would be improper in [this] situation because its basic purpose is to provide a method of supervising offenders without removing them from the community * * * If the court decides to withhold additional imprisonment * * * it can impose a concurrent sentence, or, where authorized, conditional or absolute discharge."

As the Commission indicated, probation is inappropriate for defendants being imprisoned because the "basic purpose" of probation is to provide supervision without removing offenders from the community. This rationale applies with equal force whether defendant is sentenced for related crimes contained in a single accusatory instrument or unrelated crimes charged in separate instruments. So long as defendant is imprisoned for "some other crime" the Legislature did not authorize probation as a sentencing option.

Id. at 1018, 592 N.Y.S.2d 661-62 (citation and footnote omitted). See also People v. Latzen, 165 A.D.2d 913, ___, 560 N.Y.S.2d 365, 365 (3d Dep't 1990) ("Defendant may not receive at the same sentencing a term of [5] years' probation on one conviction and more than [6] months of incarceration on another conviction").

Where a person is sentenced to incarceration in excess of the limits set forth in PL § 60.01(2)(d), the Appellate Division has found the probationary portion of the sentence to be illegal (precluding punishment for an alleged violation of such probation). See, e.g., People v. Gauthier, 73 A.D.3d 1229, ___, 899 N.Y.S.2d 679, 680 (3d Dep't 2010); People v. Harris, 72 A.D.3d 1492, ___, 899 N.Y.S.2d 519, 521-22 (4th Dep't 2010); People v. McClure, 26 A.D.3d 674, ___, 809 N.Y.S.2d 299, 300-01 (3d Dep't 2006); People v. Antwine, 299 A.D.2d 151, 753 N.Y.S.2d 355 (1st Dep't 2002); People v. Maynard, 295 A.D.2d 805, 743 N.Y.S.2d 912 (3d Dep't 2002); People v. Wemette, 285 A.D.2d 729, 728 N.Y.S.2d 805 (3d Dep't 2001); People v. La Parl, 276 A.D.2d 814, 718 N.Y.S.2d 889 (3d Dep't 2000); People v. Furnia, 223 A.D.2d 887, 636 N.Y.S.2d 488 (3d Dep't 1996); People v. O'Brien, 190 A.D.2d 1097, 594 N.Y.S.2d 672 (4th Dep't 1993); People v. Latzen, 165 A.D.2d 913, 560 N.Y.S.2d 365 (3d Dep't 1990).

In People v. Zephrin, 14 N.Y.3d 296, 899 N.Y.S.2d 739 (2010), the defendant pled guilty to a felony and was sentenced to a split sentence of 6 months in jail and 5 years' probation. Critically, the defendant had served the jail portion of the sentence prior to sentencing. As a result, on the date of his sentencing he was sentenced to time served and 5 years' probation. The defendant violated the terms of his probation. However, while the violation occurred less than 5 years from the date of sentencing, it occurred more than 5 years from the date that the defendant had commenced the jail portion of his sentence.

On appeal, the defendant claimed that the 5 years' probation portion of his sentence should be deemed to have commenced on the date that his jail sentence began (i.e., several months prior to the date of sentencing). In other words, the defendant claimed that the "time served" portion of his sentence was required to include probation as well as jail. The Court of Appeals agreed, reasoning as follows:

Authorized by Penal Law § 60.01(2)(d), a "split sentence" consists of a term of imprisonment combined with a term of probation or conditional discharge. * * *

Penal Law § 65.00(3)(a) authorizes a [5]-year term of probation for most felony offenses. Section 65.00(2), however, recognizes that, where a split sentence is imposed, the limitations set forth in Penal Law § 60.01(2)(d) may trump the time period set forth in section 65.00(3)(a). Specifically, section 65.00(2) states: "When a person is sentenced to a period of probation the court shall, except to the extent authorized by [PL

§ 60.01(2)(d)], impose the period authorized by subdivision [3] of this section and shall specify . . . the conditions to be complied with" (emphasis added). Taken together, the explicit statutory command of Penal Law § 60.01(2)(d) and Penal Law § 65.00 dictates that, where a court imposes a split sentence, the term of imprisonment and term of probation together may not exceed, in most cases, [5] years. In other words, for most felonies, the relevant statutory provisions create a cap of [5] years that the two components of a split sentence together may not exceed.

Thus, in cases where a defendant has been incarcerated pending sentencing and, as a result, receives credit for time served toward the term of imprisonment of a split sentence (see Penal Law § 70.30[3]), that defendant's probationary term is also reduced by the period the defendant was incarcerated prior to sentencing. * * *

Even if Penal Law § 65.15(1) can be read to conflict with the specific directive of Penal Law § 60.01(2)(d), we have held on numerous occasions that a specific statutory provision governs over a more general provision. In this instance, Penal Law § 60.01(2)(d) is not only the more specific statutory command, inasmuch as it was enacted specifically to provide for split sentences, but it is also the later-enacted statute vis-a-vis Penal Law § 65.15(1). We also refuse to read Penal Law § 70.30(3) in isolation to preclude our conclusion. In short, all parts of this sentencing scheme are best harmonized by running the term of probation together with the term of imprisonment, not to exceed [5] years.

Id. at 299-301, 899 N.Y.S.2d at 741-42 (citations omitted). See also People v. Teddy W., 56 A.D.3d 697, 867 N.Y.S.2d 545 (2d Dep't 2008); People v. Dawson, 301 A.D.2d 659, 753 N.Y.S.2d 879 (2d Dep't 2003).

As a result of Zephrein, People v. Ellis, 27 A.D.3d 236, 809 N.Y.S.2d 906 (1st Dep't 2006), and People v. Feliciano, 1 A.D.3d 163, 766 N.Y.S.2d 561 (1st Dep't 2003), should no longer be followed.

Conversely to the situation presented in Zephrin, it is not uncommon for an in-custody defendant to receive an offer of a split sentence after he or she has already served more jail time than could lawfully be imposed as part of such sentence. For example, the defendant could have been in jail for more than 60 days and then receive an offer of 60 days in jail and 3 years' probation. Such a sentence is legal. See, e.g., People v. Conley, 70 A.D.3d 961, ___, 897 N.Y.S.2d 135, 136-37 (2d Dep't 2010); People v. Marinaccio, 297 A.D.2d 754, 747 N.Y.S.2d 555 (2d Dep't 2002). In this regard, the appropriate way to impose such a sentence is to "expressly impose[] a sentence of 60 days' imprisonment, which [i]s satisfied by the 'time served' by the defendant" prior to sentencing. Conley, 70 A.D.3d at ___, 897 N.Y.S.2d at 137. See also Marinaccio, 297 A.D.2d at ___, 747 N.Y.S.2d at 556.

§ 46:51 Sufficiency of guilty plea

In the past, most local criminal courts had no record of the proceedings beyond the documents in the Court's file and the Judge's notes. As a result, although guilty pleas in such courts are often extremely informal in nature, there was no real means by which to challenge the sufficiency thereof (due to the lack of a sufficient record).

However, now that all proceedings in the local criminal courts are electronically recorded, the People and the Courts should be cognizant of the requirements of Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969). In Boykin, the Supreme Court held as follows:

A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment. Admissibility of a confession must be based on a "reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant." The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation. In Carnley v. Cochran, we dealt with a problem of waiver of the right to counsel, a Sixth Amendment right. We held: "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

We think that the same standard must be applied to determining whether a guilty plea is voluntarily made. For, as we have said, a plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality. The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards.

Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Second, is the right to trial by jury. Third, is the right to confront one's accusers. We cannot presume a waiver of these three important federal rights from a silent record.

Id. at 242-43, 89 S.Ct. at 1711-12 (citations and footnote omitted).

In People v. Harris, 61 N.Y.2d 9, 19, 471 N.Y.S.2d 61, 66 (1983), the Court of Appeals applied Boykin as follows:

A survey of the decisions of the Federal Courts of Appeals and the State courts . . . reveals a virtual unanimity of opinion that a detailed articulation and waiver of the three rights mentioned in Boykin is not constitutionally mandated. The clear import of Boykin and its progeny is that the Trial Judge has a vital responsibility "to make sure [that the accused] has full understanding of what the plea connotes and of its consequence," not that a new procedural requirement has been imposed, mandating the Trial Judge's ritualistic recitation of the rights waived upon a guilty plea.

(Citations omitted).

In deciding how rigorous a plea allocution should be, factors to be considered include the defendant's prior criminal experience, "the seriousness of the crime, the competency and experience of counsel, the actual intensive participation by

counsel, the nature of the crime as clearly understood by laymen, the rationality of the 'plea bargain,' and the speed or slowness of procedure in the particular criminal court." People v. Nixon, 21 N.Y.2d 338, 353, 287 N.Y.S.2d 659, 671 (1967). The Nixon Court further pointed out that:

The competency of counsel and the degree of actual participation by counsel, as well as his opportunity for and the fact of consultation with the pleading defendant, are particularly important. Indeed, if independent and good advice in the interest of the defendant is the goal, it is more important that he consult with competent counsel than that a harried, calendar-conscious Judge be the one to perform the function in displacement of the lawyer. Moreover, there are many reasons why a defendant may not wish to be subjected to an inquisition by officials; it may affect him on his prison or parole status; it may be an added pillory for him to experience that he would eschew.

Id. at 354, 287 N.Y.S.2d at 671. By contrast, "[i]n cases involving defendants without lawyers, or those ignorant of the language of the court, particular pains must be taken. . . . In such cases inquiry, well beyond the standards thus far propounded, is indicated." Id. at 355, 287 N.Y.S.2d at 672.

Thus, the required plea allocation in a case where a speeding ticket is reduced to Parked on Pavement would be less than the required allocation in a case where a defendant charged with Aggravated DWI pleads guilty to the charge and is sentenced to 3 years' probation. Similarly, the required plea allocation in a case where the defendant is represented by experienced defense counsel would be less than the required allocation in a case where the defendant pleads guilty without a lawyer.

In People v. Tyrell, 22 N.Y.3d 359, 366, 981 N.Y.S.2d 336, 340 (2013), the Court of Appeals invalidated defendant's guilty pleas in two separate misdemeanor cases on Boykin grounds where:

[T]he records do not affirmatively demonstrate defendant's understanding or waiver of his constitutional rights. In each case, there is a complete absence of discussion of any of the pertinent constitutional rights; none are addressed by the court, defense counsel or defendant. Nor is there any indication that defendant spoke with his attorney regarding the

constitutional consequences of taking a plea -- in fact, these cases were both resolved during arraignment within days of arrest. Put simply, the records in these cases are inadequate to uphold the judgments of conviction and, contrary to the dissent's position, the pleas must be vacated.

On the other hand, the Court noted that:

[C]ontrary to the dissent's assertion, we signal no retreat from the principle that trial courts retain broad discretion in the taking of pleas and need not follow any kind of rigid catechism. We merely apply the well-settled proposition that the record as a whole must contain an affirmative demonstration of the defendant's waiver of his fundamental constitutional rights -- a requirement the dissent neglects to mention. And although the dissent suggests that a defendant must establish prejudice even where the record is completely silent as to his waiver of constitutional rights, Boykin holds directly to the contrary.

Id. at 366, 981 N.Y.S.2d at 341.

Perhaps realizing the Pandora's box that would be opened if routine guilty pleas in non-felony cases were required to truly comply with Boykin, the Court of Appeals relaxed the requirements of a valid guilty plea in the trio of cases at issue in People v. Conceicao, 26 N.Y.3d 375, 23 N.Y.S.3d 124 (2015). In this regard, the Conceicao Court held as follows:

The primary issue in these appeals is whether defendants entered knowing, intelligent and voluntary guilty pleas when the trial courts failed to mention the constitutional rights defendants were waiving -- the right to a trial by jury, the right to confront one's accusers and the privilege against self-incrimination (see Boykin v. Alabama). We hold that the failure to recite the Boykin rights does not automatically invalidate an otherwise voluntary and intelligent plea. Where the record as a whole affirmatively shows that the defendant intentionally relinquished those rights, the plea will be upheld.

26 N.Y.3d at 379, 23 N.Y.S.3d at 126-27 (citation omitted).

One of the cases at issue in Conceicao was People v. Sanchez -- a misdemeanor DWI case. In Sanchez, the Appellate Division, First Department, had held that:

The record fails to demonstrate that defendant was informed of any of the constitutional rights that he was waiving by pleading guilty or that he consulted with counsel about the constitutional consequences of his guilty plea. The only question addressed by the court to defendant was whether he wanted to plead guilty. Defense counsel then waived "further allocution," and the court imposed sentence.

The People's reliance on People v. Perez, where this Court upheld a waiver of "formal allocution" regarding a plea to disorderly conduct resulting in a fine, is misplaced. Unlike disorderly conduct, driving while intoxicated is not a petty offense. Such a conviction is a misdemeanor rather than a traffic infraction, it affects a defendant's driving privileges, and it can be the basis for elevating a subsequent similar charge to a felony. Furthermore, in Perez there was more in the record than here to show consultation with counsel concerning the plea.

People v. Sanchez, 126 A.D.3d 482, ___, 6 N.Y.S.3d 25, 25-26 (1st Dep't 2015) (citations omitted). In reversing the Appellate Division, the Court of Appeals stated:

The record in Sanchez . . . reflects a knowing and voluntary plea. Represented by the same attorney that represented the defendant in Perez, defendant filed numerous pretrial motions and actively litigated the case for six months. Moreover, defendant was aware of his right to a trial, because his case was on for trial the very same day that defendant pleaded guilty. That his attorney announced at the start of the plea proceeding, without the need for any additional discussion with defendant or the prosecutor, that defendant had decided to plead guilty rather than proceed to the scheduled trial further confirms that defendant made the decision to plead guilty after consulting with counsel prior to the start of the proceeding. And as in Perez,

defendant, through his attorney, waived a more detailed allocution that might have entailed discussion of the Boykin rights.

We recognize that a DWI is a serious offense that "affects a defendant's driving privileges" and "can be the basis for elevating a subsequent similar charge to a felony." We are also aware that defendant did not affirmatively state on the record, as did the defendant in Perez, that he had enough time to speak with his attorney about the plea. Though the plea allocution in Sanchez could have been more robust, the record as a whole reveals a knowing and intelligent choice among alternative courses of action.

Conceicao, 26 N.Y.3d at 384, 23 N.Y.S.3d at 130 (citation omitted). Cf. People v. Rivera, 2017 WL 1825495 (App. Term, 9th & 10th Jud. Dist. 2017) (plea of guilty to DWAI with no allocution invalid under the unique circumstances presented); People v. Vargas, 2017 WL 2622513, *1 (App. Term, 1st Dep't 2017) (per curiam) ("As the People concede, defendant's conviction must be vacated since the plea record lacks the requisite 'affirmative showing' that defendant understood and waived her Boykin rights when she pleaded guilty at arraignment") (citations omitted).

§ 46:52 Pleading client guilty to top charge as ineffective assistance of counsel

In light of People v. Rivera, 91 A.D.3d 450, 935 N.Y.S.2d 515 (1st Dep't 2012), defense counsel had better think twice before pleading a first offender guilty to DWI without conducting any type of meaningful investigation. In Rivera, the Appellate Division, First Department, held that:

The record supports the court's conclusion, made after a thorough evidentiary hearing, that defendant did not receive meaningful representation. "In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel."

Defense counsel failed to conduct any investigation, make any motions, or even view the video of defendant's breathalyzer test before negotiating a plea bargain whereby

defendant would plead guilty to the top count of the accusatory instrument. There were lines of defense that were at least worthy of investigation, including matters that could have affected the accuracy of the breathalyzer results. The attorney's testimony established that there were no strategic reasons for these omissions.

The hearing evidence also established that since defendant had no prior record and no accident occurred, it was extremely unlikely that defendant would receive a jail sentence. Accordingly, defendant received little, if any benefit, by pleading guilty to the top count without ever having received even a minimally accurate assessment of the strength of the People's case.

Id. at ___, 935 N.Y.S.2d at 515-16 (citation omitted).

Another decision that found defense counsel to be ineffective in a DWI case is People v. Murray, 40 Misc. 3d 47, 970 N.Y.S.2d 659 (App. Term, 9th & 10th Jud. Dist. 2013). In Murray, "[d]efendant's trial attorney presented no evidence but, rather, argued to the jury that defendant could not be found guilty of the charges because the People could not prove that defendant had operated the motor vehicle within the meaning of the Vehicle and Traffic Law since defendant had no present intent to place the vehicle in motion inasmuch as he was asleep when the police officer found him in the vehicle." Id. at ___, 970 N.Y.S.2d at 661-62. In this regard, the Court found that "the decision by defendant's trial attorney not to present any evidence, especially evidence regarding defendant's lack of intent to place the vehicle into motion by explaining why the engine was otherwise running, was devoid of any strategic purpose." Id. at ___, 970 N.Y.S.2d at 662.

In addition, even though defendant's trial attorney focused the defense on the premise that defendant had not operated the vehicle, he did not object, and/or move for preclusion and a mistrial, when the prosecutor repeatedly referred to defendant as the driver of the vehicle, and elicited the police officer's testimony that defendant had told him that "you didn't catch me driving," and that he "had been drinking throughout Port Jervis," which statements were not included in the CPL 710.30 notice. Defendant's trial attorney also did not attempt to impeach the police officer when he

testified at trial that defendant had not had identification on him, whereas, at a pretrial hearing, the officer had testified that defendant had provided him with his driver's license.

It is clear that no legitimate trial strategy existed for defendant's trial attorney's actions, which, when considered in the aggregate, deprived defendant of meaningful representation.

Id. at ___, 970 N.Y.S.2d at 662. See also People v. Dollinger, 128 A.D.3d 1085, ___, 9 N.Y.S.3d 635, 637 (2d Dep't 2015) ("the defendant's representation at sentencing by the attorney who had represented the People when he pleaded guilty presented a potential conflict of interest. Moreover, the record establishes that the potential conflict actually operated on or affected the defense. Indeed, the defendant's attorney at sentencing, by characterizing the defendant as a repeat offender, showed that she had not departed from her prosecutorial stance. Accordingly, we vacate the sentence imposed, and remit the matter to the County Court, Putnam County, for resentencing") (citation omitted).

§ 46:53 Jail sentence in DWI case found to be improper

Too often, Courts threaten -- either explicitly or implicitly -- to sentence DWI defendants to jail if they go to trial and lose. In this regard, in People v. Rivera, 91 A.D.3d 450, ___, 935 N.Y.S.2d 515, 516 (1st Dep't 2012), the Appellate Division, First Department, stated that "since defendant had no prior record and no accident occurred, it was extremely unlikely that defendant would receive a jail sentence."

In People v. Johnson, 114 A.D.3d 534, ___, 980 N.Y.S.2d 447, 447-48 (1st Dep't 2014), the same Court held as follows:

Judgment, Supreme Court, Bronx County (Patricia Anne Williams, J.), rendered May 16, 2012, convicting defendant, after a jury trial, of driving while intoxicated (two counts) and operating a motor vehicle without a license, and sentencing her to a term of 30 days of intermittent imprisonment to be served on weekends, a conditional discharge for a period of one year and a \$300 fine, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the term of intermittent imprisonment, and otherwise affirmed.

See also People v. Kennedy, 2015 WL 6511855, *2 (App. Term, 9th & 10th Jud. Dist. 2015) ("upon a review of the record, and as a matter of discretion in the interest of justice, we modify the judgment convicting defendant of driving while impaired by vacating so much of the sentence as imposed a term of [7] days' incarceration").

In this regard:

In setting sentence the trial judge should be guided not only by the . . . objectives of punishment, but also by the criterion that a *minimum amount of confinement* should be imposed "consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant."

People v. Notey, 72 A.D.2d 279, ___, 423 N.Y.S.2d 947, 950 (2d Dep't 1980) (emphasis added) (citation omitted).

§ 46:54 Periods of probation

Prior to February 9, 2014, a person sentenced to probation for a misdemeanor VTL § 1192 offense would be sentenced to 3 years' probation, and a person sentenced to probation for a felony VTL § 1192 offense would be sentenced to 5 years' probation. Effective February 9, 2014, the Court now has discretion to impose a period of probation of 2 or 3 years for a misdemeanor, see PL § 65.00(3)(d), and 3, 4 or 5 years for a felony. See PL § 65.00(3)(a)(i).

§ 46:55 Who can a probationer get in trouble for associating with?

In People v. Kislowski, 145 A.D.3d 1197, 44 N.Y.S.3d 214 (3d Dep't 2016), the Appellate Division, Third Department, held that a probationer can violate the terms of his or her probation merely by associating with a "convicted criminal" (as opposed to a "known criminal"):

The term and condition at issue here -- special condition No. 17 -- prohibited defendant from "associat[ing] with any drug users or convicted criminals," and the People alleged that defendant violated this prohibition by having contact with Nichols, his former girlfriend and a convicted criminal, on four separate occasions in August 2014.

Although Nichols' testimony regarding her criminal history was not a model of clarity (and the People failed to enter Nichols' certificate of conviction into evidence at the hearing), Nichols nonetheless testified that she had "a misdemeanor DWI" and that defendant was aware that she had been "sentenced to probation" as a result. As a misdemeanor conviction for [DWI] indeed would constitute a crime, Nichols thus qualified as a "convicted criminal" for purposes of special condition No. 17. As for defendant's stated belief that Nichols had only been convicted of [DWAII], an offense that, in certain instances, would constitute only a traffic violation, his erroneous belief in this regard is irrelevant. Special condition No. 17 required defendant to refrain from associating with "convicted criminals" -- as opposed to "known criminals." Accordingly, defendant cannot avoid a violation of the subject condition simply by claiming either that he did not know that a particular individual had been convicted of a crime or that he believed that said individual was guilty of only a traffic violation. As a probationer subject to special condition No. 17, it was incumbent upon defendant to ascertain whether any of his associates, including Nichols, constituted "convicted criminals."

Id. at ____-____, 44 N.Y.S.3d at 216-17 (citations omitted).

CHAPTER 48

IGNITION INTERLOCK DEVICE PROGRAM

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§ 48:1 In general

Effective August 15, 2010, every person who is convicted of common law DWI, per se DWI, or per se Aggravated DWI (*i.e.*, VTL § 1192(2), (2-a) or (3)) -- committed on or after November 18, 2009 -- will be required to install an ignition interlock device in any vehicle that the person owns or operates (with the exception of certain employer-owned vehicles) for at least 6 months. See VTL § 1193(1)(b)(ii); VTL § 1193(1)(c)(iii). See also VTL § 1198; PL § 65.10(2)(k-1). This chapter addresses various issues associated with the ignition interlock device requirement.

§ 48:2 What is an ignition interlock device?

VTL § 119-a defines "ignition interlock device" (a.k.a. "IID") as:

Any blood alcohol concentration equivalence measuring device which connects to a motor vehicle ignition system and prevents a motor vehicle from being started without first determining through a deep lung breath sample that the operator's equivalent breath alcohol level does not exceed the calibrated setting on the device as required by [VTL § 1198].

See also 9 NYCRR § 358.3(1); 10 NYCRR § 59.1(g); 15 NYCRR § 140.1(b)(1).

An ignition interlock device is required to be calibrated to a "set point" of .025% BAC. See 9 NYCRR § 358.5(c)(2); 9 NYCRR § 358.5(c)(10)(i); 9 NYCRR § 358.5(d)(6); 10 NYCRR § 59.10(c)(2). The term "set point" means "a pre-set or pre-determined BAC setting at which, or above, the device will prevent the ignition of a motor vehicle from operating." 9 NYCRR § 358.3(y).

§ 48:3 Rules and regulations regarding IIDs

The Department of Health ("DOH") is required to publish a list of approved ignition interlock devices. See VTL § 1198(6)(a). In addition, both the Division of Probation and Correctional Alternatives ("DPCA") and the DOH are required to promulgate regulations regarding ignition interlock devices. See VTL § 1193(1)(g); VTL § 1198(6)(b). Such regulations must require, at a minimum, that ignition interlock devices:

- (1) have features that make circumventing difficult and that do not interfere with the normal or safe operation of the vehicle;
- (2) work accurately and reliably in an unsupervised environment;
- (3) resist tampering and give evidence if tampering is attempted;
- (4) minimize inconvenience to a sober user;
- (5) require a proper, deep, lung breath sample or other accurate measure of blood alcohol content equivalence;
- (6) operate reliably over the range of automobile environments;
- (7) correlate well with permissible levels of alcohol consumption as may be established by the sentencing court or by any provision of law; and
- (8) [be] manufactured by a party covered by product liability insurance.

VTL § 1198(6)(b).

The relevant DOH regulations are contained in 10 NYCRR Part 59 (a copy of which is set forth at Appendix 3). The relevant DPCA regulations are contained in 9 NYCRR Part 358 (a copy of which is set forth at Appendix 64).

§ 48:4 Definitions

Relevant definitions pertaining to the ignition interlock device program are contained in the DPCA regulations, see 9 NYCRR § 358.3, and, to a lesser extent, in the DOH regulations. See 10 NYCRR § 59.1. In this regard, 9 NYCRR § 358.3 provides as follows:

- (a) The term "blood alcohol concentration" or "BAC" shall mean the weight amount of alcohol contained in a unit volume of blood, measured as grams ethanol/100 ml. blood and expressed as %, grams %, % weight/volume (w/v), and % BAC. Blood alcohol concentration in this Part shall be designated as % BAC.

(b) The term "certificate of completion" shall mean a document issued by the monitor after the conclusion of the ignition interlock period, including any extensions or modifications as may have occurred since the date of sentence which shows either completion of the operator's sentence or a change in the conditions of probation or conditional discharge no longer requiring the need for a device.

(c) The term "circumvent" shall mean to request, solicit or allow any other person to blow into an ignition interlock device, or to start a motor vehicle equipped with the device, for the purpose of providing the operator whose driving privileges [are] so restricted with an operable motor vehicle, or to blow into an ignition interlock device or start a motor vehicle equipped with the device for the purpose of providing an operable motor vehicle to a person whose driving privilege is so restricted or to tamper with an operable ignition interlock device.

(d) The term "county" shall mean every county outside of the city of New York, and the City of New York as a whole.

(e) The term "county executive" shall mean a county administrator, county manager, county director or county president and in cities with a population of one million or more, the mayor.

(f) The term "division" shall mean the division of probation and correctional alternatives.

(g) The term "drinking driver program" shall mean an alcohol and drug rehabilitation program established pursuant to [VTL § 1196].

(h) The term "failed tasks" shall mean failure to install the ignition interlock device or failure to comply with a service visit or any requirement resulting therefrom as prescribed by this Part.

(i) The term "failed tests" shall mean a failed start-up re-test, failed rolling re-test, or missed rolling re-test.

(j) The term "failure report recipients" shall mean all persons or entities required to receive a report from the monitor of an operator's failed tasks or failed tests pursuant to a county's plan which may include, but is not limited to[,] the sentencing court, district attorney, operator's alcohol treatment provider, and the drinking driver program, where applicable.

(k) The term "ignition interlock device" shall mean any blood alcohol concentration equivalence measuring device which connects to a motor vehicle ignition system and prevents a motor vehicle from being started without first determining through a deep lung breath sample that the operator's equivalent blood alcohol level does not exceed the calibrated setting on the device as required by standards of the [DOH].

(l) The term "installation/service provider" shall mean an entity approved by a qualified manufacturer that installs, services, and/or removes an ignition interlock device.

(m) The term "lockout mode" shall mean circumstances enumerated in this Part which trigger the ignition interlock device to cause the operator's vehicle to become inoperable if not serviced within [5] calendar days.

(n) The term "monitor" shall mean the local probation department where the operator is under probation supervision or any person(s) or entity (ies) designated in the county's ignition interlock program plan for any operator granted conditional discharge.

(o) The term "operator" shall mean a person who is subject to installation of an ignition interlock device following a conviction of a violation of [VTL § 1192(2), (2-a) or (3),] or any crime defined by the Vehicle and Traffic Law or Penal Law of which an alcohol-related violation of any provision of [VTL § 1192] is an essential element.

(p) The term "qualified manufacturer" shall mean a manufacturer or distributor of an ignition interlock device certified by the

[DOH] which has satisfied the specific operational requirements herein and has been approved as an eligible vendor by the [DPCA] in the designated region where the county is located.

(q) The term "region" shall mean counties comprising an area within New York State designated by the [DPCA] where a qualified manufacturer is authorized and has agreed to service.

(r) The term "start-up test" shall mean a breath test taken by the operator to measure the operator's blood alcohol concentration prior to starting the vehicle's ignition.

(s) The term "start-up re-test" shall mean a breath test taken by the operator to measure the operator's blood alcohol concentration required within [5] to [15] minutes of a failed start-up test.

(t) The term "rolling test" shall mean a breath test, administered at random intervals, taken by the operator while the vehicle is running.

(u) The term "rolling re-test" shall mean a breath test, taken by the operator while the vehicle is running, within [1] to [3] minutes after a failed or missed rolling test.

(1) The term "failed rolling re-test" shall mean a rolling re-test in which the operator's BAC is at or above the set point.

(2) The term "missed rolling re-test" shall mean failure to take the rolling re-test within the time period allotted to do so.

(v) The term "service period" shall mean the length of time between service visits.

(w) The term "service visit" shall mean a visit by the operator to[,] or with[,] the installation/service provider for purposes of having the ignition interlock device inspected, monitored, downloaded, recalibrated, or maintained. It shall also mean[,] where applicable, the act by any

operator of sending the portion of the interlock device that contains the data log and the breath testing module to the qualified manufacturer for the purposes of downloading the data, reporting to the monitor, and recalibrating the device.

(x) The term "set point" shall mean a pre-set or pre-determined BAC setting at which, or above, the device will prevent the ignition of a motor vehicle from operating.

(y) The term "STOP-DWI" shall mean special traffic options program-driving while intoxicated.

(z) The term "tamper" shall mean to alter, disconnect, physically disable, remove, deface, or destroy an ignition interlock device or any of its component seals in any way not authorized by this Part.

§ 48:5 Scope of IID program

VTL § 1198(1) provides as follows:

Applicability. The provisions of this section shall apply throughout the state to each person required or otherwise ordered by a court as a condition of probation or conditional discharge to install and operate an ignition interlock device in any vehicle which he or she owns or operates.

See also 9 NYCRR § 358.2.

§ 48:6 Who must be required to install and maintain an IID?

Effective August 15, 2010, literally everyone who is convicted of an alcohol-related misdemeanor or felony DWI, or any other crime in either the VTL or the Penal Law of which an alcohol-related violation of VTL § 1192 is an essential element, is required to install and maintain an IID. In this regard, VTL § 1198(2)(a) provides:

In addition to any other penalties prescribed by law, the court shall require that any person who has been convicted of a violation of [VTL § 1192(2), (2-a) or (3)], or any crime defined by this chapter or the penal law of which an alcohol-related violation of any provision of [VTL § 1192] is an essential element, to install and maintain, as a

condition of probation or conditional discharge, a functioning ignition interlock device in accordance with the provisions of this section and, as applicable, in accordance with the provisions of [VTL §§ 1193(1) and (1-a)]; provided, however, the court may not authorize the operation of a motor vehicle by any person whose license or privilege to operate a motor vehicle has been revoked except as provided herein. For any such individual subject to a sentence of probation, installation and maintenance of such ignition interlock device shall be a condition of probation.

In addition, prior to November 1, 2013, VTL § 1193(1)(b)(ii) provided:

In addition to the imposition of any fine or period of imprisonment set forth in this paragraph, the court shall also sentence such person convicted of a violation of [VTL § 1192(2), (2-a) or (3)] to a period of probation or conditional discharge, as a condition of which it shall order such person to install and maintain, in accordance with the provisions of [VTL § 1198], an ignition interlock device in any motor vehicle owned or operated by such person during the term of such probation or conditional discharge imposed for such violation of [VTL § 1192] and in no event for less than [6] months.

Notably, the IID requirement only applied where the defendant was "convicted" of certain DWI offenses. As such, it did not apply to youthful offender adjudications (as such adjudications are not "convictions"). See CPL § 720.10.

VTL § 1193(1)(b)(ii) also provided that the duration of a mandatory IID requirement was "during the term of such probation or conditional discharge imposed for such violation of [VTL § 1192] and in no event for a period of less than six months." This language led to considerable confusion in that many people who thought that they had received a 6-month IID requirement -- and many Judges who thought that they had imposed a 6-month IID requirement -- were confronted with a situation in which the installer would not remove the IID without a Court order on the ground that the sentence was for a *minimum* of 6 months as opposed to for *precisely* 6 months. In addition, defendants who installed the IID prior to sentencing were not given credit for "time served."

The Legislature addressed both of these issues in 2013. In this regard, effective November 1, 2013, VTL § 1193(1)(b)(ii) now provides as follows:

In addition to the imposition of any fine or period of imprisonment set forth in this paragraph, the court shall also sentence such person convicted of, *or adjudicated a youthful offender for*, a violation of [VTL § 1192(2), (2-a) or (3)] to a term of probation or conditional discharge, as a condition of which it shall order such person to install and maintain, in accordance with the provisions of [VTL § 1198], an ignition interlock device in any motor vehicle owned or operated by such person during the term of such probation or conditional discharge imposed for such violation of [VTL § 1192] *and in no event for a period of less than [12] months; provided, however, that such period of interlock restriction shall terminate upon submission of proof that such person installed and maintained an ignition interlock device for at least [6] months, unless the court ordered such person to install and maintain an ignition interlock device for a longer period as authorized by this subparagraph and specified in such order. The period of interlock restriction shall commence from the earlier of the date of sentencing, or the date that an ignition interlock device was installed in advance of sentencing.* Provided, however, the court may not authorize the operation of a motor vehicle by any person whose license or privilege to operate a motor vehicle has been revoked pursuant to the provisions of this section.

(Emphases added).

Similar changes were made to VTL § 1193(1)(c)(iii). Prior to November 1, 2013, VTL § 1193(1)(c)(iii) provided:

In addition to the imposition of any fine or period of imprisonment set forth in this paragraph, the court shall also sentence such person convicted of a violation of [VTL § 1192(2), (2-a) or (3)] to a period of probation or conditional discharge, as a condition of which it shall order such person to install and maintain, in accordance with

the provisions of [VTL § 1198], an ignition interlock device in any motor vehicle owned or operated by such person during the term of such probation or conditional discharge imposed for such violation of [VTL § 1192] and in no event for a period of less than [6] months.

Effective November 1, 2013, this section provides:

In addition to the imposition of any fine or period of imprisonment set forth in this paragraph, the court shall also sentence such person convicted of, or adjudicated a youthful offender for, a violation of [VTL § 1192(2), (2-a) or (3)] to a period of probation or conditional discharge, as a condition of which it shall order such person to install and maintain, in accordance with the provisions of [VTL § 1198], an ignition interlock device in any motor vehicle owned or operated by such person during the term of such probation or conditional discharge imposed for such violation of [VTL § 1192] and in no event for a period of less than [12] months; provided, however, that such period of interlock restriction shall terminate upon submission of proof that such person installed and maintained an ignition interlock device for at least [6] months, unless the court ordered such person to install and maintain a[n] ignition interlock device for a longer period as authorized by this subparagraph and specified in such order. The period of interlock restriction shall commence from the earlier of the date of sentencing, or the date that an ignition interlock device was installed in advance of sentencing. Provided, however, the court may not authorize the operation of a motor vehicle by any person whose license or privilege to operate a motor vehicle has been revoked pursuant to the provisions of this section.

See People v. Nunez, 119 A.D.3d 1373, ___, 988 N.Y.S.2d 396, 397 (4th Dep't 2014).

In People v. Vidaurrazaga, 100 A.D.3d 664, 953 N.Y.S.2d 290 (2d Dep't 2012), the Appellate Division, Second Department, made clear that sentencing Courts have discretion in determining how long the IID requirement will remain in effect (*i.e.*, the IID

requirement must remain in effect anywhere from a minimum of 6 months to a maximum of the duration of the period of probation or conditional discharge), and held that:

Based on the record before us, it is not clear whether the Supreme Court was aware that it had discretion in fixing the duration of the condition requiring the defendant to install and maintain an ignition interlock device in his automobile. We therefore remit the matter to the Supreme Court, Nassau County, for resentencing. We express no opinion as to the appropriate duration of the condition.

Id. at ___, 953 N.Y.S.2d at 293 (citations omitted). See also People v. Minchala, 2016 WL 4166145, *1 (App. Term, 2d, 11th & 13th Jud. Dist. 2016) ("The parties agree that the period for which the ignition interlock was required was illegal, and that it cannot exceed the period of a conditional discharge for misdemeanors, which is one year").

Pursuant to VTL § 1193(1-a), where a defendant is convicted of DWI in violation of VTL § 1192(2) or (3) after having been previously convicted of DWI in violation of VTL § 1192(2) or (3) within the preceding 5 years, the sentencing Court must, *inter alia*:

[O]rder the installation of an ignition interlock device approved pursuant to [VTL § 1198] in any motor vehicle owned or operated by the person so sentenced. Such devices shall remain installed during any period of license revocation required to be imposed pursuant to [VTL § 1193(2)(b)], and, upon the termination of such revocation period, for an additional period as determined by the court.

VTL § 1193(1-a)(c)(i).

Moreover, "[a]ny person ordered to install an ignition interlock device pursuant to [VTL § 1193(1-a)(c)] shall be subject to the provisions of [VTL § 1198(4), (5), (7), (8) and (9)]." VTL § 1193(1-a)(c).

§ 48:6A How long must an IID be installed for?

For misdemeanor DWI offenses, VTL § 1193(1)(b)(ii) provides, in pertinent part:

In addition to the imposition of any fine or period of imprisonment set forth in this paragraph, the court shall also sentence such person convicted of, or adjudicated a youthful offender for, a violation of [VTL § 1192(2), (2-a) or (3)] to a term of probation or conditional discharge, as a condition of which it shall order such person to install and maintain, in accordance with the provisions of [VTL § 1198], an ignition interlock device in any motor vehicle owned or operated by such person during the term of such probation or conditional discharge imposed for such violation of [VTL § 1192] and in no event for a period of less than [12] months; provided, however, that such period of interlock restriction shall terminate upon submission of proof that such person installed and maintained an ignition interlock device for at least [6] months, unless the court ordered such person to install and maintain an ignition interlock device for a longer period as authorized by this subparagraph and specified in such order. The period of interlock restriction shall commence from the earlier of the date of sentencing, or the date that an ignition interlock device was installed in advance of sentencing.

For felony DWI offenses, VTL § 1193(1)(c)(iii) provides, in pertinent part:

In addition to the imposition of any fine or period of imprisonment set forth in this paragraph, the court shall also sentence such person convicted of, or adjudicated a youthful offender for, a violation of [VTL § 1192(2), (2-a) or (3)] to a period of probation or conditional discharge, as a condition of which it shall order such person to install and maintain, in accordance with the provisions of [VTL § 1198], an ignition interlock device in any motor vehicle owned or operated by such person during the term of such probation or conditional discharge imposed for such violation of [VTL § 1192] and in no event for a period of less than [12] months; provided, however, that such period of interlock restriction shall terminate upon submission of proof that such person installed and maintained an ignition

interlock device for at least [6] months, unless the court ordered such person to install and maintain a[n] ignition interlock device for a longer period as authorized by this subparagraph and specified in such order. The period of interlock restriction shall commence from the earlier of the date of sentencing, or the date that an ignition interlock device was installed in advance of sentencing.

§ 48:7 Who may not be required to install and maintain an IID?

The IID program only applies to people who have been convicted of a violation of VTL § 1192(2), (2-a) or (3), or any other crime in either the VTL or the Penal Law of which an alcohol-related violation of VTL § 1192 is an essential element. See PL § 65.10(2)(k-1) ("The court may require [the IID] condition only where a person has been convicted of a violation of [VTL § 1192(2), (2-a) or (3)], or any crime defined by the [VTL] or this chapter of which an alcohol-related violation of any provision of [VTL § 1192] is an essential element"). See also VTL § 1198(2)(a); VTL § 1198(3)(d); 9 NYCRR § 358.1; 15 NYCRR § 140.2.

Thus, a defendant who has been convicted of DWAI in violation of VTL § 1192(1), DWAI Drugs in violation of VTL § 1192(4), or DWAI Combined Influence in violation of VTL § 1192(4-a), cannot be ordered to install and maintain an IID. See People v. Levy, 91 A.D.3d 793, ___, 938 N.Y.S.2d 315, 316 (2d Dep't 2012) ("We agree with the defendant that the County Court improperly directed, as a condition of probation, that the defendant install an ignition interlock device on her motor vehicle. . . . Here, the defendant's conviction for operating a motor vehicle while under the influence of drugs pursuant to Vehicle and Traffic Law § 1192(4) falls outside the scope of Penal Law § 65.10(2)(k-1)"). See also VTL § 1198(2)(c) ("Nothing contained in [VTL § 1198] shall authorize a court to sentence any person to a period of probation or conditional discharge for the purpose of subjecting such person to the provisions of [VTL § 1198], unless such person would have otherwise been so eligible for a sentence of probation or conditional discharge").

In People v. Uribe, 109 A.D.3d 844, ___, 971 N.Y.S.2d 60, 60 (2d Dep't 2013), the same Court that decided Levy, *supra*, summarily stated (without explanation) that "[t]he County Court correctly imposed an interlock ignition [sic] requirement as an element of the defendant's sentence (see [VTL] §§ 1192[4-a], 1198[2])." However, since a person can violate VTL § 1192(4-a) without consuming alcohol -- and thus the consumption of alcohol is not an essential element of a VTL § 1192(4-a) charge -- it

would appear that VTL § 1198(2) does not authorize the imposition of an IID in VTL § 1192(4-a) cases. See also PL § 65.10(2)(k-1) ("The court may require [the IID] condition only where a person has been convicted of a violation of [VTL § 1192(2), (2-a) or (3)], or any crime defined by the [VTL] or this chapter of which an alcohol-related violation of any provision of [VTL § 1192] is an essential element"). See generally PL § 60.21 (which is only applicable to VTL §§ 1192(2), (2-a) or (3)).

