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DWI: Problems & Pitfalls

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Presented by:
Peter Gerstenzang, Esq.
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Introduction

Peter Gerstenzang is the senior partner in the Albany firm of Gerstenzang, Sills, Cohn & Gerstenzang where he focuses on Criminal Defense with an emphasis on DWI cases and Vehicular Crimes. 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 its Breath Test Training Program for 12 years.

Mr. Gerstenzang is Board Certified by the National College for DUI Defense ("NCDD"), and 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 the NCDD's Board of Regents from 2003 to 2013, as Assistant Dean in 2012-2013, and Dean in 2013-2014. The NCDD is the only organization accredited by the American Bar Association to certify attorneys as specialists in DUI law.* His book, ***Handling the DWI Case in New York***, published annually by Thomson/Reuters, is considered a standard reference in the field of Driving While Intoxicated cases.

Peter Gerstenzang is a regular lecturer for the New York State Bar Association, the New York State Association of Criminal Defense Lawyers, the National Association of Criminal Defense Lawyers, the New York State Magistrates Association, and the New York State Defenders Association. In addition, he lectures for numerous County Bar and Magistrates Associations, public defense organizations and the New York State Court Clerks Association.

* 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).

2021 NEW YORK STATE MAGISTRATES ASSOCIATION CONFERENCE

DWI: PROBLEMS & PITFALLS

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Supporting Deposition -- Proof of Service

(17:27)

CPL § 100.25(2) provides, in pertinent part:

> Upon [a timely request for a supporting deposition], the court must order the complainant police officer or public servant to serve a copy of such supporting deposition upon the defendant or [if the defendant is represented by an attorney, upon] his attorney, within [30] days of the date such request is received by the court, or at least [5] days before trial, whichever is earlier, and to file such supporting deposition with the court *together with proof of service thereof*.

(Emphasis added).

In People v. Waqschal, 59 Misc. 3d 29, ___, 73 N.Y.S.3d 349, 351 (App. Term, 9th & 10th Jud. Dist. 2018), the Appellate Term held as follows:

> While the record demonstrates that a supporting deposition had been filed with the court, it was not accompanied with any "proof of service thereof." Consequently, under the particular circumstances of this case, the People failed to demonstrate their full compliance with CPL 100.25(2).
>
> Accordingly, the judgment of conviction is reversed, the order denying defendant's motion to dismiss the simplified traffic information is vacated, and defendant's motion is granted.

(Citation omitted).

Out-of-State Licensee Suspension Termination

(13:7)

Defendants charged with AUO often claim that they thought that their license suspension/revocation had automatically terminated at the conclusion of the minimum suspension/revocation period. However, VTL § 503(2)(j) makes clear that a driver's license suspension does not terminate until a suspension

termination fee is paid; and VTL §§ 510(5), 510(6), 1193(2)(c)(1) and VTL § 1194(2)(d)(1) make clear that an application for relicensure is required after a period of license revocation.

Accordingly, it is no defense to an AUO charge that the defendant thought that the suspension/revocation of his or her driver's license automatically terminated at the expiration of the minimum suspension/revocation period. See, e.g., People v. Demperio, 86 N.Y.2d 549, 552, 634 N.Y.S.2d 672, 673 (1995) (per curiam) (VTL § 1193(2)(c) provides a defendant with "reason to know that upon revocation of his license, a new license application [is] required"); People v. Campbell, 36 A.D.3d 1016, ___, 827 N.Y.S.2d 768, 768-69 (3d Dep't 2007) ("[VTL] § 511(3) and [VTL] § 503(2)(j), when read together, 'put defendant on notice that the [AUO] statute encompasses a suspension that continued in effect based upon a failure to pay the termination of suspension fee'") (citation omitted); People v. Cleveland, 238 A.D.2d 897, ___, 660 N.Y.S.2d 771, 772 (4th Dep't 1997) (same); People v. Fisher, 165 Misc. 2d 650, 630 N.Y.S.2d 188 (Nassau Co. Dist. Ct. 1995) (same); People v. Bell, 163 Misc. 2d 432, ___, 620 N.Y.S.2d 923, 926 (Clarkstown Just. Ct. 1994). Cf. People v. Root, 267 A.D.2d 1103, 701 N.Y.S.2d 227 (4th Dep't 1999) (under former rule, a license suspension did automatically terminate by operation of law at the conclusion of the suspension period).

Violation of Conditional Discharge - IID Never Installed

I have not located a case directly on point. It would appear that with the expiration of the period of the conditional discharge, it would seem that a Court would no longer have jurisdiction to consider a violation of the conditional discharge filed subsequent to the expiration of the conditional discharge.

20-Day Order and Test Refusals

(48:5, 48:6)

Vehicle and Traffic Law § 1193(2)(d)(2) states that a conditional license can be issued with the following exceptions:

1. Where the license holder has been charged with a violation of § 120.00 or § 125.00 of the Penal Law arising out of the same incident. (Vehicular Assault or Homicide)

2. Or has a prior conviction of any subdivision of VTL 1192 within the preceding 5 years.

As a general rule, any person who is eligible for the DDP and a conditional or restricted use license following a VTL § 1192 conviction, see Chapter 50, infra, is eligible for a 20-Day Order. Specifically, VTL § 1193(2)(d)(2) provides that:

> Except where the license holder has been [1] charged with a violation of [Penal Law Article 120 or 125] arising out of the same incident or [2] convicted of such violation or a violation of any subdivision of [VTL § 1192] within the preceding [5] years, the [Court] may issue an order making said license suspension or revocation take effect [20] days after the date of sentencing.

Many Courts are under the misimpression that a defendant is only eligible for a 20-Day Order if his or her driver's license is suspended for a conviction of DWAI, as opposed to revoked for a DWI. In this regard, as VTL § 1193(2)(d)(2) makes clear, it is irrelevant whether the defendant's driver's license is revoked as opposed to suspended. Thus, for example, a defendant with no prior VTL § 1192 conviction(s) who pleads guilty to misdemeanor DWI, and whose driver's license is thereby revoked for at least 6 months, is eligible for a 20-Day Order. In fact, a defendant who is convicted of felony DWI is eligible for a 20-Day Order (as long as his or her predicate DWI conviction is more than 5 years old).

However, as is explained in the previous section, even if the defendant is eligible for (and granted) a 20-Day Order, such Order would have no effect if the defendant is precluded from driving for some other reason (e.g., as a condition of probation).

As is noted previously, a 20-Day Order merely continues the defendant's existing driving privileges for 20 days. Thus, if the defendant had any pre-existing suspension/revocation on his or her driver's license, a 20-Day Order is useless (as it merely "continues" nonexistent driving privileges).

In this regard, a chemical test refusal does not affect a defendant'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 test 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). See also § 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 chemical test refusal hearing held during the 20-day life span of the Order.

Suspension Pending Prosecution

(44:5)

How prompt is Prompt Suspension? Defendant appears or is brought in without counsel and counsel is not available.

What if defendant declines assigned counsel?

Perhaps the most disturbing aspect of the prompt suspension law is the way in which it is administered by many Courts where the defendant appears for arraignment without counsel. In this regard, many defendants who appear for arraignment without counsel in DWI cases have their driver's licenses summarily suspended by the Court. No findings are made; no Pringle hearing is held; no opportunity to make a statement or present evidence is offered, etc.

