2. HOW TO HANDLE A DWI CASE IN NEW YORK STATE

NEW DMV REGULATIONS
AFFECTING REPEAT DWI OFFENDERS

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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, Governor Cuomo directed DMV to enact harsh new administrative 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.

The new DMV regulations ordered by Governor Cuomo took effect on September 25, 2012. However, starting in February of 2012 DMV stopped processing the applications for relicensure of thousands of individuals whose driver's licenses were currently revoked and who either (a) had 3 or more DWI-related convictions/incidents within the new 25-year look-back period, or (b) had 5 or more DWI-related convictions/incidents within their lifetimes. In this regard, DMV intentionally delayed the applications for relicensure of thousands of individuals who were eligible for immediate relicensure under existing laws, existing regulations and the DMV policy that had been in effect since at least January of 1986. The purpose of the delay was to prevent repeat DWI offenders from being relicensed prior to the enactment of the harsh new regulations ordered by the Governor -- so that the (as yet non-existent) regulations could subsequently be retroactively applied to their applications for relicensure.

This Chapter discusses the new DMV regulations, as well as various potential challenges thereto.

§ 55:2 Summary of pre-existing DMV policy

Prior to the enactment of its 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 -- and is still treated as a first offender for purposes of all existing DWI statutes. See, e.g., VTL §§ 1193(1)(a), 1193(1)(c)(i), 1193(1)(c)(ii), 1193(1)(d)(2), 1193(1)(d)(4)(i), 1193(1)(d)(4)(ii), 1193(2)(b)(12)(a), 1193(2)(b)(12)(d), 1194(2)(d)(1) & 1198(3)(a). See also PL §§ 120.04(3), 120.04-a(3), 125.13(3) & 125.14(3). See generally VTL § 201(1)(k); CPL § 160.55(5)(c) (records pertaining to a VTL § 1192-a finding are required to be sealed after 3 years or when the person turns 21, whichever is longer).

§ 55:3 Effective date of new regulations

The effective date of the new DMV regulations is September 25, 2012. Critically, 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 in February of 2012 (as these applications were intentionally not decided until after the new regulations took effect).

§ 55:4 Summary of 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 (*i.e.*, the Zero Tolerance law);

   (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 §§ 132.1(a) & 136.5(a)(1).

3. "*High-point driving violation*" -- any violation for which 5 or more points are assessed on a person's driving record.

   See 15 NYCRR §§ 132.1(c) & 136.5(a)(2)(iii).

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 §§ 132.1(d) & 136.5(a)(2).

   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 one in which the operation of a motor vehicle is an essential element. Thus, for example, a DWI 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 §§ 132.1(e), 136.1(b)(3) & 136.5(a)(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 of the 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.

6. *License with "A2 problem driver restriction"* -- a driver's license that is treated like a restricted use license, see VTL § 530; 15 NYCRR § 135.9(b), and which will be revoked for the reasons that would lead to the revocation of a probationary license (*i.e.*, (a) following too closely, (b) speeding, (c) speed contest, (d) operating out of restriction, (e) reckless driving, or (f) any two other moving violations).

See 15 NYCRR §§ 3.2(c)(4) & 136.4(b)(3); VTL § 510-b(1); DMV website.

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 §§ 3.2(c)(4), 136.4(b)(1)-(3) & 136.5(b)(3)-(4).

§ 55:5 Summary of new regulations -- Key provisions

The sections that follow summarize the key provisions of the new DMV regulations.

§ 55:6 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.

§ 55:7 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" who are convicted of high-point driving violations (which violations generally do not, in and of themselves, even lead to a license suspension -- let alone a revocation). See §§ 55:14 & 55:15, *infra*.

§ 55:8 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.

§ 55:9 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).

§ 55:10 Third offenders no longer eligible for conditional license

Under the old rules, a person was generally eligible for a conditional license approximately every five 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).

§ 55:11 It is often now necessary to obtain person's lifetime driving record

A person's publicly available DMV driving abstract only goes back 10 years; and non-DWI-related convictions/incidents do not even remain on an abstract for nearly 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. At the present time, it appears that the only way to obtain such records is to file a FOIL request with DMV. See Form MV-15F.

§ 55:12 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.

§ 55:13 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.

§ 55:14 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 Chapter 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 § 55:12, *supra*.

Notably, not long after Part 132 was enacted 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 ticket can lead to a permanent, lifetime driver's license revocation.

§ 55:15 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 Chapter 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."

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 § 55:13, *supra*.