§ 48:8 Cost, installation and maintenance of IID

The cost of installing and maintaining the ignition interlock device is the responsibility of the defendant:

[U]nless the court determines such person is financially unable to afford such cost whereupon such cost may be imposed pursuant to a payment plan or waived. In the event of such waiver, the cost of the device shall be borne in accordance with regulations issued under [VTL § 1193(1)(g)] or pursuant to such other agreement as may be entered into for provision of the device.

VTL § 1198(5)(a). See also 9 NYCRR § 358.8(a).

In this regard, every qualified IID manufacturer must:

[A]gree to adhere to a maximum fee/charge schedule with respect to all operator's costs associated with such devices, offer a payment plan for any operator determined to be financially unable to pay the cost of the ignition interlock device where a payment plan is so ordered, and provide a device free of fee/charge to the operator where the cost is waived by the sentencing court, or pursuant to such other agreement as may be entered into for provision of the device. Any contractual agreement between the operator and the qualified manufacturer or its installation/service providers shall permit an early termination without penalty to the operator when a certificate of completion has been issued, where the sentence has been revoked, and whenever the operator has been transferred to a jurisdiction where the manufacturer does not do business. Nothing shall prevent a

qualified manufacturer from lowering the fee/charge schedule during the course of an operator's contract and/or the contractual agreement with the [DPCA].

9 NYCRR § 358.5(c)(3).

Although the cost of an IID is considered a fine for purposes of CPL § 420.10(5), it does not replace, but rather is in addition to, any fines, surcharges or other costs imposed by law. See VTL § 1198(5)(a).

The installer/service provider of the ignition interlock device is responsible for the installation, calibration and maintenance of such device. See VTL § 1198(5)(b).

§ 48:9 IID installer must provide defendant with fee schedule

An ignition interlock device installer must:

[P]rovide to all operators, at the time of device installation a hardcopy statement of fees/charges clearly specifying warranty details, schedule of lease payments where applicable, any additional costs anticipated for routine recalibration, service visits, and shipping where the device includes the direct exchange method of servicing, and listing any items available without charge if any, along with a list of installation/service providers in their respective county, a toll-free 24 hour telephone number to be called from anywhere in the continental United States to secure up-to-date information as to all installation/service providers located anywhere in the continental United States and for emergency assistance, and a technical support number available during specified business hours to reach a trained staff person to answer questions and to respond to mechanical concerns associated with the ignition interlock device.

9 NYCRR § 358.5(d)(2).

§ 48:10 What if defendant is unable to afford cost of IID?

As is noted in the previous section, the cost of installing and maintaining the ignition interlock device is the responsibility of the defendant "unless the court determines such person is financially unable to afford such cost whereupon such cost may be imposed pursuant to a payment plan or waived." VTL § 1198(5)(a). See also 9 NYCRR § 358.5(c)(3); 9 NYCRR § 358.8(a). In this regard, the DPCA has promulgated a form entitled "Financial Disclosure Report" to be used in determining a person's ability to afford the cost of an IID. This form (a copy of which is set forth at Appendix 65) only has to be completed by people seeking a payment plan or a full waiver of the costs of an IID.

Where the defendant claims an inability to afford the costs of an IID, 9 NYCRR § 358.8(b) provides that:

Any operator who claims financial inability to pay for the device shall submit in advance of sentencing [3] copies of his or her financial disclosure report, on a form prescribed by the [DPCA], to the sentencing court[,], which shall distribute copies to the district attorney and defense counsel. The report shall enumerate factors which may be considered by the sentencing court with respect to financial inability of the operator to pay for the device and shall include, but not be limited to[,], income from all sources, assets, and expenses. This report shall be made available to assist the court in determining whether or not the operator is financially able to afford the cost of the ignition interlock device, and[,], if not[,], whether to impose a payment plan. Where it is determined that a payment plan is not feasible, the court shall determine whether the fee/charge for the device shall be waived.

9 NYCRR § 358.4(d)(3) addresses the issue of how IID manufacturers should divide the costs of providing IIDs to indigent defendants:

[I]n the event more than one qualified manufacturer does business within its region, the county shall establish an equitable procedure for manufacturers to provide ignition interlock devices without costs where an operator has been determined

financially unable to afford the costs and has received a waiver from the sentencing court. The equitable procedure should be based upon proportion of ignition interlock devices paid to each qualified manufacturer by operators in the county.

§ 48:11 Notification of IID requirement

Where a Court imposes the IID condition upon a defendant, the Court must notify DMV of such condition. See VTL § 1198(4)(b). In addition, every County must:

[E]stablish a procedure whereby the probation department and any other monitor will be notified no later than [5] business days from the date an ignition interlock condition is imposed by the sentencing court, any waiver of the cost of the device granted by the sentencing court, and of any intrastate transfer of probation or interstate transfer of any case which either has responsibility to monitor. Such procedure shall also establish a mechanism for advance notification as to date of release where local or state imprisonment is imposed.

9 NYCRR § 358.4(d)(5). See also 9 NYCRR § 358.7(a)(1).

Furthermore, IID installers must "notify the monitor and county probation department when an ignition interlock device has been installed on an operator's vehicle(s) within [3] business days of installation." 9 NYCRR § 358.5(d)(16).

§ 48:12 Defendant must install IID within 10 business days of sentencing

Every defendant sentenced to the IID requirement must:

[H]ave installed and maintain a functioning ignition interlock device in any vehicle(s) he or she owns or operates within [10] business days of the condition being imposed by the court or[,] if sentenced to imprisonment[,] upon release from imprisonment, whichever is applicable.

9 NYCRR § 358.7(c)(1).

In this regard, IID installers are required to install an IID within 7 business days of a defendant's request that the device be installed. See 9 NYCRR § 358.5(d)(1). Notably, where the defendant's vehicle needs repairs before installation can take place, the 7-day installation period commences when such repairs are completed. See 9 NYCRR § 358.5(d)(12).

§ 48:13 Defendant must provide proof of compliance with IID requirement within 3 business days of installation

Every defendant who has an IID installed must, "within [3] business days of installation, submit proof of installation to the court, county probation department, and any other designated monitor." 9 NYCRR § 358.7(c)(1). See also VTL § 1198(4)(a). If the defendant fails to provide proof of installation, the Court may, absent a finding of good cause for the failure which is placed in the record, revoke, modify or terminate the defendant's sentence of probation or conditional discharge. See VTL § 1198(4)(a).

An issue had arisen as to how to handle situations in which the defendant failed to install an IID due to the fact that the defendant did not own -- and claimed that he or she would not operate -- a motor vehicle during the duration of the IID requirement. In this regard, effective November 1, 2013, VTL § 1198(4)(a) defines "good cause" for not installing an IID as follows:

Good cause may include a finding that the person is not the owner of a motor vehicle if such person asserts under oath that such person is not the owner of any motor vehicle and that he or she will not operate any motor vehicle during the period of interlock restriction except as may be otherwise authorized pursuant to law. "Owner" shall have the same meaning as provided in [VTL § 128].

§ 48:14 DMV will note IID condition on defendant's driving record

Where a Court notifies DMV that it has imposed the IID condition upon a defendant, DMV must note such condition on the defendant's driving record. VTL § 1198(4)(b). See also VTL § 1198(3)(f).

§ 48:15 How often does defendant have to blow into IID?

The operator of a vehicle equipped with an ignition interlock device is not merely required to blow into the device to start the vehicle. Rather:

[T]he operator after passing the start-up test allowing the engine to start, [must] submit to an initial rolling test within a randomly variable interval ranging from [5] to [15] minutes. Subsequent rolling tests shall continue to be required at random intervals not to exceed [30] minutes for the duration of the travel. A start-up re-test shall be required within [5] to [15] minutes of a failed start-up test. A rolling re-test shall be required within [1] to [3] minutes after a failed or missed rolling test.

9 NYCRR § 358.5(c)(2).

§ 48:16 Lockout mode

When an ignition interlock device goes into "lockout mode," it causes the operator's vehicle to become inoperable if not serviced within 5 calendar days. See 9 NYCRR § 358.3(n). "An ignition interlock device shall enter into a lockout mode upon the following events: [1] failed start-up retest, [1] missed start-up re-test, [1] failed rolling re-test or [1] missed rolling re-test within a service period, or [1] missed service visit." 9 NYCRR § 358.5(c)(2).

§ 48:17 Circumvention of IID

It is a class A misdemeanor:

(a) for a defendant subject to the ignition interlock device requirement to request, solicit or allow any other person to either (i) blow into an ignition interlock device, or (ii) start a motor vehicle equipped with an ignition interlock device, for the purpose of providing the defendant with an operable motor vehicle;

(b) for a person to either (i) blow into an ignition interlock device, or (ii) start a motor vehicle equipped with an ignition interlock device, for the purpose of providing a person sentenced to the ignition interlock device requirement with an operable motor vehicle;

(c) to tamper with or circumvent an otherwise operable ignition interlock device; and/or

(d) for a defendant subject to the ignition interlock device requirement to operate a motor vehicle without such device.

VTL § 1198(9)(a)-(e).

Every ignition interlock device is required to have a label affixed to it "warning that any person tampering, circumventing, or otherwise misusing the device is guilty of a misdemeanor and may be subject to civil liability." VTL § 1198(10). See also 10 NYCRR § 59.12(f).

§ 48:18 Duty of IID monitor to report defendant to Court and District Attorney

9 NYCRR § 358.7(d)(1) provides, in pertinent part, that:

Upon learning of the following events:

(i) that the operator has failed to have installed the ignition interlock device on his/her own vehicle(s) or vehicle(s) which he/she operates;

(ii) that the operator has not complied with service visits requirements;

(iii) a report of alleged tampering with or circumventing an ignition interlock device or an attempt thereof;

(iv) a report of a failed start-up re-test;

(v) a report of a missed start-up re-test;

(vi) a report of a failed rolling re-test;

(vii) a report of a missed rolling re-test; and/or

(viii) a report of a lockout mode;

the applicable monitor shall take appropriate action consistent with public safety. Where under probation supervision, the county probation department shall adhere to Part 352. With respect to any operator sentenced to conditional discharge, the monitor shall

take action in accordance with the provisions of its county ignition interlock program plan.

In this regard:

At a minimum, any monitor shall notify the appropriate court and district attorney, within [3] business days, where an operator has failed to have installed the ignition interlock device on his/her own vehicle(s) or vehicle(s) which he/she operates, where the operator has not complied with a service visit requirement, any report of alleged tampering with or circumventing an ignition interlock device or an attempt thereof, any report of a lock-out mode, and/or any report of a failed test or re-test where the BAC is .05 percent or higher.

Id. (emphasis added).

As part of its report to the Court and District Attorney:

The monitor may recommend modification of the operator's condition of his or her sentence or release whichever is applicable as otherwise authorized by law, including extension of his/her ignition interlock period, a requirement that the operator attend alcohol and substance abuse treatment and/or drinking driver program, referral to [DMV] to determine whether [DMV] may suspend or revoke the operator's license, or recommend revocation of his/her sentence or release.

9 NYCRR § 358.7(d)(2).

"Where the operator is under supervision by the division of parole, the monitor shall coordinate monitoring with the division of parole and promptly provide the parole agency with reports of any failed tasks or failed tests." 9 NYCRR § 358.7(d)(3).

§ 48:19 Use of leased, rented or loaned vehicles

Where a defendant is subjected to the ignition interlock device requirement, such requirement applies to every motor vehicle operated by the defendant including, but not limited to, vehicles that are leased, rented or loaned. See VTL § 1198(7)(a). In this regard, a defendant who is sentenced to the

ignition interlock device requirement must "notify any other person who rents, leases or loans a motor vehicle to him or her of such driving restriction." VTL § 1198(7)(b).

A violation of VTL § 1198(7)(a) or (b) is a misdemeanor. See VTL § 1198(7)(c). It is also a misdemeanor for a person to knowingly rent, lease or lend a motor vehicle to a person known to be subject to the ignition interlock device requirement unless such vehicle is equipped with an IID. See VTL § 1198(7)(b), (c).

§ 48:20 Use of employer-owned vehicles

Where a defendant who is sentenced to the ignition interlock device requirement is required to operate a motor vehicle owned by the defendant's employer for work-related purposes, the defendant is allowed to operate such vehicle without an ignition interlock device under the following conditions:

1. Only in the course and scope of the defendant's employment;
2. Only if the employer has been notified that the defendant is subject to the ignition interlock device requirement;
3. Only if the defendant has provided the Court and the Probation Department with written proof indicating that the defendant's employer is aware of the ignition interlock device requirement and has granted the defendant permission to operate the employer's vehicle without an ignition interlock device only for business purposes; and
4. The defendant has notified the Court and the Probation Department of his or her intention to so operate the employer's vehicle.

VTL § 1198(8). See also 15 NYCRR § 140.5(c); 9 NYCRR § 358.7(c)(5).

A motor vehicle owned by a business entity that is wholly or partly owned or controlled by a defendant subject to the ignition interlock device requirement does not qualify for the "employer vehicle exemption." See VTL § 1198(8); 15 NYCRR § 140.5(c); 9 NYCRR § 358.7(c)(5).

§ 48:21 Pre-installation requirements

Prior to installing an IID, an installer must "obtain and record the following information from every operator":

- (i) photo identification;
- (ii) the name and policy number of his/her automobile insurance;
- (iii) the vehicle identification number (VIN) of all motor vehicles owned or routinely driven by the operator, and a statement disclosing the names of all other individuals who operate the motor vehicle(s) owned or driven by the operator; and
- (iv) a notarized affidavit from the registered owner of the vehicle granting permission to install the device if the vehicle is not registered to the operator.

9 NYCRR § 358.5(d)(13). See also 9 NYCRR § 358.7(c)(3).

§ 48:22 Mandatory service visit intervals

Every defendant sentenced to the IID requirement must:

[S]ubmit to service visits within [30] calendar days of prior installation or service visits for the collection of data from the ignition interlock device and/or for inspection, maintenance, and recalibration purposes where the device does not automatically transmit data directly to the monitor; and submit to an initial service visit within [30] calendar days of installation and service visits within [60] calendar days of prior service visits where the device either automatically transmits data directly to the monitor for inspection, maintenance, or recalibration purposes or the device head is sent to the qualified manufacturer every [30] calendar days for such purposes, including data download.

9 NYCRR § 358.7(c)(2).

§ 48:23 Accessibility of IID providers

A qualified ignition interlock device manufacturer must:

[A]gree to service every county within [its] region and ensure that there shall be an installation/service provider within 50 miles from the operator's residence or location

where the vehicle is parked or garaged, whichever is closest[,] and ensure repair or replacement of a defective ignition interlock device shall be made available within the same 50 mile radius by a fixed or mobile installation/service provider, or through a qualified manufacturer sending a replacement, within 48 hours of receipt of a complaint, or within 72 hours where an intervening weekend or holiday. Mobile servicing may be permissible provided that the above facility requirements are met and a specific mobile servicing unit with regular hours is indicated.

9 NYCRR § 358.5(c)(4).

§ 48:24 Frequency of reporting by IID providers

A qualified ignition interlock device manufacturer must:

[G]uarantee that an installation/service provider or the manufacturer shall download the usage history of every operator's ignition interlock device within [30] calendar days between service visits or if the operator fails to appear for a service visit(s) as soon thereafter as the device can be downloaded, and provide the monitor with such information and in such format as determined by the [DPCA].

9 NYCRR § 358.5(c)(5).

In addition, the manufacturer must:

Further guarantee that the installation/service provider shall take appropriate, reasonable and necessary steps to confirm any report of failed tasks, failed tests, circumvention, or tampering and thereafter notify the appropriate monitor within [3] business days of knowledge or receipt of data, indicating:

(i) installation of a device on an operator's vehicle(s);

(ii) report of a failed start-up re-test;

- (iii) report of a missed start-up re-test;
- (iv) report of a failed rolling re-test;
- (v) report of a missed rolling re-test;
- (vi) report of the device entering lockout mode;
- (vii) failure of an operator to appear at a scheduled service visit; or
- (viii) report of an alleged circumvention or tampering with the ignition interlock devices as prohibited by [VTL § 1198(9)(a), (c) or (d)], or an attempt thereof.

Id.

§ 48:25 Defendant entitled to report of his/her IID usage history

An ignition interlock device manufacturer must:

[P]rovide, no more than monthly to the operator upon his or her request, the operator's usage history, including any report of failed tasks, failed tests, circumvention, or tampering. An operator may only make [1] request during any month for such information. Such request shall be in writing and provide either an email address or self-addressed stamped envelope.

9 NYCRR § 358.5(c)(6).

§ 48:26 IID providers must safeguard personal information

A qualified ignition interlock device manufacturer must:

[A]gree to safeguard personal information with respect to any operator and any reports and provide access to such records only as authorized herein, by law, or by court order. All records maintained by the manufacturer and any of its installation/service providers with respect to ignition interlock devices in New York State shall be retained in accordance with section 358.9.

9 NYCRR § 358.5(c)(7). See also 9 NYCRR § 358.5(c)(10)(vii).

Any monitor may disseminate relevant case records, including failed tasks or failed reports not otherwise sealed or specifically restricted in terms of access by state or federal law[,] to appropriate law enforcement authorities, district attorney, treatment agencies, licensed or certified treatment providers, the judiciary, for law enforcement and/or case management purposes relating to criminal investigations and/or execution of warrants, supervision and/or monitoring of ignition interlock conditions, and treatment and/or counseling. Personal information in any financial disclosure report shall only be accessible to the monitor, court, and district attorney for purposes related to determination of financial affordability. Case record information is not to be used for noncriminal justice purposes and shall otherwise only be available pursuant to a court order. In all such instances, those to whom access has been granted shall not secondarily disclose such information without the express written permission of the monitor that authorized access.

9 NYCRR § 358.7(e).

§ 48:27 Post-revocation conditional license

When the ignition interlock device program first came into effect, it had limited applicability. For example, the program only applied to defendants who were placed on probation for DWI, and thus it generally only applied to recidivist drunk drivers. See generally People v. Letterlough, 86 N.Y.2d 259, 268-69, 631 N.Y.S.2d 105, 110 (1995). Such defendants generally were either ineligible for, and/or were in any event prohibited from obtaining, a regular conditional license during the mandatory license revocation period. However, DMV was authorized to grant such defendants a "post-revocation conditional license" for use during the remainder of the term of probation. See VTL § 1198(3)(a).

Now that literally everyone who is convicted of an alcohol-related misdemeanor or felony DWI, or any other crime in either the VTL or the Penal Law of which an alcohol-related violation of VTL § 1192 is an essential element, will be required to obtain an ignition interlock device -- regardless of whether they are on probation and regardless of whether they are repeat offenders --

the concept of the post-revocation conditional license has become outdated. In this regard, DMV's position is that, for purposes of determining eligibility for a conditional license, it will treat a defendant subject to the IID requirement the same as it would have treated him/her prior to August 15, 2010. See Chapter 50, *infra*. In other words, defendants who would be eligible for a conditional license if they were not subject to the IID requirement (e.g., most first offenders) will still be eligible for a conditional license after August 15, 2010, notwithstanding the language of VTL § 1198(3)(a).

To the extent that a "post-revocation conditional license" is still a relevant concept, such a license is akin to a regular conditional license. It allows the defendant to drive:

- (1) enroute to and from the holder's place of employment,
- (2) if the holder's employment requires the operation of a motor vehicle then during the hours thereof,
- (3) enroute to and from a class or course at an accredited school, college or university or at a state approved institution of vocational or technical training,
- (4) to and from court ordered probation activities,
- (5) to and from [DMV] for the transaction of business relating to such license,
- (6) for a [3] hour consecutive daytime period, chosen by [DMV], on a day during which the participant is not engaged in usual employment or vocation,
- (7) enroute to and from a medical examination or treatment as part of a necessary medical treatment for such participant or member of the participant's household, as evidenced by a written statement to that effect from a licensed medical practitioner,
- (8) enroute to and from a class or an activity which is an authorized part of the alcohol and drug rehabilitation program and at which participant's attendance is required, and

(9) enroute to and from a place, including a school, at which a child or children of the participant are cared for on a regular basis and which is necessary for the participant to maintain such participant's employment or enrollment at an accredited school, college or university or at a state approved institution of vocational or technical training.

VTL § 1198(3)(b). See also 15 NYCRR § 140.5(b).

A person is ineligible for a post-revocation conditional license if he or she has either (a) "been found by a court to have committed a violation of [VTL § 511] during the license revocation period," VTL § 1198(3)(a), or (b) been "deemed by a court to have violated any condition of probation set forth by the court relating to the operation of a motor vehicle or the consumption of alcohol." Id. See also 15 NYCRR § 140.4(a).

DMV cannot deny an application for a post-revocation conditional license "based solely upon the number of convictions for violations of any subdivision of [VTL § 1192] committed by such person within the [10] years prior to application for such license." VTL § 1198(3)(a). See also 15 NYCRR § 140.4(b). By contrast:

A post-revocation conditional license shall be denied to any person if a review of such person's driving record, or additional information secured by [DMV], indicates that any of the following conditions apply:

(1) The person has been convicted of homicide, assault, criminal negligence or criminally negligent homicide arising out of the operation of a motor vehicle.

(2) The conviction upon which eligibility is based involved a fatal accident.

(3) The person has been convicted more than once of reckless driving within the last [3] years.

(4) The person has had a series of convictions, incidents and/or accidents or has a medical or mental condition, which in the judgment of [DMV] tends to establish that the person would be an unusual and immediate risk upon the highway.

(5) The person has been penalized under section [VTL § 1193(1)(d)(1)] for any violation of [VTL § 1192(2), (2-a), (3), (4) or (4-a)].

(6) The person has had a post-revocation conditional license within the last [5] years.

(7) The person has other open suspension or revocation orders on their record, other than for a violation of [VTL § 1192(1), (2), (2-a), (3), (4) or (4-a)].

(8) The person has [2] convictions of a violation of [VTL § 1192(3), (4) or (4-a)] where physical injury has resulted in both instances.

(9) The person has been convicted of an offense arising from the same event which resulted in the current alcohol-related conviction, which conviction, aside from the alcohol-related conviction, resulted in the mandatory revocation of the person's license for leaving the scene of an accident involving personal injury or death.

(10) The person has had [2] or more revocations and/or suspensions of his driver's license, other than the revocation or suspension upon which his eligibility for the rehabilitation program is based[,] within the last [3] years. This subdivision shall not apply to suspensions which have been terminated by performance of an act by the person, nor to a suspension or revocation resulting from a chemical test refusal, if the person had been convicted of a violation of [VTL § 1192] arising out of the same incident.

(11) The person was the holder of a limited DJ or limited MJ license at the time of the violation which resulted in the revocation.

15 NYCRR § 140.4(c).

A post-revocation conditional license may be revoked by DMV for "sufficient cause," including, but not limited to, "failure to comply with the terms of the condition[s] of probation or conditional discharge set forth by the court, conviction of any

traffic offense other than one involving parking, stopping or standing[,] or conviction of any alcohol or drug related offense, misdemeanor or felony[,] or failure to install or maintain a court ordered ignition interlock device." VTL § 1198(3)(c). See also 15 NYCRR § 140.5(d).

"Upon the termination of the period of probation or conditional discharge set by the court, the person may apply to [DMV] for restoration of a license or privilege to operate a motor vehicle in accordance with this chapter." VTL § 1198(3)(a). In this regard, 15 NYCRR § 136.10 provides that:

Upon the termination of the period of probation set by the court, the holder of a post-revocation conditional license may apply to the commissioner for restoration of a license or privilege to operate a motor vehicle. An application for licensure shall be approved if the applicant demonstrates that he or she:

(a) has a valid post-revocation conditional license; and

(b) has demonstrated evidence of rehabilitation as required by this Part.

§ 48:28 Intrastate transfer of probation/conditional discharge involving IID requirement

9 NYCRR § 358.7(b) addresses the situation where a defendant subject to the ignition interlock device requirement either (a) resides in another County at the time of sentencing, or (b) desires to move to another County subsequent to sentencing. Where the defendant is on probation:

Where the operator is under probation supervision and resides in another county at the time of sentencing or subsequently desires to reside in another county, upon intrastate transfer of probation, the receiving county probation department selects the specific class and features of the ignition interlock device available from a qualified manufacturer in its region. Thereafter, the operator may select the model of the ignition interlock device meeting the specific class and features selected by the receiving county probation department from a qualified manufacturer in the operator's region of residence. Where intrastate

transfer occurs after sentencing and the installation of a different device is required as a result of the transfer, the device shall be installed within [10] business days of relocation. All intrastate transfer of probation shall be in accordance with Part 349.

9 NYCRR § 358.7(b)(1).

Where the defendant is subject to a conditional discharge:

Where an operator has received a sentence of conditional discharge and resides in another county at the time of sentencing or thereafter, the receiving county monitor shall select the class of ignition interlock device available from a qualified manufacturer in its region for any such operator. The operator may select the model of the ignition interlock device from within the class designated by the monitor from a qualified manufacturer in the operator's region of residence. The receiving county monitor shall perform monitor services and the sentencing court retains jurisdiction of the operator. Upon knowledge, the monitor of the sentencing county shall provide necessary operator information in advance to the receiving county monitor. The receiving county monitor shall notify the sentencing court and county district attorney pursuant to paragraph (d) of this section.

9 NYCRR § 358.7(b)(2).

§ 48:29 Interstate transfer of probation/conditional discharge involving IID requirement

9 NYCRR § 358.7(b)(3) and (4) address the situation where a defendant subject to the ignition interlock device requirement either (a) resides in another State at the time of sentencing, or (b) desires to move to another State subsequent to sentencing. In such a situation:

(3) Where an operator, subject to probation supervision or a sentence of conditional discharge, resides or desires to reside out-of-state and is an offender subject to the interstate compact for adult offender supervision pursuant to [Executive Law 259-

mm], the governing rules of such compact shall control. Additionally, Part 349 shall apply with respect to transfer of supervision of probationers. Where transfer is permitted, the receiving state retains its authority to accept or deny the transfer in accordance with compact rules. Where an operator is subject to probation supervision and is granted reporting instructions and/or acceptance by a receiving state, the sending probation department selects the specific class and features of the ignition interlock device available from a qualified manufacturer in the receiving state. Thereafter, the operator may select the model of the ignition interlock device meeting the specific class and features selected by the sending county probation department from a qualified manufacturer in the receiving state region. The device shall be installed prior to relocation or return where feasible. A qualified manufacturer shall make necessary arrangements to ensure the county monitor in New York State and the receiving state receive timely reports from the manufacturer and/or installation/service provider; and

(4) Where an operator resides or desires to reside out-of-state, is not subject to the interstate compact for adult offender supervision and such compact's governing rules, and has been given permission to return or relocate by the sentencing court or monitor, the same provisions with respect to selection specified in paragraph [3] of this subdivision applies and the device shall be installed prior to relocation or return. A qualified manufacturer shall make necessary arrangements to ensure the county monitor receives timely reports from the manufacturer and/or installation/service provider. *Pursuant to the compact, an operator convicted of his or her first DWI misdemeanor is not subject to the compact.*

(Emphasis added).

§ 48:30 VTL § 1198 does not preclude Court from imposing any other permissible conditions of probation

PL § 60.36 provides that:

Where a court is imposing a sentence for a violation of [VTL § 1192(2), (2-a) or (3)] pursuant to [PL §§ 65.00 or 65.05] and, as a condition of such sentence, orders the installation and maintenance of an ignition interlock device, the court may impose any other penalty authorized pursuant to [VTL § 1193].

See also VTL § 1198(3)(e) ("Nothing contained herein shall prevent the court from applying any other conditions of probation or conditional discharge allowed by law, including treatment for alcohol or drug abuse, restitution and community service").

§ 48:31 Imposition of IID requirement does not alter length of underlying license revocation

"Imposition of an ignition interlock condition shall in no way limit the effect of any period of license suspension or revocation set forth by the commissioner or the court." VTL § 1198(3)(d).

§ 48:32 IID requirement runs consecutively to jail sentence

PL § 60.21 provides that whenever a person is sentenced to imprisonment for a conviction of VTL § 1192(2), (2-a) or (3), the Court is also required to both (a) sentence the person to either probation or a conditional discharge, and (b) order the person to install an ignition interlock device. Such period of probation or conditional discharge is required to run *consecutively* to any period of imprisonment, and to commence immediately upon the person's release from imprisonment. See, e.g., People v. Sierra, 126 A.D.3d 1513, ___, 4 N.Y.S.3d 565, 566 (4th Dep't 2015); People v. Brainard, 111 A.D.3d 1162, ___, 975 N.Y.S.2d 498, 500 (3d Dep't 2013). Specifically, PL § 60.21 provides that:

Notwithstanding [PL § 60.01(2)(d)], when a person is to be sentenced upon a conviction for a violation of [VTL § 1192(2), (2-a) or (3)], the court may sentence such person to a period of imprisonment authorized by [PL Article 70] and shall sentence such person to a period of probation or conditional discharge in accordance with the provisions of [PL § 65.00] and shall order the installation and maintenance of a functioning ignition interlock device. Such period of probation or conditional discharge shall run consecutively to any period of imprisonment and shall commence immediately upon such person's release from imprisonment.

It seems clear that this statute, which was enacted as part of a series of statutes and statutory amendments collectively known as "Leandra's Law," see Chapter 496 of the Laws of 2009, was intended to be read in conjunction with the ignition interlock device requirement. In other words, it appears clear that the intent of PL § 60.21 is to preclude a person from receiving credit for "time served" on the IID portion of his or her sentence while the person is incarcerated. See generally People v. Panek, 104 A.D.3d 1201, 960 N.Y.S.2d 801 (4th Dep't 2013).

This raises the question: If a person has been sentenced to a longer period of incarceration than would otherwise permit a term of probation (or conditional discharge), see PL § 60.01(2)(d), what is the potential consequence of violating a condition of such probation (or conditional discharge)?

In People v. Brown, 40 Misc. 3d 821, ___, 970 N.Y.S.2d 391, 393 (Erie Co. Sup. Ct. 2013), the Court recognized the inherent conflict between PL § 60.21 and PL § 60.01(2)(d), and held that:

After review of PL §§ 60.01, 60.21, 65.00, 70.00 and V & T Law §§ 1193, 1198, it is apparent that the legislature has not established a term of imprisonment as a penalty for a violation of probation pursuant to V & T Law § 1193-1(c)(iii) and PL § 60.21. The only penalty set forth for failure to install an ignition interlock device as a condition of probation is a new charge pursuant to V & T Law § 1198-9, a class "A" Misdemeanor.

As the court has no authority to impose a term of imprisonment for this violation of probation the question of Double Jeopardy is moot.

This leaves the question of what sanction the court may impose for a violation of probation in this situation. Since the court cannot impose a term of imprisonment, the choice of remedies is either continued probation or a fine pursuant to PL § 60.01-3(b) or (e).

In People v. Brainard, 111 A.D.3d 1162, ___, 975 N.Y.S.2d 498, 500 (3d Dep't 2013), the Appellate Division, Third Department, citing Brown, held that:

County Court has authority to enforce the condition of defendant's conditional discharge. The condition is that defendant

install and maintain an ignition interlock device (see Penal Law § 65.10[2][k-1]). If the court has reasonable cause to believe that he has violated that condition, the court may file a declaration of delinquency, order defendant to appear and hold a hearing (see CPL 410.30, 410.40, 410.70). If the court finds defendant delinquent, it may revoke his conditional discharge and impose another sentence, such as a term of probation or a fine. Thus, the court does have the authority to enforce the terms of the conditional discharge.

(Citations omitted). "Additionally, operation of a vehicle without a court-ordered ignition interlock device is a class A misdemeanor (see [VTL] § 1198[9][d], [e]), which would subject defendant to further punishment upon conviction." Id. at ___, 975 N.Y.S.2d at 500. The Court also held that PL § 60.21 does not violate Double Jeopardy. Id. at ___, 975 N.Y.S.2d at 499-500.

In People v. Flagg, 107 A.D.3d 1613, 967 N.Y.S.2d 577 (4th Dep't 2013), the defendant pled guilty to Vehicular Manslaughter 2nd, in violation of PL § 125.12(1), and common law DWI, in violation of VTL § 1192(3). The defendant was resentenced to "a term of probation with respect to each count requiring defendant to equip with an ignition interlock device (IID) any vehicle owned or operated by him." Id. at ___, 967 N.Y.S.2d at 578. On appeal, the Appellate Division, Fourth Department, held as follows:

As the People correctly concede . . . , the resentence is illegal insofar as County Court directed that defendant serve a term of five years of probation following the indeterminate term of imprisonment of 2 to 6 years on the conviction of vehicular manslaughter in the second degree (see Penal Law § 60.01[2][d]). Contrary to defendant's contention that the term of imprisonment therefore must be reduced, however, we agree with the People that the proper remedy is to vacate the term of probation imposed on the vehicular manslaughter count. We therefore modify the resentence accordingly. Section 60.21 requires a court to sentence a defendant convicted of a violation of Vehicle and Traffic Law § 1192(2), (2-a), or (3) to a period of probation or conditional discharge and to order the installation and maintenance

of a functioning IID. Section 60.21 does not apply, however, to vehicular manslaughter in the second degree.

Id. at ___, 967 N.Y.S.2d at 578. See also People v. Giacona, 130 A.D.3d 1565, 14 N.Y.S.3d 850 (4th Dep't 2015).

In People v. Dexter, 104 A.D.3d 1184, 960 N.Y.S.2d 773 (4th Dep't 2013), the defendant, who pled guilty to DWI as a class E felony, was sentenced to 1 to 3 years in prison followed by a 1-year period of conditional discharge with an IID requirement. The Appellate Division, Fourth Department, held that the 1-year conditional discharge was illegal -- not because PL § 60.21 is illegal -- but rather because PL § 65.05(3)(a) mandates that the period of conditional discharge "shall be" 3 years for felony offenses, and "[n]either County Court nor this Court possesses interest of justice jurisdiction to impose a sentence less than the mandatory statutory minimum." Id. at ___, 960 N.Y.S.2d at 774 (citation omitted). See also People v. Barkley, 113 A.D.3d 1002, 978 N.Y.S.2d 920 (3d Dep't 2014); People v. O'Brien, 111 A.D.3d 1028, 975 N.Y.S.2d 219 (3d Dep't 2013); People v. Marvin, 108 A.D.3d 1109, 967 N.Y.S.2d 897 (4th Dep't 2013).

In People v. Bush, 103 A.D.3d 1248, ___, 959 N.Y.S.2d 361, 362 (4th Dep't 2013), the Appellate Division, Fourth Department, held that "the portion of [defendant's] sentence imposing a three-year conditional discharge and an ignition interlock device requirement is illegal inasmuch as he committed the offense prior to the effective date of the statute imposing those requirements."

In People v. Scholz, 125 A.D.3d 1492, ___, 3 N.Y.S.3d 860, 860-61 (4th Dep't 2015), the Appellate Division, Fourth Department, held that:

We reject defendant's contention . . . that the court erred in directing that the IID probation commence upon his release from prison. Penal Law § 60.21 provides that, when a person is to be sentenced for driving while intoxicated, "the court may sentence such person to a period of imprisonment authorized by [PL Article 70] and shall sentence such person to a period of probation or conditional discharge in accordance with the provisions of section 65.00 of this title and shall order the installation and maintenance of a functioning [IID]." The statute further provides that "[s]uch period of probation or conditional discharge shall run consecutively to any period of imprisonment and shall commence immediately

upon such person's release from imprisonment" (emphasis added). We interpret the phrase "any period of imprisonment" to mean any period of imprisonment imposed on any offense, and not, as defendant suggests, any period of imprisonment imposed for driving while intoxicated. Thus, we conclude that the court properly directed that defendant's term of IID probation for driving while intoxicated run consecutively to the sentences imposed for the other counts.

In People v. Brothers, 123 A.D.3d 1240, 999 N.Y.S.2d 225 (3d Dep't 2014), although it was contemplated that the defendant would plead guilty to both AUO 1st and DWI, the plea colloquy only addressed the AUO 1st charge. On appeal, the Appellate Division, Third Department, held as follows:

We . . . agree with defendant that County Court improperly sentenced him to a conditional discharge while apparently under the mistaken belief that defendant had also pleaded guilty to DWI (see Vehicle and Traffic Law § 1192[2]; Penal Law § 60.21). As conceded by the People, conditional discharge is an impermissible sentence for the crime of aggravated unlicensed operation of a motor vehicle in the first degree (see Vehicle and Traffic Law § 511[3][b]) and, accordingly, defendant's sentence must be modified.

Id. at ___, 999 N.Y.S.2d at 226.

§ 48:33 Applicability of IID requirement to parolees

Executive Law § 259-c(15-a) requires that everyone who is released from State Prison on parole or conditional release after serving a sentence for felony DWI or Vehicular Assault/Vehicular Manslaughter must install an ignition interlock device in any vehicle that they own or operate during the term of such parole or conditional release. Specifically, Executive Law § 259-c(15-a) provides that:

Notwithstanding any other provision of law, where a person is serving a sentence for a violation of section 120.03, 120.04, 120.04-a, 125.12, 125.13 or 125.14 of the penal law, or a felony as defined in [VTL § 1193(1)(c)], if such person is released on parole or conditional release the board shall require

as a mandatory condition of such release, that such person install and maintain, in accordance with the provisions of [VTL § 1198], an ignition interlock device in any motor vehicle owned or operated by such person during the term of such parole or conditional release for such crime. Provided further, however, the board may not otherwise authorize the operation of a motor vehicle by any person whose license or privilege to operate a motor vehicle has been revoked pursuant to the provisions of the vehicle and traffic law.

§ 48:34 IID cannot be removed without "certificate of completion" or "letter of de-installation"

An IID installer can "remove an ignition interlock device and return the vehicle to normal operating condition only after having received a certificate of completion or a letter of de-installation from the monitor as authorized pursuant to section 358.7 of this Part." 9 NYCRR § 358.5(d)(4). In this regard, 9 NYCRR § 358.7(a)(2) provides that "[w]here a monitor learns that the operator no longer owns or operates a motor vehicle in which an ignition interlock device has been installed, the monitor may issue a letter of de-installation directly to the installation/service provider which authorizes removal of the device."

§ 48:35 Constitutionality of VTL § 1198

Courts have reached differing conclusions with regard to whether VTL § 1198 is Constitutional. Compare People v. Pedrick, 32 Misc. 3d 703, 926 N.Y.S.2d 269 (Rochester City Ct. 2011) (statute is Constitutional), with People v. Walters, 30 Misc. 3d 737, 913 N.Y.S.2d 893 (Watertown City Ct. 2010) (certain aspects of statute are unconstitutional).

§ 48:36 Necessity of a Frye hearing

In People v. Bohrer, 37 Misc. 3d 370, 952 N.Y.S.2d 375 (Penfield Just. Ct. 2012), the Court held that evidence of a failed IID test is admissible, without first conducting a Frye hearing, at a violation of conditional discharge hearing held pursuant to CPL § 410.70.

§ 48:37 IID violation issues

If the Court's conditional discharge does not expressly prohibit the defendant from failing to submit to a start-up re-test (after failing an IID start-up test), can the defendant be

charged with an IID violation for doing so? In People v. Twist, 54 Misc. 3d 377, 44 N.Y.S.3d 688 (Canandaigua City Ct. 2016), the Court held as follows:

In a case of first impression, it is held that where a defendant is sentenced to a conditional discharge and is ordered, both orally and in writing, to comply with ignition interlock device (IID) requirements, and the monitor notifies the court of an IID violation, the sentencing court retains jurisdiction to deal with the IID violation regardless of whether the oral and written conditional discharge orders spell out the prohibited conduct. * * *

In my view, the court is not required to inform the defendant at sentencing of every specific behavior that will result in an IID violation. * * *

The written Orders and Conditions do not include a specific prohibition of the behavior at issue; but the defendant was verbally ordered at sentencing to comply with IID requirements for a period of one year. According to the monitor, the defendant committed a reportable IID violation. Although specification of terms of probation may be required, there is no necessity of a written elaboration of each instance of prohibited conduct in the orders of conditional discharge (Criminal Procedure Law § 410.10[1]). Therefore, on the facts of this case, the court retains jurisdiction to adjudicate any IID violation found at 9 NYCRR § 358.7, where the orders of conditional discharge (verbal or written) require the defendant to comply with the IID requirements for a period of 12 months.

Id. at ___, ___, ___, 44 N.Y.S.3d at 688, 690, 690-91.

§ 48:38 Who is responsible for the cost of a SCRAM bracelet?

A SCRAM bracelet is a transdermal alcohol detection device that continuously measures the alcoholic content of perspiration. The device is "an ankle bracelet that gathers information and transfers that information to a computer for purposes of analysis.

Essentially the role of a SCRAM device is to provide the equivalence of ongoing breathalyzers. The fundamental difference between a breathalyzer and a SCRAM [device] is that a breathalyzer analyzes the gas within an individual's lungs, while the SCRAM [device] analyzes the gas [or vapors] leaving an individual's skin."