Simply stated, such Courts are both (a) flagrantly disregarding the requirements of the statute, and (b) flagrantly disobeying the Court of Appeals' decision in Pringle v. Wolfe, 88 N.Y.2d 426, 646 N.Y.S.2d 82 (1996). As such, they are flagrantly disregarding defendants' Constitutional right to Due Process.

But that is not all. Such Courts are also violating one of the most cherished Constitutional rights of all -- the right to counsel -- which right has been zealously protected by the Court of Appeals, and has been codified in CPL § 170.10. In this regard, the Court of Appeals has made clear that:

> The State constitutional right to counsel is a "cherished principle" worthy of the "highest degree of [judicial] vigilance." Our decisional law has advanced this principle by holding that the State

> constitutional right to counsel attaches indelibly in two situations. First, it arises when formal judicial proceedings begin, whether or not the defendant has actually retained or requested a lawyer. . . . Although these principles are similar to those developed under the Fifth and Sixth Amendments to the Federal Constitution, New York's constitutional right to counsel jurisprudence developed "independent of its Federal counterpart" and offers broader protections.

People v. Ramos, 99 N.Y.2d 27, 32-33, 750 N.Y.S.2d 821, 824 (2002) (citations and footnote omitted). See also People v. West, 81 N.Y.2d 370, 373, 599 N.Y.S.2d 484, 486 (1993); People v. Ross, 67 N.Y.2d 321, 502 N.Y.S.2d 693 (1986); People v. Cunningham, 49 N.Y.2d 203, 207-08, 424 N.Y.S.2d 421, 423-24 (1980).

> *This "indelible" right to counsel . . . attaches* upon defendant's request for an attorney, *at arraignment* or upon the filing of an accusatory instrument. Underlying the rule is the concept that a criminal defendant confronted by the awesome prosecutorial machinery of the State is entitled, at a bare minimum, to the advice of counsel when he is considering surrender of his valuable legal rights.

People v. Grimaldi, 52 N.Y.2d 611, 616, 439 N.Y.S.2d 833, 835 (1981) (emphases added) (citations omitted).

In addition, CPL § 170.10(3) provides:

> 3. *The defendant has the right to the aid of counsel at the arraignment and at every subsequent stage of the action. If he appears upon such arraignment without counsel, he has the following rights*:
>
> (a) *To an adjournment for the purpose of obtaining counsel*; and
>
> (b) To communicate, free of charge, by letter or by telephone, for the purposes of obtaining counsel and informing a

relative or friend that he has been charged with an offense; and

(c) To have counsel assigned by the court if he is financially unable to obtain the same; except that this paragraph does not apply where the accusatory instrument charges a traffic infraction or infractions only.

(Emphases added).

Furthermore, CPL § 170.10(4) mandates that the Court "must inform the defendant":

(a) Of his rights as prescribed in subdivision three; *and the court must not only accord him opportunity to exercise such rights but must itself take such affirmative action as is necessary to effectuate them*.

(Emphasis added).

Numerous Court of Appeals decisions clearly establish that, for a waiver of the fundamental Constitutional right to counsel to be valid, the Court must conduct a "*searching inquiry*," on the record, into whether the waiver is knowing, voluntary, intelligent and unequivocal. In People v. Smith, 92 N.Y.2d 516, 683 N.Y.S.2d 164 (1998), the Court of Appeals reiterated that:

> This Court has recognized that defendants may insist on foregoing the benefits associated with the right to counsel and proceeding on a *pro se* basis. We have consistently also cautioned, however, that the waiver of this fundamental right to counsel requires that a trial court must be satisfied that a defendant's waiver is unequivocal, voluntary and intelligent; otherwise the waiver will not be recognized as effective.
>
> To ascertain whether a waiver meets these appropriately *rigorous requirements*, the trial courts "should undertake a sufficiently '*searching inquiry*'" in order to be "reasonably certain" that a defendant appreciates the "'*dangers and disadvantages*'

> of giving up the *fundamental right to counsel*." Governing principles demand that *appropriate record exploration* between the trial court and defendant be conducted, both to test an accused's understanding of the waiver and to provide a reliable basis for appellate review.
>
> *When a record lacks the requisite "searching inquiry" or fails to measure up to the prescribed standards, a waiver of the right to counsel will be deemed ineffective*. To pass muster, a "*searching inquiry*" must reflect *record evidence* that defendant's know what they are doing and that choices are exercised "with eyes open."
>
> This Court has also signified that these *record exchanges* should *affirmatively disclose* that a trial court has *delved into a defendant's age, education, occupation, previous exposure to legal procedures and other relevant factors* bearing on a competent, intelligent, voluntary waiver.

Id. at 520, 683 N.Y.S.2d at 166-67 (emphases added) (citations omitted). See also People v. Arroyo, 98 N.Y.2d 101, 103-04, 745 N.Y.S.2d 796, 798 (2002) (same); People v. Slaughter, 78 N.Y.2d 485, 491-92, 577 N.Y.S.2d 206, 210-11 (1991) (same); People v. Sawyer, 57 N.Y.2d 12, 21, 453 N.Y.S.2d 418, 423 (1982) (same).

In this regard, the United States Supreme Court has made clear that "[p]resuming 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 a waiver." Carnley v. Cochran, 369 U.S. 506, 516, 82 S. Ct. 884, 890 (1963). See generally People v. Nixon, 21 N.Y.2d 338, 355, 287 N.Y.S.2d 659, 672 (1967) ("In cases involving defendants without lawyers . . . particular pains must be taken. . . . In such cases inquiry, well beyond the standards thus far propounded, is indicated").

The requirement of a valid waiver of the right to counsel is also codified in CPL § 170.10(6). CPL § 170.10(6) provides, in pertinent part, that except where the only charges are traffic infractions:

> If a defendant . . . desires to proceed without the aid of counsel, . . . the court must permit the defendant to proceed without the aid of counsel if it is satisfied that he made such decision with knowledge of the significance thereof, but if it is not so satisfied it may not proceed until the defendant is provided with counsel, either of his own choosing or by assignment.

Finally, the official Practice Commentaries to CPL § 170.10 provide, in pertinent part, that:

> The statutory procedure as outlined, however, omits an essential first step that should be the responsibility of the court whenever the defendant appears without counsel and there has been no warrant of arrest. This is scrutiny of the accusatory instrument for legal sufficiency. The reason for immediate initial appraisal of that instrument is of course that it is the basis of the court's jurisdiction; and, accordingly, if the instrument is not legally sufficient, the court has no authority at all to proceed with the arraignment. It must dismiss the instrument and discharge the defendant.

If the court is satisfied that it has jurisdiction, the next step is to advise the defendant of his or her rights. In this respect the statute reflects New York's long-standing policy that every effort be made for certainty that the defendant is aware, and has reasonable opportunity to avail himself, of the right to representation by counsel. *Thus the court, in addition to advising an unrepresented defendant of the rights set forth in subdivision three, must not only accord the defendant an opportunity to exercise those rights, "but must itself take such affirmative action as is necessary to effectuate them.*"

> *A defendant has the right to the aid of counsel at arraignment and at all subsequent stages of the proceedings, regardless of the gravity of the charge. Under New York statutory law this right is broader than the requirements of the Federal Constitution.*
> . . .