Notably, not long after Part 132 was enacted 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 ticket can lead to a permanent, lifetime driver's license revocation.

§ 55:16 New lifetime revocation #5 -- Person revoked for new DWI-related conviction/incident 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) 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 ignition interlock device 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 ignition interlock 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, such person shall thereafter be ineligible for any kind of license to operate a motor vehicle.

§ 55:17 Person has 3 or 4 DWIs, no SDOs, and is currently revoked for a DWI-related conviction/incident -- Statutory revocation + 5 more years + 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 offense, 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.

(Emphasis added).

§ 55:18 Person has 3 or 4 DWIs, no SDOs, and is currently revoked for a non-DWI-related conviction/incident -- Statutory revocation + 2 more years + 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 offense, 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 ignition interlock requirement, for a period of [2] years.

(Emphasis added).

§ 55:19 Applicability of 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 waivable "permanent" revocation pursuant to VTL

§§ 1193(2)(b)(12), at the end of the 5- or 8-year minimum statutory 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 (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), 136.5(b)(2) & 136.5(b)(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.

§ 55:20 Legal challenges to the new DMV regulations

At the present time, the new DMV regulations are being vigorously challenged on numerous grounds. Some of the issues being raised are set forth below.

§ 55:21 The Legislature has preempted the field of DWI law in a manner that limits the discretion of other branches of government to expand the scope of the DWI laws

The issue of whether the new DMV regulations are a good idea is arguably irrelevant. Rather, the issue is whether, under the Constitution, the executive branch of government can engage in inherently legislative activity on an issue that the Legislature has been unable to reach agreement upon.

The Court of Appeals has *repeatedly* made clear both (a) that the Legislature has given significant thought to the topic of DWI-related offenses, and has enacted "tightly and carefully integrated" statutes covering these offenses, see People v. Prescott, 95 N.Y.2d 655, 659 (2001), and (b) that, as a result, creative attempts to expand the scope of the relevant statutes are inappropriate -- *even if such interpretation of the laws would otherwise be valid*. See, e.g.:

1. People v. Rivera, 16 N.Y.3d 654 (2011) (defendant whose driver's license is revoked for DWI and who commits a new DWI while on a conditional license cannot be prosecuted for the felony of AUO 1st, in violation of VTL § 511(3), but rather can only be prosecuted for the traffic infraction of VTL § 1196(7)(f));

2. People v. Ballman, 15 N.Y.3d 68 (2010) (VTL § 1192(8) does not allow an out-of-State DWI conviction occurring prior to November 1, 2006 to be considered for purposes of elevating a new DWI charge from a misdemeanor to a felony);

3. People v. Litto, 8 N.Y.3d 692 (2007) (the term "intoxicated" in VTL § 1192(3) only applies to intoxication caused by alcohol -- not, as the People claimed, to intoxication caused by *any* substance);

4. People v. Prescott, *supra* (a person cannot be charged with *attempted* DWI); and

5. People v. Letterlough, 86 N.Y.2d 259 (1995) (condition of probation that defendant would have to affix a fluorescent sign stating "CONVICTED DWI" to the license plates of any vehicle that he operated is illegal).

In Prescott, the Court of Appeals specifically stated, *inter alia*, that:

> In addition to criminal penalties, [VTL §] 1193 further imposes mandatory minimum periods for license suspension or revocation. These sanctions, like the criminal penalties, are correlated to the specific nature and degree of the section 1192 violation.
>
> The Legislature placed great significance on the enforcement of specific statutory penalties for drunk driving. . . . Thus, *the Legislature has made it clear that the courts must look to section 1193 for the appropriate penalties and sentencing options for drunk driving offenses*.

95 N.Y.2d at 660-61 (emphasis added) (citations omitted). See also Letterlough, 86 N.Y.2d at 269 ("While innovative ideas to address the serious problem of recidivist drunk driving are not to be discouraged, the courts must act within the limits of their authority and cannot overreach by using their probationary powers to accomplish what only the legislative branch can do"); VTL § 510(3)(a) (DMV's discretionary authority to suspend or revoke a driver's license -- *or to deny a license to an unlicensed person* -- pursuant to VTL § 510 does not apply to violations of VTL § 1192).