People v. Hakes, 143 A.D.3d 1054, ____ n.1, 39 N.Y.S.3d 299, 300 n.1 (3d Dep't 2016) (citation omitted). In Hakes, the Appellate Division, Third Department, held that:

Although not raised by defendant in his brief, we are compelled to find "that County Court did not have statutory authority for requiring [defendant] to pay for the cost of the electronic monitoring program." While County Court can require a defendant to submit to the use of an electronic monitoring device if it determines that such a condition would advance public safety, it could not require a defendant to pay the costs associated with such monitoring since such costs do not fall within the category of restitution, but are more in the nature of a law enforcement expense.

Id. at ____, 39 N.Y.S.3d at 301 (citations omitted).

CHAPTER 55

"NEW" DMV REGULATIONS AFFECTING REPEAT DWI OFFENDERS

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§ 55:1 In general

Starting in approximately 2011, a series of high publicity cases involving repeat DWI offenders led to a campaign to keep these drivers off the road. In this regard, certain politicians attempted to pass legislation that would greatly increase the driver's license revocation periods for repeat DWI offenders. However, the proposed legislation was not enacted.

Dissatisfied with the Legislature's lack of action on this issue, the Governor directed DMV to enact harsh new regulations that would render the need for legislative action moot. Stated another way, when the Legislature could not agree on how to best address the issue of repeat DWI offenders -- and/or could not agree as to whether the existing treatment of repeat DWI offenders was inadequate -- the executive branch of government bypassed the Legislature and took matters into its own hands. Culminating with the Court of Appeals' decision in Matter of Acevedo v. New York State Dep't of Motor Vehicles, 29 N.Y.3d 202, ___ N.Y.S.3d ___ (2017), all legal challenges to the new regulations have failed.

This Chapter discusses the "new" regulations.

§ 55:2 Summary of pre-existing DMV policy

Prior to the enactment of the new regulations, DMV had a policy regarding repeat DWI offenders that had been in effect since at least January of 1986. See Appendix 53 ("Letter from Department of Motor Vehicles Regarding Multiple Offenders"). Unless the person (a) was underage, (b) had refused to submit to a chemical test, or (c) was a commercial driver -- and as long as the person provided proof of alcohol/drug treatment -- the policy was as follows:

1. *2nd offenders* -- if the person was eligible for the Drinking Driver Program ("DDP"), the license would be restored upon successful completion thereof.

Otherwise, license restored at the conclusion of the minimum statutory revocation period.

2. *3rd offenders* -- if eligible for the DDP, license restored upon successful completion thereof. Otherwise, license restored after 18 months.
3. *4th offenders* -- if eligible for the DDP, license restored upon successful completion thereof. Otherwise, license restored after 24 months.
4. *5th offenders* -- if eligible for the DDP, license restored upon successful completion thereof. Otherwise, license restored after 30 months.
5. *6th and subsequent offenders* -- license only restored upon Court order.

Pursuant to this policy, DWI-related convictions/incidents were only taken into account if they occurred within a 10-year period. In this regard, prior to the enactment of the new regulations, 15 NYCRR § 136.1(b)(3) provided as follows:

History of abuse of alcohol or drugs. A history of abuse of alcohol or drugs shall consist of a record of [2] or more incidents, within a 10 year period, of operating a motor vehicle while under the influence of alcoholic beverages and/or drugs or of refusing to submit to a chemical test not arising out of the same incident, whether such incident was committed within or outside of this state.

(Emphasis added).

Thus, for example, if a person was convicted of his or her 6th DWI, but had no DWI-related convictions/incidents within the past 10 years, the person was treated as a 1st offender for purposes of the above policy.

§ 55:3 Effective date of the new regulations

The effective date of the new regulations was September 25, 2012. Critically, however, unlike new laws -- which generally only apply to offenses committed on or after the effective date thereof -- the new regulations are being applied retroactively. In fact, the new regulations were applied to applications for relicensure that were received between February and September of 2012 (as these applications were intentionally not decided until after the new regulations took effect).

§ 55:4 The new regulations apply retroactively to offenses committed prior to their effective date

The new regulations apply even if all of the offenses being taken into account were committed prior to September 25, 2012. In this regard, in Matter of Acevedo v. New York State Dep't of Motor Vehicles, 29 N.Y.3d 202, ___, ___ N.Y.S.3d ___, ___ (2017), the Court of Appeals held that:

While New York law does not favor retroactive operation, the Regulations were not impermissibly applied retroactively to petitioners' applications simply because the Commissioner considered prior conduct -- namely, petitioners' drunk driving offenses -- that predated the Regulations. As we have previously noted, regulations are not retroactive "when made to apply to future transactions merely because such transactions . . . are founded upon antecedent events." Here, the Regulations did not rescind petitioners' existing licenses on the basis of prior conduct. Rather, the Regulations applied only to the Commissioner's prospective consideration of petitioners' pending relicensing applications -- a "future transaction[]." The Commissioner's consideration of "antecedent events" -- petitioners' driving records -- does not, by itself, render the Regulations "retroactive" in nature.

For the same reason, we reject petitioners' contention that the Regulations, as applied to their applications, constitute a violation of the Ex Post Facto Clause of the United States Constitution. In any event, "[t]he prohibition on ex post facto laws" is inapplicable, as it "applies only to penal statutes." The "revocation of the privilege of operating a motor vehicle" -- and by extension, the denial of the privilege of relicensing -- is "essentially civil in nature," as it serves primarily to "protect[] . . . the public from such a dangerous individual." Because they "do[] not seek to impose a *punishment*," the Regulations "do[] not run afoul of the Ex Post Facto Clause."

We therefore reject petitioners' argument that the Commissioner's consideration of conduct that occurred before the promulgation

of the Regulations constituted retroactive application.

(Citations omitted).

§ 55:5 Summary of the new regulations -- Key definitions

The new DMV regulations contain the following key definitions:

1. **"Dangerous repeat alcohol or drug offender" --**

- (a) any driver who, within his or her lifetime, has [5] or more alcohol- or drug-related driving convictions or incidents in any combination; or
- (b) any driver who, during the 25 year look back period, has [3] or [4] alcohol- or drug-related driving convictions or incidents in any combination and, in addition, has [1] or more serious driving offenses during the 25 year look back period.

See 15 NYCRR § 132.1(b).

2. **"Alcohol- or drug-related driving conviction or incident"** (hereinafter "DWI") -- any of the following, *not arising out of the same incident*:

- (a) a conviction of a violation of VTL § 1192 (or an out-of-state conviction for operating a motor vehicle while under the influence of alcohol or drugs);
- (b) a finding of a violation of VTL § 1192-a or VTL § 1194-a (*i.e.*, the Zero Tolerance law) (until the case is "sealed" pursuant to VTL § 201(1)(k));
- (c) a conviction of a Penal Law offense for which a violation of VTL § 1192 is an essential element; or
- (d) a finding of a refusal to submit to a chemical test pursuant to VTL § 1194.

See 15 NYCRR § 136.5(a)(1). See also § 132.1(a).

3. **"High-point driving violation"** -- any violation for which 5 or more points are assessed on a person's driving record.

See 15 NYCRR § 136.5(a)(2)(iii). See also § 132.1(c).

4. **"Serious driving offense"** (hereinafter "SDO") -- any of the following within the 25-year look-back period:

- (a) a fatal accident;
- (b) a driving-related Penal Law conviction;
- (c) conviction of 2 or more high-point driving violations; or
- (d) 20 or more total points from any violations.

See 15 NYCRR § 136.5(a)(2). See also § 132.1(d).

The new regulations do not define what would constitute a "driving-related Penal Law conviction." In this regard, however, DMV Counsel's Office advises that a driving-related Penal Law offense is a Penal Law offense for which the operation of a motor vehicle is an essential element. Thus, for example, a DWI charge that is plea bargained to Reckless Endangerment would not constitute a driving-related Penal Law conviction.

5. **"25-year look-back period"** -- the time period 25 years prior to, and including, the date of the revocable offense.

See 15 NYCRR § 136.5(a)(3). See also § 132.1(e). See generally 15 NYCRR § 136.1(b)(3).

6. **"Revocable offense"** -- the violation, incident or accident that results in the revocation of a person's driver's license and which is the basis for the person's application for relicensure.

See 15 NYCRR § 136.5(a)(4).

Upon reviewing an application for relicensure, DMV will review the applicant's entire driving record and evaluate any offense committed between the date of the revocable offense and the date of application as if the offense had been committed immediately prior to the date of the revocable offense.

See id.

For purposes of this definition, "**date of the revocable offense**" means the date of the *earliest* revocable offense that resulted in a license revocation that has not been terminated by DMV.

See id.

7. **License with an A2 problem driver restriction** -- a driver's license that is treated like a restricted use license.

See 15 NYCRR §§ 3.2(c)(4) & 135.9(b). See also VTL § 530.

A license with an A2 problem driver restriction will be revoked for the same reasons that would lead to the revocation of a probationary license (*i.e.*, convictions of (a) following too closely, (b) speeding, (c) speed contest, (d) operating out of restriction, (e) reckless driving, or (f) any 2 other moving violations).

If the revocable offense leading to the issuance of a license with an A2 problem driver restriction was DWI-related, an ignition interlock device ("IID") requirement will be imposed.

See 15 NYCRR §§ 136.4(b)(1)-(3) & 136.5(b)(3)-(4). See also VTL § 510-b(1); DMV website.

§ 55:6 Summary of the new regulations -- Key provisions

The sections that follow summarize the key provisions of the new DMV regulations.

§ 55:7 The new regulations only apply to repeat DWI offenders

The new regulations only affect repeat DWI offenders. There are no changes to the rules applicable to first offenders.

§ 55:8 The new regulations generally only apply where person's license is revoked

A critical aspect of the new regulations is that they generally only apply where the defendant's driver's license is revoked (as opposed to suspended). This is because license suspensions do not trigger either a full record review or the need to submit an application for relicensure, whereas license revocations trigger both.

Thus, a conviction of DWAI (as opposed to DWI) can now mean the difference between a 90-day license suspension and a lifetime license revocation. In this regard, however, it must not be

forgotten that there are several circumstances in which a DWAI conviction results in a license revocation. See Chapter 46, *supra*. See also Chapters 14 & 15, *supra*.

In addition, 15 NYCRR Part 132 is the primary exception to the rule that the new regulations only apply where the defendant's driver's license is revoked. Part 132 applies to "dangerous repeat alcohol or drug offenders," see § 55:5, *supra*, who are convicted of a high-point driving violation. See §§ 55:15 & 55:16, *infra*.

§ 55:9 DMV's definition of "history of abuse of alcohol or drugs" now utilizes 25-year look-back period

Prior to September 25, 2012, DMV defined "history of abuse of alcohol or drugs" as:

A history of abuse of alcohol or drugs shall consist of a record of [2] or more incidents, within a 10 year period, of operating a motor vehicle while under the influence of alcoholic beverages and/or drugs or of refusing to submit to a chemical test not arising out of the same incident, whether such incident was committed within or outside of this state.

15 NYCRR former § 136.1(b) (3) (emphasis added).

Pursuant to the new regulations, the look-back period in 15 NYCRR § 136.1(b) (3) is now 25 years.

§ 55:10 Second offenders

Under the old rules, unless a person (a) was underage, (b) had refused to submit to a chemical test, or (c) was a commercial driver, successful completion of the DDP would terminate any outstanding license suspension/revocation period. See VTL § 1196(5). In other words, successful DDP completion generally allowed the person to apply for reinstatement of his or her full driving privileges. In this regard, it was possible for second or third offenders to re-obtain their full licenses back in as little as 7-8 weeks.

Pursuant to the new regulations, a person who has a second DWI-related conviction/incident within the past 25 years can still obtain a conditional license (if eligible under the old rules), but can no longer re-obtain his or her full license back prior to the expiration of the minimum suspension/revocation period (*i.e.*, successful DDP completion no longer terminates a license suspension/revocation for second offenders). See 15 NYCRR §§ 134.10(b), 134.11 & 136.5(b) (5).

§ 55:11 Third offenders no longer eligible for conditional license

Under the old rules, a person was generally eligible for a conditional license approximately every 5 years. In this regard, a person was ineligible for a conditional license if the person, among other things, (a) had a prior VTL § 1192 conviction within the past 5 years, (b) had participated in the DDP within the past 5 years, or (c) had 2 prior DWI-related convictions/incidents within the past 10 years. See VTL § 1196(4); 15 NYCRR § 134.7; Chapter 50, *supra*.

Pursuant to the new regulations, a person who has 3 or more DWI-related convictions/incidents *within the past 25 years* is ineligible for a conditional license. See 15 NYCRR § 134.7(a)(11)(i).

§ 55:12 It is often now necessary to obtain person's lifetime driving record

A person's DMV driving abstract generally only goes back 10 years; and non-DWI-related convictions/incidents typically do not remain on an abstract for even that long. However, the new DMV regulations apply to offenses/incidents going back a minimum of 25 years -- and sometimes forever.

As a result, it is now often necessary to obtain a person's full, lifetime driving record before giving the person advice on how to proceed in a pending matter. A person's lifetime driving record can be obtained by filing a FOIL request with DMV. See DMV Form MV-15F.

§ 55:13 New lifetime revocation #1 -- Person has 5 or more lifetime DWIs and is currently revoked

15 NYCRR § 136.5(b)(1) provides that:

(b) Upon receipt of a person's application for relicensing, the Commissioner shall conduct a lifetime review of such person's driving record. If the record review shows that:

(1) the person has [5] or more alcohol- or drug-related driving convictions or incidents in any combination within his or her lifetime, then the Commissioner shall deny the application.

In other words, pursuant to the new regulations a person with 5 or more lifetime DWI-related convictions/incidents whose driver's license is currently revoked for any reason will never be relicensed.

§ 55:14 New lifetime revocation #2 -- Person has 3 or 4 DWIs and 1 or more SDOs within the 25-year look-back period and is currently revoked

15 NYCRR § 136.5(b) (2) provides that:

(b) Upon receipt of a person's application for relicensing, the Commissioner shall conduct a lifetime review of such person's driving record. If the record review shows that: * * *

(2) the person has [3] or [4] alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period and, in addition, has [1] or more serious driving offenses within the 25 year look back period, then the Commissioner shall deny the application.

In other words, pursuant to the new regulations a person with 3 or 4 DWI-related convictions/incidents and 1 or more SDOs within the 25-year look-back period whose driver's license is currently revoked for any reason will never be relicensed.

§ 55:15 New lifetime revocation #3 -- Person has 5 or more lifetime DWIs and is convicted of a high-point driving violation

15 NYCRR § 132.1(b) provides, in pertinent part, that:

"Dangerous repeat alcohol or drug offender"
means:

(1) any driver who, within his or her lifetime, has [5] or more alcohol- or drug-related driving convictions or incidents in any combination.

15 NYCRR § 132.2 provides that:

Upon receipt of notice of a driver's conviction for a high-point driving violation, the Commissioner shall conduct a review of the lifetime driving record of the person convicted. If such review indicates that the person convicted is a dangerous

repeat alcohol or drug offender, the Commissioner shall issue a proposed revocation of such person's driver license. Such person shall be advised of the right to request a hearing before an [ALJ], prior to such proposed revocation taking effect. The provisions of Part 127 of this Title shall be applicable to any such hearing.

15 NYCRR § 132.3 provides that:

The sole purpose of a hearing scheduled pursuant to this Part is to determine whether there exist unusual, extenuating and compelling circumstances to warrant a finding that the revocation proposed by the Commissioner should not take effect. In making such a determination, the [ALJ] shall take into account a driver's entire driving record. Unless the [ALJ] finds that such unusual, extenuating and compelling circumstances exist, the judge shall issue an order confirming the revocation proposed by the Commissioner.

In other words, pursuant to the new regulations a person with 5 or more lifetime DWI-related convictions/incidents who is convicted of a traffic infraction carrying 5 or more points will be *permanently* revoked unless the person requests a hearing at which he or she establishes that "there exist unusual, extenuating and compelling circumstances to warrant a finding that the revocation proposed by the Commissioner should not take effect."

The reason why a license revocation pursuant to 15 NYCRR Part 132 is a lifetime revocation is that, once revoked, the person is subject to 15 NYCRR § 136.5(b)(1). See § 55:13, *supra*.

Notably, not long after Part 132 was enacted (*i.e.*, starting on June 1, 2013) cell phone and texting infractions were added to the list of high-point driving violations. See 15 NYCRR § 131.3(b)(4)(iii). Thus, under the new regulations a cell phone or texting ticket can lead to a permanent, lifetime driver's license revocation.

§ 55:16 New lifetime revocation #4 -- Person has 3 or 4 DWIs and 1 or more SDOs within the 25-year look-back period and is convicted of a high-point driving violation

15 NYCRR § 132.1(b) provides, in pertinent part, that:

"Dangerous repeat alcohol or drug offender"

means: * * *

(2) any driver who, during the 25 year look back period, has [3] or [4] alcohol- or drug-related driving convictions or incidents in any combination and, in addition, has [1] or more serious driving offenses during the 25 year look back period.

15 NYCRR § 132.2 provides that:

Upon receipt of notice of a driver's conviction for a high-point driving violation, the Commissioner shall conduct a review of the lifetime driving record of the person convicted. If such review indicates that the person convicted is a dangerous repeat alcohol or drug offender, the Commissioner shall issue a proposed revocation of such person's driver license. Such person shall be advised of the right to request a hearing before an [ALJ], prior to such proposed revocation taking effect. The provisions of Part 127 of this Title shall be applicable to any such hearing.

15 NYCRR § 132.3 provides that:

The sole purpose of a hearing scheduled pursuant to this Part is to determine whether there exist unusual, extenuating and compelling circumstances to warrant a finding that the revocation proposed by the Commissioner should not take effect. In making such a determination, the [ALJ] shall take into account a driver's entire driving record. Unless the [ALJ] finds that such unusual, extenuating and compelling circumstances exist, the judge shall issue an order confirming the revocation proposed by the Commissioner.

In other words, pursuant to the new regulations a person with 3 or 4 DWI-related convictions/incidents and 1 or more SDOs within the 25-year look-back period who is convicted of a traffic infraction carrying 5 or more points will be *permanently* revoked unless the person requests a hearing at which he or she establishes that "there exist unusual, extenuating and compelling circumstances to warrant a finding that the revocation proposed by the Commissioner should not take effect."

It should be noted that the high-point driving violation that triggers the review of a person's lifetime driving record pursuant to 15 NYCRR Part 132 does not count in assessing whether the person has an SDO within the 25-year look-back period. See 15 NYCRR §§ 132.1(d)(3) and 132.1(d)(4).

The reason why a license revocation pursuant to 15 NYCRR Part 132 is a lifetime revocation is that, once revoked, the person is subject to 15 NYCRR § 136.5(b)(2). See § 55:14, *supra*.

Notably, not long after Part 132 was enacted (*i.e.*, starting on June 1, 2013) cell phone and texting infractions were added to the list of high-point driving violations. See 15 NYCRR § 131.3(b)(4)(iii). Thus, under the new regulations a cell phone or texting ticket can lead to a permanent, lifetime driver's license revocation.

§ 55:17 New lifetime revocation #5 -- Person revoked for new DWI-related conviction/incident, or for conviction arising out of a fatal accident, while on license with A2 problem driver restriction

Pursuant to the new regulations, a person who has 3 or 4 DWI-related convictions/incidents -- but no SDOs -- within the 25-year look-back period may be eligible for a restricted use license containing a so-called "A2 problem driver restriction." In this regard, 15 NYCRR § 3.2(c)(4) provides:

A2-Problem driver restriction. The operation of a motor vehicle shall be subject to the driving restrictions set forth in section 135.9(b) of this Title and the conditions set forth in section 136.4(b) of this Title. As part of this restriction, the commissioner may require a person assigned the problem driver restriction to install an [IID] in any motor vehicle that may be operated with a Class D license or permit and that is owned or operated by such person. The [IID] requirement will be noted on an attachment to the driver's license or permit held by such person. Such attachment must be carried at all times with the driver license or permit.

Both 15 NYCRR § 136.5(b)(3) and 15 NYCRR § 136.5(b)(4) provide that:

If such license with an A2 restriction is later revoked for a subsequent alcohol- or drug-related driving conviction or incident

or for a conviction which arises out of a fatal accident, such person shall thereafter be ineligible for any kind of license to operate a motor vehicle.

§ 55:18 Person has 3 or 4 DWIs, no SDOs, and is currently revoked for a DWI-related conviction/incident -- Statutory revocation plus 5 more years plus 5 more years on an A2 restricted use license with an IID

Pursuant to the new regulations, a person who has 3 or 4 DWI-related convictions/incidents -- but no SDOs -- within the 25-year look-back period, and whose license is currently revoked for a DWI-related conviction/incident, will serve out the minimum statutory revocation period *plus* 5 more years, after which the person may be granted a license with an A2 problem driver restriction (with an IID requirement) for an additional 5 years.

Specifically, 15 NYCRR § 136.5(b)(3) provides, in pertinent part:

(b) Upon receipt of a person's application for relicensing, the Commissioner shall conduct a lifetime review of such person's driving record. If the record review shows that: * * *

(3)(i) the person has [3] or [4] alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period but no serious driving offenses within the 25 year look back period; and

(ii) the person is currently revoked for an alcohol- or drug-related driving conviction or incident, then the Commissioner shall deny the application for at least [5] years after which time the person may submit an application for relicensing. *Such waiting period shall be in addition to the revocation period imposed pursuant to the Vehicle and Traffic Law.* After such waiting period, the Commissioner may in his or her discretion approve the application, provided that upon such approval, the Commissioner shall impose the A2 restriction on such person's license for a period of [5] years and shall require the installation of an [IID] in any motor vehicle owned or operated by such person for such [5]-year period. *Such waiting period shall be extended for an additional [5] years*

if the Commissioner finds that the person has any incidents of driving during the waiting period, as indicated by accidents, convictions or pending tickets or adjudications.

(Emphases added).

§ 55:19 Person has 3 or 4 DWIs, no SDOs, and is currently revoked for a non-DWI-related conviction/incident -- Statutory revocation plus 2 more years plus 2 more years on an A2 restricted use license with no IID

Pursuant to the new regulations, a person who has 3 or 4 DWI-related convictions/incidents -- but no SDOs -- within the 25-year look-back period, and whose license is currently revoked for a non-DWI-related conviction/incident, will serve out the minimum statutory revocation period *plus 2 more years*, after which the person may be granted a license with an A2 problem driver restriction (with no IID requirement) for an additional 2 years.

Specifically, 15 NYCRR § 136.5(b)(4) provides, in pertinent part:

(b) Upon receipt of a person's application for relicensing, the Commissioner shall conduct a lifetime review of such person's driving record. If the record review shows that: * * *

(4)(i) the person has [3] or [4] alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period but no serious driving offenses within the 25 year look back period; and

(ii) the person is not currently revoked as the result of an alcohol- or drug-related driving conviction or incident, then the Commissioner shall deny the application for at least [2] years, after which time the person may submit an application for relicensing. *Such waiting period shall be in addition to the revocation period imposed pursuant to the Vehicle and Traffic Law.* After such waiting period, the Commissioner may in his or her discretion approve the application, provided that upon such approval, the Commissioner shall impose an A2 restriction, with no [IID] requirement, for a

period of [2] years. Such waiting period shall be extended for an additional [2] years if the Commissioner finds that the person has any incidents of driving during the waiting period, as indicated by accidents, convictions or pending tickets or adjudications.

(Emphases added).

§ 55:20 Person has 2 DWI convictions but has a 3rd DWI charge pending -- Application for relicensure will be held in abeyance pending outcome of 3rd charge

The application for relicensure of a person who has 2 DWI-related convictions/incidents -- but has a third DWI-related charge pending at the time of the application -- will be held in abeyance pending the outcome of the third charge. In this regard, 15 NYCRR § 136.5(e) provides that:

If there are [2] alcohol[-] or drug- related driving convictions or incidents on an applicant's driving record, the consideration of an application for relicensing shall be held in abeyance if the applicant has at least [1] ticket pending for alcohol[-] or drug- related driving offenses where the pending ticket or tickets, if disposed of as a conviction of the original charge, would result in the denial of the application. In addition, if, after an application for relicensing is approved, the Commissioner receives information that indicates that such application should have been denied or that the applicant operated a motor vehicle prior to approval or after approval of such application but prior to obtaining a valid permit or license, the Commissioner shall rescind such approval and the license or privilege granted shall be revoked.

§ 55:21 Applicability of the new regulations to person who is "permanently" revoked pursuant to VTL § 1193(2) (b) (12)

Prior to the enactment of the new DMV regulations, VTL § 1193(2) (b) (12) already provided for 5- and 8-year "permanent" license revocations for repeat DWI offenders. See Chapter 46, *supra*. The new regulations consider these revocation periods to be the minimum statutory revocation periods for purposes of 15 NYCRR § 136.5(b) (3).

Thus, under the new regulations, where a person is subject to a 5- or 8-year "permanent" revocation pursuant to VTL §§

1193(2)(b)(12), at the end of the 5- or 8-year minimum statutory revocation period DMV will now either:

- (a) impose a *lifetime license revocation*; or
- (b) pursuant to 15 NYCRR § 136.5(b)(3), add 5 more years to the revocation period (for a total of 10 or 13 years with no driving privileges whatsoever), after which the person may be granted an A2 restricted use license with an IID requirement for *an additional* 5 years.

See 15 NYCRR §§ 136.10(b), 136.5(b)(1)-(3).

In this regard, 15 NYCRR § 136.10(b) provides as follows:

(b) Application after permanent revocation. The Commissioner may waive the permanent revocation of a driver's license, pursuant to [VTL §] 1193(2)(b)(12)(b) and (e), only if the statutorily required waiting period of either [5] or [8] years has expired since the imposition of the permanent revocation and, during such period, the applicant has not been found to have refused to submit to a chemical test pursuant to [VTL §] 1194 and has not been convicted of any violation of section 1192 or section 511 of such law or a violation of the Penal Law for which a violation of any subdivision of [VTL §] 1192 is an essential element. In addition, the waiver shall be granted only if:

- (1) The applicant presents proof of successful completion of a rehabilitation program approved by the Commissioner within [1] year prior to the date of the application for the waiver; provided, however, if the applicant completed such program before such time, the applicant must present proof of completion of an alcohol and drug dependency assessment within [1] year of the date of application for the waiver; and
- (2) The applicant submits to the Commissioner a certificate of relief from civil disabilities or a certificate of good conduct pursuant to Article 23 of the Correction Law; and

- (3) The application is not denied pursuant to section 136.4 or section 136.5 of this Part; and
- (4) There are no incidents of driving during the period prior to the application for the waiver, as indicated by accidents, convictions or pending tickets. The consideration of an application for a waiver when the applicant has a pending ticket shall be held in abeyance until such ticket is disposed of by the court or tribunal.

§ 55:22 Relicensure following DWI-related fatal accident

New regulation 15 NYCRR § 136.5(b) (7) provides as follows:

(b) Upon receipt of a person's application for relicensing, the Commissioner shall conduct a lifetime review of such person's driving record. If the record review shows that: * * *

(7) the person is otherwise eligible for relicensing under this section, but is applying for relicensing due to revocation arising out of an alcohol-related conviction involving a fatal accident, the Commissioner may approve the application after the minimum revocation period is served, provided that upon such approval, the Commissioner shall impose the A2 restriction on such person's license for a period of [3] years and shall require the installation of an [IID] in any motor vehicle owned or operated by such person for such period. For the purpose of this paragraph, **alcohol-related conviction** shall mean:

- (i) a conviction of a violation of [VTL § 1192]; or
- (ii) a conviction of an offense under the Penal Law for which a violation of [VTL § 1192] is an essential element.

§ 55:23 DMV will theoretically grant a waiver of the new regulations upon a showing of "unusual, extenuating and compelling circumstances"

15 NYCRR § 136.5(d) provides, in pertinent part:

While it is the Commissioner's general policy to act on applications in accordance with this section, the Commissioner shall not be foreclosed from consideration of unusual, extenuating and compelling circumstances that may be presented for review and which may form a valid basis to deviate from the general policy, as set forth above, in the exercise of discretionary authority granted under sections 510 and 1193 of the Vehicle and Traffic Law. If an application is approved based upon the exercise of such discretionary authority, the reasons for approval shall be set forth in writing and recorded. If an approval is granted based upon unusual, extenuating and compelling circumstances, the applicant may be issued a license or permit with a problem driver restriction, as set forth in section 3.2(c)(4) of this Title, and may be required to install an [IID] in any motor vehicle owned or operated by such person for a period of [5] years.

At oral argument before the Court of Appeals in Matter of Acevedo v. New York State Dep't of Motor Vehicles, 29 N.Y.3d 202, ___ N.Y.S.3d ___ (2017), which was held on March 23, 2017, the Government represented that fewer than 20 waivers had been granted. In addition, DMV does not publish or disclose the criteria for a waiver. Notably in this regard, in Matter of Merkel v. New York State Dep't of Motor Vehicles, 145 A.D.3d 1279, 42 N.Y.S.3d 686 (3d Dep't 2016), the Appellate Division, Third Department, held that DMV did not even use a proper legal standard in reviewing petitioner's request for an "unusual, extenuating and compelling circumstances" waiver.

In Matter of Gurnsey v. Sampson, ___ A.D.3d ___, ___ N.Y.S.3d ___, ___, 2017 WL 2819987, *1 (4th Dep't 2017), the Appellate Division, Fourth Department, held that 15 NYCRR § 136.5(d) "does not give respondent 'unfettered discretion' to deny an application"; rather, it "ensures that [DMV] has the flexibility to grant an application for relicensing where extraordinary circumstances render the application of the general policy inappropriate or unfair. Thus, reading the language of the challenged exception within the context of the regulation as a whole, we conclude that 15 NYCRR 136.5(d) is not unconstitutionally vague." (Citations omitted).

§ 55:24 All challenges to the legality of the new regulations have failed

Culminating with the Court of Appeals' decision in Matter of Acevedo v. New York State Dep't of Motor Vehicles, 29 N.Y.3d 202, ___ N.Y.S.3d ___ (2017), all challenges to the legality of the new regulations have failed. See, e.g., Matter of Gurnsey v. Sampson, ___ A.D.3d ___, ___ N.Y.S.3d ___, 2017 WL 2819987 (4th Dep't 2017); Matter of Argudo v. New York State Dep't of Motor Vehicles, 149 A.D.3d 830, 51 N.Y.S.3d 589 (2d Dep't 2017); Matter of Kamarad v. Fiala, 149 A.D.3d 740, 50 N.Y.S.3d 556 (2d Dep't 2017); Matter of Forrest v. New York State Dep't of Motor Vehicles, 140 A.D.3d 1571, 33 N.Y.S.3d 793 (3d Dep't 2016); Matter of Underwood v. Fiala, 133 A.D.3d 1319, 20 N.Y.S.3d 286 (4th Dep't 2015); Matter of Klink v. Fiala, 129 A.D.3d 1685, 11 N.Y.S.3d 399 (4th Dep't 2015); Matter of Arrazola v. State Dep't of Motor Vehicles, Appeals Bd., 129 A.D.3d 1444, 12 N.Y.S.3d 680 (4th Dep't 2015); Matter of McKevitt v. Fiala, 129 A.D.3d 730, 10 N.Y.S.3d 554 (2d Dep't 2015); Matter of Kenny v. Fiala, 127 A.D.3d 1359, 9 N.Y.S.3d 692 (3d Dep't 2015); Matter of Shearer v. Fiala, 124 A.D.3d 1291, 3 N.Y.S.3d 473 (4th Dep't 2015); Matter of Dahlgren v. New York State Dep't of Motor Vehicles, 124 A.D.3d 1400, ___, 1 N.Y.S.3d 699, 700 (4th Dep't 2015) ("We reject petitioner's contention that his license should not be subject to the ignition interlock restriction because he waited nearly 10 years to apply for a new license. The Commissioner's regulations permit the imposition of the A2 restriction upon granting an application for a new license without regard to how long the applicant has been without one"); Matter of Scism v. Fiala, 122 A.D.3d 1197, 997 N.Y.S.2d 798 (3d Dep't 2014); Matter of Berroa v. Fiala, 122 A.D.3d 1209, 997 N.Y.S.2d 808 (3d Dep't 2014).

§ 55:25 A few challenges to the implementation of the new regulations have been successful

In Matter of Resto v. State of N.Y., Dep't of Motor Vehicles, 135 A.D.3d 772, 22 N.Y.S.3d 584 (2d Dep't 2016), the Appellate Division, Second Department, held that DMV acted arbitrarily and capriciously in applying the new regulations to petitioner under the following circumstances:

In March 2007, the Justice Court of the Village of Haverstraw ordered that the petitioner's driver license be revoked for a period of at least [6] months. Over a year later, in July 2008, the petitioner applied for and obtained a new driver license from the New York State Department of Motor Vehicles (hereinafter the DMV). In 2009, the petitioner applied to renew his driver license, disclosing on his application form

that he had previously had his license "suspended, revoked, or cancelled." The petitioner's 2009 application to renew his license was also granted by the DMV. It is undisputed that at the time the DMV issued the petitioner a new license in 2008, and renewed his license in 2009, it was unaware that the Justice Court had ordered revocation of the petitioner's driver license in 2007. The Justice Court did not notify the DMV that it had ordered revocation of the petitioner's driver license until January 2013. When the petitioner subsequently applied for a new driver license in July 2013, the DMV Driver Improvement Bureau denied the application, and that decision was confirmed by the DMV's Administrative Appeals Board in a determination dated November 26, 2013. * * *

Under the unique circumstances of this case, including the Justice Court's nearly [6]-year delay in reporting that it had ordered the revocation of the petitioner's driver license to the DMV, we find that the determination of the Administrative Appeals Board, confirming the decision of the Driver Improvement Bureau to deny the petitioner's application for a new driver license, was arbitrary and capricious. We therefore grant the petition, annul the determination, and remit the matter to the DMV to grant the petitioner's application for a driver license.

Id. at ____-____, 22 N.Y.S.3d at 585-86.

In Matter of Merkel v. New York State Dep't of Motor Vehicles, 145 A.D.3d 1279, 42 N.Y.S.3d 686 (3d Dep't 2016), the Appellate Division, Third Department, granted an Article 78 petition challenging DMV's denial of petitioner's request for a waiver of the new regulations "to the extent of annulling respondents' determination and remitting the matter to respondents for further review of petitioner's application" where:

In 2014, petitioner's application for a new license was denied by the Driver Improvement Bureau (hereinafter Bureau) of respondent Department of Motor Vehicles pursuant to 15 NYCRR 136.5(b)(1). The Bureau also denied petitioner's request for a hardship exception

under 15 NYCRR 136.5(d), and that determination was affirmed by respondent Department of Motor Vehicles Appeals Board (hereinafter the Board). * * *

In her hardship affidavit, petitioner acknowledged that she was convicted of alcohol-related offenses in 1986, 1989 and 1992, and two in 2012. She explained that after the 1992 conviction, she participated in alcohol rehabilitation, married in 1998 and had a child, obtained a certificate of relief from disabilities in 2000 and was licensed as a registered nurse in 2001, working in that capacity until 2012. Petitioner maintained a 20-year period of sobriety, but, due to a series of significant stressful events in her personal life in which she separated from her husband and was the victim of two violent crimes, she relapsed and was arrested for driving while intoxicated in May 2012 and again in June 2012. At this point, she increased alcohol and psychological treatment, completing a Bridge Back to Life program in 2013, while continuing counseling at the Central Nassau Guidance Center. She was granted another certificate of relief from disabilities in 2013. Pursuant to a consent order in October 2013, petitioner was authorized to continue to practice as a registered nurse by the Department of Education, subject to quarterly monitoring. She seeks a driver's license for purposes of securing employment and to attend to the needs of her family, documenting the history recited above.

The difficulty in reviewing this petition is that the record does not include the Bureau's March 25, 2014 letter determination. All we have in this record is the Board's explanation that the Bureau "determined that the denial of [petitioner's] application for a driver's license *could not be withdrawn*" (emphasis added) -- a conclusion the Board determined "had a rational basis." The flaw here is that the underscored phrase runs counter to the discretionary standard set forth in 15 NYCRR 136.5(d). On this record, it would appear that the Bureau misconstrued its authority under the regulation and failed to exercise any discretion in reviewing the

application. This error is not cured by the Board's characterization of the Bureau's decision as "rational."

Id. at ___, 42 N.Y.S.3d at 687-88 (citation omitted).

In People v. Luther, 48 Misc. 3d 699, 12 N.Y.S.3d 491 (Monroe Co. Ct. 2014), the Monroe County Court affirmed the granting of a CPL § 440 motion vacating the defendant's DWI conviction, on Due Process grounds, where the defendant was unaware of the new DMV regulations until after he had pled guilty. In so holding, the Court stated:

The bedrock of due process of law is fairness. . . . What happened here -- through no fault of the People, defendant's plea attorney, or the trial court -- was an affront to the notion due process and patently unfair. In balancing the equities, the Court fails to apprehend any straight-faced argument that the defendant's due process rights -- as a matter of fundamental fairness -- were not violated. Likewise, the Court fails to descry how, under the circumstances, the defendant should not be returned to *status quo ante*, having been jarred, post guilty plea and sentencing, with the harsh reality of being ineligible for re-licensure for [5] years beyond what he thought would be the case when he agreed to plead guilty and be sentenced.

Id. at ___, 12 N.Y.S.3d at 493. Cf. People v. Wheaton, 49 Misc. 3d 378, 17 N.Y.S.3d 586 (Seneca Co. Ct. 2015) (Court disagrees with Luther Court's conclusion that CPL § 440.10 is applicable to this type of situation). Notably, however, the guilty plea at issue in Wheaton was entered in 2004 (*i.e.*, 8 years before the new DMV regulations were promulgated), whereas the guilty plea at issue in Luther was entered in February of 2013.

APPENDIX 3

New York State Department of Health Rules and Regulations for Chemical Tests (Breath, Blood, Urine and Saliva)

PART 59 CHEMICAL ANALYSIS OF BLOOD, URINE, BREATH OR SALIVA FOR ALCOHOLIC CONTENT

(Statutory authority: Environmental Conservation Law, § 11-1205(6); Vehicle and Traffic Law, §§ 1194(4)(c), 1198(6))

[Current with amendments included in the New York State Register, Volume XXXVIII, Issue 34, dated August 24, 2016.]

Sec.

59.1. Definitions

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59.9. Technical supervisor; qualifications and certification

59.10. Certification criteria for ignition interlock devices

59.11. Testing of ignition interlock devices

59.12. Continued ignition interlock device certification

Section 59.1. Definitions

(a) **Techniques and methods** means the collection, processing and determination of the alcoholic content of body fluids such as human blood, saliva or urine, and of breath or alveolar air by protocols and/or instruments determined by the commissioner to be acceptable.

(b) **Per centum by weight of alcohol** as used in the Vehicle and Traffic Law and the Environmental Conservation Law means percent weight per volume, that is, grams of alcohol per 100 milliliters of whole blood.

(c) **Chemical tests/analyses** include breath tests conducted

on breath analysis instruments approved by the commissioner in accordance with section 59.4 of this Part.

(d) **Training agency or agencies** means the Office of Public Safety of the Division of Criminal Justice Services, the Division of State Police, the Nassau County Police Department, the Suffolk County Police Department, and/or the New York City Police Department.

(e) **Commissioner** means the New York State Commissioner of Health.

(f) **Department** means the New York State Department of Health.

(g) **Ignition interlock device** means any blood alcohol concentration equivalence measuring device which connects to a motor vehicle ignition system and prevents a motor vehicle from being started without first determining through a deep lung breath sample that the operator's equivalent breath alcohol level does not exceed the calibrated setting on the device as required by standards in this Part.

(h) **Blood alcohol concentration (BAC)** means the weight amount of alcohol contained in a unit volume of blood, measured as grams ethanol/100 ml blood and expressed as %, grams %, % weight/volume (w/v), and % BAC. Blood alcohol concentration in this Part shall be designated as % BAC.

(i) **Testing laboratory** means a nationally recognized, independent materials testing laboratory that is not affiliated with, and operates autonomously from, any ignition interlock device manufacturer, is properly equipped and staffed to carry out test procedures required by this Part, and is independently accredited in accordance with requirements for the competence of testing and calibration laboratories promulgated as a standard by the International Organization for Standardization (ISO), or other commensurate standard acceptable to the department.

(j) **Breath analysis instrument** means a device that complies with section 59.4 of this Part.

(k) **Saliva** means oral fluid.

(l) **Calibration** means the activity of verifying that a value generated by the instrument is in acceptable agreement with the assigned value for a traceable and/or certified reference standard, including any adjustment to the instrument to bring it into acceptable agreement.

[Current with amendments included in the New York State Register, Volume XXXVIII, Issue 34, dated August 24, 2016.]

Section 59.2. Techniques and methods for determining blood and urine alcohol

(a) All blood and urine alcohol determinations shall be made by quantitative methods and reported as whole blood alcohol concentration (BAC) to the second decimal place as found; for

example, 0.137 percent found shall be reported as 0.13 percent weight per volume. If specimens other than whole blood are analyzed, the following conversions shall apply:

(1) three fourths of the determined concentration of alcohol in the urine shall be equivalent to the corresponding BAC; and

(2) nine tenths of the determined concentration of alcohol in the serum or plasma shall be equivalent to the corresponding BAC.

(b) Analytical procedures for blood and urine alcohol analysis shall include the following controls in conjunction with any sample or series of 10 samples analyzed sequentially or simultaneously:

(1) a blank analysis as appropriate; and

(2) analysis of a suitable reference sample of known alcoholic content greater than or equal to 0.08 percent weight per volume, the result of which analysis shall agree with the reference sample value within the limits of plus or minus 0.01 percent weight per volume or such limits as specified by the commissioner.

(c) An analysis of urine shall be made upon two specimens collected at least 30 minutes apart.