> Note too, the clear statutory direction that, in cases other than a traffic infraction, the court must not permit defendant to proceed without the aid of counsel unless it is satisfied that the defendant made the choice to do so with knowledge of the value of counsel and risks inherent in self-representation. *This requires a "searching inquiry" as to defendant's appreciation of the "dangers and disadvantages" of attempting to cope with the legal proceedings -- e.g.*, various motions, jury selection, introduction of evidence, objections to same, etc. -- as distinguished from merely advising as to the seriousness of the charge and of the fact that the defendant could be sentenced to imprisonment. People v. Kaltenbach, 1983, 60 N.Y.2d 797, 469 N.Y.S.2d 685, 457 N.E.2d 791.

Preiser, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 11A, CPL § 170.10, at 12-13 (emphases added) (citations omitted).

Simply stated, an unfortunate byproduct of the prompt suspension law is that it puts local criminal courts, who are often under tremendous pressure from groups such as M.A.D.D., S.A.D.D. and R.I.D., in a position where they are forced to balance the fundamental need to impartially protect defendants' Constitutional rights with the perceived need to confiscate the driver's licenses of accused drunken drivers at any cost -- and, all too often, the latter concern prevails.

In People v. Rios, 9 Misc. 3d 1, 801 N.Y.S.2d 113 (App. Term, 9th and 10th Jud. Dist. 2005), the defendant's convictions of various traffic infractions were reversed for failure to properly advise the defendant of his right to counsel.

VTL §1193(2)(e)(7) Applies to Drivers Licenses

No mention of out-of-state privileges

Is VTL §1193(2)(e)(7) applicable to out-of-state licensees?

(44:9)

In Matter of Vanderminden v. Tarantino, 60 A.D.3d 55, ___, 871 N.Y.S.2d 760, 762-63 (3d Dep't 2009), the Appellate Division, Third Department, held as follows:

> The threshold question is whether petitioner, as the holder of a Vermont license, was subject to the prompt suspension law. Petitioner contends that because the statute authorizes the suspension of a driver's *license* but does not specifically refer to an out-of-state licensee's *driving privileges*, the statute applies only to holders of New York licenses. We do not agree. As noted by the Court of Appeals, Vehicle and Traffic Law article 31, of which section 1193 is a part, is "a tightly and carefully integrated statute the sole purpose of which is to address drunk driving." Within the statutory scheme, section 1193 contains the exclusive criminal penalties and civil sanctions applicable to drunk driving offenses, including the prompt suspension provision that is intended to keep potentially dangerous drivers off New York's roadways while their criminal charges are adjudicated. The role of that provision would be undermined, and its application rendered arbitrary, if it is interpreted to allow the holder of an out-of-state license to continue driving in New York when, under the same circumstances, the holder of a New York license would be prohibited from driving. Given the comprehensive nature and remedial purpose of article 31, we do not believe the Legislature intended such an anomalous result. Accordingly, we construe Vehicle and Traffic Law § 1193(2)(e)(7) as authorizing a court to suspend the driving privileges of an out-of-state licensee under the same circumstances as would justify suspending a New York license.

(Citations and footnote omitted). See also People v. MacDougall, 165 Misc. 2d 991, ___, 630 N.Y.S.2d 853, 854 (Brighton Just. Ct. 1995) (same). Cf. People v. Nuchow, 164 Misc. 2d 24, ___, 623 N.Y.S.2d 1006, 1010 (Orangetown Just. Ct. 1995) (reaching opposite conclusion).

Where an out-of-state licensee's New York driving privileges are suspended pending prosecution, the Court has the power to issue him or her a hardship privilege. See People v. Reick, 33 Misc. 3d 774, 930 N.Y.S.2d 429 (N.Y. City Crim. Ct. 2011). See

also next section. Similarly, DMV will issue the person a pre-conviction conditional privilege if he or she is otherwise eligible therefor.

Is AUO Applicable to Public Parking Lots?

(13:11)

VTL § 1100(a) provides that "[t]he provisions of [VTL Title VII] apply upon public highways, private roads open to public motor vehicle traffic and any other parking lot, except where a different place is specifically referred to in a given section." VTL § 511 is part of Title V -- *not* Title VII -- of the VTL. In addition, VTL § 511 by its express terms only applies to operation "upon a public highway." As such, a person caught driving in a parking lot with a suspended or revoked driver's license cannot validly be charged with AUO. See People v. Stewart, 92 A.D.3d 1146, ___, 940 N.Y.S.2d 178, 180 (3d Dep't 2012); People v. Mills, 45 A.D.3d 1348, ___, 845 N.Y.S.2d 597, 598 (4th Dep't 2007). See also VTL § 512 (driving with suspended or revoked registration).

In People v. Hopper, 165 Misc. 2d 694, ___, 629 N.Y.S.2d 943, 945 (Dewitt Just. Ct. 1995), the Court concluded that:

> [T]he New York State Legislature, amended Section 1192 of the [VTL] by adding . . . Subdivision (7).
>
> In the above section of the [VTL] the Legislature directly addressed the situation concerning driving while intoxicated in a parking lot.
> Conversely, the New York State Legislature, in its infinite wisdom, and for good or for ill, has not chosen to amend the statutes concerning Suspended Registration and [AUO].
>
> It is the decision of this Court that the motion to dismiss the charges against the Defendant consisting of violations of Sections 512 Suspended registration; 511(1)(a) [AUO 3rd]; 511(2)(a)(i) [AUO 2nd] is hereby granted and those charges are dismissed.

(Citation omitted). See generally People v. Thew, 44 N.Y.2d 681, 405 N.Y.S.2d 433 (1978); People v. Kenyon, 85 A.D.2d 916, 446 N.Y.S.2d 783 (4th Dep't 1981); People v. Conzo, 100 Misc. 2d 143,

418 N.Y.S.2d 750 (Suffolk Co. Sup. Ct. 1979); People v. Robillard, 2002 WL 377027 (Cayuga Co. Ct. 2002).

A Zero Tolerance Plea Bargain

(15:7-15:13)

VTL § 1192-a provides, in pertinent part:

> **Operating a motor vehicle after having consumed alcohol; under the age of [21]; per se**
>
> No person under the age of [21] shall operate a motor vehicle after having consumed alcohol as defined in this section. For purposes of this section, a person under the age of [21] is deemed to have consumed alcohol only if such person has .02 of one per centum or more but not more than .07 of one per centum by weight of alcohol in the person's blood [*i.e.*, between .02% and .07%], as shown by chemical analysis of such person's blood, breath, urine or saliva, made pursuant to the provisions of [VTL § 1194].

VTL § 1194-a sets forth the procedures applicable to a violation of VTL § 1192-a, as well as the procedures applicable to a Zero Tolerance law chemical test refusal.