§ 55:22 The new DMV regulations conflict with existing statutes -- Generally

It is axiomatic that an administrative regulation that conflicts with a statute is illegal. See, e.g., Matter of Broidrick v. Lindsay, 39 N.Y.2d 641, 649 (1976) ("In conclusion, the . . . regulations are invalid for lack of legislative authorization, [as well as] for inconsistency with applicable State statutes"); Sciara v. Surgical Assocs. of Western New York,

P.C., 104 A.D.3d 1256, 1257 (4th Dep't 2013) ("it is well established that, in the event of a conflict between a statute and a regulation, the statute controls"). The new DMV regulations conflict with existing statutes -- both directly and implicitly -- in multiple key respects.

§ 55:23 The new regulations conflict with VTL § 1193(2)(b)(12)

Perhaps the most direct conflict between the new DMV regulations and existing law is the conflict between VTL § 1193(2)(b)(12)(b) and 15 NYCRR Part 132, 15 NYCRR § 136.5(b) and 15 NYCRR § 136.10(b). Several existing statutes directly address the issue of repeat DWI offenders. Specifically, there are three "permanent" driver's license revocations: (a) one that is truly *permanent*; see VTL § 1193(2)(c)(3), (b) one that is waivable after 5 years; see VTL §§ 1193(2)(b)(12)(a)/(b), and (c) one that is waivable after 8 years. See VTL §§ 1193(2)(b)(12)(d)/(e).

VTL §§ 1193(2)(b)(12)(a)/(b) provide for a 5-year "permanent" driver's license revocation where a person either:

(a) has 3 DWI-related convictions (and/or chemical test refusal findings) within 4 years; or

(b) has 4 DWI-related convictions (and/or chemical test refusal findings) within 8 years.

VTL §§ 1193(2)(b)(12)(a)/(b) make clear that a driver's license cannot be "permanently" revoked -- even for 5 years -- unless the person has at least 3 DWI-related convictions (and/or chemical test refusal findings) within 4 years, or at least 4 DWI-related convictions (and/or chemical test refusal findings) within 8 years. Since 15 NYCRR Part 132 and 15 NYCRR § 136.5(b) contain multiple greater-than-5-year license revocations that are triggered by as few as 3 DWI-related convictions/incidents *over a period of 25 years*, they appear to irreconcilably conflict with VTL §§ 1193(2)(b)(12)(a)/(b).

Simply stated, where a person's DWI-related driving record would not result in a 5-year license revocation under the "permanent" revocation statute targeting repeat DWI offenders, it would seem that DMV cannot lawfully enact administrative regulations that trump the statute and impose a greater-than-5-year license revocation on the person. Yet the new DMV regulations do exactly that. Thus, if the new DMV regulations are legal, then VTL §§ 1193(2)(b)(12)(a)/(b) are "superfluous, a result to be avoided in statutory construction." People v. Litto, 33 A.D.3d 625, 626 (2d Dep't 2006), aff'd, 8 N.Y.3d 692 (2007).

In addition, VTL § 1193(2)(b)(12)(b) provides that:

> (b) *The permanent driver's license revocation required by clause (a) of this subparagraph 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 section [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 or a certificate of good conduct pursuant to [Correction Law Article 23].
>
> 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.

(Emphases added).

VTL § 1193(2)(b)(12)(b) clearly provides that even where a person has 3 DWI-related convictions (and/or chemical test refusal findings) within 4 years (or 4 DWI-related convictions (and/or chemical test refusal findings) within 8 years), DMV is generally *required* to immediately waive the "permanent" revocation after 5 years. Nonetheless, under the new DMV regulations everyone who has 3 or more DWI-related convictions/incidents within the past 25 years will receive a greater-than-5-year -- and in some cases *lifetime* -- driver's license revocation (unless the current revocation is not DWI-related and the person does not have an SDO on his or her driving record).

Thus, the new DMV regulations impose a greater-than-5-year license revocation on both:

(a) people who are ineligible for a 5-year revocation under VTL § 1193(2)(b)(12); and

(b) people who fall within VTL § 1193(2)(b)(12) but are statutorily entitled to a waiver after 5 years.

With regard to the latter group, despite the 5-year waiver requirement in VTL § 1193(2)(b)(12)(b), new 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 motorist also has 1 or more SDOs within the past 25 years). See 15 NYCRR § 136.5(b)(2); 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).

15 NYCRR § 136.10(b) irreconcilably conflicts with VTL § 1193(2)(b)(12)(b) in yet another way. Specifically, although VTL § 1193(2)(b)(12)(b) expressly provides that a 5-year "permanent" license revocation generally must be waived as long as the motorist:

(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;

new DMV regulation 15 NYCRR § 136.10(b) provides that the revocation will only be waived:

(a) after *another 5 years*; *and*

(b) only if the motorist:

(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).