(d) If a blood specimen is to be collected for analysis, an aqueous solution of a nonvolatile antiseptic shall be used on the skin. Alcohol or phenol shall not be used as a skin antiseptic.

(e) Specimens shall be clearly identified at the time of collection.

[Current with amendments included in the New York State Register, Volume XXXVIII, Issue 34, dated August 24, 2016.]

Section 59.3. Blood, urine and saliva alcohol analysis; permits

(a) Individuals performing chemical analyses for blood, urine and saliva alcohol content may apply to the commissioner for a permit.

(b) A permit for the performance of chemical analyses for blood, urine and saliva alcohol content shall be issued by the commissioner to an applicant who:

(1) is a high school graduate and has one year of laboratory experience acceptable to the commissioner; or

(2) has satisfactorily completed two years of college study and has six months of laboratory experience acceptable to the commissioner; and

(3) demonstrates to the satisfaction of the commissioner proficiency in the chemical analyses of the alcoholic content of blood and any other sample type that the commissioner requires; and

(4) has access to appropriate laboratory facilities for the performance of such analyses.

(c) The applicant shall demonstrate proficiency in the techniques and methods of analysis by correctly analyzing and reporting results, within limits of accuracy established by the commissioner, for 75 percent of the samples for each set of proficiency tests issued by the commissioner.

(d) A permit shall be issued for a period of one year and may be renewed annually thereafter. A permit shall not be issued or renewed if, for two consecutive sets of proficiency tests, the applicant or permit holder:

(1) does not meet the proficiency requirements of this section; or

(2) fails to report proficiency test results; or

(3) reports results after three weeks from the date of distribution of proficiency test samples, except that the commissioner, for good cause, may extend such time on request made during such three-week period.

[Current with amendments included in the New York State Register, Volume XXXVIII, Issue 34, dated August 24, 2016.]

Section 59.4. Breath analysis instruments

(a) The commissioner approves, for use in New York State, breath analysis instruments found on the Conforming Products List of Evidential Breath Alcohol Measurement Devices as established by the U.S. Department of Transportation/National Highway Traffic Safety Administration (NHTSA), published in the Federal Register on March 11, 2010 (75 Fed. Reg. 11624-11627, available for public inspection and copying at the Department of Health Records Access Office, Corning Tower, Empire State Plaza, Albany, NY 12237). A facsimile of that list is set forth in subdivision (b) of this section. At the request of a training agency, the commissioner may approve a breath analysis instrument that has been accepted by NHTSA but is not on the Conforming Products List published in the Federal Register on March 11, 2010, if the commissioner determines that approval of such instrument is appropriate.

(b) Conforming Products List of Evidential Breath Measurement Devices

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| CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES | | |
|--|--------|-----------|
| Manufacturer and model | Mobile | Nonmobile |
| Alcohol Countermeasure Systems Corp., Mississauga, Ontario, Canada: | | |

| CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES | | |
|---|--------|-----------|
| Manufacturer and model | Mobile | Nonmobile |
| Alert J3AD* | X | X |
| Alert J4X.ec | X | X |
| PBA3000C | X | X |
| BAC Systems, Inc., Ontario, Canada: Breath Analysis Computer* | X | X |
| CAMEC Ltd., North Shields, Tyne and Ware, England: IR Breath Analyzer* | X | X |
| CMI, Inc., Owensboro, Kentucky: Intoxilyzer Model: | | |
| 200 | X | X |
| 200D | X | X |
| 240 (aka: Lion Alcolmeter 400+ outside the U.S.) | X | X |
| 300 | X | X |
| 400 | X | X |
| 400PA | X | X |
| 1400 | X | X |
| 4011* | X | X |
| 4011A* | X | X |
| 4011AS* | X | X |
| 4011AS -A* | X | X |
| 4011AS -AQ* | X | X |
| 4011 AW* | X | X |
| 4011A27 -10100* | X | X |
| 4011A27 -10100 with filter* | X | X |
| 5000 | X | X |
| 5000 (w/Cal. Vapor Re-Circ.) | X | X |
| 5000 (w/3/8" ID Hose option) | X | X |
| 5000CD | X | X |
| 5000CD/FG5 | X | X |
| 5000EN | X | X |
| 5000 (CAL DOJ) | X | X |
| 5000VA | X | X |
| 8000 | X | X |
| PAC 1200* | X | X |
| S -D2 | X | X |

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| CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES | | |
|---|--------|-----------|
| Manufacturer and model | Mobile | Nonmobile |
| S -D5 (aka: Lion Alcolmeter SD -5 outside the U.S.) | X | X |
| Draeger Safety, Inc. (aka: National Draeger) Irving, Texas: | | |
| Alcotest Model: | | |
| 6510 | X | X |
| 6810 | X | X |
| 7010* | X | X |
| 7110* | X | X |
| 7110 MKIII | X | X |
| 7110 MKIII -C | X | X |
| 7410 | X | X |
| 7410 Plus | X | X |
| 7510 | X | X |
| 9510 | X | X |
| Breathalyzer Model: | | |
| 900 | X | X |
| 900A* | X | X |
| 900BG* | X | X |
| 7410 | X | X |
| 7410 -II | X | X |
| EnviteC by Honeywell GmbH, Fond du Lac, Wisconsin: | | |
| AlcoQuant 6020 | X | X |
| Gall's Inc., Lexington, Kentucky: | | |
| Alcohol Detection System-A.D.S. 500 | X | X |
| Guth Laboratories, Inc., Harrisburg, Pennsylvania: | | |
| Alcotector BAC -100 | X | X |
| Alcotector C2H5OH | X | X |
| Intoximeters, Inc., St. Louis, Missouri: | | |
| Photo Electric Intoximeter* | | X |
| GC Intoximeter MK II* | X | X |
| GC Intoximeter MK IV* | X | X |
| Auto Intoximeter* | X | X |
| Intoximeter Model: | | |
| 3000 | X | X |
| 3000 (rev B1)* | X | X |

| CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES | | |
|--|--------|-----------|
| Manufacturer and model | Mobile | Nonmobile |
| 3000 (rev B2)* | X | X |
| 3000 (rev B2A)* | X | X |
| 3000 (rev B2A) w/FM option* | X | X |
| 3000 (Fuel Cell)* | X | X |
| 3000 D* | X | X |
| 3000 DFC* | X | X |
| Alcomonitor | | X |
| Alcomonitor CC | X | X |
| Alco-Sensor III | X | X |
| Alco-Sensor III (Enhanced with Serial Numbers above 1,200,000) | X | X |
| Alco-Sensor IV | X | X |
| Alco-Sensor IV XL | X | X |
| Alco-Sensor V | X | X |
| Alco-Sensor AZ | X | X |
| Alco-Sensor FST | X | X |
| Intox EC/IR | X | X |
| Intox EC/IR II | X | X |
| Intox EC/IR II (Enhanced with serial number 10,000 or higher)X | | |
| Portable Intox EC/IR | X | X |
| RBT -AZ | X | X |
| RBT -III | X | X |
| RBT III -A | X | X |
| RBT IV | X | X |
| RBT IV with CEM (cell enhancement module) | X | X |
| Komyo Kitagawa, Kogyo, K.K., Japan: | | |
| Alcolyzer DPA -2* | X | X |
| Breath Alcohol Meter PAM 101B* | X | X |
| Lifeloc Technologies, Inc., (formerly Lifeloc, Inc.), Wheat Ridge, Colorado: | | |
| PBA 3000B | X | X |
| PBA 3000-P* | X | X |
| PBA 3000C | X | X |
| Alcohol Data Sensor | X | X |
| Phoenix | X | X |

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HANDLING THE DWI CASE IN NEW YORK

| CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES | | |
|---|--------|----------------|
| Manufacturer and model | Mobile | Nonmo- bile |
| Phoenix 6.0 | X | X |
| EV 30 | X | X |
| FC 10 | X | X |
| FC 20 | X | X |
| Lion Laboratories, Ltd., Cardiff, Wales, United Kingdom: | | |
| Alcolmeter Model: | | |
| 300 | X | X |
| 400 | X | X |
| 400+ (aka: Intoxilyzer 240 in the U.S.) | X | X |
| SD -2* | X | X |
| SD -5 (aka: S -D5 in the U.S.) | X | X |
| EBA* | X | X |
| Intoxilyzer Model: | | |
| 200 | X | X |
| 200D | X | X |
| 1400 | X | X |
| 5000 CD/FG5 | X | X |
| 5000 EN | X | X |
| Luckey Laboratories, San Bernardino, California: | | |
| Alco-Analyzer Model: | | |
| 1000* | | X |
| 2000* | | X |
| Nanopuls AB, Uppsala, Sweden: | | |
| Evidenzer | X | X |
| National Patent Analytical Systems, Inc., Mansfield, Ohio: | | |
| BAC DataMaster (with or without the Delta-1 accessory): | | |
| BAC Verifier DataMaster (w/or with- out the Delta-1 accessory) | X | X |
| DataMaster cdm (w/or without the Delta-1 accessory) | X | X |
| DataMaster DMT | X | X |
| Omicron Systems, Palo Alto, California: | | |
| Intoxilyzer Model: | | |

| CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES | | |
|--|--------|-----------|
| Manufacturer and model | Mobile | Nonmobile |
| 4011* | X | X |
| 4011AW* | X | X |
| PAS International, Fredericksburg, Virginia: Mark V Alcovisor | X | X |
| Plus 4 Engineering, Minturn, Colorado: 5000 Plus 4* | X | X |
| Seres, Paris, France: Alco Master | X | X |
| Alcopro | X | X |
| Siemens-Allis, Cherry Hill, New Jersey: Alcomat* | X | X |
| Alcomat F* | X | X |
| Smith and Wesson Electronics, Springfield, Massachusetts: Breathalyzer Model: | | |
| 900* | X | X |
| 900A* | X | X |
| 1000* | X | X |
| 2000* | X | X |
| 2000 (non-Humidity Sensor)* | X | X |
| Sound-Off, Inc., Hudsonville, Michigan: AlcoData | X | X |
| Seres Alco Master | X | X |
| Seres Alcopro | X | X |
| Stephenson Corp.: Breathalyzer 900* | X | X |
| Tokai-Denshi Inc., Tokyo, Japan: ALC -PRO II (US) | X | X |
| U.S. Alcohol Testing, Inc./Protection Devices, Inc., Rancho Cucamonga, California: Alco-Analyzer 1000 | | X |
| Alco-Analyzer 2000 | | X |
| Alco-Analyzer 2100 | X | X |
| Verax Systems, Inc., Fairport, New York: BAC Verifier* | X | X |
| BAC Verifier Datamaster | X | X |

| CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH MEASUREMENT DEVICES | | |
|---|--------|-----------|
| Manufacturer and model | Mobile | Nonmobile |
| BAC Verifier Datamaster II* | X | X |

* Instruments marked with an asterisk (*) meet the Model Specifications detailed in 49 FR 48854 (December 14, 1984) (i.e., instruments tested at 0.000, 0.050, 0.101, and 0.151 BAC.) Instruments not marked with an asterisk meet the Model Specifications detailed in 58 FR 48705 (September 17, 1993), and were tested at BACs = 0.000, 0.020, 0.040, 0.080, and 0.160. All instruments that meet the Model Specifications currently in effect (dated September 17, 1993) also meet the Model Specifications for Screening Devices to Measure Alcohol in Bodily Fluids.

(c) No law enforcement agency shall use a breath analysis instrument unless the training agency has verified that representative samples of the specific make and model perform properly. Maintenance shall be conducted as specified by the training agency, and shall include, but shall not be limited to, calibration at a frequency as recommended by the device manufacturer or, minimally, annually.

(d) Training agencies shall be responsible for maintaining records pertaining to verification and maintenance (including calibration) of breath analysis instruments and standards; provided, however, that record keeping maintenance may be delegated, in whole or in part, to the law enforcement agency using the breath analysis instrument(s).

[Current with amendments included in the New York State Register, Volume XXXVIII, Issue 34, dated August 24, 2016.]

Section 59.5. Breath analysis; techniques and methods

The following breath analysis techniques and methods shall be a component of breath analysis instrument operator training provided by training agencies and shall be used by operators performing breath analysis for evidentiary purposes:

(a) A breath sample shall be collected at the direction and to the satisfaction of a police officer and shall be analyzed with breath analysis instruments meeting the criteria set forth in section 59.4 of this Part.

(b) The subject shall be observed for at least 15 minutes prior to the collection of the breath sample, during which period the subject must not have ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten, or smoked, or have placed anything in his/her mouth; if the subject should regurgitate, vomit, smoke or place anything in his/her mouth, an additional 15-minute waiting period shall be required.

(c) A system purge shall precede both the testing of each subject and the analysis of the reference standard.

(d) The result of an analysis of a reference standard with an alcoholic content greater than or equal to 0.08 percent must agree with the reference standard value within the limits of plus or minus 0.01 percent weight per volume, or such limits as set by the commissioner. An analysis of the reference standard shall precede or follow the analysis of the breath of the subject in accordance with the test sequence established by the training agency. Readings for the reference standard, a blank and the subject's breath, shall be recorded.

(e) Results of an analysis of breath for alcohol shall be expressed in terms of percent weight per volume, to the second decimal place as found; for example, 0.237 percent found shall be reported as 0.23 percent.

[Current with amendments included in the New York State Register, Volume XXXVIII, Issue 34, dated August 24, 2016.]

Section 59.6. Breath analysis permit program

Training agencies shall submit an application for approval of a breath analysis permit program or a training program for breath analysis to the commissioner. Other agencies seeking approval of such programs shall submit an application to the commissioner through the Office of Public Safety of the Division of Criminal Justice Services. The application shall include:

(a) a description of the techniques and methods to be utilized;

(b) the make and model of the breath analysis instruments used;

(c) an outline of the material presented in the breath analysis instrument operator and technical supervisor training program;

(d) the name of the individual primarily responsible for each training program and for the breath analysis program;

(e) the name and qualifications of one or more individuals meeting the requirements for technical supervisor under section 59.9 of this Part; and

(f) such other information as the commissioner shall require.

[Current with amendments included in the New York State Register, Volume XXXVIII, Issue 34, dated August 24, 2016.]

Section 59.7. Breath analyzer operator permits

(a) A permit valid for two years shall be issued by the commissioner to breath analysis instrument operators who have completed an approved program based upon standards acceptable to the training agency and certified by the commissioner. Such program shall consist of a minimum of 24 hours of instruc-

tion and training with identified learning objectives, supervised by one or more individuals certified as technical supervisors, and shall include:

- (1) three hours of instruction on the effects of alcohol on the human body;
- (2) five hours of instruction on operational principles of the selected techniques and methods, including a functional description and a detailed operational description of the breath analysis instrument(s) with a demonstration;
- (3) five hours of instruction on the legal aspects of chemical tests generally, and of the particular techniques and methods to be employed;
- (4) three hours of instruction on supplemental information to include nomenclature appropriate to the field of chemical tests for alcohol;
- (5) six hours of laboratory participation using approved breath analysis instruments and simulators, or other reference standards;
- (6) a passing score on a one-hour formal examination designed to evaluate whether the operator has met the course learning objectives; and
- (7) a demonstration of analytical proficiency on each breath analysis instrument for which the operator is seeking certification.

(b) A permit as a breath analysis instrument operator shall be renewed for a two-year period, provided that, within the 120 calendar days preceding the permit's expiration date, the operator: completes a retraining program that minimally includes an instructional course in breath analysis designed to refresh and update the operator's knowledge in areas described in subdivision (a) of this section; satisfactorily meets the course's learning objectives as determined by a technical supervisor; demonstrates analytical proficiency on each breath analysis instrument for which the operator is seeking permit renewal; and attains a passing score on a formal examination; or, in lieu of such formal retraining, with the concurrence of the responsible training agency, provided that the operator and his/her superior officer submits to the training agency, a written declaration that the operator has performed six or more breath analyses on subjects in accordance with this Part on each breath analysis instrument for which the operator is seeking permit renewal during the 24 months preceding permit expiration. Notwithstanding such a submission, every four years all operators shall participate successfully in the retraining course described in this subdivision.

- (c) (1) Whenever a breath analysis instrument operator's

permit is not renewed prior to the expiration date, the commissioner may extend such expiration date for 30 calendar days, provided that the training agency and operator jointly submit a written request for such extension, describing the reasons for the failure to renew in a timely manner. The operator's permit shall remain valid during the 30-day extension period.

(2) If the operator fails to meet the conditions for permit renewal pursuant to subdivision (b) of this section within the extension period authorized pursuant to paragraph (1) of this subdivision, the permit shall become void and not renewable; an operator whose permit becomes void may apply for a new permit by repeating the requirements of subdivision (a) of this section; and the effective date of any such new permit shall be the date of commissioner approval, without back dating to the date on which the prior permit became void.

(d) A training agency shall submit to the commissioner documentation of breath analysis instrument operator training for initial issuance and renewal of a permit in a format designated by the commissioner.

[Current with amendments included in the New York State Register, Volume XXXVIII, Issue 34, dated August 24, 2016.]

Section 59.8. Revocation or suspension of permits

(a) The commissioner or the training agencies may at any time and from time to time require breath analysis instrument operators or technical supervisors to demonstrate their ability to operate properly the breath analysis instrument(s) for which they hold a permit.

(b) The operator's permit may be revoked by the commissioner based on information acquired by the commissioner, or a training agency, that the operator does not conduct breath tests in accordance with techniques and methods as instructed by the training agency, that the operator's performance is unreliable, or the operator is incompetent. Upon revocation, the operator shall return any and all permits to the commissioner.

(c) The training agency may suspend the permit of any operator under its supervision when, in its judgment, the operator does not conduct breath tests in accordance with techniques and methods as established by the training agency, the operator's performance is unreliable or the operator is incompetent. The training agency shall immediately notify the commissioner in writing of any such suspension and furnish a copy of such notice to the suspended operator, who shall not be permitted to operate the breath analysis instrument until such time as the suspension is removed.

(d) An operator whose permit has been suspended by the training agency may appeal to the commissioner who shall decide whether suspension shall be affirmed or set aside. The

commissioner may reinstate the permit of the operator making such appeal under such conditions as the commissioner deems necessary.

(e) An operator whose permit has been revoked shall not be eligible for a new permit within 12 months from the date of revocation or at such other time as may be determined by the commissioner.

[Current with amendments included in the New York State Register, Volume XXXVIII, Issue 34, dated August 24, 2016.]

Section 59.9. Technical supervisor; qualifications and certification

(a) The commissioner may authorize certification of an applicant as technical supervisor for a period of four years, provided such applicant submits satisfactory evidence through the training agency that he/she meets the following qualifications:

(1) thirty semester hours of college credits, including eight semester hours of chemistry;

(2) certification as an operator of the breath analysis instrument(s) to be supervised, or possession of equivalent experience or training to qualify as an operator; and

(3) satisfactory completion of a technical supervisor's course, the content of which shall include:

(i) advanced survey of current information concerning alcohol and its effect on the human body (one hour);

(ii) operational principles and theories applicable to the program (two hours);

(iii) breath analysis instrument maintenance and calibration (two hours);

(iv) legal aspects of chemical testing (one hour); and

(v) principles of instruction (two hours); or

(4) training and experience equivalent to a technical supervisor's course and acceptable to the commissioner.

(c) A technical supervisor shall have responsibility for:

(1) breath analysis instrument operator training, competency evaluation, and periodic examination to ensure maintenance of technical knowledge and proficiency;

(2) maintenance, including calibration of breath analysis instruments and equipment under his/her supervision and preparation and standardization of chemicals used for testing and/or evaluation of such chemicals, by direct performance of such tasks or by delegating performance to another person with demonstrated competency, but who need not be qualified as a technical supervisor; provided, however, when-

ever such tasks are so delegated, the technical supervisor shall review the work product to ensure that the assigned designee's performance meets expectations; and

(3) periodic inspection of breath analysis instrument performance.

(d) A technical supervisor's certificate may be renewed for a period of four years upon submission of a written application and statement that he/she has carried out his/her duties in accordance with this Part. Suspension or revocation pursuant to section 59.8 of this Part of a breath analysis instrument operator's permit held by a technical supervisor shall result in suspension or revocation, respectively, of the individual's certification as a technical supervisor.

[Current with amendments included in the New York State Register, Volume XXXVIII, Issue 34, dated August 24, 2016.]

Section 59.10. Certification criteria for ignition interlock devices

(a) A manufacturer of ignition interlock devices shall apply to the department to certify a device for use in New York State. The application shall be on a form or format specified by the department with documents appended as necessary to provide the requisite information, and shall include, but not be limited to:

(1) name and address of the manufacturer, and contact information, including identification of a person to respond to department inquiries;

(2) name and model of the ignition interlock device;

(3) a detailed description of the ignition interlock device, including: instructions for its installation and operation; technical specifications, including, but not limited to, accuracy; calibration stability; data security; and capability for data collection and recording, tamper detection, and retesting; and unsupervised operation in a range of environmental conditions;

(4) the manufacturer's statement that all ignition interlock devices of the same make and model sold or offered for sale or lease, for which certification is sought, meet the requirements of this Part; and

(5) a certificate or other document from an insurance carrier licensed in New York State demonstrating that the manufacturer holds product liability insurance with minimum liability limits of one million dollars per occurrence and three million dollars aggregate. The documentation shall include the issuing company's statement that at least thirty (30) days notice will be provided to the department whenever the issuing company intends to cancel the insurance before

the policy's expiration date. Liability coverage shall include defects in product design and materials, as well as in manufacture, calibration, installation and removal of devices.

(b) The manufacturer shall provide the testing laboratory with:

(1) six representative instruments of each ignition interlock device model for which certification is sought, from which the testing laboratory shall select at least two for testing;

(2) instructions for device installation and operation; and

(3) a description of the device's capabilities, including, but not limited to: security; data collection and recording; tamper detection; circumvention prevention; retesting; and unsupervised operation in a range of environmental conditions.

(c) At the request of a manufacturer of ignition interlock devices, the commissioner shall certify the ignition interlock device for use in New York State, provided the manufacturer:

(1) demonstrates, through arrangements with a testing laboratory, that the model meets or exceeds the model specifications for breath alcohol ignition interlock devices adopted by NHTSA and published in the Federal Register on April 7, 1992 (57 Fed. Reg. 11772-11787, available for public inspection and copying at the Department of Health Records Access Office, Corning Tower, Empire State Plaza, Albany, NY 12237);

(2) demonstrates, through arrangements with a testing laboratory, that the device meets the model specifications specified in paragraph (1) of this subdivision when calibrated to a set point of 0.025% BAC;

(3) has requested certification for a device that employs fuel cell technology or another technology with demonstrated comparable accuracy and specificity;

(4) has demonstrated that the certified device can and would be installed to allow normal operation of the vehicle after it is started, except as specifically approved by the department; and

(5) has demonstrated compliance with all the requirements of this Part.

(d) Certification shall be effective as of the date of its issuance.

(e) Certified ignition interlock devices installed in vehicles shall be uniquely serial-numbered.

(f) Each certification shall cover only one model of ignition interlock device. Modifications to a model of a device, without regard to the manufacturer's assigning a new model number,

shall be reported to the department as required in section 59.12 of this Part.

(g) The department may deny, suspend or revoke the certification of an ignition interlock device for reasons including:

(1) the device does not meet the requirements for certification specified in this Part, including but not limited to, the commissioner's determination that the testing laboratory misrepresented a device's meeting such requirements;

(2) the manufacturer has failed to comply with any requirement of this Part or of Part 358 of Title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York;

(3) substantial evidence exists that devices manufactured, sold, leased, offered for sale or leased, or installed in vehicles do not function in accordance with the specifications in this Part or are easily circumvented or tampered with;

(4) substantial evidence exists that the manufacturer has not made adequate provision for effective and timely maintenance, inspection, calibration and repair of installed devices;

(5) the manufacturer is no longer in the business of manufacturing devices;

(6) the manufacturer fails to retain the required product liability insurance, including through cancellation or non-renewal;

(7) the manufacturer has been convicted of a crime or offense related to fraud; or

(8) the ignition interlock device does not meet federal model specifications for breath alcohol ignition interlock devices adopted by NHTSA after the specifications referred to in paragraph (1) of subdivision (c) of this section are adopted.

(h) Notice of an ignition interlock device's certification, discontinuation, suspension and revocation shall be published in the State Register, and shall be provided promptly to the Division of Probation and Correctional Alternatives. The commissioner shall make available a list of certified ignition interlock devices upon request.

[Current with amendments included in the New York State Register, Volume XXXVIII, Issue 34, dated August 24, 2016.]

Section 59.11. Testing of ignition interlock devices

(a) The department may require a testing laboratory, as defined in section 59.1 of this part, to submit its credentials for department review prior to accepting any report submitted by the testing laboratory in support of an ignition interlock device manufacturer's application for certification.

(b) The testing laboratory shall provide, directly to the

department, a detailed report of test data and findings of the ignition interlock device's performance on each standard, generated by the testing laboratory, documenting that at least two representative instruments of an ignition interlock device model have successfully met the requirements of subdivision (c) of section 59.10 of this Part.

(c) The testing laboratory's report shall minimally include: a description of tests performed; data and findings for each test conducted, with numerical readouts as appropriate; a description of the effectiveness of the ignition interlock device's security provisions, if any, for detection and recording of attempted tampering and preventing circumvention; the reliability of the device's data recording features; and a description of the effectiveness of the device over a range of environmental conditions. The report shall include a dated and signed attestation by the person supervising such testing that identifies the ignition interlock device model and manufacturer, and states that all tests on the named device model were conducted in accordance with NHTSA specifications.

[Current with amendments included in the New York State Register, Volume XXXVIII, Issue 34, dated August 24, 2016.]

Section 59.12. Continued ignition interlock device certification

(a) An ignition interlock device certification shall remain in effect until:

(1) the manufacturer files a written request for discontinuance;

(2) the department issues to the manufacturer a written notice of suspension or revocation of approval; or

(3) the manufacturer modifies the device so that it does not meet the federal model specifications for breath alcohol ignition interlock devices in effect when it was certified.

(b) No manufacturer who makes an operational modification to a model of an ignition interlock device that has been certified pursuant to this Part shall release the modified device for use pursuant to Vehicle and Traffic Law Section 1198 without having obtained the express approval of the department. Manufacturers shall submit to the department a description of the intended operational modification(s), and the commissioner shall determine either that the existing certification shall continue in effect for the ignition interlock device as modified or that the manufacturer must apply for separate certification for the modified device. For purposes of this section, "operational modification" means any change to product design or function that would or could affect the device's anti-circumvention, anti-tampering or analytical features, as determined by the department.

(c) A manufacturer shall ensure that the department is provided with documentation of current insurance by notifying the department in writing of each renewal of coverage, each change of issuing company, and each change in liability limits.

(d) The department may require manufacturers whose devices are certified pursuant to this Part to periodically renew the certifications. Information required for renewal of certification shall minimally include:

(1) verification that information on file with the department, including, but not limited to, manufacturer's address and contact person, is current;

(2) an attestation that the department has been notified of any operational modification made to the certified model, or that no modification was made; and

(3) documentation of current insurance coverage.

(e) Each device shall be provided with a supply of disposable spit-trap mouthpieces, and the manufacturer shall ensure availability of additional mouthpieces.

(f) A manufacturer shall provide to installation/service providers that install its certified device(s) a sufficient number of labels to label each device installed and replace labels as needed. The label shall contain a notice printed in at least 10-point boldface type, reading as follows: "WARNING—ANY PERSON TAMPERING, CIRCUMVENTING OR OTHERWISE MISUSING THE DEVICE IS GUILTY OF A MISDEMEANOR AND MAY BE SUBJECT TO CIVIL LIABILITY."

[Current with amendments included in the New York State Register, Volume XXXVIII, Issue 34, dated August 24, 2016.]

APPENDIX 53

Letter from Department of Motor Vehicles Regarding Multiple Offenders

PATRICIA B. ADDUCI STATE OF NEW YORK
Commissioner DEPARTMENT OF MOTOR VEHICLES
THE GOVERNOR NELSON A. ROCKWELLER EMPIRE STATE PLAZA, ALBANY, NEW YORK 12226

January 7, 1986

Peter Gerstensang
c/o Gerstensang, Weiner & Gerstensang
41 State Street
Albany, New York 12207-2835

Dear Mr. Gerstensang:

This will confirm our telephone conversation concerning the Commissioner's policy on repeat drinking/driving offenders.

1. Second Conviction
 - A. If ineligible for the drinking driver program we will approve at the end of the statutory revocation period.
 - B. Evidence of alcohol evaluation and/or rehabilitation will be required.
2. Third Conviction
 - A. Allowed to enroll in the drinking driver program if eligible but will not be granted a conditional license.
 - B. If not eligible for the D.D.P., a minimum revocation period of eighteen months will be imposed.
 - C. See 1B.
3. Fourth Conviction
 - A. See 2A.
 - B. If not eligible for the drinking driver program a minimum revocation period of twenty-four months will be imposed.
 - C. See 1B.

(21404)

Peter Gerstanzang

-2-

January 7, 1986

4. Fifth Conviction
A. See 2A.

B. If not eligible for the drinking driver program a minimum revocation period of thirty months will be imposed.

C. See 1B.

5. Sixth and Subsequent Convictions
At the present time we will deny based on a history of alcohol related offenses. We will continue to deny until some Court tells us that we must approve. (Denials are, of course, appealable through the Administrative Appeals Board.)

If we have a change in policy in the future, I will advise you.

Very truly yours,

Alfred J. Frakes, Director
Driver Licensing Services

(E1443)

AJF:mj

APPENDIX 64

DPCA Financial Disclosure Report

NEW YORK STATE
IGNITION INTERLOCK DEVICE PROGRAM - FINANCIAL DISCLOSURE REPORT
CONFIDENTIAL

FINANCIAL DISCLOSURE INSTRUCTIONS

IN ORDER TO BE PROCESSED AS AN APPLICATION FOR JUDICIAL CONSIDERATION OF FINANCIAL AFFORDABILITY, ALL INFORMATION REQUESTED ON THIS REPORT MUST BE COMPLETELY, PROPERLY AND ACCURATELY PROVIDED. DATED SIGNATURE OF THE DEFENDANT IS ALSO REQUIRED.

QUALIFYING INFORMATION SECTION *

DEFENDANT'S NAME LAST, FIRST, MI (MIDDLE INITIAL): ENTER DEFENDANT'S NAME.

ADDRESS: ENTER DEFENDANT'S MAILING ADDRESS

DEFENDANT'S LICENSE NUMBER: ENTER DEFENDANT'S DRIVER LICENSE NUMBER.

DATE OF BIRTH: ENTER DEFENDANT'S BIRTHDATE

LIVING ARRANGEMENTS AND LENGTH OF TIME IN CURRENT ARRANGEMENT: DESCRIBE THE DEFENDANT'S PRESENT LIVING ARRANGEMENT AND THE LENGTH OF TIME IN THIS LIVING ARRANGEMENT (E.G. HOMELESS, MARRIED LIVING WITH SPOUSE AND/OR CHILD(REN), SINGLE/DIVORCED/WIDOWED LIVING ALONE, SINGLE/DIVORCED/WIDOWED LIVING WITH CHILD(REN), SINGLE/DIVORCED/WIDOWED LIVING WITH PARENTS WITH OR WITHOUT CHILD(REN), CO-HABITATING, LIVING WITH RELATIVE(S) OTHER THAN SPOUSE OR PARENT).

LIST OTHER PEOPLE IN HOUSEHOLD: LIST ANY OTHER PEOPLE WHO LIVE IN THE SAME HOUSEHOLD WITH THE DEFENDANT, INCLUDING SPOUSE AND ANY DEPENDENTS.

EMPLOYMENT STATUS: CHECK THE APPROPRIATE RESPONSE. IF EMPLOYED, PROVIDE ALL INFORMATION REQUESTED IN THE "EMPLOYED" SECTION ONLY AND PROCEED TO THE "FINANCIAL REPORTING SECTION". DOCUMENTS THAT CAN BE USED AS VERIFICATION OF EMPLOYMENT INCLUDE A RECENT PAY STUB OR A COMPANY OR EMPLOYER LETTER. IF UNEMPLOYED, PROVIDE ALL INFORMATION REQUESTED IN THE "UNEMPLOYED" SECTION AND PROCEED TO THE "FINANCIAL REPORTING SECTION". DOCUMENTS THAT CAN BE USED AS VERIFICATION OF UNEMPLOYMENT INCLUDE BENEFITS STATEMENT/CHECK STUB FOR UNEMPLOYMENT BENEFITS, EMPLOYER LETTER, OR DISABILITY VERIFICATION.

FINANCIAL REPORTING SECTION **

DO NOT LEAVE ANY SPACES BLANK. PLACE A ZERO IN THE APPROPRIATE SPACE IF THE DEFENDANT HAS NO SUCH INCOME OR EXPENSES.

A - MONTHLY INCOME FROM WAGES: ENTER TOTAL GROSS FOR ALL WAGES. THE FOLLOWING DOCUMENTS CAN BE USED AS VERIFICATION: PAY CHECK STUB, W-2 FORM OR EMPLOYER STATEMENT.

B - MONTHLY INCOME FROM OTHER SOURCES: ENTER ALL INCOME RECEIVED FROM SOURCES OTHER THAN EMPLOYMENT. ("RENTAL INCOME" REFERS TO INCOME RECEIVED FROM RENTAL PROPERTY THAT IS OWNED BY THE DEFENDANT.) THE FOLLOWING DOCUMENTS CAN BE USED AS VERIFICATION: PAYMENT STUB, MOST RECENT STATE OR FEDERAL TAX RETURN, BANK STATEMENT, COURT RECORDS, LETTERS FROM THE BENEFIT OFFICE REGARDING MONTHLY BENEFIT AMOUNT, ETC.

C - MISCELLANEOUS INCOME DURING PAST 12 MONTHS: SPECIFY ALL OTHER INCOME, REGARDLESS OF SOURCE.

D - CURRENT BALANCES: SPECIFY ALL TYPES AND AMOUNTS.

E - PERSONAL PROPERTY: LIST THE MARKET VALUE OF ALL PERSONAL PROPERTY OWNED.

F - MONTHLY EXPENSES: ENTER ALL MONTHLY EXPENSES AS APPROPRIATE. THE FOLLOWING DOCUMENTS CAN BE USED AS VERIFICATION: EXPENSE RECEIPTS, PAYMENT BOOK, MOST RECENT BILL.

SUBMIT 3 COPIES OF THIS COMPLETED REPORT TO THE SENTENCING COURT

DPCA-500IID-FDR Available at <http://www.dpca.state.ny.us>

1 OF 5

NEW YORK STATE
IGNITION INTERLOCK DEVICE PROGRAM - FINANCIAL DISCLOSURE REPORT
CONFIDENTIAL

QUALIFYING INFORMATION SECTION *

DEFENDANT'S LAST NAME _____ FIRST NAME _____ MI _____

DEFENDANT'S LICENSE NUMBER _____ DATE OF BIRTH _____

HOME ADDRESS _____

CITY _____ STATE _____ ZIP _____

MAILING ADDRESS _____

IF DIFFERENT _____

CITY _____ STATE _____ ZIP _____

| | YEAR | MAKE | MODEL | VALUE |
|---------------|------|------|-------|-------|
| VEHICLE ONE | | | | |
| VEHICLE TWO | | | | |
| VEHICLE THREE | | | | |

PROVIDE INFORMATION FOR EACH VEHICLE OWNED

*IF MORE THAN 3 VEHICLES PLEASE ATTACH ADDITIONAL SHEET WITH REQUIRED INFORMATION

DESCRIBE LIVING ARRANGEMENTS _____

LENGTH OF TIME IN CURRENT ARRANGEMENT _____

OTHER PEOPLE LIVING IN HOUSEHOLD:

| NAME | AGE | RELATIONSHIP |
|------|-----|--------------|
| | | |
| | | |
| | | |

| NAME | AGE | RELATIONSHIP |
|------|-----|--------------|
| | | |
| | | |
| | | |

EMPLOYMENT STATUS (CHECK ONE)

| | |
|--|--|
| EMPLOYED <input type="checkbox"/> | UNEMPLOYED <input type="checkbox"/> |
| PLACE OF EMPLOYMENT _____ | LENGTH OF UNEMPLOYMENT _____ |
| ADDRESS _____ | LAST PLACE OF EMPLOYMENT _____ |
| POSITION _____ | LAST EMPLOYMENT FROM _____ |
| LENGTH OF TIME _____ | TO _____ |
| VERIFICATION DOCUMENT (SPECIFY & ATTACH) _____ | VERIFICATION DOCUMENT (SPECIFY & ATTACH) _____ |

NEW YORK STATE
IGNITION INTERLOCK DEVICE PROGRAM - FINANCIAL DISCLOSURE REPORT
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FINANCIAL REPORTING SECTION ****A: MONTHLY INCOME FROM WAGES**

SELF \$ _____
 SPOUSE \$ _____
 OTHER HOUSEHOLD MEMBERS \$ _____
 \$ _____
 HOW OFTEN IS DEFENDANT PAID?
 (WKLY, BI-WKLY, MNTHLY, BI-MNTHLY)

B: MONTHLY INCOME FROM OTHER SOURCES

PENSION INCOME \$ _____
 RENTAL INCOME \$ _____
 CERTIFICATES OF DEPOSIT \$ _____
 TRUSTS/STOCKS/BONDS \$ _____
 CHILD SUPPORT \$ _____
 SPOUSAL MAINTENANCE/ALIMONY \$ _____
 LEGAL SETTLEMENTS/AWARD \$ _____
 AFDC/FOOD STAMPS/RENTAL ASSISTANCE \$ _____
 WORKERS COMP \$ _____
 UNEMPLOYMENT COMP \$ _____
 COUNTY/CITY WELFARE \$ _____
 OTHER: \$ _____
 \$ _____
 \$ _____

C: MISCELLANEOUS INCOME DURING PAST 12 MONTHS

LOTTERY \$ _____
 SWEEPSTAKE(S) \$ _____
 DISABILITY INSURANCE \$ _____
 BONUS \$ _____
 WAGERING \$ _____
 LEGAL SETTLEMENT/AWARD \$ _____
 ANNUITY \$ _____
 SPECIFY AMOUNTS
 OTHER \$ _____
 \$ _____
 \$ _____

D: CURRENT ACCOUNT BALANCES

SAVINGS ACCOUNT \$ _____
 CHECKING ACCOUNT \$ _____
 INDIVIDUAL RETIREMENT ACCOUNT \$ _____
 DEFERRED COMPENSATION ACCOUNT \$ _____
 TRUST ACCOUNT \$ _____
 OTHER ACCOUNTS (SPECIFY & AMOUNT) \$ _____

NEW YORK STATE
IGNITION INTERLOCK DEVICE PROGRAM - FINANCIAL DISCLOSURE REPORT
CONFIDENTIAL

E: PERSONAL PROPERTY

DO YOU OWN:

REAL ESTATE

| | | | | |
|----------|-------|-------|----|-------|
| LOCATION | _____ | VALUE | \$ | _____ |
| LOCATION | _____ | VALUE | \$ | _____ |
| LOCATION | _____ | VALUE | \$ | _____ |

REC VEHICLE/CAMPER

| | | | | |
|------|-------|-------|----|-------|
| MAKE | _____ | VALUE | \$ | _____ |
|------|-------|-------|----|-------|

ATV 3/4 WHEEL

| | | | | |
|------|-------|-------|----|-------|
| MAKE | _____ | VALUE | \$ | _____ |
|------|-------|-------|----|-------|

MOTORCYCLE

| | | | | |
|------|-------|-------|----|-------|
| MAKE | _____ | VALUE | \$ | _____ |
|------|-------|-------|----|-------|

BOAT

| | | | | |
|------|-------|-------|----|-------|
| MAKE | _____ | VALUE | \$ | _____ |
|------|-------|-------|----|-------|

| | | | | |
|------|-------|-------|----|-------|
| MAKE | _____ | VALUE | \$ | _____ |
|------|-------|-------|----|-------|

PERSONAL PROPERTY (ELECTRONICS, ART, JEWELRY, FURNITURE, ETC.)

APPROXIMATE VALUE _____

F: MONTHLY EXPENSES

| | | | | | |
|-----------------------------|----|----------------------|-----------------------|----|-------|
| RENT/MORTGAGE | \$ | _____ | WATER/SEWER | \$ | _____ |
| HOME ELECTRIC/GAS | \$ | _____ | FOOD | \$ | _____ |
| TELEPHONE (LANDLINE) | \$ | _____ | TELEPHONE (CELL) | \$ | _____ |
| HEALTH/LIFE INSURANCE | \$ | _____ | CHILD CARE | \$ | _____ |
| AUTOMOBILE INSURANCE(S) | \$ | _____ | AUTOMOBILE FUEL/GAS | \$ | _____ |
| | | SPECIFY NUMBER _____ | | | |
| AUTOMOBILE LOAN(S) | \$ | _____ | ALCOHOL | \$ | _____ |
| | | SPECIFY NUMBER _____ | CIGARETTES/OTHER | \$ | _____ |
| | | | TOBACCO PRODUCTS | \$ | _____ |
| SPOUSAL MAINTENANCE/ALIMONY | \$ | _____ | CABLE TELEVISION | \$ | _____ |
| INTERNET SERVICE | \$ | _____ | SATELLITE TV/RADIO | \$ | _____ |
| BEEPERS/PAGERS | \$ | _____ | MEDICAL PRESCRIPTIONS | \$ | _____ |
| | | SPECIFY NUMBER _____ | | | |

NEW YORK STATE
IGNITION INTERLOCK DEVICE PROGRAM - FINANCIAL DISCLOSURE REPORT
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F: MONTHLY EXPENSES CONTINUED *

| | <u>SPECIFY BELOW:</u> | <u>AMOUNTS</u> |
|-----------------------------|-----------------------|----------------|
| CREDIT CARD CHARGE(S)/OTHER | _____ | \$ _____ |
| LOAN AMOUNT(S) | _____ | \$ _____ |
| | _____ | \$ _____ |
| | _____ | \$ _____ |
| | _____ | \$ _____ |
| WORK RELATED TRAVEL | _____ | \$ _____ |
| RECREATION | _____ | \$ _____ |
| | _____ | \$ _____ |
| | _____ | \$ _____ |
| OTHER EXPENSES | _____ | \$ _____ |
| | _____ | \$ _____ |
| | _____ | \$ _____ |

* ATTACH ADDITIONAL SHEET WITH REQUIRED INFORMATION IF MORE SPACE IS NECESSARY.