VTL § 1192-a was created to send a message to underage drivers that if they merely drink and drive they will lose their driver's licenses *regardless of whether they are actually impaired to any extent* (*i.e.*, New York has "zero tolerance" for underage drinking and driving). In this regard, since the intent of the Zero Tolerance laws was to deter underage drinking and driving without inordinately punishing the underage drinking driver, and since a person who drives in violation of VTL § 1192-a may not be at all impaired by the consumption of alcohol, the statute makes clear that it is civil, not criminal, in nature. See VTL § 1192-a ("Notwithstanding any provision of law to the contrary, a finding that a person under the age of [21] operated a motor vehicle after having consumed alcohol in violation of this section is not a judgment of conviction for a crime or any other offense"). See also VTL § 1194-a(2) (a person found guilty of a Zero Tolerance law violation is not subject to a fine, but rather to a "civil penalty").

Alleged violation of Zero Tolerance laws adjudicated at DMV -- not in Court

Consistent with the fact that a Zero Tolerance law violation is civil, not criminal, in nature, see previous section, the adjudication of an alleged violation of the Zero Tolerance laws takes place at DMV, *not* in a local criminal Court. See VTL § 1192-a ("Any person who operates a motor vehicle in violation of this section, and who is not charged with a violation of any subdivision of [VTL § 1192] arising out of the same incident shall be referred to [DMV] for action in accordance with the provisions of [VTL § 1194-a]").

Person cannot be charged with Zero Tolerance law violation if charged with violating VTL § 1192

VTL § 1192-a expressly provides that "[a]ny person who operates a motor vehicle in violation of this section, *and who is not charged with a violation of any subdivision of [VTL § 1192] arising out of the same incident* shall be referred to [DMV] for action in accordance with the provisions of [VTL § 1194-a]." (Emphasis added). See also VTL § 1194-a(1)(a); VTL § 1194-a(1)(b). Thus, a person cannot be charged with violating VTL § 1192-a if he or she is charged with a violation of VTL § 1192 arising out of the same incident.

Similarly, a person cannot be charged with violating VTL § 1192-a in a criminal Court. Rather, such "charge" must be filed with DMV. In this regard, in People v. Pesantes, 10 Misc. 3d 676, ___-___, 809 N.Y.S.2d 859, 860-61 (N.Y. City Crim. Ct. 2005), the Court held that:

> While defendant correctly argues that the information fails to establish the necessary elements of Vehicle and Traffic Law § 1192-a, the charge is also subject to dismissal for a more fundamental reason, i.e., Vehicle and Traffic Law § 1192-a is a non-criminal offense which is adjudicated exclusively before a Department of Motor Vehicles hearing officer. * * *
>
> While the New York City Criminal Court generally has jurisdiction to hear, try and determine misdemeanors and all offenses of a grade less than misdemeanor, the Legislature has explicitly limited the adjudication of Vehicle and Traffic Law § 1192-a offenses to

> the Department of Motor Vehicles. Accordingly, this Court is without jurisdiction to hear, try and determine this charge.

Person can be *convicted* of Zero Tolerance law violation if charged with violating VTL § 1192

Although a person cannot be *charged* with violating VTL § 1192-a if he or she is charged with a violation of VTL § 1192 arising out of the same incident, see previous section, a person can be *convicted* of violating VTL § 1192-a even if he or she is charged with a violation of VTL § 1192(1). See VTL § 1192(10)(a)(iii), (c). See also § 15:11, *infra*; People v. Pesantes, 10 Misc. 3d 676, ___, 809 N.Y.S.2d 859, 861 (N.Y. City Crim. Ct. 2005).

In addition, VTL § 1192(10)(a)(i) provides that if a person is charged with violating VTL § 1192(2), (3), (4) or (4-a) and "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." Since, in such a case, a plea outside of VTL § 1192 is authorized, a plea to a violation of VTL § 1192-a is permissible (as long as the defendant was under 21 years of age on the date of the offense) even if the original charge consisted of a violation of VTL § 1192(2), (3), (4) and/or (4-a).

Indeed, an argument can be made that VTL § 1192-a is a lesser included offense of VTL §§ 1192(1) and (3). In this regard, CPL § 1.20(37) defines "lesser included offense" as follows:

> When it is impossible to commit a particular crime without concomitantly committing, by the same conduct, another offense of lesser grade or degree, the latter is, with respect to the former, a "lesser included offense." In any case in which it is legally possible to attempt to commit a crime, an attempt to commit such crime constitutes a lesser included offense with respect thereto.

CPL § 300.50 provides, in pertinent part, that:

> 1. In submitting a count of an indictment to the jury, the court in its discretion may, in addition to submitting the greatest offense which it is required to submit, submit in the alternative any lesser included offense if there is a reasonable view of the evidence which would support a finding that the defendant committed such lesser offense but did not commit the greater. If there is no reasonable view of the evidence which would support such a finding, the court may not submit such lesser offense. Any error respecting such submission, however, is waived by the defendant unless he objects thereto before the jury retires to deliberate.
>
> 2. If the court is authorized by subdivision one to submit a lesser included offense and is requested by either party to do so, it must do so. In the absence of such a request, the court's failure to submit such offense does not constitute error.

See also CPL § 360.50(1), (2).

Plea bargain limitations applicable to underage offenders

VTL § 1192(10) sets forth certain plea bargain limitations applicable to VTL § 1192 cases. With respect to underage offenders, VTL § 1192(10)(a)(iii) provides, in pertinent part, that:

> In any case wherein the charge laid before the court alleges a violation of [VTL § 1192(1)] and the operator was under the age of [21] at the time of such violation, any plea of guilty thereafter entered in satisfaction of such charge must include at least a plea of guilty to the violation of [VTL § 1192(1)]; provided, however, such charge may instead be satisfied as provided in [VTL § 1192(10)(c)].

VTL § 1192(10)(a)(iii) further provides that:

> [I]f the district attorney, upon reviewing the available evidence, determines that the

> charge of a violation of [VTL § 1192(1)] 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.

VTL § 1192(10)(b) sets forth plea bargain limitations where the defendant was charged with VTL § 1192(1) or (6) while operating a commercial motor vehicle.

VTL § 1192(10)(c) provides that:

> (c) Except as provided in [VTL § 1192(10)(b)], in any case wherein the charge laid before the court alleges a violation of [VTL § 1192(1)] by a person who was under the age of [21] at the time of commission of the offense, the court, with the consent of both parties, may allow the satisfaction of such charge by the defendant's agreement to be subject to action by [DMV] pursuant to [VTL § 1194-a]. In any such case, the defendant shall waive the right to a hearing under [VTL § 1194-a] and such waiver shall have the same force and effect as a finding of a violation of [VTL § 1192-a] entered after a hearing conducted pursuant to [VTL § 1194-a]. The defendant shall execute such waiver in open court, and, if represented by counsel, in the presence of his attorney, on a form to be provided by [DMV], which shall be forwarded by the court to [DMV] within [96] hours.

VTL § 1192(10)(c) further provides that:

> To be valid, such form shall, at a minimum, contain clear and conspicuous language advising the defendant that a duly executed waiver: (i) has the same force and effect as a guilty finding following a hearing pursuant to [VTL § 1194-a]; (ii) shall subject the defendant to the imposition of sanctions pursuant to [VTL § 1194-a]; and (iii) may subject the defendant to increased sanctions

> upon a subsequent violation of [VTL § 1192] or [VTL § 1192-a].