The new DMV regulations appear to illegally conflict with VTL § 1193(2)(b)(12) in still more ways. For example, VTL §§ 1193(2)(b)(12)(d)/(e) provide for an 8-year, waivable "permanent" driver's license revocation where a person has 5 DWI-related convictions (and/or chemical test refusal findings) within 8 years. This statute provides a clear legislative determination that 5 DWI-related convictions (and/or chemical test refusal findings) should generally result in an 8-year driver's license revocation -- and should only result in such a lengthy license revocation if the convictions occur within a time frame of 8 years.

Simply stated, where a person's DWI-related driving record would not result in an 8-year license revocation under the "permanent" revocation statute targeting repeat DWI offenders, it would seem that DMV cannot lawfully enact administrative regulations that trump the statute and impose a greater-than-8-year license revocation on the person. Yet the new DMV regulations impose a permanent lifetime license revocation where a person has 5 DWI-related convictions/incidents over the course of his or her entire lifetime. See 15 NYCRR § 136.5(b)(1). See also 15 NYCRR Part 132. Thus, if DMV's new regulations are legal, then VTL §§ 1193(2)(b)(12)(d)/(e) are also "superfluous, a result to be avoided in statutory construction." Litto, 33 A.D.3d at 626.

Notably, in order for a person to be subject to a 5-year license revocation pursuant to VTL § 1193(2)(b)(12)(a)(i), at least one of the person's DWI-related convictions must be for a crime; and in order for a person to be subject to a 5-year license revocation pursuant to VTL § 1193(2)(b)(12)(a)(ii), *at least two* of the person's DWI-related convictions must be for crimes. In other words, under the statute it is not enough to merely have 4 DWI-related convictions within 8 years. Rather, at least two of the convictions must be for crimes.

By contrast, the new DMV regulations contain no requirement that *any* of the person's DWI-related convictions be for a crime. In addition, Zero Tolerance law (*i.e.*, VTL § 1192-a) findings do not count as DWI-related offenses for purposes of VTL § 1193(2)(b)(12), but they do count for purposes of the new DMV regulations. See 15 NYCRR §§ 132.1(a) & 136.5(a)(1).

In sum, VTL § 1193(2)(b)(12) provides clear statutory limits regarding (a) when a driver's license can be "permanently" revoked, (b) what offenses can be counted for purposes of "permanent" revocation, and (c) for how long a "permanent" revocation can continue. The new DMV regulations appear to directly and irreconcilably conflict with this statute.

§ 55:24 The 5-year IID portion of the new regulations conflicts with VTL § 1198, PL § 65.10(2)(k-1) and case law

The 5-year IID portion of 15 NYCRR §§ 3.2(c)(4), 136.4(b)(2) and 136.5(b)(3) conflicts with existing statutes and case law. In this regard, PL § 65.10(2)(k-1) makes clear that an IID can be mandated:

> *[O]nly* 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 [the PL] of which an alcohol-related violation of any provision of [VTL § 1192] is an essential element. The offender shall be required to install and operate the [IID] *only* in accordance with [VTL § 1198].

(Emphases added).

In People v. Levy, 91 A.D.3d 793, 794 (2d Dep't 2012), the Appellate Division, Second Department, held that "County Court improperly directed . . . that the defendant install an [IID] 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 addition, in People v. Letterlough, 86 N.Y.2d 259, 268 (1995), the Court of Appeals made clear that:

> A recent enactment authorizes courts to order a defendant, as a condition of probation, to install an "ignition interlock device" that attaches to the vehicle's steering mechanism and ignition (Vehicle and Traffic Law § 1198). . . . Clearly, no such legislative initiative would have been necessary if this type of condition could have been imposed by the courts on a case-by-case basis under Penal Law § 65.10's existing catch-all provision.

Levy makes clear that an IID requirement can only be imposed where there is express statutory authorization therefor; and

Letterlough makes clear that such a requirement cannot be imposed under a generic, "catch-all" provision simply because a Court or an administrative agency thinks it is a good idea.

To make matters worse, 15 NYCRR § 136.5(b)(3) mandates the imposition of a 5-year IID requirement on individuals who could not lawfully be subjected to an IID pursuant to either PL § 65.10(2)(k-1) or VTL § 1198 (e.g., individuals who have only been convicted of violating VTL § 1192(1) or VTL § 1192(4), or who have only been found guilty of refusing to submit to a chemical test in violation of VTL § 1194 or of underage drinking and driving in violation of VTL § 1192-a).