THE INFORMATION PRESENTED HEREIN IS TRUTHFUL AND ACCURATE TO THE BEST OF MY KNOWLEDGE.

| | |
|------------------------------|---------------|
| _____ DEFENDANT SIGNATURE | _____ DATE |
| _____ PRINT NAME | |

APPENDIX 65

Order of Suspension Pending Prosecution Hardship Privilege and Order of Suspension

New York State Department of Motor Vehicles

**ORDER OF SUSPENSION PENDING PROSECUTION
HARDSHIP PRIVILEGE**

Please Print

PART 1 - HARDSHIP PRIVILEGE

| | | | | |
|---------------|----------------|------------------|------------|--------------|
| Motorist Name | State of Birth | Yr. Lic. Expires | Lic. Class | Restrictions |
|---------------|----------------|------------------|------------|--------------|

YOUR EMPLOYER AND/OR SCHOOL YOU ATTEND

| | |
|------|--|
| Name | Address (No. and Street, City or Town, State and ZIP Code) |
| Name | Address (No. and Street, City or Town, State and ZIP Code) |
| Name | Address (No. and Street, City or Town, State and ZIP Code) |

Under the authority of Section 1193 of the Vehicle and Traffic Law, your license is suspended immediately. This order will allow you to drive to or from work, to or from medical treatment (for yourself or a member of your immediate household), or if you are a student enrolled in a school, college or university, you may drive to and from school if such travel is necessary for the completion of your degree or certificate. You must have both parts of this order with you when you drive.

REASON FOR GRANTING HARDSHIP PRIVILEGE (this privilege is not valid unless this part is completed by the Court):

This hardship privilege is not valid: If you are convicted; If you do not have a valid driver license; If your license is revoked or suspended after this order is issued; or If your license is expired more than two years.

Date _____ (Judge's Signature) _____

DMV-1193 (10/02)

New York State Department of Motor Vehicles

ORDER OF SUSPENSION PENDING PROSECUTION

Please Print

PART 2

| | | | | | |
|---------------------------|---------------|----------|---|------------------------|---|
| Motorist Name | Date of Birth | Apt. No. | TBLRAD Ticket Number (or Docket Number) | Violation Date | Male <input type="checkbox"/> Female <input type="checkbox"/> |
| Address (Number & Street) | City | State | Zip Code | Police NCIC/ORI Number | |

Under the authority of Section 1193 of the Vehicle and Traffic Law, your license is suspended immediately, pending prosecution for a charge of violating Section: ☐ 1192-1 ☐ 1192-2 ☐ 1192-3 ☐ 1192-4 of the New York State Vehicle and Traffic Law.

☐ You have been convicted of violating a subdivision of Section 1192 of the V&T Law within the past five years, or you are charged with a felony under Article 120 or 125 of the New York State Penal Law. (You are not eligible for a hardship privilege or conditional license under these circumstances.)

☐ You are alleged to have had .08 of one percent or more by weight of alcohol in your blood, as shown by chemical analysis of blood, breath, urine or saliva according to Section 1194 of the V&T Law. (If this box is checked, you may be eligible for a conditional license after 30 days. The Department of Motor Vehicles will notify you of your eligibility.)

☐ You have a DJ/MJ license/permit and are charged with violating subdivisions 1, 2 or 3 of Section 1192 of the Vehicle and Traffic Law. You may be eligible for a conditional license after 30 days. The Department of Motor Vehicles will notify you of your eligibility.

| | | |
|------------|------------|------------------------------|
| Court | Court Code | Effective Date of Suspension |
| Judge Name | | Judicial Code |

COMPLIANCE - Has motorist turned in photo license and any permits to the court?

☐ Yes - photo license attached ☐ No

☐ Yes - permit(s) attached

Motorist Signature _____ Signature of Judge or Clerk of Court _____

Note to Court Clerk: Send the "DMV" copy of this MV-1193 to your designated data entry site.

| DMV OFFICE USE ONLY | | | |
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DMV-1193 (10/02) CUSTOMER

Topic 6:

DWAI Drug Issues

DEFENDING DWI CASES - THE CRITICAL ISSUES

DWAI DRUGS ISSUES

Sponsored by

THE NEW YORK STATE BAR ASSOCIATION

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Materials Submitted By

JOSEPH M. GERSTENZANG, ESQ.
GERSTENZANG, SILLS, COHN & GERSTENZANG
210 Great Oaks Boulevard
Albany, New York 12203
Tel: (518) 456-6456

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CHAPTER 10

DRIVING WHILE ABILITY IMPAIRED BY DRUGS

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§ 10:1 Generally

Driving while under the influence of drugs is a violation of § 1192(4) of the VTL. With the exception of the specification of drugs as the substance at issue, this section has wording similar to driving while ability impaired by alcohol in violation of VTL § 1192(1).

No person shall operate a motor vehicle while the person's ability to operate such a motor vehicle is impaired by the use of a drug as defined in this chapter.

VTL § 1192(4). The words "as defined in this chapter" refer to VTL § 114-a which defines a drug as follows:

The term "drug" when used in this chapter, means and includes any substance listed in section thirty-three hundred six of the public health law.

VTL § 114-a.

Section 3306 of the Public Health Law establishes five schedules of controlled substances and lists those substances. While the list is extensive, its effect is to restrict the application of the statute to the listed substances. Those persons operating a motor vehicle under the influence of substances not set forth in the schedule do not come within the purview of this statute. See People v. Mercurio, N.Y.L.J., 8/30/93, p. 25, Col. 5 (Suffolk Co. Ct.).

In contrast, the California Vehicle Code Section 312 defines a drug as:

The term "drug" means any substance or combination of substances, other than alcohol, which could so affect the nervous system, brain, or muscles of a person as to impair, to an appreciable degree, his ability to drive a vehicle in the manner that an ordinary prudent and cautious man, in full possession of his faculties, using reasonable care, would drive a similar vehicle under like conditions.

There is no generic statute in New York State which prohibits the impaired operation of a motor vehicle. The statutory framework is specific to the substance at issue. The People must specifically charge the defendant with the statutes pertaining to alcohol, or those pertaining to drugs, or both. In

People v. Bayer, 132 A.D.2d 920, 518 N.Y.S.2d 475 (4th Dep't 1987), the Court articulated the rule as follows:

Vehicle and Traffic Law § 1192, entitled "Operating a motor vehicle while under the influence of alcohol or drugs", contains three subdivisions relating to alcohol (subds. [1], [2], [3]) and one relating to drugs (subds. [4]). Subdivision (3) prohibits operation of a motor vehicle while defendant "is in an intoxicated condition", but does not refer to a substance creating the condition. It is clear as a matter of law, however, that the subdivision is intended to apply only to intoxication caused by alcohol. That conclusion is buttressed by examining Vehicle and Traffic Law § 1196(1) which permits conviction of a violation of subdivision (1), (2) or (3) of Vehicle and Traffic Law § 1192, notwithstanding that the charge laid before the court alleged a violation of subdivision (2) or (3), but does not permit conviction of a violation of subdivision (4). Additionally, while a violation of either subdivision (3) or (4) of Vehicle and Traffic Law § 1192 is a misdemeanor, the elements of the two crimes differ. Proof that defendant was in an intoxicated condition is essential to a prosecution under subdivision (3), but is not required under subdivision (4).

People v. Bayer, 132 A.D.2d 920, 518 N.Y.S.2d 475, 476-77 (1987). See also People v. Grinberg, 4 Misc. 3d 670, 781 N.Y.S.2d 584 (N.Y. City Crim. Ct. 2004); People v. Wiley, 59 Misc. 2d 519, 299 N.Y.S.2d 704 (Nassau Co. Dist. Ct. 1969); People v. Cheperuk, 64 Misc. 2d 498, 315 N.Y.S.2d 203 (Nassau Co. Ct. 1970).

§ 10:2 Elements of proof

In People v. Kahn, 160 Misc. 2d 594, 610 N.Y.S.2d 701 (Nassau Co. Dist. Ct. 1994), Judge Mahon set forth the elements of proof.

In order for the People to prove the defendant guilty beyond a reasonable doubt they must prove the following elements of the crime:

- 1) The defendant ingested a drug.

2) The drug ingested by the defendant is one proscribed by Public Health Law section 3306. See VTL 114-a.

3) After ingesting the drug, the defendant operated a motor vehicle. See VTL section 125.

4) While operating this motor vehicle the defendant's ability to operate the motor vehicle was impaired by the ingestion of the drug.

610 N.Y.S.2d at 703. See also People v. Felicia, 52 Misc. 3d 212, ___, 27 N.Y.S.3d 841, 846 (N.Y. City Crim. Ct. 2016) (same); People v. Rose, 8 Misc. 3d 184, ___, 794 N.Y.S.2d 630, 631 (Nassau Co. Dist. Ct. 2005) ("A driving while impaired by drugs prosecution requires that the individual's impairment be shown to have been caused by a drug specifically listed in the Public Health Law").

Here, the Court found the defendant not guilty based upon the fact that the People failed to prove that the defendant suffered impairment, to any extent, of his physical or mental abilities which he was expected to possess as a reasonable and prudent driver. 610 N.Y.S.2d at 703-04. Cf. People v. Crandall, 255 A.D.2d 617, 681 N.Y.S.2d 99 (3d Dep't 1998).

When charging a jury, one of the most common references is the New York Office of Court Administration's Criminal Jury Instructions. In defining the charge of driving a motor vehicle while ability impaired by drugs, the Office of Court Administration ("OCA") parallels the definition of impairment by alcohol and sets forth the following charge:

In order to drive safely, a driver is expected at all times to be able to think clearly and act carefully. If, by reason of the consumption of drugs, a driver loses to any extent control of his mental faculties and his physical responses, our law considers that he has operated his vehicle while under the influence of a drug or drugs.

The key words in that law are "to any extent."

According to the law, a person's ability to drive safely is impaired by the use of drugs when, by voluntarily consuming drugs, he has actually impaired, to any extent, the physical and mental abilities which he is

expected to possess in order to operate his vehicle as a reasonable and prudent driver. The law does not require proof that such ability to operate his vehicle has been substantially affected. The proof need only show that such ability to drive safely has been affected "to any extent."

New York Criminal Jury Instructions, Vol. 3, VTL § 1192(4), pg. 2318S.

While both DWI (alcohol) and DWAI (drugs) are class A misdemeanors, the standards of proof are quite different. The People's burden in proving DWAI (drugs) is lower than that for intoxication by alcohol. The standard for drugs is identical to that of DWAI (alcohol). Specifically, the People's burden in a drug case is impairment, to any extent, of the physical and mental abilities a person is expected to possess in order to operate his vehicle as a reasonable and prudent driver. The standard for DWI (alcohol) is:

[A] greater *degree* of impairment which is reached when the driver has voluntarily consumed alcohol to the extent that he is *incapable of employing the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver.*

People v. Cruz, 48 N.Y.2d 419, 427, 423 N.Y.S.2d 625, 628 (1979) (emphases added).

§ 10:3 Probable cause to arrest

In People v. Shapiro, 141 A.D.2d 577, 529 N.Y.S.2d 186 (2d Dep't 1988), the Appellate Division, Second Department, upheld the hearing court's finding of probable cause where the evidence indicated erratic driving, dilated pupils, fidgety behavior, presence of white powder, and colloquy with the defendant which indicated that he was not ill or under the influence of prescription medication:

We agree with the hearing court's conclusion that there was probable cause for the arrest of the defendant and that the seizure of physical evidence from the defendant's car was proper. The evidence adduced at the hearing established that the two arresting officers observed the defendant driving at erratic speeds as well as swerving across a double yellow line. Upon pulling the

defendant's vehicle over, the officers further observed that the defendant's pupils were dilated, his hair was "disheveled", his clothing was "mussed" and his behavior was "fidgety" and "jumpy". At the same time, Officer Casetelli observed a vial containing white powder on the front seat of defendant's car. After engaging in conversation with the defendant and ascertaining that he was not ill, or under the influence of prescription medication, the officers concluded that the defendant's behavior bore the characteristic manifestations of cocaine influence and thus arrested him for driving while his ability was impaired by the use of drugs.

People v. Shapiro, 529 N.Y.S.2d at 187.

In People v. Kaminski, 151 Misc. 2d 664, 573 N.Y.S.2d 394 (Rhinebeck Just. Ct. 1991), the following evidence was sufficient to establish probable cause to arrest for VTL § 1994(4):

Upon approaching the vehicle, one of the officers reported smelling the odor of marijuana emanating from the cab. The senior officer conducted four field tests generally associated with developing probable cause to make an arrest under Vehicle and Traffic Law 1192. He testified that the defendant failed all or portions of several of these tests, that the defendant displayed several of the traditional signs of impairment, namely slow speech, bloodshot eyes as well as the odor of marijuana. In addition, the defendant admitted to the officer that he had a "joint" before entering the bridge toll plaza.

People v. Kaminski, 573 N.Y.S.2d at 395.

§ 10:4 Quantifying drug impairment

The major distinction between alcohol and drug cases is that there is an acknowledged correlation between blood alcohol concentrations and impaired driving. Most states have recognized .08 as the blood alcohol concentration correlating to intoxication. A blood alcohol concentration can be determined by analysis of breath, blood or urine. Drugs are far more subjective, and there are no numerical standards associating so many nanograms of a drug with a level of impairment or intoxication. In this regard, People v. Rossi, 163 A.D.2d 660, 558 N.Y.S.2d 698 (3d Dep't 1990) is somewhat of an anomaly.

Here, the Appellate Division affirmed vehicular crimes convictions on the ground, in part, that the amount of drugs detected in the motorist's blood was sufficient to support imposition of criminal liability:

Defendant also argues that the amount of drugs detected was insufficient to warrant criminal liability. There was testimony from a forensic toxicologist that the amount of drugs detected in defendant's blood, totaling 46 nanograms per milliliter of methamphetamine and 13 nanograms per milliliter of amphetamine, was sufficient to affect driving ability detrimentally. That the amount of drugs in defendant's blood was detected by the private laboratory rather than the State Police Laboratory is of no moment considering that the State Police only test for at least 100 nanograms per milliliter and the applicable statute proscribes any impairment of the ability to drive (cf., People v. Scallero, 122 A.D.2d 350, 352, 504 N.Y.S.2d 318), which can be evidenced not only by alcohol or drug presence in blood but by descriptions of the driver's conduct (id.). Considering the testimony by the forensic toxicologist concerning the effect of the drugs and by the police officers and others concerning defendant's conduct and driving, we do not believe that defendant was improperly convicted based on an insufficient amount of drugs.

558 N.Y.S.2d at 700.

In People v. Prowse, 60 A.D.3d 703, ___, 875 N.Y.S.2d 121, 122 (2d Dep't 2009), the Appellate Division, Second Department, held that:

The County Court properly admitted into evidence at trial the opinion testimony of a forensic toxicologist with respect to the effect that a certain amount of cocaine would have on a person's ability to operate a motor vehicle, and as to whether the level of cocaine present in a person's body would be higher four hours before a blood sample was drawn. The forensic toxicologist's testimony regarding her qualifications and experience provided a sufficient foundation for her subsequent opinion testimony. The County

Court was not required to formally declare or certify the forensic toxicologist to be an expert witness.

(Citations omitted).

In People v. Clark, 309 A.D.2d 1076, ___, 766 N.Y.S.2d 710, 711 (3d Dep't 2003), the Appellate Division, Third Department, found that there was legally sufficient evidence to support the defendant's conviction of DWAI Drugs where:

The evidence is that while on routine parole in the City of Schenectady, Schenectady County on the night of November 17, 2000, two police officers observed a vehicle approaching them without its headlights on. As they watched, it turned into an intersecting street, pulled to the curb and defendant exited the vehicle. He approached the police car, but when the officers started to exit the car, defendant ran. In the ensuing chase and capture, one of the officers used pepper spray to help subdue defendant. A glassine envelope containing a white substance was found in defendant's car and a glass pipe of the type used to smoke crack cocaine was found on defendant's person. As a result, State Trooper Joseph Germano, a certified drug recognition expert, was called and he performed a standardized 12-step evaluation process. He testified that, in his opinion, defendant's ability to operate his vehicle was impaired by the use of crack cocaine. Of note, during the 12-step process, defendant admitted to having smoked crack cocaine earlier that evening.

The mere presence of a metabolite in a person's body at the time of arrest, coupled with observations of impairment, were found insufficient to establish driving while ability impaired by drugs. In People v. Kahn, 160 Misc. 2d 594, 610 N.Y.S.2d 701 (Nassau Co. Dist. Ct. 1994), Police Officer Read testified that he observed the defendant's vehicle weaving and, at one point, leaving the paved portion of the roadway. After stopping the defendant's vehicle, the defendant staggered and swayed, exhibited bloodshot and glassy eyes, slurred speech, and had difficulty producing documents requested by the officer. Officer Read testified that he detected a slight odor of an alcoholic beverage on the defendant's breath. Police Officer Fox testified to similar observations and, in addition, stated that the

defendant had indicated that he had taken a medication known as Ciprin. A laboratory analysis of the defendant's urine revealed the presence of benzodiazapine.

The defendant testified that he had recently returned from a ten-day business trip in South Africa, which subjected him twice to a nine-hour difference in time zones. He also testified that he used Dalmane, a prescription medication used to induce sleep, also known as flurazepam. He testified that he had last taken the drug approximately 48 hours before his arrest.

The defendant's expert witness testified that the clinical effect of Dalmane lasts only eight to ten hours. Thereafter, the person could expect to awaken and function normally. Further, the witness testified that, after Dalmane is ingested, the human body metabolizes the drug into a substance known as benzodiazapine. This metabolite remains detectable in the human blood stream up to 14 days after ingestion. A urine test, such as the one administered to the defendant, can only establish the presence of flurazepam in the human body, not the quantity.

The Court concluded that the People failed to establish that the defendant drove while his ability was impaired by drugs.

In the absence of a blood test given to the defendant near the time of his arrest, the quantity of the drug flurazepam in the defendant's body while operating his motor vehicle is unknown. In view of the expert testimony, . . . it cannot be said that the mere presence of the metabolite, benzodiazapine, in the defendant's body at the time of his arrest, coupled with the observations of the defendant's behavior . . . establishes beyond a reasonable doubt the defendant's impaired ability to drive on the night in question. To find criminal culpability upon the stricter standard of mere presence of a proscribed drug in the defendant's body, coupled with observations of the defendant's behavior, would, on these facts, fly in the face of generally accepted scientific fact within our medical community and, in our view, impermissibly strain the meaning of the statute.

People v. Kahn, 610 N.Y.S.2d at 704. See also People v. Mercurio, N.Y.L.J., 8/30/93, p. 25, Col. 5 (Suffolk Co. Ct.) (mere presence of metabolites in blood insufficient to prove controlled substance actually impaired the ability of defendant to drive).

§ 10:5 Statute is not unconstitutionally vague

In People v. Percz, 100 Misc. 2d 1018, 420 N.Y.S.2d 477 (Suffolk Co. Dist. Ct. 1979), the defendant argued that VTL § 1192(4) is unconstitutionally vague in that it contains no definition of the term "impaired." The court upheld the statute, concluding that the statute is sufficiently clear so as to warn a person of ordinary intelligence that the conduct contemplated is forbidden.

§ 10:6 Must impairment be voluntary?

The OCA jury charge requires only a finding that the drugs at issue had been voluntarily consumed. Some of the case law, however, seems to require that the impairment resulting from the consumption be voluntary. In People v. Koch, 250 A.D. 623, 294 N.Y.S. 987 (2d Dep't 1937), the defendant had taken a drug known as luminol for the purpose of relieving headaches arising from a fractured skull. The drug had been prescribed by a physician. The defendant, inadvertently, took an overdose which had an intoxicating effect upon him. In reversing and dismissing a conviction for DWI under the statute in existence at that time, the Court stated:

The statute contemplates only voluntary intoxication resulting from imbibing alcoholic liquors or the voluntary taking in to the system of other intoxicating agents; and not the condition from which the appellant was suffering, induced by the drug.

People v. Koch, 294 N.Y.S. at 989.

Citing People v. Koch, the Appellate Term in People v. Van Tuyl, 79 Misc. 2d 262, 359 N.Y.S.2d 958 (App. Term, 9th & 10th Jud. Dist. 1974), held:

The quality of evidence remains virtually the same in charges of intoxication or impairment. The People must prove that by reason of the impairment the defendant was incapable of operating the motor vehicle in a prudent and cautious manner (cf. People v. Weaver, 188 App. Div. 395, 177 N.Y.S. 71; People v. Bevilacqua, 12 Misc. 2d 558, 170 N.Y.S.2d 423; People v. Davis, 270 Cal.App.2d 197, 75 Cal. Rptr. 627) and that the impairment was *voluntarily induced* (People v. Koch, 250 App. Div. 623, 294 N.Y.S. 987, *supra*).

359 N.Y.S.2d at 963-64 (emphasis added).

In People v. Van Tuyl, the proof indicated that the defendant had been taking butazolidin alka as prescribed by a physician for an arthritic condition of his spine and knees. The defendant had been advised to take two pills daily, but had not been advised regarding potential adverse side effects. Expert testimony indicated that approximately 40% of the patients using butazolidin had severe orientation problems including "confusional state, lethargy, vertigo, unsteadiness afoot, blurred vision and possibly even slurred speech." 359 N.Y.S.2d at 960.

Prior to the accident which led to his arrest, the defendant had attended a cocktail party and had had two drinks consisting of scotch and soda. Charged initially with DWI in violation of VTL § 1192(3), the defendant was convicted of a violation of VTL § 1192(1), DWAI. The testimony at trial was that the defendant weighed 220 pounds. An expert witness for the defense testified that the defendant could not have been intoxicated from the two drinks he consumed.

In reversing and dismissing the information, the Court noted that the proof indicated that impairment was induced by the drug butazolidin. In addition, the Court observed that there was a failure of proof in regard to voluntary impairment, and that butazolidin was not a scheduled drug under VTL § 114-a. Finally, the defendant was convicted of DWAI in violation of VTL § 1192(1). Inasmuch as VTL § 1192(1) was not a lesser included offense of VTL § 1192(4), the conviction could not stand. 359 N.Y.S.2d at 964.

In People v. Calcasola, 80 Misc. 2d 429, 364 N.Y.S.2d 301 (App. Term, 9th & 10th Jud. Dist. 1975), the Court distinguished People v. Van Tuyl, and affirmed a conviction of a defendant who had been adjudicated impaired by virtue of an overdose of methadone. Judge Gagliardi, who wrote the majority opinion in People v. Van Tuyl, dissented in Calcasola on the ground that the proof failed to establish that the defendant had been advised not to operate a motor vehicle while using methadone, and the consumption of the drug was in accordance with a physician's advice and, therefore, any resultant impairment or intoxication was involuntary.

The majority, seemingly, retreated from the position taken in People v. Van Tuyl, and noted that the conviction in Van Tuyl was for a violation of VTL § 1192(1), impairment by alcohol. Since the proof in People v. Van Tuyl indicated that the impairment in issue was the result of the use of a drug, the Court distinguished Van Tuyl on the basis that the defendant was convicted under a statute that was not applicable to drugs. The majority affirmed the conviction in People v. Calcasola, holding

that the fact that the defendant was legally participating in the methadone maintenance program did not excuse his operation of a motor vehicle while impaired by methadone. 364 N.Y.S.2d at 302-03.

§ 10:7 Absence of alcohol held not relevant to drug prosecution

Since the legislative framework is specific for alcohol or drugs, evidence of the absence of alcohol in a drug prosecution would seem to be most pertinent. In People v. Salino, 139 Misc. 2d 386, 527 N.Y.S.2d 169 (N.Y. City Crim. Ct. 1988), the Court held to the contrary. Here, the People attempted to introduce the results of a Breathalyzer test indicating a .00 reading. In suppressing this test result, the Court held:

The .00% reading of the breathalyzer exam regarding defendant's blood alcohol content is indicative of nothing else other than, at the time of defendant's arrest, no alcohol was present in his blood. This court is unable to see the relevancy of permitting such blood test results into evidence to show that defendant was impaired by drugs. It has no probative worth; additionally, it is neither rational nor logical to allow such results into evidence. To do so would offend due process, concomitantly, the basic rules of circumstantial evidence, and permit an inference on an inference which is impermissible.

527 N.Y.S.2d at 171.

§ 10:8 Drug evaluation and classification

Over the last several years, the Los Angeles Police Department has developed a series of clinical and psycho-physical examinations. These procedures are designed to enable trained police officers to determine whether a suspect is under the influence of drugs and, furthermore, what category of drugs he has been using. In the 1980's, the Los Angeles Police Department developed a series of clinical and psychophysical examinations. These procedures were designed to enable trained police officers to determine whether a subject was under the influence of drugs and furthermore, what category of drugs he had been using. While the program began in Los Angeles, it has expanded throughout the country. In New York, the New York City Police, the Nassau County Police, Bureau for Municipal Police and New York State Police have been actively involved in the training of police officers in these procedures.

The program and procedures are controversial in that their end product is the expression of an opinion by the drug recognition expert ("DRE") as to the use by a defendant of a particular category of drugs. Given the almost limitless possibilities of human physiology, and the potential physical and mental effects of various legal and illegal substances, to say nothing of the possibilities arising out of polydrug use, the admissibility of an opinion by a drug recognition expert is questionable.

In People v. Quinn, 153 Misc. 2d 139, 580 N.Y.S.2d 818 (Suffolk Co. Dist. Ct. 1991), rev'd on unrelated grounds 158 Misc. 2d 1015, 607 N.Y.S.2d 534 (1993), Judge Dounias conducted a hearing pursuant to Frye v. United States, 293 Fed. 1013 (D.C. Cir. 1923) and People v. Middleton, 54 N.Y.2d 42, 444 N.Y.S.2d 581 (1981). After hearing extensive testimony, the Court held that both horizontal gaze nystagmus and the DRE protocol met the standards enunciated by Frye and Middleton. 580 N.Y.S.2d at 826.

Following Judge Dounias' grant of judicial recognition, the case proceeded to trial before District Court Judge Ira P. Block. Judge Block noted that there was no testimony elicited at the trial, rather the parties stipulated as to what the testimony would be if the witnesses were called and submitted the test and results as previously received in evidence at the hearing before Judge Dounias. In entering the verdict of guilty, the Judge noted:

[I]n the within case we had a confession by the defendant, a voluntary submission to a blood test which revealed that the defendant had cocaine in her blood stream, observations of erratic operation of a motor vehicle by two police officers, attempts by the defendant to conceal materials within the car, drugs found in the vehicle and on the person of the defendant . . . were any or all of these not present would this change the effect of this case? We do not pass upon that since that is not before us. Would there be any different effect if any or all of these elements were not present . . . this is another question which does not have to be addressed at this time.

People v. Quinn, N.Y.L.J., 2/11/92, at p. 25-26, Col. 5.

In People v. Villeneuve, 232 A.D.2d 892, 649 N.Y.S.2d 80 (3d Dep't 1996), the Appellate Division, Third Department, rejected defendant's challenge to the admissibility of officer Murphy's testimony as a DRE, stating that:

Murphy testified about his training, the tests given defendant, the process of metabolization of drugs by the body and specifically the metabolism of cocaine by this defendant. We reject defendant's challenge. The attack on Murphy's expertise was not supported by any evidence. Defendant's conclusory [sic] allegations as to Murphy's limitations as an expert fail to make out a ground for exclusion of his testimony.

Id. at ___, 649 N.Y.S.2d at 83.

§ 10:9 DRE training

The approved training is a three-phase process. The initial phase is not specific to drug recognition, rather it is the NHTSA approved standardized field sobriety test program. This is used to detect alcohol impaired motorists as well as the drugged defendant.

Phase I of the drug recognition training consists of a two-day (16-hour) preschool. Phase II is a seven day (56-hour) classroom program. The two-day preschool defines the term "drug" as it is used in the DRE program and also familiarizes students with the techniques of the drug evaluation process. Phase II provides detailed instruction in the techniques of drug evaluation examination as well as physiology. Students are required to pass a comprehensive written examination before proceeding to Phase III, which consists of field certification.

The field certification portion of the training begins upon completion of the classroom training and is conducted periodically over a period of 60 to 90 days. Students work under the direction of certified instructors and evaluate persons suspected of being impaired by drugs other than alcohol. Students are required to participate and document the results of at least 12 drug evaluations and complete a comprehensive examination. Upon successful completion of the examination and the evaluations, a student is certified as a drug recognition expert. *The DRE*, Winter 1993, Vol. 5, Issue 1, (Phoenix City Prosecutor's Office, Phoenix, Arizona).

DREs are trained in performing the drug recognition evaluation, and distinguishing between seven broad categories of drug groups. The categories have been developed based upon shared symptomatology. The seven categories are:

- 1) Central nervous system depressants;
- 2) Central nervous system stimulants;
- 3) Hallucinogens;
- 4) Phencyclidine;
- 5) Narcotic analgesics;
- 6) Inhalants; and
- 7) Cannabis.

Much of the training concerns breaking drugs down into these seven categories and discussing their symptomology and the physical manifestations that people exhibit when they are under the influence of these substances. There is also a great deal of training in regard to the effects of combinations of the illegal drugs or polydrug usage.

§ 10:10 Drug classifications: Central nervous system depressants

Central nervous system depressants are defined by the DRE training materials as substances that slow down the operation of the central nervous system which consists of the brain, brain stem and spinal cord. They can slow down the users reactions and cause him or her to process information more slowly. They relieve anxiety and tension, and have a sedative effect. In high enough doses they have the effect of general anesthesia and can induce coma and death. See Preliminary Training For Drug Evaluation And Classification, Administrators Guide, HS172A R4/88, pgs. I-4 to I-5.

Included within this classification are alcohol, valium, xanax and various other tranquilizers and sedatives.

Central Nervous System Stimulants

Central nervous system stimulants speed up the operation of the central nervous system and the bodily functions controlled by the central nervous system. They can cause the user to become hyperactive, talkative, and to have rapid and repetitive speech patterns. The stimulants increase heart rate, blood pressure and body temperature. They induce emotional reactions of excitement, restlessness and irritability. They can also induce unstable beating of the heart (cardiac arrhythmia), seizures and death. See Preliminary Training for Drug Evaluation And Classification, Administrators Guide, HS172A R4/88, page I-6.

Central nervous system stimulants include such commonly abused drugs as cocaine and amphetamines.

Hallucinogens

In addition to hallucinations, hallucinogens can distort perception so that the user's perceptions of real stimuli are distorted. What they see, hear and smell are different from the objective reality of what is present. Rather than speeding up or slowing down the central nervous system, "hallucinogens cause the nervous system to send strange or false signals to the brain." Id. at pg. I-7.

They "produce sights, sounds and odors that aren't real; induce a temporary condition very much like psychosis or insanity; and can create a 'mixing' of sensory modalities, so that the user 'hears colors', 'sees music', 'tastes sounds', etc." Id. at pg. I-7.

Included among hallucinogens are LSD and Peyote.

Disassociative Anesthetics

While similar to hallucinogens, disassociative anesthetics are given its own category because of the various kinds of impairment they create. PCP or phencyclidine is the primary disassociative anesthetic that is commonly abused. It is a synthetic drug and does not occur naturally. People under the influence of PCP can exhibit a combination of symptoms associated with hallucinogens, stimulants and depressants. Id. at I-7.

Like central nervous system depressants, PCP depresses brain wave activity, causing a slow down in thought, reaction time, and verbal responses. It is similar to central nervous system stimulants in that it causes increases in heart rate, blood pressure, adrenalin production, body temperature, and causes muscles to become rigid.

It is akin to hallucinogens in that it distorts or "scrambles" signals received by the brain. PCP distorts sight, hearing, taste, smell and touch. Perceptions of time and space may be affected, and the user can become paranoid, feel isolated and depressed. The user may develop a strong fear of and preoccupation with death, and may become unpredictably violent. Id. at I-8.

Narcotic Analgesics

The drugs in this category tend to reduce a person's reaction to pain. They produce euphoria, drowsiness, apathy, lessened physical activity and sometimes impaired vision. Persons under the influence may appear as being semi-conscious,

or what is commonly referred to as "on the nod". In high enough doses, narcotic analgesics can produce coma, respiratory failure and death. Id. at I-9 to I-10.

Narcotic analgesics include heroin, morphine and codeine.

Inhalants

Inhalants are defined by the DRE training materials as fumes of volatile substances. Common among these are gasoline, oil, base paints, glue, aerosol cans, varnish remover, cleaning fluid, and nitrous oxide. Symptoms vary with the inhalant used and the effects can vary from the stuporous and passive to irritable, violent and dangerous. Id. at pg. I-10 to I-11.

Cannabis

Cannabis includes all forms and products derived from the Cannabis Sativa plant. The active ingredient in cannabis products is the substance known as "Delta-9 Tetrahydrocannabinol", or "THC". Its most common form is marijuana. Marijuana is neither a central nervous system depressant, nor a central nervous system stimulant. Its effects are to interfere with the attention process and produce a distortion of the user's perception of time. Its symptoms include an increased heart beat and reddening of the eyes. Id. at pg. I-11.

§ 10:11 Evaluation procedures

There are basically eight procedures that are used to evaluate a defendant for the purpose of determining whether and/or what group of drugs the defendant has been using. The evaluation is extensive and consumes a fair amount of time during which the DRE is performing procedures that are akin to those done by a nurse or a physician. It should be noted that the claimed rate of accuracy for these evaluations is very high. It should also be noted that over the course of the evaluation, a high percentage of defendants will voluntarily disclose the specifics as to their drug usage.

Drug recognition evaluations are, at present, not done on the road. Rather, they are a post-arrest procedure which is followed once the defendant has been taken into custody and brought to the police station. The defendant is already under arrest, and the drug recognition expert (DRE) is not, generally, present at the time of arrest. The issue of probable cause is, therefore, of great interest particularly where the arrest is for driving while under the influence of drugs in the first instance.

One of the great problems associated with enforcement in this area is the difficulty in developing probable cause. With alcohol, there is the odor of alcoholic beverage and commonly recognized signs of intoxication which have been traditionally used to justify the arrest of DWI defendants. With drugs, the physical manifestations vary with the drug and personality of the defendant. The fact that DREs are available back at the station once the arrest is made is of little assistance to the officer on the scene if she is unable to develop the probable cause she needs to justify her arrest.

While the DRE program is a response to the increasing number of drugged drivers, it cannot be effective unless it is combined with training for police officers on the street. Since the DREs do not become involved until after the arrest, they will have little to do unless valid arrests are being made. Once the arrest is made, the DRE is called to the station and the evaluation process begins.

§ 10:12 Breath alcohol test

The first part of the drug recognition evaluation is a breath alcohol test. In New York State, the most common possibilities are the Alco-Sensor, BAC DataMaster, Intoxilyzer, and Alcotest 7110.

In a DWI prosecution, the Alco-Sensor would be inadmissible at trial. People v. Thomas, 121 A.D.2d 73, 509 N.Y.S.2d 668 (4th Dep't 1986), aff'd, 70 N.Y.2d 823, 523 N.Y.S.2d 437 (1987). In a DWI prosecution, breath test devices, other than the Breathalyzer, are subject to challenge particularly where judicial recognition has not been granted in the jurisdiction in which the test result is being offered into evidence. Even a Breathalyzer result requires a fairly extensive foundation consisting of the testimony and documentation set forth in Chapter 42.

In a DWAI (drug) case, the primary purpose in performing the breath alcohol test is to obtain a negative result indicating that alcohol is not a cause or contributing factor to the impaired condition of the defendant. The inference is that if you are not under the influence of alcohol, and you are impaired, the cause of that impairment lies elsewhere, and may be drug related.

While that is the inference, Judge Sparks of the New York City Criminal Court has held that a negative breath alcohol test is not relevant, and, therefore, not admissible in a driving while under the influence of drugs case. People v. Salino, 139 Misc. 2d 386, 527 N.Y.S.2d 169 (1988). In Salino, the defendant obtained a .00% reading on a Breathalyzer. The People attempted

to offer this result into evidence as part of their proof of driving while under the influence of drugs. The Court, citing *Richardson on Evidence*, held that the result was inadmissible in that it was an inference based upon an inference. 527 N.Y.S.2d at 171.

§ 10:13 Interview of arresting officer

The next component of the evaluation is the interview of the arresting officer. While any testimony from the DRE in regard to statements obtained from the arresting officer constitutes hearsay, the fact that he interviewed the arresting officer should be admissible. Insofar as the observations of the arresting officer are concerned, they would normally be elicited directly from the arresting officer, and he or she would, normally, testify prior to the DRE.

§ 10:14 Preliminary examination

The preliminary examination consists of a series of questions asked of the defendant by the DRE. The questions are designed to elicit information from the defendant in regard to his physical condition, use of medication, and consumption of food and beverage. In addition, the defendant is asked the time of day to determine whether or not he or she is oriented as to time. The questions are all obtained from the drug evaluation form (See Appendix 5) and the defendant's answers are placed on that form.

§ 10:15 Eye examination

Eye Movements -- Gaze Nystagmus & Convergence

This portion of the examination consists of a series of tests during which the evaluator determines whether the defendant's eyes move smoothly or with a jerking motion in response to a stimulus. The tests are referred to as *horizontal gaze nystagmus*, *vertical gaze nystagmus*, and *convergence*. In addition to the discussion immediately below, see Chapter 8 for more material on horizontal gaze nystagmus and vertical gaze nystagmus.

§ 10:16 Horizontal gaze nystagmus

The horizontal gaze nystagmus portion consists of three distinct tests of both eyes. The first is called "smooth pursuit."

Smooth Pursuit

The smooth pursuit portion of the test is performed by moving an object, usually a pen, from a point near the defendant's nose outward towards the side of the defendant's face. The defendant is asked to follow the movement of the pen

with his eyes and to do so without moving his head. The DRE starts with the left eye and observes whether or not the eye moves smoothly or with a jerking motion. A "normal" eye will move smoothly in a manner similar to a marble moving over a hard surface. If the defendant is under the influence of alcohol and/or certain drugs, a nystagmus may be observed. Nystagmus refers to a jerking motion which is similar to rolling a marble over sandpaper. The eye does not proceed smoothly, but moves with an apparent jerking motion. After the left eye is tested, the test is performed on the right eye.

Maximum Deviation

The second part of the horizontal gaze nystagmus test is called maximum deviation. On this part of the test, the defendant is asked to follow the stimulus, which is moved to the side of his face. The defendant's left pupil is directed to the corner of the eye and the stimulus is held stationary for a period of approximately four seconds. While the eye is in this position, it is observed for nystagmus. Again, the presence of nystagmus may indicate that the defendant is under the influence of alcohol or certain drugs. This process is repeated with the right eye.

Onset of Jerkiness

The third part of the horizontal gaze nystagmus test is called angle of onset. The purpose of the test is to determine the angle with the nose at which the eye commences to jerk. A test is performed by placing the pen about 15 inches from the defendant's nose and by slowly moving the pen toward the outer corner of his eye. The DRE starts with the left eye and watches it closely for the first sign of jerking. If she observes any jerking, the DRE stops moving the pen and holds it steady. The DRE makes sure that the eye is jerking. If it is not, the DRE is required to start the procedure over again by moving the pen further towards the outer portion of the eye and observing for the "onset" of jerking. Once the DRE determines the point of onset, he estimates the angle of this point with the defendant's nose.

Vertical Gaze Nystagmus

The fourth part of the eye examination tests for vertical nystagmus. Here, the defendant again is asked to follow the movement of a pen. Instead of being held up and down, the pen is held sideways and the defendant is asked to keep his eyes on the middle of the pen. The pen is then moved up and the defendant's eyes are moved up to maximum elevation and held for a minimum of four seconds. This test is almost identical to the maximum deviation portion of the horizontal gaze nystagmus test, except the movement is vertical.

Lack of Convergence

The fifth part of the eye test is designed to observe how the defendant's eyes converge. The pen is held about 15 inches in front of the defendant's face with the tip pointing at his nose. The defendant is directed to hold his head still and follow the pen with his eyes. The pen is moved in a slow circle until the technician performing the test observes that the defendant is tracking the pen. The pen is then moved in slowly and steadily towards the bridge of the defendant's nose. The defendant's eyes are then observed to determine whether they move together and converge at the bridge of the defendant's nose.

§ 10:17 Pupil reaction

Pupil reaction consists of a series of tests which are designed to determine the effect of various conditions on the size of the defendant's pupils. The DRE has an eye gauge which contains circles representing different sizes of pupils. These dark circles have diameters ranging from 1.0 millimeters to 9.0 millimeters in half millimeter increments. The eye gauge is held up alongside the defendant's eyes and the gauge is moved up and down until the technician locates the circle closest in size to the defendant's pupil.