"Upon receipt of a duly executed waiver pursuant to this paragraph, [DMV] shall take such administrative action and impose such sanctions as may be required by [VTL § 1194-a]." Id.

Sealing of records in Zero Tolerance law case

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.

At such time:

> [T]he entirety of the proceedings concerning the violation or alleged violation of [VTL § 1192-a] or [Navigation Law § 49-b], from the initial stop and detention of the operator to the entering of a finding and imposition of sanctions pursuant to any subdivision of [VTL § 1194-a] or of [Navigation Law § 49-b] shall be deemed a nullity, and the operator shall be restored, in contemplation of law, to the status he occupied before the initial stop and prosecution.

Id. It is critical to note that, *upon the expiration of the retention period set forth in VTL § 201(1)(k), all records in a Zero Tolerance law case "shall be deemed destroyed as a matter of law for all purposes" whether or not such records are actually destroyed*. VTL § 201(5) (emphasis added).

In addition, CPL § 160.55(5) provides, in pertinent part, that:

> (b) Where a person under the age of [21] is referred by the police to [DMV] for action pursuant to [VTL § 1192-a or VTL § 1194-a], or [Navigation Law § 49-b] and a finding in favor of the motorist or operator is rendered, the commissioner of [DMV] shall, as soon as practicable, but not later than [3] years from the date of commission of the offense or when such person reaches the age of [21], whichever is the greater period of time, notify the commissioner of [DCJS] and the heads of all appropriate police departments and other law enforcement agencies that such finding in favor of the motorist or operator was rendered. Upon receipt of such notification, the commissioner of [DCJS] and the heads of such police departments and other law enforcement agencies shall take the actions required by [CPL § 160.50(1)(a), (b) and (c)].
>
> (c) Where a person under the age of [21] is referred by the police to [DMV] for action pursuant to [VTL § 1192-a or VTL § 1194-a], or [Navigation Law § 49-b], and no notification is received by the commissioner of [DCJS] and the heads of all appropriate police departments and other law enforcement agencies pursuant to [CPL § 160.55(5)(b)], such commissioner of [DCJS] and such heads of police departments and other law enforcement agencies shall, after [3] years from the date of commission of the offense or when the person reaches the age of [21], whichever is the greater period of time, take the actions required by [CPL § 160.50(1)(a), (b) and (c)].

CPL § 160.55(5)(b), (c).

Sealing of records where VTL § 1192 charge reduced to violation of VTL § 1192-a

Where a VTL § 1192 charge is reduced to a violation of VTL § 1192-a, CPL § 160.55(5)(a) provides:

> When a criminal action or proceeding is terminated against a person by the entry of a waiver of a hearing pursuant to [VTL § 1192(10)(c)] or [Navigation Law § 49-b], the record of the criminal action shall be sealed in accordance with [CPL § 160.55(5)]. Upon the entry of such waiver, the court or the clerk of the court shall immediately notify the commissioner of [DCJS] and the heads of all appropriate police departments and other law enforcement agencies that a waiver has been entered and that the record of the action shall be sealed when the person reaches the age of [21] or [3] years from the date of commission of the offense, whichever is the greater period of time. At the expiration of such period, the commissioner of [DCJS] and the heads of all appropriate police departments and other law enforcement agencies shall take the actions required by [CPL § 160.50(1)(a), (b) and (c)].

Bench Trial - Reconsidering Your Verdict

(11:93)

Where the People's case is based *entirely* on circumstantial evidence, the defendant is entitled to a "circumstantial evidence charge" pursuant to which the jury is instructed that the defendant's guilt must be proven to a "moral certainty." See, e.g., People v. Barnes, 50 N.Y.2d 375, 379-80, 429 N.Y.S.2d 178, 180 (1980) ("While it is the oft-quoted rule in criminal cases which depend entirely upon circumstantial evidence that '"the facts from which the inference of the defendant's guilt is drawn must be established with certainty -- they must be inconsistent with his innocence and must exclude to a moral certainty every other reasonable hypothesis,"' this legal standard does not apply to a situation where, as here, both direct and circumstantial evidence are employed to demonstrate a defendant's culpability") (citations omitted). See generally People v. Miller, 194 A.D.2d 230, ___, 607 N.Y.S.2d 507, 508 (4th Dep't 1993) ("trial judges are advised to avoid using 'moral certainty' language in their instructions except in circumstantial evidence cases where the

words are appropriate. Trial judges are further advised to adhere to the charge set forth in 1 CJI(NY) 6.20 in order to help curb the recurring problems that arise in instructing a jury on reasonable doubt") (citations omitted).

In a DWI case, most of the evidence against the defendant is circumstantial in nature. For example, observations of the condition of the defendant's eyes and face, the odor of the defendant's breath, the manner of the defendant's speech, the defendant's performance on field sobriety tests, admissions of consuming alcohol in the recent past, etc., clearly constitute circumstantial -- as opposed to direct -- evidence regarding the issue of whether the defendant was intoxicated at the time that he or she operated the vehicle. See, e.g., U.S. v. Horn, 185 F.Supp.2d 530, 533 (D. Md. 2002) ("A police officer trained and qualified to perform SFSTs may testify with respect to his or her observations of a subject's performance of these tests, if properly administered, to include the observation of nystagmus, and these observations are admissible as circumstantial evidence that the defendant was driving while intoxicated or under the influence"); id. at 560-61 ("The results of properly administered WAT, OLS and HGN SFSTs may be admitted into evidence in a DWI/DUI case only as circumstantial evidence of intoxication or impairment but not as direct evidence of specific BAC").

Simply stated, a person can exhibit most, if not all, indicators commonly associated with intoxication without having consumed any alcohol whatsoever. For example, the person could be sick, tired, nervous, embarrassed, injured, uncoordinated, mentally ill, diabetic or epileptic; and/or could have a speech impediment, allergies, other medical conditions, etc. See, e.g., People v. Butts, 21 Misc. 2d 799, 201 N.Y.S.2d 926 (Poughkeepsie City Ct. 1960).

In addition, since a chemical test is never administered simultaneously with the defendant's operation of the vehicle, a chemical test result clearly constitutes circumstantial evidence of the defendant's BAC at the time of operation. See People v. Fisher, 2005 WL 2780686, *9 (Rochester City Ct. 2005).