In addition, the Legislature has declared that the cost of an IID is a fine. See VTL § 1198(5)(a). It is axiomatic that DMV has no authority to impose -- as opposed to collect -- fines or fees. See Matter of Redfield v. Melton, 57 A.D.2d 491, 495 (3d Dep't 1977). Thus, it appears that the IID portion of the new DMV regulations also constitutes an illegal fine.

§ 55:25 The 25-year look-back portion of the new regulations conflicts with numerous statutes

The Legislature has repeatedly made clear that (unless there was physical injury or the motorist is a commercial driver) the relevant look-back period for DWI-related offenses is never more than 10 years. See, e.g., VTL §§ 1193(1)(a), 1193(1)(c)(i), 1193(1)(c)(ii), 1193(1)(d)(2), 1193(1)(d)(4)(i), 1193(1)(d)(4)(ii), 1193(2)(b)(12)(a), 1193(2)(b)(12)(d), 1194(2)(d)(1) & 1198(3)(a). See also PL §§ 120.04(3), 120.04-a(3), 125.13(3) & 125.14(3).

For example, a prior DWI conviction can only be used to elevate the level of a new DWI charge from a misdemeanor to a felony if the prior conviction was within 10 years of the new offense. See, e.g., VTL §§ 1193(1)(c)(i) & 1193(1)(c)(ii). Thus, a person who is charged with DWI 10 years and 1 day after being convicted of a previous DWI is treated as a first offender. See, e.g., People v. Smith, 57 A.D.3d 1410 (4th Dep't 2008) (class D felony DWI reduced to class E felony DWI because one of defendant's two predicate DWI convictions was 10 years and 3 days old, and it thus could not be counted).

Similarly, a prior DWI conviction can only be used to elevate the level of a Vehicular Assault/Vehicular Manslaughter charge if the prior conviction was within 10 years of the current offense. See, e.g., PL §§ 120.04(3), 120.04-a(3), 125.13(3) & 125.14(3).

A DWAI charge is only a misdemeanor -- as opposed to a traffic infraction -- if the defendant has two prior VTL § 1192 convictions within the past 10 years. See VTL § 1193(1)(a).

A chemical test refusal is only treated as a repeat offense if the motorist has a prior refusal or DWI-related conviction within the previous 5 years. See VTL § 1194(2)(d)(1).

For purposes of issuing a post-revocation conditional license, "the commissioner shall not deny such issuance based solely upon the number of convictions for violations of any subdivision of [VTL § 1192] committed by such person within the ten years prior to application for such license." VTL § 1198(3)(a).

Records pertaining to a VTL § 1192-a finding are required to be sealed after 3 years or when the motorist turns 21, whichever is longer. See CPL § 160.55(5)(c). See also VTL § 201(1)(k) ("Upon the expiration of the period for destruction of records pursuant to this paragraph, the entirety of the proceedings concerning the violation or alleged violation of [VTL § 1192-a] . . . from the initial stop and detention of the operator to the entering of a finding and imposition of sanctions . . . 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").

Finally, for purposes of "permanent" driver's license revocation, DWI-related convictions are only relevant for, at most, 8 years. See VTL § 1193(2)(b)(12).

Simply stated, the Legislature has repeatedly and unequivocally made clear, over a period of decades, that (unless there was physical injury or the motorist is a commercial driver) DWI-related convictions/incidents that are more than 10 years old are too remote in time to be relevant -- even in vehicular homicide cases. In changing from a 10-year to a 25-year (and in some cases lifetime) look-back period, the new DMV regulations would appear to conflict with well over a dozen statutes.

§ 55:26 The new regulations violate the separation of powers doctrine

Article III, § 1 of the New York State Constitution provides that "[t]he legislative power of this state shall be vested in the senate and assembly." See also Matter of Medical Soc'y of State v. Serio, 100 N.Y.2d 854, 864 (2003). The new DMV regulations are clearly legislative in nature. Indeed, the Governor's press release that accompanied the announcement of the new regulations expressly states that "[u]nder current law, drivers who are convicted of multiple alcohol or drug related

driving offenses cannot permanently lose their licenses." The Governor's press release also states that "'[w]e are saying "enough is enough" to those who have chronically abused their driving privileges and threatened the safety of other drivers, passengers and pedestrians.'" See id. In the release, DMV Commissioner Fiala is quoted as saying "'[t]he Department of Motor Vehicles is proud to be *working with Governor Cuomo* in a concerted effort to address the problems caused by the most dangerous drivers with a history of repeat alcohol- or drug-related driving offenses.'" Id. (emphasis added). These comments make clear that DMV bypassed the Legislature in addressing the issue of repeat DWI offenders.