Initially, the eye gauge is used during the preliminary examination to determine whether the defendant's pupils are of equal size. Later on, the eye gauge is used under various lighting conditions for the purpose of determining the size of the pupils. The first part of the examination consists of determining the size of the defendant's pupils under normal or room light conditions.

Dark Room Examination

After determining the size of the defendant's pupils under room light, the defendant is taken into a room which is almost completely dark. The DRE and the defendant wait for 90 seconds to allow their eyes to adjust to the dark. The DRE then takes a penlight and covers the tip of the penlight with his finger or thumb so that there is only a reddish glow and no white light emerges. The glowing tip of the penlight is then moved to the vicinity of the defendant's left eye until the DRE can see the pupil separate and apart from the colored portion of the eye or the iris. The eye gauge is then brought up alongside the defendant's left eye, and the circle nearest in size to the pupil as it appears in the dark room is estimated and noted. The procedure is then repeated with the defendant's right eye.

Indirect Light

The pupil size is then estimated in indirect light. Indirect light is obtained by the DRE uncovering the tip of the penlight and shining it across the defendant's left eye so that the light just barely eliminates the shadow from the bridge of his nose. The DRE is careful not to shine the light directly into the defendant's eyes, but rather across them. Again, both eyes are gauged, and the estimated pupil size noted.

Direct Light

In the direct light portion of the evaluation, the tip of the penlight is uncovered and is shone directly into the defendant's eyes. Each eye is done in turn, and an estimation of the pupil size obtained.

§ 10:18 Psycho-physical tests

Four psycho-physical or field sobriety tests are administered as part of the drug recognition evaluation. The purpose of the tests are to determine the defendant's physical coordination as well as his ability to understand and follow instructions. The presumption is that a defendant who does not listen or follow instructions, or exhibits a lack of balance and coordination, may be under the influence of a drug.

Romberg Balance Test

The first test performed is the Romberg balance test. This involves the technician asking the defendant to stand erect with his feet together and his arms down to his sides. He is told to stay in this position while being given instructions in regard to the performance of the test. He is observed to see if he follows that instruction, or whether he starts the test prior to being told to begin.

The defendant is told that when he is told to "*begin*" he is to tilt his head back slightly and close his eyes. He is told to maintain that position for what he deems to be 30 seconds. The DRE compares this period of time with a watch for the purpose of determining whether the defendant's internal clock is functioning. In addition, the DRE looks for swaying, tremors and other physical symptoms.

Walk and Turn Test

The second test is the walk and turn test. In this test, the defendant is asked to walk heel to toe along a line for nine steps, turn around, and walk back nine steps. He is told to watch his feet, and to count off the steps out loud. Again, he

is observed to see whether he follows the instructions and whether he begins when he is directed to "*begin*", as opposed to beginning on his own. He is observed to see whether he keeps his balance, steps off the line, raises his arms while walking, walks heel to toe, stops walking, takes the wrong number of steps, turns improperly, has body tremors, exhibits muscle tension, or makes any statements or sounds.

One Leg Stand

The third test is the one leg stand. Here the defendant is told to stand with his feet together, his arms down at his sides, and to raise his left foot in a stiff leg manner approximately six inches off the ground and count to 30. The test is then repeated with the right leg.

The DRE looks for swaying, hopping, body tremors, muscle tension, and whether or not the defendant puts his foot down during the test.

Finger To Nose Test

The final psycho-physical test is the finger to nose test. As with all these tests, the defendant is observed for the purpose of seeing whether he follows the instructions given. Here, he is told to put his feet together, stand straight and extend his arms towards the instructor, and to make a fist with each hand. The defendant is then told to extend the index finger from each hand and to bring his arms back down to his sides with the index fingers extended. He is further instructed that when he is told to "*begin*", he is to tilt his head back slightly and close his eyes. He is then told that he is to bring the tip of the index finger up to the tip of his nose, and that upon touching his nose he is to return his arm to his side. He is then told that he will be instructed as to which hand to use by the evaluator who will say the word "*right*" or "*left*." He is told to tilt his head back and close his eyes and keep them closed until he is told to open them.

The DRE notes where on his or her face the defendant's fingertips touch, any swaying, body tremors, eyelid tremors, muscle tension and/or any other statements or sounds made by the defendant.

These four psycho-physical tests may or may not be videotaped. In New York City, the New York City Police Department asks the defendant if he or she is willing to perform these tests and have them videotaped. The New York City Police Department does not videotape any other portion of the evaluation.

§ 10:19 Vital signs

Part of the evaluation consists of a check of the defendant's pulse, blood pressure and temperature. This is performed by the DRE using a blood pressure cuff and thermometer. The pulse is taken three times during the evaluation. The first during the preliminary examination, the second at the time that the blood pressure and temperature are taken, and the third following the examination of the defendant's arms for drug injection sites.

Interestingly, the Oregon Court of Appeals has held that a person's pulse is private and not subject to examination absent a warrant or a constitutionally recognized exception to the warrant requirement. In State v. Stowers, 136 Or. App. 448, 902 P.2d 117 (1995), upon being stopped for a traffic infraction, the officer suspected that the defendant might be under the influence of drugs. After asking the defendant to exit the vehicle, the officer placed his fingers on the defendant's neck and took the defendant's carotid pulse. The court concluded that the taking of the defendant's pulse revealed aspects of the defendant's physical and psychological condition that were not otherwise observable to the public. The court held that a person's pulse is private and is not subject to examination absent a warrant or a constitutionally recognized exception to the warrant requirement.

§ 10:20 Drug administration sites

Nasal and Oral Examination

Prior to leaving the dark room, the DRE will shine his penlight into the defendant's nose and mouth. The purpose of this is to check for signs of drug use. Certain drugs will leave a residue around the mouth and nose. The DRE may observe signs of redness and irritation in the defendant's nose and mouth, or even blistering. There may be an absence of nasal hair. Frequently, the DRE will detect distinctive odors in the vicinity of the defendant's mouth and nose caused by the use of various drugs.

Arm and Neck Examination

The arm and neck examination consists of checking the defendant's arms and neck to see if there are needle marks and to determine whether his muscles are rigid, "normal" or relaxed. The DRE runs his hands over the defendant's arms and neck feeling for bumps that would indicate needle marks. Any bumps that are located are examined using a lighted magnifying glass which helps the DRE determine whether or not the bump is a needle mark.

§ 10:21 Urine sample

Finally, the DRE obtains a blood or urine sample from the defendant for submission to a laboratory.

§ 10:22 Drug symptom chart

While the physiology associated with various drugs is far too extensive for this chapter, a copy of the drug symptom chart commonly used by police departments is set forth at Appendix 6.

§ 10:23 Drug Influence Evaluation form

A copy of the Drug Influence Evaluation form which is completed by the Drug Recognition Expert is set forth at Appendix 5.

§ 10:24 Trial Guide

A copy of a trial guide setting forth a suggested direct examination, which was developed for the New York City Police Department and the District Attorneys of the five boroughs of the City of New York, is set forth at Appendix 7.

§ 10:25 Person convicted of DWAI Drugs not eligible for conditional license

A person who is convicted of DWAI Drugs is not eligible for a conditional license, but may be eligible for a restricted use license. See N.Y. Comp. Codes R. & Regs. tit. 15, § 134.7(a)(10); § 50:18, *infra*.

§ 10:26 Plea bargain limitations

VTL § 1192(10)(a)(i) provides that:

In any case wherein the charge laid before the court alleges a violation of [VTL § 1192(2), (3), (4) or (4-a)], any plea of guilty thereafter entered in satisfaction of such charge must include at least a plea of guilty to the violation of the provisions of one of the subdivisions of [VTL § 1192], other than [VTL § 1192(5) or (6)], and no other disposition by plea of guilty to any other charge in satisfaction of such charge shall be authorized; provided, however, if the district attorney, upon reviewing the available evidence, determines that the charge of a violation of [VTL § 1192] is not warranted, such district attorney may

consent, and the court may allow a disposition by plea of guilty to another charge in satisfaction of such charge; provided, however, in all such cases, the court shall set forth upon the record the basis for such disposition.

In other words, where a defendant is charged with DWAI Drugs, any plea bargain must generally contain at least a plea to DWAI Alcohol.

In People v. Lehman, 183 Misc. 2d 97, 702 N.Y.S.2d 551 (Watertown City Ct. 2000), the Court denied the People's motion to amend/reduce a charge of VTL § 1192(4) (i.e., DWAI Drugs), to VTL § 1192(1) (i.e., DWAI Alcohol), where there was no evidence that the defendant's impairment was in any way caused by alcohol.

However, the Court of Appeals has made clear that:

[A] plea may be to . . . a crime for which the facts alleged to underlie the original charge would not be appropriate.

A plea is a bargain struck by a defendant and a prosecutor who may both be in doubt about the outcome of a trial. Only the events of time, place, and, if applicable, victim, need be the same for the crime pleaded as for the one charged.

People v. Francis, 38 N.Y.2d 150, 155, 379 N.Y.S.2d 21, 26 (1975) (citations omitted). See also People v. Clairborne, 29 N.Y.2d 950, ___, 329 N.Y.S.2d 580, 581 (1972) ("A bargained guilty plea to a lesser crime makes unnecessary a factual basis for the particular crime confessed"); People v. Adams, 57 N.Y.2d 1035, 1038, 457 N.Y.S.2d 783, 784-85 (1982) (same).

§ 10:27 Sufficiency of accusatory instrument charging defendant with DWAI Drugs

"A driving while impaired by drugs prosecution requires that the individual's impairment be shown to have been caused by a drug specifically listed in the Public Health Law." People v. Rose, 8 Misc. 3d 184, ___, 794 N.Y.S.2d 630, 631 (Nassau Co. Dist. Ct. 2005). See also People v. Grinberg, 4 Misc. 3d 670, ___ n.1, 781 N.Y.S.2d 584, 586 n.1 (N.Y. City Crim. Ct. 2004). In this regard, the Rose Court found that an accusatory instrument to a DWAI drugs charge is not necessarily required to include a chemical test result or an admission by the defendant of using a specific drug in order to provide "reasonable cause" to believe that the defendant committed the offense. Id. at ___, 794 N.Y.S.2d at 635.

Rather, "[t]he written record of an opinion of a DRE can, and in the instant case does, provide 'reasonable cause' for believing that the defendant committed the offense charged." Id. at ___, 794 N.Y.S.2d at 635. On the other hand, in the absence of a chemical test result or an admission by the defendant, "the failure to have referred to, summarized, or annexed the drug influence evaluation to the supporting deposition renders the accusatory instrument dismissible." Id. at ___, 794 N.Y.S.2d at 635. See also People v. Jackson, 2011 WL 3594010, *1 (App. Term, 9th & 10th Jud. Dist. 2011) ("The supporting deposition in the instant case fails to provide reasonable cause to believe that defendant was impaired by the use of any of the substances set forth in Public Health Law § 3306 (see CPL 100.25[2])). Consequently, the accusatory instrument charging defendant with driving while ability impaired by drugs (Vehicle and Traffic Law § 1192[4]) is jurisdictionally defective and must be dismissed"); People v. Matozzo, 2015 WL 1786184 (Nassau Co. Dist. Ct. 2015) (same).

Similarly, in People v. Hill, 16 Misc. 3d 176, ___, 834 N.Y.S.2d 840, 845 (N.Y. City Crim. Ct. 2007), the Court held that:

[W]here testimony of a drug recognition expert is available or the testimony of a lesser expert is combined with an admission or other physical evidence, a laboratory test is not required for conversion of a complaint to an information in cases where the defendant is charged with driving while impaired under VTL § 1192(4).

See also People v. Felicia, 52 Misc. 3d 212, 27 N.Y.S.3d 841 (N.Y. City Crim. Ct. 2016).

§ 10:28 Level of impairment required by VTL § 1192(4) is same as for VTL § 1192(1)

In People v. Cruz, 48 N.Y.2d 419, 426-27, 423 N.Y.S.2d 625, 628 (1979), the Court of Appeals defined the degree of impairment required to be "impaired" within the meaning of VTL § 1192(1):

In sum the prohibition against driving while the ability to do so is impaired by alcohol (Vehicle and Traffic Law, § 1192, subd. 1) is not a vague and indefinite concept as the defendant contends. It is evident from the statutory language and scheme that the question in each case is whether, by voluntarily consuming alcohol, this particular defendant has actually impaired,

to any extent, the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver.

The Cruz Court further defined the degree of impairment required to be "intoxicated" within the meaning of VTL § 1192(3):

In sum, intoxication is a greater degree of impairment which is reached when the driver has voluntarily consumed alcohol to the extent that he is incapable of employing the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver.

Id. at 428, 423 N.Y.S.2d at 629.

In People v. Shakemma, 19 Misc. 3d 771, 855 N.Y.S.2d 871 (Suffolk Co. Dist. Ct. 2008), the defendant was charged with DWAI Drugs in violation of VTL § 1192(4). The Court noted that being impaired by alcohol is a traffic infraction, not a misdemeanor; and thus held that, since DWAI Drugs is a misdemeanor, "VTL 1192(4) must be interpreted to mean that where marijuana is present the impairment must be *substantial*." Id. at ___, 855 N.Y.S.2d at 873 (emphasis added). However, the Appellate Term reversed, holding that:

As the statutory prohibitions with respect to operating a motor vehicle while ability impaired by alcohol (Vehicle and Traffic Law § 1192[1]) and while ability impaired by drugs (Vehicle and Traffic Law § 1192[4]) are identical as to the degree of impairment constituting the offense, the People were required to establish only that there was probable cause to infer that defendant's ability to operate a motor vehicle was impaired "to any extent."

People v. Davis, 23 Misc. 3d 30, ___, 879 N.Y.S.2d 268, 269 (App. Term, 9th & 10th Jud. Dist. 2009) (citation omitted). Notably, in the trial court the defendant's name was listed as Davis I. Shakemma, but on appeal the defendant's name was listed as Shakeema I. Davis. See also People v. Bayer, 132 A.D.2d 920, ___, 518 N.Y.S.2d 475, 477 (4th Dep't 1987) ("while a violation of either subdivision (3) or (4) of Vehicle and Traffic Law § 1192 is a misdemeanor, the elements of the two crimes differ. Proof that defendant was in an intoxicated condition is essential to a prosecution under subdivision (3), but is not required under subdivision (4)").

§ 10:29 Defendant under the influence of drugs cannot be charged with common law DWI in violation of VTL § 1192(3)

In People v. Litto, 8 N.Y.3d 692, 840 N.Y.S.2d 736 (2007), the defendant was accused of driving while impaired by a drug not listed in Public Health Law § 3306. Accordingly, he could not be charged with VTL § 1192(4). However, the People charged the defendant with violating VTL § 1192(3), claiming that New York's common law DWI statute is not limited to intoxication caused by alcohol, but rather applies to intoxication caused by any substance, including drugs.

Rejecting this argument, the Court of Appeals held that "[b]ased on the language, history and scheme of the statute, we conclude that the Legislature here intended to use 'intoxication' to refer to a disordered state of mind caused by alcohol, not by drugs." Id. at 694, 840 N.Y.S.2d at 737. See also People v. Farmer, 36 N.Y.2d 386, 390, 369 N.Y.S.2d 44, 45 (1979) ("subdivisions 1, 2 and 3 of section 1192 proscribe separable offenses based upon the degree of impairment caused by alcohol ingestion"); People v. Bayer, 132 A.D.2d 920, ___, 518 N.Y.S.2d 475, 476 (4th Dep't 1987) (VTL § 1192(3) "prohibits operation of a motor vehicle while defendant 'is in an intoxicated condition', but does not refer to a substance creating the condition. It is clear as a matter of law, however, that the subdivision is intended to apply only to intoxication caused by alcohol").

§ 10:30 DWAI Combined Influence of Drugs or Alcohol and Drugs

VTL § 1192(4-a) makes it a crime for a person to operate a motor vehicle while his or her ability to do so is impaired by a combination of either (a) 2 or more drugs, or (b) alcohol and a drug or drugs. In this regard, VTL § 1192(4-a) provides as follows:

4-a. Driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs. No person shall operate a motor vehicle while the person's ability to operate such motor vehicle is impaired by the combined influence of drugs or of alcohol and any drug or drugs.

Notably, unlike DWAI Drugs, in violation of VTL § 1192(4) -- which expressly limits the drugs applicable thereto to "a drug as defined in this chapter" -- VTL § 1192(4-a) contains no such limitation. However, VTL § 114-a provides that "[t]he term 'drug' when used in this chapter, means and includes any substance listed in [Public Health Law § 3306]." See People v. Primiano, 16 Misc. 3d 1023, ___, 843 N.Y.S.2d 799, 801 (Sullivan Co. Ct. 2007).

In People v. Schell, 18 Misc. 3d 972, ___, 849 N.Y.S.2d 882, 884 (N.Y. City Crim. Ct. 2008), the Court held that "the People are correct in reasoning that the offense with which the defendant is charged, VTL § 1192 subd. 4-a, contemplates chemicals beyond those listed in Public Health Law § 3306." Notably, the Schell Court did not cite any case law, legislative history or rule of statutory construction in support of its position. In the authors' opinion, the Court's conclusion in Schell is clearly erroneous.

Since VTL § 114-a expressly defines the term "drug" as meaning any substance listed in Public Health Law § 3306 *whenever such term is used in the VTL*, there is no need for either VTL § 1192(4) or VTL § 1192(4-a) to cross-reference VTL § 114-a in order to have this definition apply. Rather, if the Legislature had intended to use a different definition of the term "drug" for purposes of VTL § 1192(4-a), it would have been required to expressly say so. This conclusion is literally compelled by VTL § 100, which provides as follows:

Definition of words and phrases. The following words and phrases when used in this chapter shall, for the purpose of this chapter, have the meanings respectively ascribed to them in this article except where another definition is specifically provided in any title, article or section for application in such title, article or section.

In People v. Gonzalez, 90 A.D.3d 1668, 935 N.Y.S.2d 826 (4th Dep't 2011), the defendant was convicted of both DWI and DWAI Drugs. On appeal, he claimed that the convictions should be reversed on the ground that he was in actuality guilty of -- but not charged with -- DWAI Combined Influence. The Appellate Division, Fourth Department, affirmed the convictions, holding that "the evidence presented at trial is sufficient to establish that he was separately impaired by alcohol and by drugs." Id. at ___, 935 N.Y.S.2d at 827.

§ 10:31 Penalties for conviction of VTL § 1192(4-a)

The penalties for a conviction of VTL § 1192(4-a) are the same as the penalties for a conviction of VTL § 1192(2), (3) or (4). See VTL § 1193(1)(b); VTL § 1193(2)(b)(2); VTL § 1193(2)(b)(3). See also Chapter 46, *infra*.

§ 10:32 DWAI Drugs conviction reversed for improper cross-examination of defendant's doctor

In People v. Dimiceli, 27 Misc. 3d 84, 902 N.Y.S.2d 774 (App. Term, 9th & 10th Jud. Dist. 2010), the defendant was convicted of DWAI Drugs and Resisting Arrest. The drugs in

question were prescribed medications. The Appellate Term reversed the defendant's convictions in the interest of justice based upon the following excerpt of the prosecutor's cross-examination of the defendant's doctor:

"[THE PROSECUTOR:] * * * [Y]ou found out . . . that the defendant was arrested for this crime, correct?

[THE DOCTOR:] Uh-huh. Yes.

[THE PROSECUTOR:] And when you received word of that, that he was accused of being medicated while driving --

[THE DOCTOR:] Yes.

[THE PROSECUTOR:] -- you ordered an end to all narcotic pain medicine, correct?

[THE DOCTOR:] Could I just refer to my notes?

[THE PROSECUTOR:] Of course.

[THE DOCTOR:] (Perusing.) Because I can't order a sudden end, because then they go into withdrawal, I probably recommended later on that he be detoxed. Here we go, yes, sorry. 4-27-05; gave tapering schedule of meds, but suggest patient be detoxed.

[THE PROSECUTOR:] You followed that up with a letter to Pain Management Services recommending a detox, correct?

[THE DOCTOR:] I followed it up with -- it is back here somewhere. It wasn't the Pain Management Services, ultimately it went to South Oaks, if I remember correctly.

[THE PROSECUTOR:] For a detox program in South Oaks.

And that would be to rid all pain medicine from the body, correct?

[THE DOCTOR:] Correct.

[THE PROSECUTOR:] And then attend a treatment program because of that, correct?

[THE DOCTOR:] Correct.

[THE PROSECUTOR:] And because you got word of the defendant's arrest, you didn't prescribe any more pain medicine for approximately 10 months, correct?

[THE DOCTOR:] Correct."

There was no evidence that the doctor's decision to taper off defendant's medications, and his recommendation that defendant undergo "detox," were based on any information other than the fact that defendant had been charged with driving while ability impaired in the instant case. The doctor's choice of a course of treatment thus had no probative value with respect to defendant's actual condition before, during, or even after the incident. Because it was not relevant to any issue in the case, the course-of-treatment testimony should not have been admitted.

Furthermore, the testimony was highly prejudicial to defendant. It conveyed the impression that defendant's own doctor believed that he had been overmedicating at the time of the incident. It also conveyed the impression that the doctor believed that defendant was a prescription medication abuser in need of "detox." Particularly in light of the fact that the jury specifically requested the doctor's "detox statement" during its deliberations, we are of the opinion that the testimony was so prejudicial that it deprived defendant of a fair trial. Accordingly, we reverse the judgments of conviction as a matter of discretion in the interest of justice, and remit the matter to the District Court for a new trial.

Id. at ___, 902 N.Y.S.2d at 775-76 (citations omitted).

§ 10:33 Significance of odor of burnt marijuana

In People v. Chestnut, 43 A.D.2d 260, ___, 351 N.Y.S.2d 26, 27 (3d Dep't 1974), aff'd, 36 N.Y.2d 971, 373 N.Y.S.2d 564 (1975), the Appellate Division, Third Department, held that "the smell of marihuana smoke, with nothing more, can be sufficient to provide police officers with probable cause to search an automobile and its occupants." Notably, however, the Court made clear that:

[I]t is critical to the outcome of this case that we are here concerned with an automobile, which is stopped on the highway and readily movable, whose occupants have been alerted, and whose contents "may never be found again if a warrant must be obtained." Equally important is the experience and training of the police officers involved. Here, both Troopers Carmody and Standish had extensive training with marihuana, formally at the State Police Academy in Albany and informally at their local substation. Each, likewise, had smelled marihuana smoke and was familiar with its distinctive odor.

Id. at ___, 351 N.Y.S.2d at 28-29 (citations omitted).

In People v. Hanson, 5 Misc. 3d 67, ___, 785 N.Y.S.2d 825, 827 (App. Term, 9th & 10th Jud. Dist. 2004), the Court applied Chestnut as follows:

It is well settled that the smell of marijuana alone is sufficient to provide trained and experienced police officers in the area of narcotics probable cause to search a vehicle and its occupants. For a hearing court to make a finding that an officer had probable cause to conduct a search, the officer's expertise, training or experience with respect to knowledge of the smell of burnt marijuana must be adequately developed in the record. As we are bound by the court's return, the hearing court properly determined that the troopers lacked probable cause to search the defendant since there was no testimony regarding their training or experience in identifying the smell of burnt marijuana. Thus, the search of the defendant and the subsequent search of the automobile were not justified, and the marijuana was properly suppressed by the hearing court. In addition, the silver clip containing contraband, the pills, the statements made by the defendant after the illegal search and arrest, and the results of the field sobriety and chemical tests were also properly suppressed under the fruit of the poisonous tree doctrine.

(Citations omitted).

APPENDIX 5

Drug Influence Evaluation Form

| NEW YORK STATE DRUG INFLUENCE EVALUATION | | | | | | | | | |
|--|--|--|--|---|--|---|--|--|--|
| Evaluator | | DRE # | | Rolling Log # | | Evaluator's Agency | | | |
| Recorder/Witness | | Crash: <input type="checkbox"/> None <input type="checkbox"/> Fatal <input type="checkbox"/> Injury <input type="checkbox"/> Property | | Arresting Officer (Name, ID#) | | | | | |
| Arrestee's Name (Last, First, Middle) | | Date of Birth | | Sex | | Race | | Arresting Officer Agency | |
| Date Examined / Time / Location | | Breath Results: <input type="checkbox"/> Results <input type="checkbox"/> Test Refused | | Instrument #: | | Chemical Test: Urine <input type="checkbox"/> Blood <input type="checkbox"/> | | Test or tests refused <input type="checkbox"/> | |
| Miranda Warning Given By: <input type="checkbox"/> Yes <input type="checkbox"/> No | | What have you eaten today? When? | | What have you been drinking? How much? | | Time of last drink? | | | |
| Time now/ Actual | | When did you last sleep? How long? | | Are you sick or injured? <input type="checkbox"/> Yes <input type="checkbox"/> No | | Are you diabetic or epileptic? <input type="checkbox"/> Yes <input type="checkbox"/> No | | | |
| Do you take insulin? <input type="checkbox"/> Yes <input type="checkbox"/> No | | Do you have any physical defects? <input type="checkbox"/> Yes <input type="checkbox"/> No | | Are you under the care of a doctor or dentist? <input type="checkbox"/> Yes <input type="checkbox"/> No | | | | | |
| Are you taking any medication or drugs? <input type="checkbox"/> Yes <input type="checkbox"/> No | | Attitude: | | Coordination: | | | | | |
| Speech: | | Breath Odor: | | Face: | | | | | |
| Corrective Lenses: <input type="checkbox"/> None <input type="checkbox"/> Glasses <input type="checkbox"/> Contacts, if so <input type="checkbox"/> Hard <input type="checkbox"/> Soft | | Eyes: <input type="checkbox"/> Reddened Conjunctiva <input type="checkbox"/> Normal <input type="checkbox"/> Bloodshot <input type="checkbox"/> Watery | | Blindness: <input type="checkbox"/> None <input type="checkbox"/> Left <input type="checkbox"/> Right | | Tracking: <input type="checkbox"/> Equal <input type="checkbox"/> Unequal | | | |
| Pupil Size: <input type="checkbox"/> Equal <input type="checkbox"/> Unequal (explain) | | Vertical Nystagmus: <input type="checkbox"/> Yes <input type="checkbox"/> No | | Able to follow stimulus: <input type="checkbox"/> Yes <input type="checkbox"/> No | | Eyelids: <input type="checkbox"/> Normal <input type="checkbox"/> Droopy | | | |
| Pulse and time | | HGN | | Left Eye | | Right Eye | | Convergence | |
| 1. / | | Lack of Smooth Pursuit | | | | | | | |
| 2. / | | Maximum Deviation | | | | | | | |
| 3. / | | Angle of Onset | | | | | | | |
| Modified Romberg Balance | | Walk and Turn Test | | Cantor keep balance | | Stays too soon | | ONE LEG STAND | |
| approx approx | | | | Stops walking | | Misses heel-toe | | Stays off line | |
| | | | | Releases arms | | Actual steps taken | | 1st Nae 2nd Nae | |
| Internal clock estimated as 30 seconds | | Describe turn | | Cannot do test (explain) | | Type of footwear: | | | |
| Draw lines to spots touched | | PUPIL SIZE | | Room Light (2.5-5.0) | | Darkness (5.0-8.5) | | Direct (2.0-4.5) | |
| | | Left Eye | | | | | | | |
| | | Right Eye | | | | | | | |
| | | Rebound Dilation: <input type="checkbox"/> Yes <input type="checkbox"/> No | | Pupillary Unrest: <input type="checkbox"/> Yes <input type="checkbox"/> No | | Reaction to Light: | | | |
| | | RIGHT ARM | | LEFT ARM | | | | | |
| | | | | | | | | | |
| Blood pressure | | Temperature | | | | | | | |
| Muscle tone: <input type="checkbox"/> Normal <input type="checkbox"/> Flaccid <input type="checkbox"/> Rigid | | Comments: | | | | | | | |
| What drugs or medications have you been using? | | How much? | | Time of use? | | Where were the drugs used? (Location) | | | |
| Date / Time of arrest: | | Time DRE was notified: | | Evaluation start time: | | Evaluation completion time: | | Precinct/Station: | |
| Officer's Signature: | | DRE # | | Reviewed/approved by / date: | | | | | |
| Opinion of Evaluator: <input type="checkbox"/> Rule Out <input type="checkbox"/> Medical <input type="checkbox"/> Alcohol <input type="checkbox"/> CNS Depressant <input type="checkbox"/> CNS Stimulant <input type="checkbox"/> Hallucinogens <input type="checkbox"/> Dissociative Anesthetic <input type="checkbox"/> Narcotic Analgesic <input type="checkbox"/> Inhalant <input type="checkbox"/> Cannabinoids | | | | | | | | | |

APPENDIX 6

Drug Symptom Chart

DRUG ABUSE RECOGNITION PROGRAM: SYMPTOMOLOGY CHART

| | HGR | VERT. NYST. | NON. CONV. | PULSE | PUPIL SIZE REACTION | POSSIBLE EFFECTS | DURATION OF EFFECTS | METHODS OF INGESTION | OVERDOSE SYMPTOMS |
|---------------------|--|--|------------|----------|--------------------------------|---|---|---------------------------------|---|
| ALCOHOL | YES | POSS. WITH HIGH B.A. | YES | POSS. UP | NEAR NORMAL | BLOODSHOT/WATERY EYES, ALCOHOL. REV. COOR. UNCOORD. DRAINED, SLURRED SPEECH, ELEV. B.P. | RAPID ABSORPTION RATE OF METABOLIZATION: .02 B.A. REDUCTION PER HOUR | ORAL | COMA, COLD, CLAMMY SKIN, RAPID AND WEAK PULSE, TOTAL LOSS OF CONTACT, UNWORLD, DEAD DRIVING |
| | | | | | SLOW | | | | |
| DEPRESSANTS | | | | | NEAR NORMAL | BLOODSHOT/WATERY EYES, NO ALCOHOL COOR. UNCOORD. NATED, SLURRED SPEECH, DROWSY | BARBITURATE: 1-16 HR METHAQUALONE: 4-8 HRS TRANKQUILIZERS: 4-8 HR CHLORALHYDROTE: 5-8 HR | ORAL INJECTED | COMA, COLD, CLAMMY SKIN, RAPID AND WEAK PULSE, TOTAL LOSS OF CONTACT, UNWORLD, DEAD |
| | YES | POSS. WITH HIGH DOSE | YES | DOWN | SLOWED | | | | |
| INHALANTS | | | | | DEPENDS ON SUBSTANCE | COOR. OF SUBSTANCE, COMBINED, REDDENED NASAL PASSAGES, WATERY EYES, SNEEZING/COUGHING | VARIABLE (DEPENDS ON SUBSTANCE) | INHALATION | UNCONSCIOUS COMA, DEATH |
| | YES | GENERALLY PRESENT BUT DEPENDS ON SUBSTANCE | | UP | NEAR NORMAL | | | | |
| PHENCYCLIDINE | | | | | NEAR NORMAL | SLOW SPEECH, MEMO. RY LOSS, AGITATION, BLANK STARE, NON-COMMUNICATIVE RIGIDITY, CYCLIC BE. HAVIOR, GAIT ATAXIA | ONSET: 1-5 MIN PEAK: 15-30 MINS HALF LIFE: 4-6 HRS NORMALCY: 24-48 HRS | ORAL SMOKE INJECTION INHALATION | VIOLENT BEHAVIOR, PARANOIA, SEIZURES, PSYCHOSIS, HEART FAILURE, DEATH |
| | YES | YES | YES | UP | NEAR NORMAL | | | | |
| CANNABIS | | | | | NEAR NORMAL OR SLIGHT DILATION | REDDENING OF CONJUNCTIVAE, LACK OF INHIBITIONS, BODY TREMORS, DISORIL. ENTED, LACK OF PROPER ATTENTION, LOSS OF BALANCE, NUTANCE PERCEPT, DYSTHESIA, FLASHBACKS, PTOSES, MUSCLE | ONSET: MINUTES PEAK: 20-30 MINS HALF LIFE: 1-3 HRS NORMALCY: VARIED DUE TO FAT SOLUBILITY | SMOKING ORAL | FATIGUE PARANOIA PSYCHOSIS |
| | NO | NO | YES | UP | NEAR NORMAL | | | | |
| HALLUCINOGENS | | | | | DILATION | LOSS OF BALANCE, NUTANCE PERCEPT, DYSTHESIA, FLASHBACKS, PTOSES, MUSCLE | VARIABLE (DEPENDS ON SUBSTANCE) | ORAL SMOKE INJECTED INHALATION | LONGER MORE INTENSE TRIPS, PSYCHOSIS, DEATH |
| | GENERALLY NOT PRESENT DEPENDS ON SUBSTANCE | | | UP | SLOWED | | | | |
| NARCOTIC ANALGESICS | | | | | CONSTRICTION | RELAXATION, COOL TO TOUCH, ITCHING, DRY MOUTH, EUPHORIA, FFW OVER VEIN, CONSTIPATION | HEROIN: 4-5 HRS DEMEROL: 3-4 HRS CODEINE: 3-4 HRS DARVON: 6-12 HRS FENTANYL: 5-21 MINS METHADONE: 22-28 HRS | INJECTION ORAL SMOKE INJECTION | SHALLOW BREATHING, COLD/CLAMMY SKIN, RAPID/WEAK PULSE, RESPIRATORY DEPRESSION, DEATH |
| | NO | NO | NO | DOWN | LITTLE OR NO VISIBLE REACTION | | | | |
| STIMULANTS | | | | | DILATION | RESTLESS, TALKATIVE, HYPERFLEXIA, DRY MOUTH, BRUXISM, BOO, TREMORS, LOSS OF APPETITE, PARANOIA | COCAINE: 15-30 MINS DEPENDS ON INGESTION METHOD METHAMPHETAMINE: 4-8 HRS | ORAL SMOKE INJECTION | AGITATION, PARANOIA, CONVULSIONS, PSYCHOSIS |
| | NO | NO | NO | UP | SLOWED | | | | |

APPENDIX 7

A Guide to Direct Examination of a Drug Recognition Expert

A GUIDE TO THE DIRECT EXAMINATION OF A DRUG RECOGNITION EXPERT*

By Peter Gerstenzang, Esq.

41 State Street

Albany, New York 12207

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Peter Gerstenzang, Esq.

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*GERSTENZANG, O'HERN, HICKEY & GERSTENZANG, 41 State
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A GUIDE TO THE DIRECT EXAMINATION OF A DRUG RECOGNITION EXPERT

Introduction

In October of 1989, the New York City Department of Transportation STOP-DWI Program sponsored and funded a two-day workshop, the purpose of which was to design a prosecution for the crime of driving while under the influence of drugs. Dr. Ilona Lubman and Linda Irengreene, Esq. of the Department of Transportation organized this program. The workshop was held under the supervision of the Kings County District Attorney's Office and was conducted by six senior prosecutors: Barry Aaron, Esq., Criminal Court, Bureau Chief; Dana Paisinelli, Esq., Supervising Assistant District Attorney, Criminal Court Bureau; Don Berke, Esq., Supervising Assistant District Attorney, Criminal Court Bureau; Mark Schindelheim, Esq., Transit and Auto Crimes Bureau Chief; Joe Petrosino, Esq., Transit and Auto Crimes Deputy Bureau Chief, and Jane Meyers, Esq., Director of Training.

Judge Cliff J. Vanell, who was then an Assistant District Attorney with the City of Phoenix, Arizona's Prosecutor's Office, was invited to attend as a consultant. Judge Vanell is a national expert on the prosecution of driving while under the influence of drugs and has completed the NHTSA curriculum for the Drug Evaluation and Classification Program. He wrote a programmed workbook to guide prosecutors through the Drug Influence Evaluation used by drug recognition experts. In addition to his contributions to the workshop, Judge Vanell designed the format of this trial guide and assisted in the development of its content.

Former Inspector Terrence Randell and Lieutenant Ernest Gormley of the New York City Police Department contributed time, personnel and expertise to this project. Both Inspector

Randell and Lieutenant Gormley had been involved with the drug recognition program since its inception and were directly responsible for the development of this program in New York City.

Six drug recognition experts from the New York City Police Department provided technical advice and assistance. My thanks to Sergeant Joseph Ficarola, Officer John Itzhaki, Officer Michael Pisano, Officer Steve Placido, Officer Steven Stasinski, and Officer Eugene Venezia.

I would also like to acknowledge the contributions of Dr. William J. Closson, Director of Clinical Chemistry and Toxicology, the Brunswick Hospital Center, Inc.; and Henry Boland of the New York State Bureau for Municipal Police who reviewed the guide prior to its publication.

The trial guide that follows is designed to elicit detailed testimony from a drug recognition expert regarding the procedure followed in evaluating a defendant. The guide does not attempt to establish a foundation for obtaining the expert's opinion as to the category of drug the expert concludes has been used by the defendant. Until both the evaluation process and the training given the DREs has been granted judicial recognition in New York State, it is going to be very difficult to qualify a DRE as an expert for the purpose of obtaining his or her opinion. Absent such recognition, a physiologist or some other recognized expert should be called for the purpose of providing an opinion as to the classification of drugs which would produce the symptoms observed by the DRE. The observations of the arresting officer and the Drug Recognition Expert combined with the opinion of an expert witness, and the testimony of the toxicologist as to the specific drug found in the defendant's blood, constitute the People's case.

DIRECT EXAMINATION OF A DRUG RECOGNITION EXPERT

By PETER GERSTENZANG, ESQ.

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Peter Gerstenzang, Esq.

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- Q. Would you state your name, rank, shield number and command for the record?
- A.
- Q. How long have you been employed as a police officer?
- A.
- Q. I direct your attention to (date of arrest) and ask you if you were working on that date?
- A.
- Q. What hours were you working?

A.

Q. Who, if anyone, were you working with?

A.

Q. What were the nature of your duties that date?

A.

Q. I direct your attention to the hour of (time officer arrived at the Intoxicated Driver Testing Unit) and ask you to tell the Court where you were?

A. I was at the Intoxicated Driver Testing Unit.

Q. What was your purpose for being there?

A. I am a drug recognition expert and I was there for the purpose of conducting an evaluation.

Q. Who was the subject of that evaluation?

A. (Defendant's name.)

Q. Do you see the individual that was the subject of this evaluation in the courtroom?

A. Yes.

Q. Would you point him out please?

Let the record reflect that the witness has identified the defendant (name).

DRE DEFINED

Q. What is a Drug Recognition Expert?

A. A DRE is a person who has been trained in a standardized method of determining whether observable physical impairment and behavior is the result of the use of drugs. If drug use is suspected, the method provides procedures for determining whether the observable impairment is the result of alcohol alone, or whether it is a result of other drugs. The method also provides procedures for determining the category of drugs which is causing the impairment. (Obtained and modified from Phoenix, Arizona Prosecutor's Guide, page 5.)

DRE TRAINING

Q. What did the training consist of?

A. The training consisted of 56 hours of classroom training and hands on evaluation of defendants. This was followed by 40 hours of supervised certification training. I was required to conduct and write 15 evaluations under the supervision of a certified drug recognition instructor and I had to correctly evaluate a minimum of four categories of drugs, which were verified by Toxicology. (Phoenix, Arizona Prosecutor's Guide,

page 6)*

Q. What was covered in your classroom training?

A. We were trained to distinguish between seven broad categories of drug groups based on shared symptomatology. We were also trained to do a standard evaluation sequence and to record and document the results of our evaluation on a standardized form which also serves as a checklist for the procedure. Finally, we were trained in how to interpret the results obtained from the evaluation.

Q. What is the basis for grouping drugs into seven categories?

A. We were trained that drugs could be grouped based upon common or shared symptoms.

Q. What are these seven groups?

A.

- 1) Central nervous system depressants.
- 2) Central nervous system stimulants.
- 3) Hallucinogens.
- 4) Phencyclidine.
- 5) Narcotic Analgesics.
- 6) Inhalants.
- 7) Cannabis.

Q. Were you tested in regard to your qualifications?

A. Yes. I was given a qualifying exam as well as oral and written certification tests. Finally, I was observed by (number of instructors, must be at least 2) instructors who recommended me for certification.

Q. What was the result of that testing?

A. I qualified as a DRE.

Q. Upon being qualified, were you issued any form of certification?

A. Yes.

Q. I show you People's _____ for identification and ask you to tell the court what it is.

A. This is my certification as a Drug Recognition Expert issued by the International Association of Chiefs of Police.

(At this time, I offer People's _____ for identification into evidence.)

Q. How long have you been a Drug Recognition Expert?

A. (Number of years as DRE.)

Q. How many people have you tested using these techniques?

*Current minimum requirements are in flux. These were the NYPD standards as of June 1989. The International Association of Chiefs of Police (IACP), the National Certifiers of DRE's have adopted minimum standards which require 12 evaluations in three categories. Each police agency is encouraged to exceed the minimum standards.

- A. (Number of people tested.)
- Q. Did you perform a drug evaluation of the defendant?
- A. Yes I did.
- Q. How many different parts are there to the evaluation of a person to determine whether they are under the influence of a drug?
- A. There are 8 basic parts of the examination.
- Q. What are the evaluation procedures?
- A.
- (1) Breath alcohol test.
 - (2) Interview of the arresting officer.
 - (3) Preliminary assessment of a person's speech, breath, appearance, demeanor, behavior.
 - (4) A two part eye examination, the first part consisting of examining the subject's eyes for jerking movement, tracking ability, and ability to converge; the second part consisting of examining the subject's eyes for pupil size and the effect of light on the pupils.
 - (5) Psycho-physical evaluation of the subject based on divided attention tests.
 - (6) Examination of the subject's vital signs (blood pressure, pulse rate and temperature).
 - (7) Examination of the subject for drug administration sites. This consists of an inspection of the subject's nose and mouth for signs of drug ingestion; and examination of the subject's arms and neck for signs of drug ingestion and muscle tension.
 - (8) Obtaining urine sample.