Nonetheless, most of these types of evidence have been found to constitute direct evidence. See, e.g., People v. Musayelyan, 176 A.D.3d 871, ___, 107 N.Y.S.3d 891, 892 (2d Dep't 2019) ("Since the evidence adduced to establish the elements of operating a motor vehicle while under the influence of alcohol or drugs in violation of [VTL] § 1192(3) was supported by the direct testimony of the arresting police officers, a circumstantial evidence charge was not required"); People v. Coker, 121 A.D.3d

1305, ___, 995 N.Y.S.2d 288, 291 (3d Dep't 2014) ("Jacqueway's testimony that immediately following the crash defendant admitted to having consumed approximately 'nine drinks,' together with police testimony regarding defendant's condition and demeanor, constituted direct evidence of the element of intoxication"); People v. McRobbie, 97 A.D.3d 970, ___, 949 N.Y.S.2d 249, 252 (3d Dep't 2012) ("Counsel did not err in failing to request a circumstantial evidence charge, as defendant's admission [that he had consumed alcohol] constituted direct evidence of intoxication"); People v. Cooley, 69 A.D.3d 1058, ___, 891 N.Y.S.2d 681, 681 (3d Dep't 2010) ("the testimony that defendant had admitted that she was going too fast around a corner before her vehicle left the road and rolled over constituted direct evidence of her operation of the vehicle. In any event, a circumstantial evidence charge must be given only where all the evidence presented as to every element of the criminal charge is circumstantial, and here there was direct evidence of the element of intoxication") (citation omitted); People v. Crandall, 287 A.D.2d 881, ___, 731 N.Y.S.2d 553, 555 (3d Dep't 2001) ("we reject defendant's contention that County Court erred when it refused to charge the jury that the facts giving rise to defendant's guilt had to satisfy the 'moral certainty' standard. Defendant's admission that he had consumed four beers, together with police testimony regarding defendant's condition and demeanor and the eyewitness testimony regarding his erratic driving, constituted direct evidence of his impaired ability to operate his vehicle. Inasmuch as both direct and circumstantial evidence were present, defendant was not entitled to a circumstantial evidence charge") (citations omitted); People v. Merrick, 188 A.D.2d 764, ___, 591 N.Y.S.2d 564, 565-66 (3d Dep't 1992); People v. Heidorf, 186 A.D.2d 915, ___, 589 N.Y.S.2d 628, 629 (3d Dep't 1992); People v. Abel, 166 A.D.2d 841, ___, 563 N.Y.S.2d 531, 532 (3d Dep't 1990); People v. Green, 174 A.D.2d 511, ___, 571 N.Y.S.2d 290, 291 (1st Dep't 1991); People v. Becht, 163 A.D.2d 811, ___, 558 N.Y.S.2d 342, 343 (4th Dep't 1990); People v. Scallero, 122 A.D.2d 350, ___, 504 N.Y.S.2d 318, 319-20 (3d Dep't 1986).

Regardless, one type of evidence that is clearly direct in nature is eyewitness testimony from a witness who actually observed the defendant operate the vehicle on a roadway covered by VTL § 1192(7). Thus, the only situation where a circumstantial evidence charge would potentially be applicable in a DWI case is a situation where the defendant (a) was not observed operating the vehicle, *and* (b) did not admit to operating the vehicle (*i.e.*, a case in which the evidence of operation is entirely circumstantial in nature). See, e.g., People v. Wells, 186 A.D.2d 867, 588 N.Y.S.2d 938 (3d Dep't

1992); People v. White, 173 A.D.2d 897, 569 N.Y.S.2d 816 (3d Dep't 1991); People v. Saplin, 122 A.D.2d 498, 505 N.Y.S.2d 460 (3d Dep't 1986); People v. Collins, 70 A.D.2d 986, 417 N.Y.S.2d 819 (3d Dep't 1979). See generally People v. Blake, 5 N.Y.2d 118, 180 N.Y.S.2d 775 (1958); People v. Eckert, 2 N.Y.2d 126, 157 N.Y.S.2d 551 (1956); People v. Barnes, 137 A.D.3d 1571, 27 N.Y.S.3d 745 (4th Dep't 2016).

Use of Same Supporting Deposition Upon Refiling of Charge After Dismissal

(17:26)

In People v. Cordeiro, 24 Misc. 3d 526, 876 N.Y.S.2d 636 (Webster Just. Ct. 2009), the defendant was charged with DWI via simplified traffic informations supplemented by a form DWI supporting deposition. The DWI charges were dismissed on the ground that the DWI supporting deposition was facially insufficient. See People v. Cordeiro, 18 Misc. 3d 1135(A), 859 N.Y.S.2d 897 (Table) (Webster Just. Ct. 2008). The People re-filed the DWI charges via new simplified traffic informations supplemented, in part, by the original, facially insufficient DWI supporting deposition. The Court held that the original supporting deposition could not be re-used in this manner, reasoning as follows:

> Criminal Procedure Law 160.50(1) requires that when a case is resolved in favor of a defendant, the record of said action must be sealed, unless otherwise directed by the court. No such previous direction has been made by this court relative to said original charges. . . . The same charges that are currently before the court were dismissed against the defendant for insufficiency as set out in this court's aforementioned written decision. Thus pursuant to C.P.L. 160.50(1) & (3) the previous case was decided in favor of the defendant, which required that the entire record of that previous action be sealed. The sealing of said record would not allow the supporting deposition issued in support of the original simplified traffic informations to be used in support of the simplified traffic informations filed in the subsequent action. This would render the re-filed simplified traffic informations charging the defendant with both Common Law Driving While Intoxicated, V.T.L. 1192(3) and

> Aggravated Driving While Intoxicated V.T.L. 1192(2-a) insufficient, requiring their dismissal . . . unless a supporting deposition, dated after the date the of previous dismissal, attesting to some of the alleged indicia of intoxication of the defendant was re-filed as well.

Cordeiro, 24 Misc. 3d at ___, 876 N.Y.S.2d at 637-38. Cf. People v. Bundy, 60 Misc. 3d 518, ___, 77 N.Y.S.3d 839, 841 (Penfield Just. Ct. 2018) ("prior to a lapse of 30 days from the date of an oral order, the case is not yet sealed and the people are free, during such period, to make use of any and all documents, including copies, in the file of the dismissed action"); People v. Woods, 64 Misc. 3d 971, ___, 106 N.Y.S.3d 569, 574 (Webster Just. Ct. 2019) ("This court would agree with the holding in People v. Bundy") (citation omitted).

Defendant Refuses on Religious Grounds, Moves to Suppress Refusal

(40:32)

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).

Is Hearing on Chemical Test Refusal Restricted to DMV?

(40:33)

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. Repka, ___ A.D.3d ___, 84 N.Y.S.3d 377 (2d Dep't 2018) (issue of admissibility of alleged chemical test refusal was addressed at pre-trial hearing); 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. Graziano, 2008 WL 905901, *1 (App. Term, 9th & 10th Jud. Dist. 2008) ("Prior to trial, the court held a hearing to determine the admissibility of testimony that defendant refused to take a chemical test at the precinct"); People v. Jalloh, 65 Misc. 3d 300, ___, 108 N.Y.S.3d 732, 736 (N.Y. City Crim. Ct. 2019) ("By conducting a refusal hearing to determine whether the Defendant's statement of refusal was voluntary and free of any compulsion, the Defendant is sufficiently provided with an opportunity to examine the relevant issues and circumstances surrounding his refusal"); People v. Harster, 2019 WL 1446857, *1 (N.Y. City Crim. Ct. 2019) ("this Court held a Refusal/Huntley/Dunaway hearing"); People v. Ayabaca, 2019 WL 722484, *1 (Bronx Co. Sup. Ct. 2019) (Court "conducted a Huntley/Dunaway hearing in which the admissibility of defendant's refusal to take a breathalyzer test was also at issue"); People v. Midence, 2019 WL 438964, *1 (N.Y. City Crim. Ct. 2019) (Court held a "Dunaway/Huntley/Refusal/Gursey hearing"); People v. Labate, 2018 WL 3559238, *1 (N.Y. City Crim. Ct. 2018) ("this Court held a combined Huntley/Dunaway/Johnson/Mapp/Refusal hearing"); People v. Roy R., 60 Misc. 3d 624, ___, 77 N.Y.S.3d 632, 634 (N.Y. City Crim. Ct. 2018) (Court held "Dunaway/Huntley/Wade/Refusal hearing"); People v. Jones, 51 Misc. 3d 863, ___, 27 N.Y.S.3d 830, 832 (N.Y. City Crim. Ct. 2016) (Court held "Dunaway/Johnson/Refusal hearing"); People v. Vaughan, 2012 WL 6778455, *1 (Suffolk Co. Dist. Ct. 2012) (Court held "combination Dunaway, Huntley and 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 breathalizer [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. Odum, 31 N.Y.3d 344, 78 N.Y.S.3d 252 (2018); 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, 53 N.Y.S.3d 655 (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. Friel, 53 A.D.3d 667, ___, 862 N.Y.S.2d 105, 107 (2d Dep't 2008); 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.