It is axiomatic that an administrative agency cannot set social policy. Rather, it can only implement social policy enacted by the Legislature. See Serio, 100 N.Y.2d at 865 ("'[e]ven under the broadest and most open-ended of statutory mandates, an administrative agency may not use its authority as a license to correct whatever societal evils it perceives'") (quoting Boreali v. Axelrod, 71 N.Y.2d 1, 9 (1987)). In Boreali, the Court of Appeals held that:

> Here, we cannot say that the broad enabling statute in issue is itself an unconstitutional delegation of legislative authority. However, we do conclude that the agency stretched that statute beyond its constitutionally valid reach when it used the statute as a basis for drafting a code embodying its own assessment of what public policy ought to be.

71 N.Y.2d at 9. More specifically:

> [T]he Public Health Council overstepped the boundaries of its lawfully delegated authority when it promulgated a comprehensive code to govern tobacco smoking in areas that are open to the public. While the Legislature has given the Council broad authority to promulgate regulations on matters concerning the public health, the scope of the Council's authority under its enabling statute must be deemed limited by its role as an administrative, rather than a legislative, body. In this instance, the Council usurped the latter role and thereby exceeded its legislative mandate, when, following the Legislature's inability to reach an acceptable balance, the Council weighed the concerns of nonsmokers, smokers, affected businesses and the general public

> and, without any legislative guidance, reached its own conclusions about the proper accommodation among those competing interests. In view of the political, social and economic, rather than technical, focus of the resulting regulatory scheme, we conclude that the Council's actions were ultra vires and that the order and judgment of the courts below, which declared the Council's regulations invalid, should be affirmed.

Id. at 6.

Boreali would appear to compel the conclusion that the new DMV regulations are illegal and ultra vires. While DMV undoubtedly has a certain amount of discretion to decide, on a case-by-case basis, whether a particular individual poses a unique and immediate threat to the motoring public and should be revoked for a longer-than-normal period of time, it is quite another thing for an administrative agency to declare, *with no legislative guidance*, that entire groups -- consisting of thousands of individuals -- can be generically characterized as "persistently dangerous drivers" and punished far more severely than has ever been thought possible.

This is particularly true where, as here, (a) the groups in question have always existed, (b) the motorists in question had always been permitted to get their licenses back in a well-known time frame, and (c) there has been no legislative determination that a change in circumstances has taken place and/or that a change in policy was necessary (or even welcome). In this regard, the doctrine of legislative acquiescence provides that "[w]here the practical construction of a statute is well known, the Legislature is charged with knowledge and its failure to interfere indicates acquiescence." Engle v. Talarico, 33 N.Y.2d 237, 242 (1973).

Simply stated, the Legislature's failure to enact any new legislation addressing the issue of repeat DWI offenders is a tacit acknowledgment that the status quo should not be disturbed. While the executive branch of government may be frustrated by the Legislature's lack of action, taking matters into its own hands violates the separation of powers doctrine and is illegal and ultra vires. See also People v. Letterlough, 86 N.Y.2d 259, 269 (1995) ("While innovative ideas to address the serious problem of recidivist drunk driving are not to be discouraged, the courts must act within the limits of their authority and cannot overreach by using their probationary powers to accomplish what only the legislative branch can do"); id. ("Since . . . the creation of such a penalty out of whole cloth usurps the legislative prerogative, the condition, however well-intended, cannot be upheld").

Notably, the Appellate Division, First Department, recently struck down New York City's "large soda ban" based upon the separation of powers doctrine as delineated in Boreali. See New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dep't of Health and Mental Hygiene, ___ A.D.3d ___, 2013 WL 3880139 (1st Dep't 2013).

§ 55:27 The new regulations are being applied retroactively

One of the more disturbing aspects of the new DMV regulations is that DMV is applying them to offenses that were committed -- and to license revocations that had commenced -- prior to the date that the regulations were enacted. In this regard, it is axiomatic that "[t]he States are prohibited from enacting an *ex post facto* law." Garner v. Jones, 529 U.S. 244, 249 (2000). See also Peugh v. United States, 133 S.Ct. 2072, 2081 (2013). "One function of the *Ex Post Facto* Clause is to bar enactments which, by retroactive operation, increase the punishment for a crime after its commission." Garner, 529 U.S. at 249. See also Peugh, 133 S.Ct. at 2081.