DRUG EVALUATION PROCEDURE

1. Breath Alcohol Test

- Q. What was the first part of that evaluation?
- A. The first is a breath alcohol test to determine whether alcohol is the cause or contributing factor for the physical impairment of the defendant.
- Q. What type of breath alcohol test was performed?
- A. (Possible answers: Alco-Sensor, Breathalyzer, Intoxilyzer or Intoximeter 3000) [Foundation may or may not be required where evidence indicates that alcohol was not a cause or contributing factor to the impairment of the defendant]. Before eliciting testimony as to negative Alco-Sensor test *at trial*, see *People v. Thomas*, 121 A.D.2d 73, 509 N.Y.S.2d 668 (4th Dept. 1986), *aff'd* 70 N.Y.2d 823, 523 N.Y.S.2d 437, 517 N.E.2d 1323 (1987); also see *People v. Salino*, 139 Misc.2d 386, 527 N.Y.S.2d 169 (1988) where New York City Criminal Court holds that negative breath alcohol test neither relevant nor admissible.
- Q. What if anything did the breath alcohol test indicate as to

whether alcohol was the cause or contributing factor to the physical impairment of the defendant?

- A. The test indicated that alcohol was/was not a cause or contributing factor to the physical impairment of the defendant.

2. Interview of Arresting Officer

- Q. What was the second component of the test you performed on the defendant?
- A. The second component was an interview of the arresting officer as to his observations of the defendant.
- Q. Was this done?
- A. Yes.
- Q. Did you obtain the officer's observations?
- A. Yes. (Elicit fact that you obtained his observations, i.e., something that you did; not something that the arresting officer said which is hearsay. Alternatively, argue that you are not offering the contents of the officer's observations, merely proof that the officer's observations were obtained as part of the procedures. Hopefully, arresting officer will have already testified as to his observations.)

3. Preliminary Questioning

- Q. What was the third part of the test?
- A. The third part consists of preliminary questioning. These are questions asked of the defendant and observations made of the defendant as he answers these questions.
- Q. What questions did you ask him?
- A. I don't recall them verbatim as I sit here. I followed our drug evaluation form which contains the questions.
- Q. Would it refresh your recollection of the questions to refer to the drug evaluation form?
- A. Yes it would. (Your Honor, I request that the witness be allowed to refresh his recollection by referring to the drug evaluation form. Mark form for identification.)
- Q. I show you People's _____ for identification and ask if this is the drug evaluation form you are referring to?
- A. Yes.
- Q. Officer, would you please refer to People's _____ for identification and tell us the questions you asked the defendant and the defendant's answers.
- A.
- (1) What time is it now?
Defendant's answer: _____
- (2) When did you sleep last?
Defendant's answer: _____

(3) How long?

Defendant's answer: _____

(4) Do you take insulin?

Defendant's answer: _____

(5) Are you taking any medication or drugs?

Defendant's answer: _____

(6) What have you eaten today?

Defendant's answer: _____

(7) When did you eat?

Defendant's answer: _____

(8) Are you sick or injured?

Defendant's answer: _____

(9) Do you have any physical defects?

Defendant's answer: _____

(10) What have you been drinking?

Defendant's answer: _____

(11) How much have you been drinking?

Defendant's answer: _____

(12) Are you a diabetic or epileptic?

Defendant's answer: _____

(13) Are you under the care of a doctor or dentist?

Defendant's answer: _____

Q. What if any observations did you make of the defendant while he was speaking?

(1) Speech?

(2) Breath odor?

(3) Face?

4. Eye Examinations

A. Eye Movements

Q. What was the fourth test that you performed?

A. The next portion of the test is observing how the defendant's eyes move. (Avoid use of technical terminology such as "horizontal gaze nystagmus.")

Q. How is this performed?

A. This test is performed by having the defendant follow a moving object with his eyes for the purpose of seeing whether the eyes move smoothly or with a jerking motion?

i. Smooth Pursuit

Q. How is this test performed?

A. There are five parts to this test. The first part is simply moving an object, usually a pen, from a point near the person's nose outwards towards the side of his face so that the eyeball follows it from one side of the eye to the other. (Have witness demonstrate various motions with pen throughout testimony.)

- Q. Did you perform this part of the test on the defendant?
A. Yes I did.
Q. Which eye did you do first?
A. I did the left eye.
Q. What if any observations did you make of the left eye in the performance of this test?
A. As I moved the pen from one side of his left eye to the other, his eye moved in a jerky (or smooth motion).
Q. Did you perform this part of the test on the defendant's right eye?
A. Yes I did.
Q. What if any observations did you make of the right eye?
A. As I moved the pen from one side of his right eye to the other, his eye moved in a jerky (or smooth motion).

ii. Maximum Deviation

- Q. What is the second part of this test?
A. The second part of this test is to get the defendant to follow the pen so that his left eyeball moves to the outer corner of his eye. You hold the pen steady and see if the left eye jerks while it is at that position.
Q. Did you perform this portion of the test on the defendant?
A. Yes I did.
Q. How long did you have him hold his eye at the outer corner?
A. About four seconds.
Q. What did you observe?
A.
Q. Did you perform this part of the test on the defendant's right eye?
A. Yes I did.
Q. What did you observe?
A.

iii. Onset of Jerking

- Q. What is the third part of this test?
A. The third part is checking to see *if* and at what angle with the nose the eye starts to jerk.
Q. How is this portion of the test performed?
A. This is done by placing the pen about 15 inches from the defendant's nose and slowly moving the pen toward the outer corner of his eye. I start with the left eye and watch it closely for the first sign of jerking. If I see any jerking, I stop moving the pen and hold it steady. I make sure that the eye really is jerking. If it is not, the procedure is to start moving the pen

further towards the outer portion of the eye and watch for jerking. If there is jerking, I locate the point at which the jerking begins and estimate the angle of this point with the defendant's nose.

Q. Did you perform this portion of the test in regard to the defendant's left eye?

A. Yes I did.

Q. What did you observe?

A.

Q. Did you perform this portion of the test in regard to the defendant's right eye?

A. Yes I did.

Q. What did you observe?

A.

iv. Vertical Movement

Q. What was the fourth eye test you performed?

A. This test involves having the defendant move his eyes up and down while holding his head still. Instead of holding the pen up and down in front of his eyes, I held the pen sideways and asked him to look at the middle ring that divides the top of the pen from the bottom of the pen. I then moved the pen straight up and then down and watched how his eyes followed the pen. I looked to see if there was any jerkiness in his eyes as he followed the pen.

Q. Did you perform this test upon the defendant?

A. Yes I did.

Q. What did you observe?

A.

B. Eye Convergence

Q. What is the fifth part of the eye test?

A. The fifth part of the eye test was done by holding the pen about 15 inches in front of the defendant's face with the tip of it pointing at his nose. The defendant was asked to hold his head still and follow the pen with his eyes. Keeping the pen about 15 inches from the defendant's nose, I moved the pen in a slow circle. Once I determined that the defendant was following the pen as I moved it, I brought it slowly and steadily in towards the bridge of his nose. I did this to see whether or not both eyes would move together and converge at the bridge of his nose.

Q. What were the results of this test?

A. (Answer).

C. Pupil Size*

- Q. What was the next part of the test?
- A. Observing whether the defendant's pupils were of equal size.
- Q. How did you determine this?
- A. I estimated the defendant's pupil size using an eye gauge that has different sizes of pupils. (Identify and offer the gauge into evidence.)
- Q. How does the eye gauge work?
- A. The eye gauge has a series of dark circles, with diameters ranging from 1.0 mm to 9.0 mm, in half millimeter increments. The eye gauge is held up along side the defendant's eye and the gauge is moved up or down until I located the circle closest in size to the defendant's pupil.
- Q. What was the result of this test?
- A. (Result of this test.)

D. Pupil Reaction

- Q. What was the next part of the examination?
- A. The next part is called the dark room examination.
- Q. What is the dark room examination?
- A. These are observations of the size of the defendant's pupils at various levels of light.
- Q. What were the different levels of light that you used?
- A. We estimated the pupil size at room light, near total dark, indirect light, and direct light.

i. Room Light

- Q. How was the room light portion of this test performed?
- A. The test was performed by determining the size of the defendant's pupils in room light.
- Q. What were the results of the room light portion of the evaluation?
- A. (Detail results.)

ii. Darkness

- Q. How was the near total darkness portion of the evaluation conducted?
- A. The defendant was taken into a room which was almost completely dark. There was a waiting period of 90 seconds to allow both the defendant's and my eyes to adapt to the dark. Then the defendant's eyes were examined by use of a penlight. I covered the tip of the penlight with my finger and thumb so that only a reddish glow and no white light

*Usually performed during the preliminary examination.

emerged. Holding the glowing tip of the penlight, I moved the light up towards the defendant's left eye until I could see the pupil, separate and apart, from the colored portion of the eye or the iris. I held the tip of the penlight, brought the eye gauge up alongside the defendant's left eye and located the circle that was closest in size to the pupil as it appeared in the dark room. I then repeated this procedure on the defendant's right eye.

Q. What were the results of this portion of the examination?

A. (Detail results of evaluation.)

iii. Indirect

Q. How was the indirect light portion of the evaluation conducted.

A. Upon completion of the near total darkness portion of the exam, I uncovered the tip of the penlight and shone it across the defendant's left eye so that the light just barely eliminated the shadow from the ridge of his nose. I made sure that the light did not shine directly into the defendant's eye, but rather across it. I held the penlight in that position and brought the eye gauge up alongside the defendant's left eye. I located the circle that came closest to the size of the defendant's pupil and repeated the process on the defendant's right eye.

Q. What were the results of this portion of the evaluation?

A. (Detail results of evaluation.)

iv. Direct

Q. How was the direct light portion of the evaluation conducted?

A. For the direct light portion of the examination, I left the tip of the penlight uncovered and brought it from the side of the defendant's face and shone it directly into the defendant's left eye. I held the penlight in that position and brought the eye gauge up alongside the left eye and found the circle closest in size to the pupil. I then repeated that procedure for the defendant's right eye. The results of all four examinations were recorded.

Q. What were the results of this portion of the evaluation?

A. (Detail results of evaluation.)

5. Psycho-physical Tests

Q. What is the fifth part of the DRE examination?

A. The fifth part is the divided attention or psycho-physical tests.

Q. How many parts are there to this part of the examination?

A. There are four psycho-physical tests.

Q. Are these psycho-physical tests used exclusively for drug rec-

ognition evaluations?

- A. No.
- Q. Under what other circumstances are they used?
- A. They are standardized field sobriety tests which are used in cases involving alcohol as well as drugs.
- Q. In addition to the drug recognition evaluation and training, have you received any other training concerning these psycho-physical tests?
- A. Yes, (detail training you received.)

A. Romberg Balance Test

- Q. What was the first psycho-physical test that was performed upon the defendant?
- A. The first was the Romberg Balance test.
- Q. Prior to asking the defendant to perform this test, did you explain and demonstrate the test to him?
- A. Yes.
- Q. Would you explain and demonstrate this test for the court and jury in the same manner that you explained and demonstrated it for the defendant on the date of arrest?
- A. The defendant was asked to stand straight with his feet together and his arms down at his sides. He was told to stay in this position while he was being given the instructions. Part of the test is to see if he would follow that instruction and not try to start the test until told to begin. The defendant was then asked if he understood the instructions. The defendant was then instructed that when told to "begin" he was to tilt his head back slightly and close his eyes. Once he had done this, he was told that he must keep his head tilted back with his eyes closed until *he thought* 30 seconds had gone by.
- Q. What is the purpose of this?
- A. The purpose is to observe his balance and his perception of time. The defendant was told that when he thought 30 seconds had gone by, he was to immediately put his head forward and open his eyes. The defendant was once again asked if he understood and then he was told to begin.

ROMBERG BALANCE TEST CRITERIA

- Q. What did you look for when the defendant was performing this test?
- A. I looked to see if he was standing still with his feet together.
 - I looked for body tremors.
 - I looked to see if there were eyelid tremors.
 - I looked for swaying and whether the swaying was from front to back, side to side, and how many inches from the center he was swaying.
 - I looked for muscle tension, whether his muscles were rigid

or relaxed.

—I also looked for any statements or sounds that he made while he was performing this test.

—Finally, I recorded the number of seconds that he stood with his head tilted back and his eyes closed and compared that with the 30 seconds that he was told to stand there.

Q. How did the defendant perform this test?

A. (Answer).

B. Walk and Turn Test

Q. What was the next psycho-physical test?

A. The next psycho-physical test was the walk and turn test.

Q. Prior to asking the defendant to perform this test, did you explain and demonstrate the test for the defendant?

A. Yes.

Q. Would you please explain and demonstrate the test for the court and jury in the same manner that you did for the defendant on the date of arrest?

A. This test was performed by the defendant being first given specific instructions in regard to walking a line. He was told to place his right foot on the line ahead of his left foot with the heel of the right foot against the toe of the left foot.

— He was told to put his arms down against his sides and keep them there throughout the test.

— He was told to hold this position until he was given the instructions for the performance of the test. I emphasized to the defendant that he should not start walking until I told him to "*begin*."

— At this time, I asked the defendant if he understood my instructions.

— He indicated that he did.

WALK — I instructed him that when I told him to "*begin*," he was to take nine heel to toe steps down the line and turn around and take nine heel to toe steps back on the line.

— He was told that every time he took a step, he was to place his heel against the toe of the other foot. (Have witness demonstrate this test.)

TURN — He was told that when the ninth step had been taken, he was to leave his front foot on the line and turn around taking a series of small steps with the other foot. (Have witness demonstrate a proper turn.)

WALK — He was reminded that after turning, he was to take another nine heel to toe steps back up the line.

COUNT— Finally, he was told to watch his feet as he walked and to count off the steps out loud: 1-9.

- His final instruction was that once he started walking, he was to keep walking until the test had been completed.
- Again, before I told him to begin, I asked him if he understood these instructions and he indicated that he did.

Q. Did he perform this test?

A. Yes he did.

WALK AND TURN TEST CRITERIA

Q. As he performed this test, what did you look for?

A. There were eleven basic things that I looked for:

- (1) Whether he kept his balance during the instructions.
- (2) Whether he started walking too soon.
- (3) Whether he stepped off the line while he was walking.
- (4) Whether he raised his arms while he was walking.
- (5) Whether he missed walking heel-to-toe.
- (6) Whether he stopped walking.
- (7) Whether he took the wrong number of steps.
- (8) Whether he turned improperly.
- (9) Whether he had body tremors.
- (10) Whether his muscle tension was rigid, relaxed, or normal.
- (11) Any statements or sounds he made while he performed the test.

Q. What were your observations of the defendant in the performance of this test?

A. (Answer).

C. One Leg Stand Test

Q. What was the third psycho-physical test that you performed?

A. The third test was the one-leg stand.

Q. Prior to asking the defendant to perform this test, did you explain and demonstrate the test to him?

A. Yes.

Q. Would you explain and demonstrate this test for the court and jury in the same manner that you explained and demonstrated for the defendant on the date of arrest?

A. In this test, the defendant was asked to stand straight with his feet together and his arms down at his sides. Again, he was told to maintain this position while he was given the instructions and it was emphasized that he was not to start the test until he was told to "begin."

—At this point, he was asked if he understood?

—Then he was told that when he was instructed to "begin," he was to raise his right foot in a stiff leg manner and hold the

- foot about six inches off the ground with the toes pointed out.
(Have witness demonstrate proper stance.)
- The defendant was told that he must keep his arms at his sides and must keep looking directly at his elevated foot while counting out 30 seconds as follows:
“one-thousand-and-one, one-thousand-and-two, etc.
 - He was again asked if he understood and was told to “begin.”
 - After he completed the test, he was told to perform it again while standing on his right foot.

ONE LEG STAND TEST CRITERIA

- Q. What did you look for when the defendant performed this test?
- A. There were eight things I looked for:
- 1) The first was whether or not he raised his arms.
 - 2) Whether he swayed.
 - 3) Whether there was any hopping on one foot.
 - 4) Whether he put the foot that he had raised down.
 - 5) I looked to see if he was standing still and straight during the instructions.
 - 6) I looked to see if there were any body tremors.
 - 7) Whether the defendant's muscles were more rigid or more relaxed.
 - 8) Finally I noted any statements or sounds that the defendant made while performing the test.

DEFENDANT'S PERFORMANCE

- Q. What observations did you make of the defendant as he performed this test?

A.

D. Finger to Nose Test

- Q. What was the fourth psycho-physical test that was performed?
- A. The fourth psycho-physical test performed was the finger to nose test.
- Q. Prior to asking the defendant to perform this test, did you explain and demonstrate the test to him?
- A. Yes.
- Q. Would you explain and demonstrate this test for the court and jury in the same manner that you explained and demonstrated it for the defendant on the date of arrest?
- A.
- In this test, the defendant was told to place his feet together and stand straight.
 - He was then told to extend his arms straight towards me and to make a fist with each hand. (Officer should be on his feet demonstrating this.)

- The defendant was then told to extend the index finger from each hand. He was then told to put his arms down at his sides with the index fingers extended.
- The defendant was then told that when he was told to “begin,” he was to tilt his head back slightly and close his eyes.
- He was then told that when he was instructed to “begin,” he was to bring the tip of the index finger up to the tip of his nose. (Demonstrate it while it is being explained.)
- The defendant was further told that as soon as he touched the tip of his nose, he was to return his arm to his side.
- The defendant was told that when he was told “RIGHT,” he was to move the right-hand index finger to his nose; when he was told “LEFT,” he was to move the left-hand index finger to his nose.
- At this point, the defendant was asked if he understood the instructions.
- The defendant was then told to tilt his head back and close his eyes and to keep them closed until he was told to open them.
- The defendant was then told the following sequence:
“LEFT . . . RIGHT . . . LEFT . . . RIGHT . . . RIGHT . . . LEFT.”

FINGER TO NOSE TEST CRITERIA

- Q. What did you look for when the defendant performed this test?
- A.
- Whether the defendant’s fingertips touched his nose or other parts of his face.
 - Whether his body swayed.
 - Whether there were any body tremors.
 - Whether there were eyelid tremors.
 - The defendant’s muscle tension.
 - Any statements or sounds made by the defendant while performing the test.
- Q. Did you make a record of the defendant’s performance of this test?
- A. Yes. I noted on the evaluation form exactly where each fingertip touched the defendant’s face. I also indicated on the form which finger was actually used by the defendant each time.
- Q. What were your observations of the defendant in the performance of this test?
- A. Detail to the jury the manner in which the defendant performed the test.

E. Videotape

The New York City Police Department as well as some other law enforcement agencies videotape the performance of the psycho-physical tests. If a videotape exists, it may be offered into evidence as a fair and accurate representation of the defendant’s

performance at the time and date in issue.

Q. Officer, was the defendant's performance of the four physical tests recorded on videotape.

A. Yes.

Q. I show you People's _____ for identification and ask you to tell the Court what it is.

A. This is the videotape of the defendant's performance of the physical tests.

Q. Prior to your taking the stand, did you view this videotape?

A. Yes.

Q. Does the videotape fairly and accurately depict the defendant's performance of the physical tests on (date of arrest)?

A. Yes.

At this time, I offer People's _____ for identification into evidence and request that the jury be allowed to view the videotape.

6. Vital Signs

Q. What is the sixth part of the examination?

A. The sixth part of the examination is called the vital signs.

Q. What were the vital signs that you checked?

A. I checked pulse rate, blood pressure and temperature.

A. Pulse

Q. How did you check the pulse rate?

A. I checked the pulse by placing my fingers on the defendant's skin next to an artery, pressed down, and felt the artery expand as the blood surged through. Each surge was a pulse and I counted the pulses that occurred in one minute and that gave me the pulse rate.

Q. How did you know that you were feeling an artery rather than a vein?

A. I knew because we were trained that you can't feel the surge or pulse in the vein.

Q. How often did you take the defendant's pulse?

A. I took his pulse three times. I took it during the preliminary examination. I took it following the finger to nose test, and I took it at the time that I checked the blood pressure and temperature.

B. Blood Pressure

Q. What was the next test?

A. The next test was blood pressure.

Q. What is blood pressure?

A. Blood pressure is the force that the circulating blood exerts on the walls of the arteries.

Topic 7:

Ethics Issues

DEFENDING DWI CASES - THE CRITICAL ISSUES

ETHICS ISSUES

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Materials Prepared By

PETER GERSTENZANG, ESQ.
GERSTENZANG, SILLS, COHN & GERSTENZANG
210 Great Oaks Boulevard
Albany, New York 12203
Tel: (518) 456-6456

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COURTROOM DEMEANOR - HANDLING JUDGES AND CLERKS

Dealing with Judges involves a lot more than motion tactics and maneuvers. It requires a thorough understanding of the judge and his or her orientation to the Criminal Justice System, and more importantly, your own. How we view the judge and the prosecutor shapes and dramatically impacts how they view us. One of the most popular perceptions of the criminal defense attorney is that of the valiant adversary battling the forces of evil and darkness. It is a very emotionally appealing image to which many of us subscribe. Of course, if we are engaged in storming the castle, it is a safe bet that the people in the castle will consider themselves under siege. An adversarial approach stimulates an adversarial response in even the most reasonable of opponents.

For many lawyers, it is necessary to demonize their opponents including the "tough Judge." From childhood, sports such as Little League Baseball and soccer, encourage adversarial behavior. We are taught to choose up sides and to play hard and be loyal to the side that we are on. We are the good guys and they are the bad guys. Both prosecutors and defense counsel see each other as adversaries in a contest where truth and virtue are always on their side. Some of our most noted defense counsel started off as zealous prosecutors. Many of these same attorneys demonized the defense when they were prosecutors, and now enthusiastically do the same to their former colleagues.

Succinctly, in war and litigation, people need the comfort of being on the "right" side. The most unhappy of our colleagues are the ones who find themselves on the "wrong" side. Many prosecutors are repelled by police abuses and the apparent inequity of the Criminal Justice System. Defense counsel frequently dislike their clients and treat them accordingly. Cynicism and disillusionment afflicts both prosecutors and defense counsel. It is a corrosive malady that depresses the psyche and diminishes the quality of life. The reality is that neither side has a monopoly on virtue. All of us swear the same oath to support the Constitution. We serve the same system, playing our chosen or assigned roles to the best of our ability.

For many advocates, it matters not whether they prosecute or defend. Their loyalty is to the principles of our Constitution and the adversarial system of Criminal Justice, which it governs. The question for all of us is whether we enjoy what we are doing and are we happy? This is not only a significant personal issue, it is also pertinent to the professional balance requisite for being an effective advocate.

EFFECTIVE ADVOCACY REQUIRES AN OBJECTIVE PERSPECTIVE

While adversarial zeal provides emotional comfort and justification, it clouds the professional objectivity needed for effective advocacy. Objectively, prosecutors, judges and defense attorneys are lawyers pursuing professional goals within an adversarial system of criminal justice. In the military, lawyers can be assigned to prosecute one day and defend the next. Their

commitment is to the standards of their profession and the system that they serve. Their oath binds them to that system and the Constitution that defines its parameters. In that context, opposing counsel is simply a lawyer who is representing the other side. The Judge is simply a lawyer assigned to the bench. They are neither friends, nor foes, good, nor evil.

While there will always be judges before whom you cannot practice because of personality conflicts, they should be few and far between. The "tough Judge" can be effectively dealt with if the attorney is balanced and objective in his or her approach to the problem. Tough judges are a problem, but there are techniques, which can be effectively used to diminish and/or overcome that problem.

REFRAMING YOUR ORIENTATION

Tough judges are simply lawyers playing a role within the context of their personal psychology and orientation. They think they are doing what they are supposed to do. It may be that they perceive themselves as the protectors of their jurisdiction. It may be that they are fearful of a public reaction to what they perceive as judicial lenience. They may enjoy positive feedback from police and prosecutors in regard to their "no nonsense" approach.

Regardless, the job of the advocate is to figure out the judge's orientation and then frame your case in terms that will produce a favorable result. This type of analysis requires clear understanding. Clear understanding requires a perspective that

is not tinged with adversarial emotion. So let's drop "the tough Judge" concept, and take a close look at this lawyer who is presiding and whom we are charged with persuading.

First of all, he or she thinks that they are right, or wants to think that they are right. Judges know that people expect them to be masters of the law, and they are well aware of the fact that they are not. Mastery of the law requires a commitment that few are willing to give to their profession. Many people enter the judiciary in order to escape the pressures of private practice. For most, the trade off is less money for fewer hours and greater status. Accordingly, a calm, competent and well-prepared lawyer is an object of respect, grudging or otherwise.

THE PRO-PROSECUTION JUDGE

Be careful in your classification of a Judge as "pro-prosecution." While their actions are consistent with the interests of the prosecution, their motivation may be entirely different. In New York State, we have both lay and lawyer judges. Many of these judges are retired police officers who occupy part-time benches in town and village courts. Many police officers go to law school and wind up on full-time benches. The knee jerk perception is that these Judges are very pro-prosecution.

While they are certainly familiar with and comfortable in the law enforcement culture and community, my experience is that they are far more willing to overrule the prosecution and to dismiss a case than judges from other backgrounds. Retired

police officers and former prosecutors are highly cognizant of both the virtues and the faults of law enforcement. Most of them take pride in the quality of service they rendered to law enforcement and greatly resent sloppy police work and police officers, who are less than honest in their testimony. If you can overcome your own prejudice in this regard, you will find these judges to be far more receptive than you might otherwise believe. Over the years, I have had a great deal of success obtaining suppression of evidence and/or outright dismissals from former law enforcement officials.

While they should be emotionally detached, these judges are assuredly not. A Driving While Intoxicated case is not particularly significant to a retired police officer or former prosecutor who routinely handled such cases and did not consider them to be the crime of the century. Improper police procedure and/or falsification of evidence or testimony is, however, something which tends to offend such judges. Generally, judges who come to the bench from a law enforcement background tend to have expectations that police and prosecutors are rarely able to meet. While these judges start off as being very pro-prosecution, they become frustrated and disillusioned when prosecutors and police do not perform competently. A prepared defense attorney can do very well with this kind of judge.

On the contrary, former public defenders can be among the toughest and most difficult judges that you encounter. The reason for this, again, lies in basic psychology. Generally,

prosecutors have the discretion to seek justice. They can make the bad guy pay for his crime and exonerate the innocent. They champion the cause of the victims and receive the gratification and applause of the community. Defense counsel in private practice are, hopefully, paid for their services and are generally well treated and regarded by those who entrust their cases to them.

Public defenders on the other hand, are rarely given the recognition that they deserve. They encompass some of the finest advocates in our profession. Even when they win, their clients frequently regard them as not being "real" lawyers. They carry ridiculous caseloads, and are frequently frustrated by their inability to do the job the way it should be done. Many of them react to their bad treatment by their clients by becoming embittered and resentful. On the bench, these former public defenders can be very harsh and difficult to deal with.

IN-COURT DEMEANOR

Whether the court sits during the day, or in the evening, go there with the attitude that you will be there until the court closes. Make sure that you have work with which to fill your time. Regardless of how pressured you may be, you should look as if you have plenty of time and are quite comfortable sitting in court waiting for your case to be called. Judges punish "difficult" lawyers by making them wait. The more impatient and agitated the attorney, the more effective the technique. The lawyer's emotional reaction feeds and ratifies the judicial

technique. Your impatience and agitation reflect a negative attitude toward the bench, which prejudices you as well as your case.

In court, your animosity is fueled by bad judicial rulings. The judges, on the other hand, perceive themselves as merely doing their job. It is your emotional reaction that sparks and develops their animosity towards you. Not only does your immediate client suffer, future clients will pay for the judicial animus that you have incurred. Patience, good humor and self-discipline impress both good and bad judges. They are as much a professional obligation as responding to phone calls and researching the issues of your client's case.

IN-CHAMBERS COERCION

There used to be a judge who would call attorneys and the defendant into chambers prior to the start of a trial. He would promise the defendant a fair trial, but advise the defendant to have his toothbrush with him in the event of a guilty verdict. The threat of jail forces people to plead guilty. Time after time, lawyers diligently prepare for trial only to find that this threat causes their client to enter a plea. Despite the fact that you discuss the possibility of jail in your initial interview, clients forget and are surprised when it is brought up on the eve of trial. Accordingly, you have to ascertain your client's position early on. Obviously, it will only be those clients who are willing to run that risk that will go to trial. Advise them verbally and in writing. You want a client who has

been thoroughly advised and fully understands the potential consequences of a trial. When you go into chambers for your pre-trial conference, you need to have the certitude of your client's position.

In driving while intoxicated cases, the threat of jail is something that judges generally use when they think it will be effective in obtaining a disposition. In New York, jail is rarely imposed for a first offense conviction. If there is a conviction, after trial, for DWI, probation is the most common sentence imposed. Where the trial really is a horse race and there are legitimate defenses, judges are less inclined to punish a defendant for asserting them. Misdemeanor DWI trials are a rarity in most local criminal courts in New York. It helps to remind a judge that if no one asserts the right to trial, then the right will cease to exist. The judge has as much interest in maintaining the health of the system as anyone else. Obviously, that is a hard sell for a part-time judge who is losing time from his law practice to conduct your trial.

Sometimes it just comes down to your having to sit there and patiently allow both sides to threaten you without giving any negative emotional reaction. Good-natured patience is far more effective than an emotional reaction or antagonism. A good-natured, prepared and competent lawyer is the best antidote to prosecutorial and judicial abuse. They have to like and respect you despite themselves.

ADJOURNMENTS

Calendar control is one of the most effective tools of the truly abusive judge. The practice is to keep making the lawyer and the client come to court for no other reason than to obtain another adjournment. In this manner, the client can be bankrupted into a plea. Even if the judge is not abusive, some court clerks will use this as a method of moving their cases and clearing their calendar. Clearing the calendar is the primary goal and motivation for most judicial abuses in the first instance. Guilty pleas take little time. Litigation is very costly and frustrating when "everyone knows" that the defendant did it and you are just trying to get him or her off.

In many jurisdictions, it is not possible to obtain telephone adjournments, and appearances are required on each date even if the appearance is merely to obtain another adjournment. In cases that are being litigated, it is common to have pretrial motions pending for some time. The defense has no control over the speed at which the prosecution responds and/or the judge decides. The defendant's retainer, however, can be eaten up by needless appearances and the defense can, thereby, be crippled by virtue of the waste of resources by the system.

In this instance, the problem is also the solution. If you know that the court is reluctant to grant adjournments and requires these "administrative" appearances, you should file a written request in the form of a letter or, if necessary, a motion. The request should document the cost of your appearance

for the purpose of obtaining an adjournment. That should be contrasted with the cost of a telephone adjournment. In addition, you should cite your ethical obligation to conserve your client's money and not run up his bill by making specious appearances. Without articulating it, this raises ethical concerns for the judge in regard to mandating pointless court appearances.

The Criminal Justice System wastes a lot of money. It wastes it by the gross expenditure of time in pointless appearances whose stated purposes could be accomplished by telephone or email. The defendant's right to counsel and their right to a competent defense is directly tied to their ability to finance it. The draining of a defendant's resources by requiring unnecessary appearances is as much a deprivation of the right to counsel as any other action that deprives the defendant of meaningful representation.

Psychologically, the judge and/or the clerk of the court may not relate to our client. They, however, do live in the real world and are generally appalled at the idea that you might have been paid a thousand or more dollars just for showing up and waiting around their court. When this is pointed out to them, their reaction is both professional and personal. In the vast majority of cases, the clerk, if not the judge, will endeavor to get the case adjourned and will be helpful in avoiding future pointless appearances. In addition, people admire an attorney who tries to avoid incurring expense for his client.

The caveat in all of this is that you not adjourn unless you really have to. It is easy to acquire a reputation of constantly delaying and never appearing. This hurts you, your case and future clients. Request only the adjournments that you really need and explain that you have a conflict elsewhere. Many courts require affidavits of engagement setting forth exactly where you are going to be.

Where possible, try to participate with the clerk and the prosecution in setting conflict-free dates for pretrial hearings and other proceedings. You want a reputation for requesting only the adjournments that you absolutely need. You really want to be seen as a solid citizen by court clerks and the judges they work for. Never forget that the clerks, judges and prosecutors all have their own associations. You and your fellow attorneys are the subject of constant discussion. Whatever you do in one court is being discussed in other courts and your reputation is your most valuable professional asset.

PAY THE JUDGE

DWI defense attorneys are usually well compensated. Unlike many other criminal defendants, the people who retain us have the means to pay our fees. Adequate compensation is something to which everyone is entitled. When people are not adequately compensated, they tend to become bitter and unhappy.

Judges, both part-time and full time, rarely feel adequately compensated. Most are underpaid and most remain on the bench because they enjoy being a judge. Their compensation comes from

the honor and respect that our society routinely pays to even the worst of judges. A lawyer that treats the court with less than the utmost of respect cheats the judge of his or her compensation. Regardless of how you feel about the person wearing the robe, the court is entitled to respect.

STAY POSITIVE

We take good judges for granted. We are relaxed when we come into their courtroom. We enjoy talking to them in chambers. We admire them and they know that they have our admiration. We spend little time thinking about or discussing them. We dwell on bad judges. We replay our unpleasant encounters, and invest tremendous emotional capital in thinking about their injustices. These judges are the enemy and our in-court demeanor broadcasts our attitude, which only fuels more abusive behavior on their part. Our clients deserve better and more effective approaches than this.

Unless you are a very good actor, it is hard to project an attitude that you do not feel. People can tell whether they are liked or not. If you think of the judge as your enemy, the chances are that he or she will reciprocate. If you cannot bring yourself to like the judge, you can at least work on attaining an emotional neutrality. Consider each court appearance as an opportunity to influence the judge's attitude. The worst judge wants to be right on the law. Lawyers, whom they think are always right on the law, are respected. They treat knowledgeable lawyers with more caution. Everyone admires conscientiousness

and diligence. Come to court well prepared. Make your best argument and, most importantly, lose graciously and professionally. Thank the court for having heard your argument even though the ruling is outrageous. Leave the judge with a good taste in his or her mouth so that your motion to reconsider will not be summarily rejected.

The same motion that a judge is reluctant to grant in a crowded courtroom becomes far more palatable in the face of a persuasive written argument that they are reviewing in the privacy of their chambers. If, however, you have emotionally hardened the judge's position by over arguing your cause and raising the emotional volume of the encounter, you will be lucky if the court even reads your motion, let alone considers it before summarily rejecting your argument.

KEEP YOUR OPINIONS TO YOURSELF

We all love to talk. We particularly love to talk about bad judges. We commiserate with each other and detail the latest story of incompetence. Talking about judges, however, is dangerous. People love to gossip and the stories and opinions get back. This is particularly the case when you confide in a colleague who shares your opinion of the judge. They want to express their own opinion, but caution dictates that they remain silent. Instead, they satisfy their emotional need by recounting your opinion at no risk to themselves. Even a carefully worded criticism will be distorted out of proportion and reported to the judge.

What frequently happens is your opinion gets into the judicial gossip circle and not only gets back to the judge, but embarrasses him or her along the way. You can be sure of a cool reception the next time you appear in that court. We owe it to our clients to keep our opinions to ourselves. Judges may make us uncomfortable and unhappy, but it is our clients who really pay for our lack of discretion. We all have to separate our personal opinions from our professional lives. We represent others and we have an obligation to maintain the best possible relations with those who influence the fate of our clients.

AVOID ANGRY ARGUMENT

Unless you can successfully obtain the removal of the judge from the bench, it is rare that an open conflict will inure to your benefit. Sharp exchanges alienate the judge in regard to the particular case you are arguing, and diminish your effectiveness in future encounters. Everyone takes note of the fact that you are disliked by the judge. For those who do not directly witness the encounter, the word is spread by court officers, attorneys, and police. Judges meet with other judges on a regular basis. They discuss lawyers in much the same way that lawyers discuss judges. Your behavior is presented in very negative terms and will influence the attitude of other judges before whom you appear.

Alternatively, patience and persistent professional discipline in the face of adversity is highly regarded. The bad judge is used to the adverse reaction of lawyers to unjust

rulings. The lawyer who responds with courtesy and professional demeanor is impressive. The record on appeal will, also, reflect the lawyers professionalism which may well have some influence on the outcome. Theodore Roosevelt's maxim of "speak softly and carry a big stick" is very much applicable to practicing before bad judges.

WORKSHOP YOUR CASE

If you know that you are going before a bad judge, workshop your case in advance. Bad judges are as predictable as good judges. If nothing else, be well prepared to make a record of your position in order to place your case in the best appellate posture. Judges hate to be appealed and become very careful when a good lawyer makes it clear that they are making a record for appeal. A professional attitude that is calm, deliberate and intent upon making that record is quite intimidating. Even if the judge rules against you on the particular issue at hand, he or she will endeavor to obtain a negotiated disposition in order to avoid your appeal.

An emotional and, obviously, ad hoc statement on the record is no where near as effective as the demeanor of a lawyer who comes to court prepared to articulate an appellate framework. That demeanor contains no adverse emotional content. The attorney is not there to argue or persuade the judge of the merit of their case. This posture assumes a difference of opinion between the court and the advocate, which needs to be resolved by a higher court. The lawyer's attitude reflects that it is a

given that the case is going to be appealed and the adverse ruling is fully anticipated.

Remember, being wrong on the law is one of the great qualities of a bad judge. You are only one of many lawyers who have suffered bad rulings from this judge. The judge is used to lawyers who express adverse emotion, but whom do nothing in response to their rulings. The reason that you are calm and cordial is that you fully intend to obtain a successful resolution of the issue at the judge's expense. Succinctly, it is not a good sign to a judge when a lawyer is happy with a judge's bad ruling. It must mean that the ruling is so bad that other judges are going to publicly repudiate it.

DOCUMENT YOUR POSITION

Prior to going to court, you have the advantage of knowing that you will be dealing with this judge and the issues that are going to be problematic. In that regard, make sure you have copies of the relevant cases that support your position, and those that do not. Have the portions of the cases that are pertinent highlighted, and make sure you have extra copies for your opponent as well as the judge. A pre-prepared memo of law can be very effective. Judges may or may not take the time to read that memo of law while you are in court, but the fact that it exists indicates that you are thoroughly prepared and have thought about as well as researched the issue at hand. That adds to your credibility and makes it harder to summarily deny your motion or overrule your position.

MOVE ALONG COUNSEL

Your case has languished on the court calendar for eight months and now it has been scheduled for a pretrial hearing. The District Attorney has finally finished her direct examination and you are ten minutes into your cross, and the judge starts sustaining the DA's objections to legitimate cross-examination. The court responds to your argument by telling you to move your cross along. What do you do?

First of all, while bad judges have no problem being unfair, they do not wish to look like they are being unfair. It is this concern about appearances that provides the advocate with great opportunity. Secondly, the judge's motivation may be to simply get out of there as quickly as possible. Judges have great leverage with the defense, but have little control over the prosecution.

A prosecutor has fairly broad discretion in how they put in their case and how much time they spend doing it. Cross-examination, on the other hand, is far more subject to the discretion of the court. Accordingly, what you perceive as a pro-prosecution bias, may merely be an expression of a judicial desire to go home. Few judges punch a time clock. When they are done for the day, they are done for the day. Your cross-examination is standing between them and the end of the day. So, how do you respond?

- a) Keep track of the time. Note when the District Attorney starts and when they finish their direct-examination, and

how much time they took. Note when you start your cross and be prepared to respond to judicial impatience by pointing out any favorable comparisons in time.

- b) Explain to the judge that you have a great many questions to ask, and that you are requesting an adjournment so that you can fully and fairly conduct your cross-examination. If the problem is that the judge has a previous engagement, this lets the judge off the hook because it is you that is seeking the recess and not the court. You will find that this is a very successful approach with an apparently impatient judge.
- c) Explain to the court that you have an obligation to the court to conduct a full and fair cross-examination. You understand that a judge cannot make an objective finding of fact unless the court has the benefit of both the complete direct and a thorough cross-examination. You know that the judge expects you to reveal questionable testimony, and help validate the parts that are reliable and accurate. In fact, the court is entitled to the very best cross-examination of which you are capable. Indeed, the entire Criminal Justice System requires that you meet your obligations in this regard. Your assertion of your professional obligations constitutes a subtle reminder to the Court of its own responsibilities.

BAD RULINGS

Control your outrage at gross rulings by slowing everything down. You have all the time in the world. Patiently articulate in emotionally neutral terms the legal reasons why the rulings should be reconsidered. The more emotional the judge or your adversary, the calmer you need to be. People are programmed since childhood to consider calmness in the face of conflict as a reflection of strength and confidence. It starts with the appropriate parental response to a child's temper tantrum and moves on through a myriad of conflicts that life presents. Bad rulings can be very time consuming because they require counsel to react by patiently explaining why the ruling is bad. It does not take long for a judge to realize that bad rulings should be avoided.

OFFERS OF PROOF

Offers of proof outside the presence of the witness are very effective in expanding cross-examination. You know where you are going, but the judge very often does not. The judge really thinks you are on a fishing expedition and that there is no point to your questions other than random discovery. An offer of proof on the record may not only gain you the ability to explore the area at issue, but repeated demonstrations of relevancy tend to establish your credibility and expand your latitude on cross-examination in the instant case, as well as future ones.

STRUCTURE YOUR CROSS-EXAMINATION

If you know that you will be cross-examining a witness before a bad judge, and a prosecutor who believes advocacy

includes the art of specious objections, you should structure your cross accordingly. Expend the prosecutor's credibility by structuring your cross so that you can successfully repel the initial volley of prosecutorial interruptions. Even bad judges will overrule prosecutors who are simply attempting to obstruct the process. Once the prosecutor has been worn down by a consistent series of adverse rulings, their enthusiasm for this technique will tend to diminish.