Does The 2-Hour Rule Apply to the Admissibility of a Chemical Test Refusal in Local Criminal Court
(40:92)

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*.

Over the years, there have been a variety of decisions reaching differing conclusions as to the applicability of the two-hour rule to chemical test refusals. See, e.g., People v. Rosa, 112 A.D.3d 551, 977 N.Y.S.2d 250 (1st Dep't 2013); People

v. Robinson, 82 A.D.3d 1269, 920 N.Y.S.2d 162 (2d Dep't 2011); People v. Brol, 81 A.D.2d 739, 438 N.Y.S.2d 424 (4th Dep't 1981); People v. Harvin, 40 Misc. 3d 921, 969 N.Y.S.2d 851 (N.Y. City Crim. Ct. 2013); People v. Popko, 33 Misc. 3d 277, 930 N.Y.S.2d 782 (N.Y. City Crim. Ct. 2011); People v. Rodriquez, 26 Misc. 3d 238, 891 N.Y.S.2d 246 (Bronx Co. Sup. Ct. 2009); People v. Morris, 8 Misc. 3d 360, 793 N.Y.S.2d 754 (N.Y. City Crim. Ct. 2005); People v. Ward, 176 Misc. 2d 398, 673 N.Y.S.2d 297 (Richmond Co. Sup. Ct. 1998); People v. Coludro, 166 Misc. 2d 662, 634 N.Y.S.2d 964 (N.Y. City Crim. Ct. 1995); People v. Morales, 161 Misc. 2d 128, 611 N.Y.S.2d 980 (N.Y. City Crim. Ct. 1994); People v. Walsh, 139 Misc. 2d 161, 527 N.Y.S.2d 349 (Nassau Co. Dist. Ct. 1988); .

Any confusion or dispute in this area was at least partially put to rest by the Court of Appeals' decision in People v. Odum, 31 N.Y.3d 344, 78 N.Y.S.3d 252 (2018). In Odum:

> [D]efendant was arrested on various charges, including operating a motor vehicle while under the influence of alcohol. More than two hours after his arrest, he was informed that police wanted him to take a breathalyzer test and was asked whether he would "take this test? Yes or no?" After defendant answered "No," he was given the "refusal warnings" set forth in [VTL] § 1194 -- namely, he was warned that, if he refused "to submit to the test," the result would be "the immediate suspension or subsequent revocation of [his] driver's license or operating privileges whether or not [he was] found guilty of the charges for which [he had] been arrested." In addition, he was warned -- inaccurately -- that if he "refuse[d] to submit to the test or any portion thereof, it w[ould] be introduced as evidence against [him] in any trial proceeding resulting from the arrest." Defendant then agreed to take the test and provided a breath sample, which showed that his blood alcohol level was above the legal limit.

Id. at 346, 78 N.Y.S.3d at 254. In holding that the defendant's consent to the breathalyzer test was involuntarily, the Court of Appeals held as follows:

> Evidence of a refusal to take a breathalyzer test is admissible at trial pursuant to [VTL] § 1194(2)(f). Although there is no time limit expressly set forth in section 1194(2)(f), that provision refers directly back to the chemical test authorized in subdivision (2)(a) . . . -- so that the two must be read together. Section 1194(2)(a) provides, in turn, that a defendant is "deemed to have given consent to a chemical [breath] test," so long as the test is performed "within two hours after such person has been placed under arrest for" driving while intoxicated. Inasmuch as "such chemical test" is no longer authorized under the deemed consent provision in section 1194(2)(a) after the two-hour period has expired, the motorist cannot, as a matter of law, refuse to take the test *within the meaning of section 1194(2)(f)*. Any evidence of a refusal after that point must be suppressed because it does not fall within the parameters of the statute.

Id. at 351-52, 78 N.Y.S.3d at 257-58 (citation and footnote omitted). See also People v. Labate, 2018 WL 3559238 (N.Y. City Crim. Ct. 2018); People v. Roy R., 60 Misc. 3d 624, 77 N.Y.S.3d 632 (N.Y. City Crim. Ct. 2018).

Regardless of the admissibility of chemical test refusal 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.

In Matter of Endara-Caicedo v. New York State Dep't of Motor Vehicles, ___ A.D.3d ___, ___, 115 N.Y.S.3d 880, ___ (1st Dep't 2020), the Appellate Division, First Department, held that:

> Vehicle and Traffic Law § 1194(2) permits the refusal of a motorist arrested for operating a motor vehicle while under the influence of alcohol or drugs to submit to a chemical test to be used against the motorist in administrative license revocation hearings even if the chemical test is offered, and the refusal occurs, more than two hours after the motorist's arrest. This interpretation of the statute is supported by its legislative history, which indicates that the two-hour time limitation in [VTL] § 1194(2)(a)(1) was confined to the admissibility of the chemical test results (or the chemical test refusal) in a criminal action against the motorist and kept separate from the deemed consent and license revocation provisions until 1970, when the Legislature merely "redrafted the piecemeal revisions of" the [VTL] from the preceding decades; the recent opinions of four Judges of the Court of Appeals; the longstanding public policy of this State, and this Nation, to discourage drunk driving in the strongest possible terms; and the same conclusions reached by courts of sister states that have similar statutory regimes.

(Citations omitted). See also People v. Odum, 31 N.Y.3d 344, 354, 78 N.Y.S.3d 252, 259-60 (2018) (Wilson, J., concurring) ("I join the majority, but write separately because law enforcement officials must have clear rules as to what they may tell a motorist suspected of impaired driving. I agree with my dissenting colleagues that the license suspension warning that police gave Mr. Odum -- that the Department of Motor Vehicles would suspend or revoke his license if he refused the test -- was correct (see 2012 NY St Dept of Motor Vehicles Op No. 1-12 at 2). Providing that warning to motorists, even after expiration of the two-hour period, does not constitute coercion, and does not render their subsequent consent involuntarily given").

Statements, Custody & Field Sobriety Tests

(6:15)

The Fifth Amendment of 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 any verbal statements of a defendant that are both (1) communicative or testimonial in nature, and (2) elicited during custodial interrogation. See Pennsylvania v. Muniz, 496 U.S. 582, 590, 110 S.Ct. 2638, 2644 (1990).