In Garner, *supra*, the United States Supreme Court made clear that retroactive changes to the rules governing the parole of inmates can violate the *Ex Post Facto* Clause. 529 U.S. at 250. See also Peugh, 133 S.Ct. at 2085. Peugh, which was decided by the Supreme Court on June 10, 2013, held that "there is an *ex post facto* violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense." 133 S.Ct. at 2078. In so holding, the Court reasoned as follows:

> A retrospective increase in the Guidelines range applicable to a defendant creates a sufficient risk of a higher sentence to constitute an *ex post facto* violation. . . .
>
> Our holding today is consistent with basic principles of fairness that animate the *Ex Post Facto* Clause. The Framers considered *ex post facto* laws to be "contrary to the first principles of the social compact and to every principle of sound legislation." The Clause ensures that individuals have fair warning of applicable laws and guards against vindictive legislative action. * * *
>
> [T]he *Ex Post Facto* Clause does not merely protect reliance interests. It also reflects principles of "fundamental justice." * * *

> "[T]he *Ex Post Facto* Clause forbids the [government] to enhance the measure of punishment by altering the substantive 'formula' used to calculate the applicable sentencing range." That is precisely what the amended Guidelines did here. Doing so created a "significant risk" of a higher sentence for Peugh, and offended "one of the principal interests that the *Ex Post Facto* Clause was designed to serve, fundamental justice."

Id. at 2084-85, 2088 (citations omitted).

Critically, the Peugh Court -- citing Garner -- stated that "our precedents make clear that the coverage of the *Ex Post Facto* Clause is not limited to legislative acts." Id. at 2085. Numerous federal Circuit Courts of Appeals have also made clear that administrative regulations are subject to the *Ex Post Facto* Clause where they have "the force and effect of law." See, e.g., Metheny v. Hammonds, 216 F.3d 1307, 1310 (11th Cir. 2000); Shabazz v. Gabry, 123 F.3d 909, 915 n.12 (6th Cir. 1997); Hamm v. Latessa, 72 F.3d 947, 957 (1st Cir. 1995); Dehainaut v. Pena, 32 F.3d 1066, 1073 (7th Cir. 1994); Flemming v. Oregon Bd. of Parole, 998 F.2d 721, 726 (9th Cir. 1993); U.S. ex rel. Forman v. McCall, 709 F.2d 852, 559 (3d Cir. 1983) ("We note at the outset that the fact that the guidelines are administrative regulations rather than statutes does not preclude their being 'laws' for ex post facto purposes, for it is a fundamental principle of administrative law that '[v]alidly promulgated regulations have the force and effect of law'") (citation omitted).

Regardless of whether the *Ex Post Facto* Clause technically applies to the new regulations, in Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208-09 (1988), the Supreme Court held as follows:

> Retroactivity is not favored in the law. Thus, congressional enactments *and administrative rules* will not be construed to have retroactive effect unless their language requires this result. By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. *Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant*.

(Emphases added) (citations omitted).

In this regard, New York Courts -- including the Third Department -- have also recognized a presumption that new administrative regulations, like new laws, apply prospectively. See, e.g., Matter of Montgomerie v. Tax Appeals Tribunal, 291 A.D.2d 129, 132 (3d Dep't 2002); Matter of Rudin Mgmt. Co. v. Commissioner, Dep't of Consumer Affairs, 213 A.D.2d 185, 185 (1st Dep't 1995); Matter of Good Samaritan Hosp. v. Axelrod, 150 A.D.2d 775, 777 (2d Dep't 1989); Matter of Linsley v. Gallman, 38 A.D.2d 367, 369 (3d Dep't 1972), aff'd on opinion below, 33 N.Y.2d 863 (1973).

Retroactively changing the rules applicable to the length of a driver's license revocation after a person has pled guilty to a VTL § 1192 offense (and/or after the person has applied for relicensure) is analogous to retroactively changing the rules applicable to how long the person will remain in prison for the offense. In both situations the person has a legitimate -- indeed Constitutional -- expectation at the time of sentencing/application that the rules then in effect will not change after the fact. Faith in our legal system would literally evaporate if sentences can validly be changed, long after a plea bargain is entered, at the whim of an administrative agency. Notably, the Peugh Court repeatedly made clear that one of the principal interests that the *Ex Post Facto* Clause was designed to serve is "fundamental justice."