CALL THEM ON IT

If the prosecutor and the judge persist in obstructing legitimate cross-examination through sustained objections, call them on it. Place on the record that the prosecutor is intentionally preventing the defendant from exercising his or her constitutional right to confront the witnesses against them. Explain that cross-examination is a sacred right that the American system of justice requires in the litigation of every criminal case. Their denial of effective cross-examination not only impairs the rights of this particular defendant, but also compromises the integrity of the entire process. It is not hard to invoke the highest of American principles since that is, indeed, what is at stake. Again, the idea is to remind them of their professional, as well as patriotic responsibility. It is not to antagonize them.

AVOID LOADED LANGUAGE

The great vice of trial lawyers is loaded language. Our opponents are not simply in error, they are "misstating the law."

They are not mistaken; they are "misleading." Loaded language, of course, sparks more loaded language, and the emotional escalation contaminates written pleadings and oral argument. If hurling invective at your opponent is effective in advancing your client's interests, then have at it. In New York, we are frequently able to negotiate dispositions of DWI cases to reckless driving, speeding, and/or parked on pavement. All those negotiations require the consent of the prosecution. Effective defense requires a calm, unemotional prosecutor, who can trust and rely on your representations in regard to the law as well as your assertions of fact.

There are two judges in every courtroom. The most important has neither robe, nor bench. We argue and try our cases before both judges, but it is the prosecutor who most often decides the fate of our client. Everything that is done in a courtroom should have a specific reason and goal. The only legitimate basis for the expression of any emotion is the advancement of the interests of our client. Accordingly, eliminate emotionally loaded words from both your oral and written argument. Save the loaded language for the jury or for those situations where it will have the desired effect.

DON'T TAKE NO FOR AN ANSWER

The reason that many attorneys react emotionally to bad judges and prosecutors is that they think that no is really the final answer. Negative responses from bad judges and prosecutors should be received with patient understanding and friendly

equilibrium. We are all just lawyers playing our respective roles and trying to do our job. The three of us have a tough case that our respective professional obligations make difficult to resolve. We are all going to have to work late going through these lengthy motions and pre-trial hearings. Maybe something will break further on down the line in the litigation that will allow us to resolve this. If not, we will let the jury decide. In any event, this case will come to an end and we will be back here with another case going through the same process. Let's all try to be as pleasant and accommodating as our respective responsibilities allow.

The above is a distillation of a professional attitude that allows as well as motivates people to reconsider and to come up with a compromise that is acceptable to all. Inasmuch as bad judges and prosecutors have no hesitation in engaging in inflammatory statements and threats, it is incumbent upon the defense attorney to set the tone and exercise the self-discipline that avoids inflammatory responses regardless of how great the provocation, or how outrageous the position articulated by the bench or your adversary. If you play the game by the other side's rules, you are likely to lose. The prosecutor and the judge wield power that is not intimidated by emotional confrontations with defense attorneys. It is these emotional confrontations that justify the bad judges' bad behavior. Your expression of righteous indignation arms both the judge and the prosecutor and plays your weakness to their strength. Your

emotional expression enables them to ignore what might otherwise be compelling legal argument. Binding precedent is always trumped by the passion of the moment. Putting an emotional defense attorney in his or her place has a much higher priority for a bad judge than either equity or justice.

On the other hand, disciplined, professional courtesy in the face of judicial bullying becomes embarrassing. It makes the judge look bad and judges do not want to look bad. Your steadfast adherence to a calm, professional demeanor makes it hard for a judge to maintain an abusive posture. It looks bad, sounds bad, and creates substantial pressure upon them to behave appropriately. Over time, you will note a change in the way that you are treated in that court. The judge still has a bad reputation among your colleagues, but treats you differently. Courtesy begets courtesy and professional discipline inspires admiration. Once you get into it, it becomes a challenge to gain the respect of these abusive judges. Having one of these judges solicit your advice or refer a client is quite rewarding.

DON'T GO PUBLIC

Anger arms the opposition. Embarrassment fuels great effort. Recently, a prosecutor complained about a defense attorney to whom he had conceded a favorable disposition in a case that had sat too long. The lawyer then issued a press release announcing his victory on the basis of prosecutorial sloth. The lawyer got his story published, but impaired his ability to effectively negotiate with that prosecutor in the

future. He armed the opposition and fueled an animosity that will survive for the rest of his professional career.

Publicity rarely helps the defense. We do not run for office, but judges and prosecutors do. If you embarrass them, they will neither forgive, nor forget. All of your future interactions will be colored by the one-day story that quickly fades from all memory except that of the prosecutor and the court. Criminal defense requires us to both fight and influence our adversaries. That requires a delicate balance of solid lawyering and emotional balance.

ENLIST THE PROSECUTION

There are judges who are so nasty and intractable that the only remedy is to try the case and appeal if there is a conviction. No matter how nasty, the vast bulk of that judge's cases are plea bargained. The judge is listening to somebody and that somebody is the prosecutor. If you cannot make your case to the judge, get the prosecutor to do it for you. The Criminal Justice System is amazingly flexible. It tends to adjust to whatever personalities are at the helm. The beauty of a DWI defense practice is that it tends to be a multi-jurisdictional exercise. Generally, you get to appear before different judges, in different courts and in different counties.

In one county in New York, we have a very smart, tough and competent judge who is very harsh and inflexible. Effective representation requires enlisting the District Attorney in obtaining your disposition. Inasmuch as the choice is convince

the judge to go along or go to trial, the District Attorney has a significant interest in your arguments and presenting your case. In one case, I was taken aback by the eloquence and persuasiveness of my adversary in arguing my case. If your reputation is that you are hired to litigate and that is what you do on a daily basis, the prosecutor is rarely interested in expending the time and effort necessary to fully litigate a garden variety DWI case.

If you are geared to litigate and you conduct significant pretrial practice, the prosecutor's cost for a conviction is pretty high. Our clients hire us to fight because they cannot take the plea that is being offered. They are apprised of the risks that they are taking right from the beginning. They assume those risks and rightfully expect only that you will do the very best that you can to assert their rights and challenge the People's case. It is worth it to them, it is worth it to us; it is not worth it to the prosecution or the court. The multitude of issues inherent to the litigation of a DWI makes this a very time consuming and tedious effort. There are good lawyers and bad lawyers, but there are few succinct lawyers. The purpose of plea bargaining for the Court and the prosecution is to alleviate them from the crushing burden of according a defendant the rights guaranteed by our Constitution.

MAKE EVERY FIGHT COUNT

In that regard, you owe all of your clients the obligation of fighting each of your cases with diligence, hard work and

single minded dedication. The prosecution and the court need to know why compromise is preferable to confrontation. In most jurisdictions, the vast majority of cases are plea bargained and litigation constitutes a small percentage of the total volume of cases. Accordingly, it is vitally important that the cases that are fought be fought well. Consider each hearing and trial an investment in the future. We build our reputations one hearing and trial at a time. A thoroughly prepared and competent advocate is a formidable and ferocious force. A dedicated attorney in the heat of trial is an awesome sight to behold. Police, prosecutors, judges and jurors all admire and respect a good trial lawyer. Advocacy is an art, and good art inspires all who behold it.

WE ARE PART OF THE SYSTEM

The abusive judge and the prosecution like to see themselves as allied against the forces of evil with you playing the role of the prince of darkness. Defense attorneys are viewed as being licensed outsiders who use the system to get off guilty clients. Both the prosecution and the court need to be constantly reminded that the role that we play is as great and even more sacred than their own within the American constitutional framework. We are the ultimate insiders. There is nothing in the Constitution guaranteeing anyone the right to be prosecuted. The Bill of Rights was not written to protect the rights of government. Defense attorneys are the primary law enforcement entity charged with maintaining the most sacred principles of the American

democracy as set forth in the United States Constitution. We carry the torch handed down by Washington, Jefferson, Madison and Hamilton. We are liberty's champion and the ultimate refuge for the wrongfully accused.

We not only work for the abusive judge, we have an absolute obligation to his or her court to diligently pursue the defense of the action to the best of our ability. We know that he or she expects nothing less and we will do everything we can to live up to the judge's expectations by conducting a good and thorough defense. Accordingly, while the cross-examination does take time and constitutes a personal sacrifice by taking us away from our families and friends, we will conduct the proceeding for as long as it takes in order that a judge can be satisfied that his or her findings of fact will not be tainted by our failure to do the job that the judge requires in order to render a fair and impartial decision.

Every once in a while, it helps to remind everyone that this is not our case, our court or our private drama. This is an exercise in the highest principles of the American democracy. The prosecution and the defense are engaging in a patriotic exercise of tremendous significance to the American people and the founders of the American republic. The American Constitution was not simply an exercise in legalistic draftsmanship, it is the product of passionate patriotism tested in human sacrifice and bloodshed. Accordingly, the case will take as long as the case takes and your motions, cross-examination and everything else

that you do in the pursuit of the defense are as patriotic an exercise as any other. We all serve the same system, swore the same oath and have the same obligation to fulfill our roles to the very best of our ability. That is what we give of ourselves and that is what the court expects from us.

SOLVE THEIR PROBLEM

In DWI cases, prosecutors and judges share a common nightmare of reading about a Vehicular Homicide committed by someone they let go. They can put your client in jail, but they can't prevent him from drinking and driving once he gets out. Coercion intimidates; it does not convince. The Criminal Justice System rarely corrects or converts anyone. Time and tide are far more effective in influencing human behavior. If the Criminal Justice System were measured based upon its effectiveness in changing human behavior, it would be abolished as a failure.

When you are retained to represent someone, however, they place a great deal of trust in your knowledge and judgment. When a lawyer tells his client that he or she is an alcoholic and must stop drinking, it has far greater impact than when these same sentiments are expressed by a judge or probation officer. The judge or probation officer can force the person to temporarily stop drinking. The defense attorney is in a position to make the person want to stop drinking.

When people are first confronted with a criminal charge, they are very receptive to whatever their lawyer has to say. If you are proactive in getting a client into treatment and

sincerely involved in helping him or her gain their sobriety, you will very quickly gain a reputation as an attorney who sincerely cares about his clients. This is noted by alcohol treatment providers and probation officers who pass the information on to prosecutors and judges. You are still the opposition in the courtroom, but you are also part of a solution and dispositions will come easier when prosecutors and judges know that you understand and are attempting to deal with the problem confronting them.

There are judges that you simply cannot win over. In those courts, you do the best that you can, preserve the record and file the appeal. Regardless of the provocation, maintain your composure and your self-control. You can never win an open confrontation with a Judge. At best, you will get a draw, and at worst, a complaint of professional misconduct.

Making your points, preserving the record and appealing wins you respect. When you know you are going in front of a difficult judge, your preparation has to be thorough and you have to anticipate the problems that are going to arise. Be ready with motions *in limine*. Be ready with briefs on the particular points. Judges hate to be appealed and they hate to be reversed. DWI is very much a specialty and most judges are insecure of their knowledge in that area. They tend to be far more careful with well-prepared lawyers than with the unprepared.

You have to think long term with each case being a battle and each battle being a part of a larger war to win the respect if not the heart and mind of the judge in question. Everybody respects a good lawyer. No matter how badly they treat you on that particular day, you will later hear how much they respected the way you handled yourself. That will be reflected in comments they make to other people or in referrals they make to your office. Never get emotional. Never harden their position. Always leave the door open for a motion to reconsider. Don't allow the Judge to become emotionally committed to a particular position by over arguing.

The practice of Criminal Defense is the art of the possible. We owe our clients the best that we have, and the best that we have is dependent upon the honor, reputation and esteem, which we are accorded by the legal community. Win or lose, it is the quality of our advocacy and our character by which we are judged.

COURT PERSONNEL

Although judges wear the robes and lawyers carry the briefcases, law clerks, court clerks, and secretaries run the court. A lawyer who speaks to the clerk is, in effect, speaking to the judge. The information conveyed by the court personnel shapes the judge's impression. The clerks control both the calendar and access to the judge. They can influence the disposition of a case.

Every lawyer has scheduling conflicts. Every lawyer will need adjournments. Some will get them. Court personnel will

help resolve conflicts for those attorneys whom the clerks respect. They will have a great deal more trouble finding solutions for attorneys who are discourteous or disreputable.

Seek an adjournment only when you really need it. The judges, prosecutors, and clerks know those lawyers who seek adjournments solely to delay. These lawyers have a difficult time obtaining even necessary extensions. By not seeking specious adjournments, you reduce the chance of having the request denied.

Judges are as dependent upon their clerks, as lawyers are upon their administrative assistants. A court clerk's opinion carries a great deal of weight with a judge. Most judges are reluctant to ignore their clerk's advice. The clerk's attitude towards lawyers, prosecutors and police is frequently transmitted to the judge. Court clerks should be treated with the highest respect because any discourtesy is likely to have a negative impact on the judge. In the same manner that we are protective of the support personnel in our offices, judges are very protective of and loyal to their court clerks.

Little things mean a lot in the Criminal Justice System. One of the things that our office tries to do is to respond immediately to any request by a court clerk for a letter of representation or any other administrative matter. A quick response indicates a high level of respect for the clerk without ever having to articulate that respect.

If you have a good relationship with the court personnel, that can translate into a clerk advising you of the best time to appear in court; or to something as mundane as the judge is having a bad day and you might want to adjourn to another time. One of the greatest benefits is simply being warmly treated when you appear in that court. Practicing in a court where you are liked and respected is a lot more pleasant than appearing in a court where you are not.

DEALING WITH PROSECUTORS AND POLICE

THE PROSECUTOR

A local criminal court practitioner handles a large number of cases with the same people over a long period of time. Reputation and relationships with the other players in the courthouse are your most valuable tools.

Most agreements in this courthouse are oral. Honesty is important, and deceit -- no matter how minor -- can have long-term consequences. A lawyer who cannot trust and be trusted will suffer.

Courtesy ranks second only to integrity among the vital tools of this trade. Everyone plays a role in the local criminal court. The us-against-them mentality that may serve the anti-trust litigator will hurt a local defense lawyer and his clients. For the most part, at the local court, everyone is simply trying to do a job. Everyone is in it together.

The personalities and eccentricities of the actors influence every case. A defense attorney who does not perceive the needs,

problems, and priorities of the people who share the cases will miss opportunities to work out advantageous resolutions or will suffer in other ways.

Prosecutors are center stage. In *some* ways, they are the unwilling partners of the defense attorneys. The partnership is often rocky, filled with anger, loud exchanges, and distrust. But it need not be that way.

The defense attorney who has been a prosecutor understands that prosecutors view themselves as protectors of the innocent, champions of law enforcement, and problem solvers. Prosecutors use a tough demeanor to move cases. They consider their cases valid unless shown otherwise. But prosecutors do not want unjust results. They want dispositions. They rarely have time for personal involvement or animosity.

Prosecutors also realize that most defendants enter the system because of personal problems -- alcoholism, drug addiction, mental illness, ignorance, poverty, and the like. Although they are not social workers, prosecutors often properly use the coercion of a criminal charge to force people to confront their problems.

Prosecutorial expressions of anger and impatience are either the result of caseload pressure, or tactical ploys. Attorneys, especially those who primarily handle civil cases, are too quick to take offense and hold grudges. Attorneys in civil courts work more or less on an equal footing. No such parity exists in a criminal case, and equality before the Bench exists primarily in principle.

Your demeanor helps determine the attitude of the prosecutor. The defense attorney who treats every prosecutor as an adversary will find an adversary in every case. Litigation maneuvers and posturing simply hurt your ability to negotiate favorable dispositions.

The art of negotiation is knowing what the other side wants. Prosecutors and defense attorneys do not want the same things. Few prosecutors are interested in trying cases in local criminal courts. They do so when defense attorneys do not accept the offered plea bargain. Prosecutors' and defense attorneys' criteria for striking a bargain differ.

Empathetic defense attorneys care a great deal about their clients' hardships. But only the foolish attorney believes that the description of such problems will be determinative in striking a deal. Trying to generate empathy in a prosecutor frequently is futile and counterproductive.

The inexperienced defense attorney begins the long and sad tale: The client is a sober citizen who normally does not drink and drive, but the client had been fighting with his wife, who was having an affair. He went to the local gin mill and had a few.

The rustling sounds that interrupt the monologue are the prosecutor going through mail, waiting for the lawyer to finish. The prosecutor knows that once past the marital problem, the attorney will explain the client's need to drive to support the children of the impending broken home.

Are prosecutors born without hearts? No. But they have heard it all before. And they make decisions based on different criteria. Equitable arguments can help only if they distinguish a case from the norm. Most defendants need a license to work. Most support themselves and others. Unless someone held a gun to a defendant's head and forced him to drink and drive, the reason for the offense matters little.

NEGOTIATING DISPOSITIONS

To negotiate effectively, the defense attorney's presentation must address the criteria that matter to the prosecutor. In fact, most prosecutors would not listen to a narrative about an unfaithful spouse without interrupting. The prosecutor usually will try to focus the defense attorney on those facts that might make a difference.

Prosecutors care about the defendant's prior record. They want to know if damage was done. Was there an accident or injury? The prosecutor will focus, as well, on the strength of his case. Was there a timely chemical result? Is there proof of operation?

In civil cases, each side tries to obtain the best possible disposition. In criminal cases, the prosecutor is charged with following office policy and doing justice. Justice is frequently what the prosecutor thinks is fair.

Yet the fairness goal occasionally will cause a prosecutor to protect a defendant from an attorney who is trying to plead guilty to defective charges. Prosecutors sometimes point out defects and consent to motions to *dismiss*.

Some time ago, I was defending a DWI charge where the defendant was found drunk and unconscious at the scene of an accident. The defendant owned the car, but had no recollection of driving it. During a pre-trial hearing, it became apparent that a key prosecution witness was lying and may well have been the driver of the car. Instead of attempting to bolster the fallacious testimony, the assistant district attorney interrupted my cross-examination to suggest a more fruitful area of impeachment. The case ended with a joint motion to dismiss.

If negotiations come to a stalemate, make a counter-offer to the prosecutor by devising an alternative disposition. The options are limited only by your imagination and the prosecutor's office policy.

Consider, for example, the college student, with no prior record, who parked illegally. After leaving a party at which he had a few too many, the student discovers that his car has been towed. The student hops the fence at the tow yard. He borrows someone else's car to create an exit by driving through the fence. The student then liberates his car.

To negotiate a plea, examine the case from the prosecutor's perspective. Both the tow truck owner and the owner of the neighboring car got hurt. The defendant avoided tow fees by helping himself. The police and the court also have relevant interests.

The prosecutor initially will offer a plea to a misdemeanor in satisfaction of the felony -- a short jail sentence, probation with restitution and/or a fine.

You should seek to avoid a criminal record, jail, and probation. First, limit or neutralize any pressure from the victims by having your client make immediate restitution.

Next, work out a program of community service to present to the court and the prosecutor. By stressing the need to avoid a criminal record and incarceration, and by providing a viable alternative, you will improve the chances of obtaining a favorable plea.

Not all local criminal court cases can be settled. Office policy may preclude a prosecutor from offering a deal that the defendant can accept. In such instances, protracted argument is a waste of time. If the case must be tried, save your argument for the jury.

Although the goal changes on the march to trial, the smart practitioner's attitude will remain the same. The inexperienced lawyer will substitute discourteous and insulting behavior for advocacy, believing that the defense is the champion of liberty and due process while the prosecution is the tyrannical enemy.

The opponents reciprocate. The lawyers engage in contests matching wits, fighting skirmishes with gusto. Such conduct is self-indulgent, unprofessional, and reprehensible. Advocacy requires lawyers to do those things, consistent with ethics, that advance the interests of the clients. Antagonizing an opponent rarely benefits the client.

Play smart. If taking offense will help the cause, take offense. If ignoring obnoxious behavior is in the client's

interest, ignore the behavior. Offend whomever you please after you leave the office.

MOTION PRACTICE

Although you would never know it from lawyer shows on television, pre-trial motions and discovery demands are the opening guns even in these cases. Litigation begins, not with drama but with paper.

Although the filing of paper is tolerated in felony cases, prosecutors view motions in local criminal court with disfavor. Most prosecutors's offices are inadequately staffed. Superior court cases take priority, and prosecutors assigned to local criminal courts have little support.

In civil litigation, both sides usually are funded by private entities. In criminal cases, the prosecution is publicly funded. Paper practice is a luxury.

In civil cases, mutual discovery is expected, encouraged, and required. Judges do not want to try cases that lingered because the parties never learned the facts. The expectations differ in a routine misdemeanor case. Motions often are answered here by law students clerking part-time. On occasion, the prosecution will respond with whatever is in the word processor. A pleading may even oppose or consent to relief that was not requested. Prosecutors assume that defense pleadings also are word processor packages. They are often correct.

Defense attorneys who truly need discovery should ask for what they need and explain why they need it. Do not expend credibility seeking something you do not need and cannot get.

Few prosecutors in local criminal court are interested in hiding evidence. Often, however, the prosecutor does not possess the requested material and may not even know that it exists. The prosecutor's major objection to discovery is the time and trouble involved in getting the discovery for you.

If you truly need specific items for the defense, help yourself and your client by making a narrow and focused demand. A cooperative approach will often be more effective than an adversarial one. You can often do best by submitting a proposed order resolving discovery issues. The prosecutor will welcome the chance to save time by negotiating the order rather than responding to motions.

Once the order is approved by the court, the prosecutor can give a copy to the police and ask them to obtain the material ordered. By saving the prosecutor's time, you may get everything you need.

A working relationship has other benefits. Although the case could not be settled at the outset, a relationship of mutual cooperation opens new opportunities to reach agreement on the entire matter.

At the outset, prosecutors frequently have little information about a particular case. Motion practice occasionally forces a prosecutor to learn the facts of the case. If the prosecutor has discretion to dispose of weak cases, a defense attorney may be able to use information gleaned from discovery to persuade the prosecutor to reduce or dismiss the

charge. That practice is known as trying the case in the prosecutor's office.

It is risky. Revealing weaknesses in the government's case may simply help the prosecutor prepare a better case. You also lose the chance to surprise the prosecution at trial. But if you proceed carefully, you may score a major victory without trial. Prosecutors do not want to be blindsided or lose at trial. Most will not expend time on a flawed prosecution. A major advantage of taking this risk is that it builds trust. Most prosecutors are sensitive to your risk as well as their own.

THE PRE-TRIAL HEARING

The pre-trial hearing usually is the last chance to resolve the case before trial. The hearing often is a mini-trial in which both sides get to see the case. Hearings also give clients a preview of the testimony and force them to confront the possibility of a conviction.

The pre-trial hearing also is an opportunity for the defense to gain discovery and prepare for trial. It fixes the testimony of some of the prosecution's witnesses. For that reason, prosecutors call only those witnesses whose testimony is necessary to satisfy the judge. However, nothing prevents you, as the defense attorney, from calling other relevant prosecution witnesses. For example, it is a rare case in which there is only one police witness. At most pre-trial hearings, however, the People rarely call more than the minimum witnesses needed to meet their burden. This usually translates into the arresting officer. You, however, can call that officer's partner and any

other police officers who have information relevant to the issue at hand.

In one jurisdiction, the police seem to have a "know nothing rule" requiring that only the arresting officer recollect the facts of the case. This is designed to prevent defense attorneys from obtaining conflicting testimony. Accordingly, a pre-trial hearing can be used to eliminate potential police witnesses by establishing a lack of recall. Absent your subpoena, this testimonial lobotomy would not be discovered until trial.

Approach trial as a good doctor approaches surgery: do it when nothing else works. No one can control or predict the result. If you practice in other courts, do not be lulled into strategic mistakes. Local criminal courts do not necessarily apply the rules of evidence or procedure. Because prosecutors in local criminal court have little time to prepare and virtually no support, they may run into problems of proof. Be alert to such opportunities.

Prepare an initial strategy. But be ready to shift gears. The prosecution might fail, for example, to establish a necessary element of the offense. Avoid establishing the missing piece on cross-examination. In local criminal court, less may often be more.

THE POLICE

For the criminal defense attorney, cross-examination of police officers is the essential art of their profession. Attacking the police officer witness's credibility is part of the

daily routine of a criminal defense practice. Interestingly, little time or effort is expended in understanding the psychology and orientation of police officers in general. While we are quick to point out the bias of prosecutors, judges, and police officers; we are mostly oblivious to our own.

Criminal trial work is generally a solitary exercise. Lawyers are frequently second seated, but cross-examination is not a team sport. Accordingly, a lawyer on trial sees himself as an individual and subconsciously deals with the officer witness as being from the same orientation.

In point of fact, patrol officers are part of a team. While personalities and characters are as varied as any other group of individuals, the patrol officer is subject to intense peer pressure from their fellow officers. While criminal defense lawyers expend little thought about how to fit in with other lawyers, fitting in is absolutely critical to the average police officer.

While no one enjoys being embarrassed, police officers are particularly vulnerable and sensitive to professional embarrassment given their exposure to the frequently merciless criticism of their fellow officers. That fear of professional embarrassment makes police officers particularly vulnerable to cross-examination on the witness stand.

While many police officers affect a cynical and, often, sarcastic demeanor, most are idealistic and perceive themselves as the good guys trying to protect people from the bad guys.

While every police department has its share of abusive and emotionally unstable officers, the vast majority are motivated by their desire to serve and to experience the satisfaction of using their power to protect the people of their community.

One of the great benefits of serving as a police officer or prosecutor is the power to do the right thing. Unlike the power of politicians, the power of a police officer is immediate and direct. That power, combined with the approval and support of their fellow police officers, makes law enforcement a very rewarding career. That peer support also helps to eliminate doubts and insecurities in regard to questionable actions taken in adrenaline laden situations. Loyalty to their fellow officers is one of the strongest emotions that a police officer can have. That loyalty frequently transcends the obligation to provide honest and objective testimony in a courtroom. Evading the truth is far more acceptable when it is done to serve the greater good and to protect the interests of fellow officers.

In addition, the system supports police officers by rarely prosecuting instances where police lie under oath. In the absence of gross perjury, prosecutors are loathe to investigate, or bring charges against their own witnesses. It is one thing to prosecute someone who lies to advance their self-interest; it is another to prosecute an officer who lies for the sake of obtaining a conviction of someone that the officer is convinced is guilty. The absence of personal gain as a motivation tends to negate the desire to prosecute. Most of the time, prosecutors and judges want to believe the officer and it takes a great deal

for them to accept that the officer is lying. Even where the falsehoods are obvious, the perjury is routinely ignored.

Ironically, this situation opens up opportunities to impeach which would not, otherwise, be available.

Most commonly, officers will claim to remember facts of which they actually have no recollection. Frequently, the officer is testifying to the contents of their notes and police reports. They are not testifying as to an actual memory of the events set forth in their paperwork. Accordingly, reasonable doubt can be established based upon a cross-examination that reveals that the officer did not, in fact, recall the events that he or she testified to on direct-examination.

Like everyone else, police officers admire good lawyers and frequently refer clients to them. Many criminal defense attorneys confuse advocacy with hostility and treat police officers with disdain. An attorney's bias negatively impacts the attorney's ability to deal with and cross-examine officers, and serves their clients poorly. Police officers are as individualized as the rest of the population. They are saints and sinners and a bad police officer can do a great deal of damage. On the other hand, watching a good officer working is like watching a great artist using psychology, rather than paint.

Effective advocates treat police officers with the utmost of respect and courtesy outside the courtroom, and do their best to challenge their testimony inside the courtroom. On many occasions, it is necessary to subpoena a police officer. Our

practice is to extend professional courtesy to officers by including a letter that advises the officer that if the date they are required to appear conflicts with their personal or professional schedule, to notify our office so that we can request a date that does not present a conflict for them. Similarly, when scheduling pre-trial hearings, we make it known that we will consent to an adjournment if it conflicts with the officer's schedule.

Regardless of your different positions inside the courtroom, people respond well to the extension of professional courtesy. Extension of that courtesy has never hurt our practice, but has benefitted our clients on multiple occasions.

MANAGING CLIENTS

CLIENTS

Clients make up the last but perhaps most important group of players in the local criminal court. The most talented lawyer will starve without clients. Referrals are critical to building a local criminal practice. Each client is connected to other potential clients. When people get into trouble, they consult friends, relatives, and acquaintances who have been in trouble.

Few people can judge the quality of a professional's work. Listen to people describe their doctors, builders, or teachers. People are impressed by factors related to the quality of the work. Because clients cannot judge your work, they judge what they can.

I have a good dentist, but I know nothing about teeth. My dentist is warm and friendly and explains what is going on with my teeth and what to expect. Because I understand, I am comfortable with the dentist and my condition.

People similarly judge their lawyers by the personal contact and the results of their case. A criminal charge is more frightening than a dental problem. A good lawyer dispels fear by explaining the law. The clearer the explanation, the better the attorney.

The initial interview is your opportunity to assess the client's situation and explain it in simple terms. In first aid, the first goal is to stop the bleeding. In criminal law, the first goal is to control the fear with information and attorney contact. Clients need to know that attorneys care about them and their case. They need to feel secure about their lawyers.

Many lawyers feel harassed by clients's constant phone calls. They do not return the calls, or they wait a day or two before calling back. Clients respond by making more phone calls. Phone tag results in an irritated lawyer and a dissatisfied client. Unhappy clients refer no one.

Encourage the client to call with any questions. Return all phone calls promptly. Call clients at night and on weekends when you are likely to be working anyway. The clients will appreciate your concern. Clients believe lawyers spend weekends on the golf course. There is nothing more gratifying, therefore, than a client's reaction to a telephone call on a Sunday evening.

My clients have my cell phone number and they can reach me at any time. I would, of course, dislike receiving a lot of calls. I have learned, however, that the more secure the client is in his or her ability to reach me, the fewer the phone calls I receive. By assuring clients of your accessibility, and your genuine concern for their cases, you will reduce the number of phone calls you receive.

Clients also feel more secure when they receive written work product. Send the client all motions and correspondence. Law is the practice of abstractions. There is no laying on of hands or surgery. Unless the case is tried, the client sees little of the actual effort. It is important, therefore, that the client see what can be seen.

Send clients copies of the pleadings and ask for comments. Giving the client homework will also reduce the number of phone calls. Clients will not call when they have not done their homework.

Carefully screen out problem clients. They come in many varieties. Avoid the attorney without a degree. These clients refuse to stay on their side of the desk. They want to run the case. They want to save money by doing part of the work. But they will share none of the responsibility.

In most cases, also avoid shoppers. Shoppers like to hire a lawyer the way they buy a car. They rarely are happy with the service or the bill. Barterers are always a temptation. Sometimes the cash poor client can help the lawyer in some way. But the practice is risky and should be avoided.

The worst clients, and the ones to be avoided in all cases, are the influence peddlers. They bowl with the chief of police, go to church with the judge, and know everyone on the jury. They need a lawyer simply to stand next to them in court. Influence peddlers tell their attorney that the disposition will be arranged by the prosecutor, who is a third cousin, and the judge, who is godfather to their children. The attorney will be paid a pro forma fee to cover travel time to and from court. After receiving the small retainer from the influence peddler, you will almost always learn that the prosecutor and judge do, in fact, know the client. And they think he belongs in jail. When instinct tells you something is wrong, it is.

To be happy and successful, you have to be efficient. Backlog hurts a practice and a career. The overworked attorney is not receptive to new clients. A new case becomes a burden, not an exciting challenge. Law becomes less fun.

FEES

Make sure you are paid fairly. Competent representation requires adequate compensation. There is no substitute for money. You cannot do good work if you are resentful.

The local criminal defense attorney should be paid in full, in advance. Fees in local court are small enough to make advance payment reasonable. Clients rarely will complain about having to pay a reasonable fee for professional service.

The fact that law is a profession, not a business, does not excuse attorneys from applying sound principles of commerce. Law

offices run on money. One of the great advantages of local criminal court practice is that the fees are predictable. Retainers constituting the entire fee can be set and collected before you begin work.

Use a retainer agreement. Write the retainer agreement in simple language. Have clients read the agreement and ask questions before they sign it. Do not accept the case until the retainer has been paid. Keep proper time records and request additional funds if you exceed the retainer.

Some clients will request payment terms. Explain that you cannot handle such arrangements. Recommend that the client borrow the money from a friend or relative. If the client's friends are not willing to extend credit, you certainly should not do so.

Contrary to popular belief, there is little shopping in criminal defense work. There are few successful cut-rate lawyers. The real competition lies in the quality of services. How a lawyer treats clients and what results a lawyer obtains are more important than how much the lawyer charges. People believe that they get what they pay for. They do not value a cheap deal when they are in trouble.

Many of this country's most proficient attorneys are provided to their clients without cost. They will tell you, however, that even when the results are outstanding, there is frequently little appreciation. Experience indicates that cutting fees is not appreciated. And cutting the time and effort that a lawyer puts into a case is never appreciated.

Regardless of the ideals of our profession, the quality of services is affected by the funds available. The number of cases necessary to sustain a cut-rate practice affects the quality of work. When a lawyer cuts corners on time, it shows up in the manner in which the lawyer interviews clients, returns phone calls, and handles the case. Lawyers tend to become brusque and intemperate as they find themselves working long hours for little money. Clients quickly become disillusioned by discourtesy and unresponsiveness. Inevitably, the practice suffers.

Lawyers who are paid adequately and in advance have time to provide excellent service. Being a lawyer is fun when you have time to do it well.

Clients are most willing to pay you when the need is greatest. In criminal work, the need is greatest at the beginning of the case. Clients will be more reluctant to pay you after work begins.

There is a long stretch from the payment of the initial retainer to the conclusion of the case. If that interval is filled with competence, compassion, and a decent result, the client will consider the money well spent.

Program Faculty

Peter Gerstenzang, Esq.

Gerstenzang, Sills, Davis, Cohn & Gerstenzang



Peter Gerstenzang is the senior partner in the Albany law firm of Gerstenzang, Sills, Davis, Cohn & Gerstenzang. He is a 1970 graduate of Albany Law School. He is one of only four lawyers in New York State who have been Board Certified as specialists in DUI Defense Law by the National College for DUI Defense ("NCDD"). The NCDD is the only organization accredited by the American Bar Association to certify attorneys as specialists in DUI law.* His practice focuses on Criminal Defense with an emphasis on DWI cases and Vehicular Crimes. In addition, Mr. Gerstenzang is listed as a top DWI attorney in the following publications: The Best Lawyers in America®, The New York Area's Best Lawyers®, and New York Super Lawyers® Upstate Edition 2014. He is listed as one of the "Top 25 Hudson Valley Super Lawyers 2010" regardless of category.

Mr. Gerstenzang commenced his legal career as a prosecutor for the United States Army in the Republic of Vietnam. From 1972 to 1975, he was an Assistant District Attorney for the County of Albany. Certified as a breath test operator, he taught at the New York State Police Academy in their Breath Test Training Program for 12 years. Mr. Gerstenzang currently serves as a Dean Emeritus and Fellow of the National College for DUI Defense, which holds an annual seminar in Cambridge, Massachusetts on the campus of Harvard Law School. He previously served on NCDD's Board of Regents from 2003 to 2013, as Assistant Dean in 2012-2013, and Dean in 2013-2014. His book, *Handling the DWI Case in New York*, published annually by Thomson/West, is considered a standard reference for the defense of Driving While Intoxicated cases.

Mr. Gerstenzang is a regular lecturer for the New York State Bar Association (Chair, Big Apple Program held annually in May, in New York City, and Chair, Representing a DWI Defendant in New York from Arraignment to Disposition, September – October, 2010); the National Association of Criminal Defense Lawyers/ National College for DUI Defense (Annual DUI Seminar, Las Vegas, Nevada 2012); the New York State Association of Criminal Defense Lawyers; the New York State Defenders Association; Albany County Bar Association; the New York State Magistrates Association; the San Diego Public Defenders Office; and Impaired Driving Specialists, LLC, Atlanta, Georgia; Delaware County Bar Association; Columbia County Magistrates Association; Suffolk County Bar Association; Suffolk County Magistrates Association; Westchester County Court Clerks Association; and Suffolk County Court Clerks Association. Mr. Gerstenzang teaches for various law enforcement, defense and judicial associations. In addition, he has lectured for the New York State Office of Court Administration Judges Training Program.

Jonathan D. Cohn, Esq.

Gerstenzang, Sills, Davis, Cohn & Gerstenzang



Jonathan D. Cohn is a partner in the law firm of Gerstenzang, Sills, Davis, Cohn & Gerstenzang. He received his Bachelor's Degree from Lafayette College, where he graduated with honors. He is a 2008 cum laude graduate of Albany Law School, where he was selected as a member of the Government and Law Journal. Mr. Cohn was one of a select group to be published as a member of the journal. Mr. Cohn is also the state delegate for the National College for DUI Defense ("NCDD"). Prior to joining the firm, Mr. Cohn was an Assistant District Attorney in the Rensselaer County District Attorney's Office, who handled all aspects of criminal law. He also gained a thorough understanding of the Criminal Procedure Law and Penal Law as a Law Clerk to Honorable Karen A. Drago, Schenectady County Court Judge.

Mr. Cohn's practice is focused on criminal defense – with an emphasis on alcohol-related offenses.

Steven Epstein, Esq.

Barket Marion Epstein & Kearon, LLP



A founding partner of Barket Marion Epstein & Kearon, LLP, Mr. Epstein is widely recognized as one of the foremost DWI attorneys in the country, specializing in representing clients accused of DWI, vehicular homicides and other criminal offenses. He is a nationally recognized and much sought after lecturer at continuing legal education seminars for other attorneys, and the author of numerous published articles relating to trial techniques, legal challenges to scientific evidence, legal updates and other criminal and DWI defense related issues. Mr. Epstein also proudly serves as a faculty member of the distinguished National College for DUI Defense.

Edward L. Fiandach, Esq.

Fiandach & Fiandach



In 1976, nationally renowned Rochester New York DWI trial expert, Edward L. Fiandach, presented his first paper on Driving While Intoxicated. Since then he's given over 100 lectures on DWI, became New York's first Board Certified DWI Specialist, authored two sets of books on DWI, established a firm that tries more DWI cases than any firm in the State of New York and has written more articles on New York DWI than any attorney in the world. His monthly DWI newsletter, The New York DWI Bulletin, is the only statewide publication of its kind and for twelve years has been continuously used by lawyers, prosecutors and judges across the state. His annually supplemented DWI treatises, New York Driving While Intoxicated, 2d and Handling Drunk Driving Cases 2d, both two volume, nationally distributed texts, are widely acclaimed as the most authoritative publications of their kind. His DWI articles have been published nationally in The Magistrate, The Public Defense Backup Report, The Daily Record, Rochester Democrat & Chronicle, Times Union, Criminal Justice Journal and The Automobile Liability Newsletter, The Champion and numerous state and local bar association publications in New York and elsewhere.

In July of 2005 at a program conducted at Harvard Law School, Mr. Fiandach was honored by being named the Dean of The National College for DUI Defense.

Mr. Fiandach is frequently used as a source of DWI information by such prestigious news outlets as The New York Times, The New York Daily News, CNN, the Associated Press, ABC, The Harrisburg Patriot, Lawyer's Weekly and others. He has been a featured "Speaking Out" columnist in the Rochester Democrat & Chronicle on eleven occasions. He is a frequent guest of local television and is regularly interviewed by all local media as an expert on DWI and alcohol related issues.

Over the years, his DWI clients have included doctors, nurses, airline and professional pilots, physicians assistants, lawyers, judges, professional musicians, professional athletes, priests, military personnel, politicians, police chiefs, fireman, bus drivers commercial drivers, CEO's, teachers, college administrators, professors, models, actors and actresses.

Joseph M. Gerstenzang, Esq.

Gerstenzang, Sills, Davis, Cohn & Gerstenzang



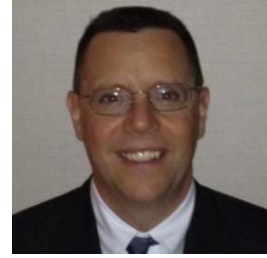
Joseph Gerstenzang is an associate at the law firm of Gerstenzang, Sills, Davis, Cohn & Gerstenzang. He received his Bachelor's Degree from Boston University. He is a 2011 magna cum laude graduate of Albany Law School, where he served as a Senior Editor of the Albany Law Review. During Law School, Joseph interned at the District Attorney's Offices in Rensselaer, Albany and Schenectady counties.

Joseph has also lectured across the state about how to handle a DWAI drugs case.

Since joining the firm, Joseph's practice has focused on the defense of driving while intoxicated and driving while ability impaired by drugs cases.

Eric H. Sills, Esq.

Gerstenzang, Sills, Davis, Cohn & Gerstenzang



Eric H. Sills is a criminal defense attorney in Albany, New York, whose practice focuses on DWI defense. He is a partner in the law firm of Gerstenzang, Sills, Davis, Cohn & Gerstenzang and, together with Peter Gerstenzang, is the co-author of the book *Handling the DWI Case in New York*. Eric was named the Best Lawyers' 2015 Albany DUI/DWI Defense "Lawyer of the Year." In 2010, he was listed as one of the "Top 25 Hudson Valley Super Lawyers" regardless of category. Eric is one of only four lawyers in New York State who have been Board Certified by the National College for DUI Defense ("NCDD").*

* The NCDD is not affiliated with any governmental authority. See Rules of Prof. Con., Rule 7.4(c)(1); *Hayes v. New York Attorney Grievance Comm. of the 8th Jud. Dist.*, 672 F.3d 158 (2d Cir. 2012).