In many cases it will be clear that the defendant is in custody at the time that he or she is requested to submit to field sobriety tests. For example, the defendant in Muniz was asked to perform such tests both at a roadside stop and later after he was arrested and transported back to the police station. On the other hand, in Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138 (1984), the Supreme Court made clear that, although the protections of Miranda 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).

However, in both Berkemer and Bruder the Court made clear that it "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.

The United States Supreme Court has made clear that the critical issue in determining whether a defendant was subjected to custodial interrogation is whether, while in custody, he or she was asked any questions, or given any instructions, that were "likely to be perceived as calling for [a] verbal response." Muniz, 496 U.S. at 603, 110 S.Ct. at 2651. "Thus, custodial interrogation for purposes of Miranda includes both express questioning and words or actions that . . . the officer knows or reasonably should know are likely to 'have . . . the force of a question on the accused,' and therefore be reasonably likely to elicit an incriminating response." Id. at 601, 110 S.Ct. at 2650

(citation omitted). This is true regardless of whether the verbal response is itself "testimonial or communicative" in nature. See id. at 603 n.17, 110 S.Ct. at 2651 n.17.

Thus, a request that a DWI suspect who is in police custody (a) count during the "walk and turn" and "one leg stand" field sobriety tests, or (b) perform the "alphabet" field sobriety test, constitutes custodial interrogation. See id. at 603 n.17, 110 S.Ct. at 2651 n.17 ("Muniz's counting at the officer's request qualifies as a response to custodial interrogation"); Bruder, 488 U.S. at 11 n.3, 109 S.Ct. at 207 n.3 ("We thus do not reach the issue whether recitation of the alphabet *in response to custodial questioning* is testimonial and hence inadmissible under Miranda v. Arizona") (emphasis added).

Similarly, asking a DWI suspect who is in police custody the question "Do you know what the date was of your sixth birthday?" constitutes custodial interrogation. Muniz, 496 U.S. at 598-99, 110 S.Ct. at 2649. Indeed, the Supreme Court has made clear that, where a defendant is in police custody, even pedigree questions constitute custodial interrogation. Id. at 601, 110 S.Ct. at 2650 ("We disagree with the Commonwealth's contention that Officer Hosterman's first seven questions regarding Muniz's name, address, height, weight, eye color, date of birth, and current age do not qualify as custodial interrogation").

By contrast, in People v. Berg, 92 N.Y.2d 701, 685 N.Y.S.2d 906 (1999), the Court of Appeals held 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." Id. at 703, 685 N.Y.S.2d at 907 (emphasis added). Stated another way, the Court held that "defendant's refusal to perform the field sobriety tests was not compelled, and therefore was 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).

Is a Positive Prescreening Test Result a Sufficient Basis to Request a Chemical Test

(7:3)

VTL §1194(2) governs the field of chemical testing. Pursuant to this statute, 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 (if the suspect is 21 years of age or older). In this regard, 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 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.

(Emphasis added).

Thus, pursuant to a plain reading of this statute, a positive breath screening test can be used to request that a DWI suspect submit to a chemical test even in the absence of probable cause to believe that the suspect violated VTL §1192. However, courts have expressed serious reservations as to the constitutionality of the statute if it were applied in this manner. See §7:6, infra. In practice, breath screening tests are used to help establish probable cause for a DWI suspect's arrest, not as a probable cause substitute (so this issue rarely arises).

Is the Alco-sensor Test Admissible as Proof in a Violation of Probation Hearing

(7:16)

In a logical extension of the principle that "breath screening devices have won acceptance as being sufficiently reliable to establish probable cause for an arrest," 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), the Dutchess County Court held that the results of an Alco-Sensor test both (a) are admissible at a violation of probation (VOP) hearing, and (b) established that the defendant had consumed alcohol in

violation of the orders and conditions of his probation. People v. Jones, 10 Misc. 3d 413, _, 805 N.Y.S.2d 807, 810 (Dutchess Co. Ct. 2005) aff'd, 50 A.D.3d 1058, 856 N.Y.S.2d 225 (2d Dep't 2008).

In so holding, the court noted that the burden of proof at a VOP hearing is merely "a preponderance of the evidence," 10 Misc. 3d at _, 805 N.Y.S.2d at 809, and that "[t]he only issue to be determined is *whether* the defendant consumed alcohol—*not* how much." 10 Misc. 3d at _, 805 N.Y.S.2d at 810 (emphases added). *See generally* People v. Oehler, 12 Misc. 3d 1101, _, 821 N.Y.S.2d 380, 381 (Warren County Ct. 2006), aff'd, 52 A.D.3d 955, 859 N.Y.S.2d 525 (3d Dep't 2008) ("No reported case in this state has held that the EtG test is sufficiently reliable to be used as proof in a criminal proceeding. However, CPL 410.70(3) provides that the court may receive '*any relevant evidence* not legally privileged' at a hearing to determine a violation of probation. (Emphasis added). This court finds that the results of the EtG test are relevant evidence that is not privileged. It is sufficiently reliable evidence for the purpose of proof of an alleged violation of probation especially where the alcohol is observed in the defendant's home during the time period when the test is administered, thereby corroborating the test results"), *aff'd*, 52 A.D.3d 955, _, 859 N.Y.S.2d 525, 526 (3d Dep't 2008) ("Even if we were to find merit to defendant's contention that County Court erroneously elicited testimony on the EtG test without first conducting a *Frye* hearing, we would find it to be harmless error, as the remaining evidence amply supported the court's determination that defendant violated the terms of his probation").

New York State Department of Motor Vehicles
Traffic Hearings

WAIVER OF 1192-a HEARING IN SATISFACTION OF 1192(1) CHARGE

(Person under 21)

To: Commissioner of Motor Vehicles

Motorist Name: _____

Date of Birth: _____ Client ID No. _____

Ticket No. _____

On _____, I was arrested in the city/town/village *(circle one)* of _____ in the County of _____, New York by a member of _____ (Police Agency) on a charge of driving while ability is impaired (a violation of subdivision one of Section 1192 of the New York State Vehicle and Traffic Law).

By signing this document in satisfaction of this charge, I agree to be subject to action by the Commissioner of Motor Vehicles pursuant to Section 1194-a of the Vehicle and Traffic Law, and I waive any right to a hearing under such section. I understand that this waiver has the same force and affect as being found guilty of a violation of Section 1192-a of the Vehicle and Traffic Law (operating a motor vehicle after having consumed alcohol).

I understand that my license will be suspended for six months (or revoked for at least one year if I have any prior alcohol-related offenses) and that I must pay the Commissioner of Motor Vehicles a civil penalty of $125 and a suspension termination fee of $100 before my license can be restored. I also understand that I will be subject to increased sanctions if I commit more violations of Section 1192 or Section 1192-a of the Vehicle and Traffic Law.

Signature of Motorist ♦ _____ Date _____

(Enclose your New York State driver license, if you did not turn it in.)

♦ _____
Court Signature

♦ _____
District Attorney Signature

♦ _____
Attorney Signature

The copies should be distributed as follows:

- One (1) copy to the motorist
- One (1) copy mailed with the disposition copy of the ticket to your assigned data entry site (TSLED or DMV Data Prep)
- One (1) copy to the court
- One (1) copy to the District Attorney

AA-1192A (9/96)