In People v. Luther, ___ Misc. 3d ___, ___ N.Y.S.2d ___, 2013 WL 3467329, *6 (East Rochester Just. Ct. 2013), the Court held that:

> The fundamental concept of the prohibition of ex post fact laws is putting a defendant on notice that certain conduct may lead to specified violations and consequences. In this case, at the time of the violation and the plea, the defendant was not on notice that a third violation of V & T § 1192(3) would or could lead to a suspension of driving privileges for two (2) years [sic five (5) years] beyond the mandatory six (6) month revocation. While DWI was illegal before and after the regulatory change, the punishment/consequences as to driving privileges were [more than] quadrupled. While this may or may not constitute an ex post facto law, it certainly violates basic[] principals of justice.

> The defendant's motion to vacate the plea of guilty is granted. The matter is restored to the trial calendar on all pending charges.

(Citations omitted).

§ 55:28 Although DMV can theoretically deviate from the new regulations in "unusual, extenuating and compelling circumstances," in reality this standard cannot be met

15 NYCRR § 136.5(d) provides that:

> 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.

(Emphases added). See also 15 NYCRR § 132.3.

According to 15 NYCRR § 136.5(d), the new DMV regulations are merely a "general policy" that DMV is free to deviate from in its discretion upon a showing of "unusual, extenuating and compelling circumstances." It is the authors' understanding, however, that the DMV employees at the Driver Improvement Bureau who review "compelling circumstances" claims are instructed to never grant them. As such, the employees who review such claims in reality have no discretion whatsoever. They simply deny them all.

In this regard, it appears that DMV's so-called "general policy" is not a general policy at all. Rather, it is a hard-and-fast rule that (a) has no exceptions, and (b) has the force and effect of law. Notably, the DMV regulations do not define what would constitute "unusual, extenuating and compelling circumstances"; nor are there any guidelines to assist a DMV employee in rendering such a determination. Accordingly, even if it is theoretically possible to meet this standard, there is no policy in effect to ensure that similarly situated individuals are treated similarly. Thus, even if "compelling circumstances"

claims are actually judged on their merits (which they aren't), the claims are reviewed in an arbitrary and capricious manner.

§ 55:29 IID rules now apply to youthful offenders

Prior to November 1, 2013, the requirement that certain DWI offenders install ignition interlock devices ("IIDs") in their vehicles only applied where the defendant was "convicted." As such, the rules did not apply to youthful offender adjudications (as such adjudications are not "convictions"). See CPL § 720.10.

Effective November 1, 2013, VTL § 1193(1)(b)(ii) and VTL § 1193(1)(c)(iii) provide that the IID requirements of VTL § 1198 now apply to anyone "convicted of, *or adjudicated a youthful offender for*, a violation of [VTL § 1192(2), (2-a) or (3)]." (Emphasis added).

§ 55:30 Duration of IID requirement

Prior to November 1, 2013, VTL § 1193(1)(b)(ii) and VTL § 1193(1)(c)(iii) 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."

As a result, VTL § 1193(1)(b)(ii) and VTL § 1193(1)(c)(iii) were amended, effective November 1, 2013, to provide that the duration of a mandatory IID requirement is as follows:

> [D]uring 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 [IID] for at least [6] months, unless the court ordered such person to install and maintain an [IID] 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 [IID] was installed in advance of sentencing.

§ 55:31 "Good cause" for not installing IID defined

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].

§ 55:32 Violating VTL § 1192 while on a conditional license is now AUO 1st

In People v. Rivera, 16 N.Y.3d 654, 655-56, 926 N.Y.S.2d 16, 17 (2011), the Court of Appeals held that "a driver whose license has been revoked, but who has received a conditional license and failed to comply with its conditions, may be prosecuted only for the traffic infraction of driving for a use not authorized by his license, not for the crime of driving while his license is revoked." In other words, since a person who possesses a valid conditional license is not committing AUO, committing DWI while on a conditional license is not AUO 1st.

Effective November 1, 2013, Rivera was legislatively overruled. In this regard, newly enacted VTL § 511(3)(a)(iv) provides that a person commits the felony of AUO 1st when the person "operates a motor vehicle upon a public highway while holding a conditional license issued pursuant to [VTL § 1196(7)(a)] while under the influence of alcohol or a drug in violation of [VTL § 1192(1), (2), (2-a), (3), (4), (4-a) or (5)]."