DEFENDING DWI CASES - THE CRITICAL ISSUES

REFUSAL ISSUES

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

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PART X

TEST REFUSALS

CHAPTER 41

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§ 41:1 In general

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

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

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

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

§ 41:3 Refusal to submit to field sobriety tests

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

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

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

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

> It is true that the admission into evidence of defendant's refusal to submit to the sobriety test here cannot be deemed a violation of his Federal or State privilege against self-incrimination on the basis that it was coerced. . . . There is no constitutional violation in so using defendant's refusal even if defendant was not specifically warned that it could be used against him at trial. . . .
>
> [However,] though *admissible*, the defendant's refusal to submit to co-ordination tests in this case on the ground that they would be painful because of his war wounds was nevertheless of *limited probative value* in proving circumstantially that defendant would have failed the tests.

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

§ 41:4 Refusal to submit to breath screening test

VTL § 1194(1)(b) provides that:

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

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

(Emphasis added).

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

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

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

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

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

§ 41:5 Refusal to submit to chemical test

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

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

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

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

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

1. Mandatory revocation of the person's driver's license, permit, or non-resident operating privilege for at least 1 year. VTL § 1194(2)(d)(1)(a);

2. A civil penalty in the amount of $500. VTL § 1194(2)(d)(2); and

3. A driver responsibility assessment of $250 a year for 3 years. VTL § 1199. <u>See also</u> § 46:47, *infra*.

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

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

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

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

1. Mandatory revocation of the person's driver's license, permit, or non-resident operating privilege for at least 18 months. VTL § 1194(2)(d)(1)(a);

2. A civil penalty in the amount of $750 (unless the predicate was a violation of VTL § 1192-a or VTL § 1194-a(3), in which case the civil penalty is $500). VTL § 1194(2)(d)(2); and

3. A driver responsibility assessment of $250 a year for 3 years. VTL § 1199. <u>See also</u> § 46:47, *infra*.

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

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

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

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

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

2. A civil penalty in the amount of $500 ($550 if the person was operating a commercial motor vehicle). VTL § 1194(2)(d)(2).

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

1. Any violation of VTL § 1192;

2. Any violation of VTL § 600(1) or (2); or

3. Any felony involving the use of a motor vehicle pursuant to VTL § 510-a(1)(a).

See VTL § 1194(2)(d)(1)(c).

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

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

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

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

> (i) that during such [10] year period such person has not been found to have refused a chemical test pursuant to [VTL § 1194] and has not been convicted of any one of the following offenses: any violation of [VTL § 1192]; refusal to submit to a chemical test pursuant to [VTL § 1194]; any violation of [VTL § 600(1) or(2)]; or has a prior conviction of any felony involving the use of a motor vehicle pursuant to [VTL § 510-a(1)(a)];
>
> (ii) that such person provides acceptable documentation to the commissioner that such person is not in need of alcohol or drug treatment or has satisfactorily completed a prescribed course of such treatment; and
>
> (iii) after such documentation is accepted, that such person is granted a certificate of relief from disabilities as provided for in [Correction Law § 701] by the court in which such person was last penalized.

VTL § 1194(2)(d)(1)(c)(i)-(iii).

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

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

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

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

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

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

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

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

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

> A woman over the age of 21 with a New York State driver's license is (a) charged with 1st offense DWI, and (b) accused of refusing to submit to a chemical test arising out of the same incident
>
> If the woman pleads guilty to DWAI at arraignment, the 90-day license suspension arising from such conviction will start immediately, and the suspension period will not be credited toward any revocation period imposed by DMV for the chemical test refusal
>
> If the woman pleads guilty to DWI at arraignment, the 6-month license revocation arising from such conviction will start immediately, and the revocation period will not be credited toward any revocation period imposed by DMV for the chemical test refusal
>
> If the woman pleads not guilty at arraignment, the arraigning Judge will suspend her driver's license and provide her with a form entitled "Notice of Temporary Suspension and Notice of Hearing" on one side, and "Waiver of Hearing" on the other side

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

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

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

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

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

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

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

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

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

(Emphasis added).

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

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

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

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

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

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

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

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

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

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

§ 41:14 What is a "chemical test"?

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

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

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

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

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

> 2. Chemical tests. (a) When authorized. Any person who operates a motor vehicle in this state shall be deemed to have given consent to a chemical test of one or more of the following: breath, blood, urine, or saliva, for the purpose of determining the alcoholic and/or drug content of the blood provided that such test is administered by or at the direction of a police officer with respect to a chemical test of breath, urine or saliva or, with respect to a chemical test of blood, at the direction of a police officer:
>
>> (1) having reasonable grounds to believe such person to have been operating in violation of any subdivision of [VTL § 1192] and within two hours after such person has been placed under arrest for any such violation; or . . .
>>
>> (2) within two hours after a breath [screening] test, as provided in [VTL § 1194(1)(b)], indicates that alcohol has been consumed by such person and in accordance with the rules and regulations established by the police force of which the officer is a member. . . .

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

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

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

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

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

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

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

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

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

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

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

> In such a situation:
>
> (a) The civil consequences of a refusal are comparatively insignificant; and, in any event, the defendant will frequently receive a sentence from the Court that will cause his or her driving privileges to be revoked for at least as long as from the refusal
>
> (b) Most defendants in this situation accept a negotiated plea bargain prior to being indicted; thus, the DMV refusal hearing is defense counsel's best opportunity to obtain information that would justify a plea bargain outside of a standard, policy-driven offer
>
> (c) If the case is litigated, a DWAI verdict is more likely where there is a refusal than where there is a chemical test result of .08 or more

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

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

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

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

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

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

In most other situations -- *refuse* the test

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

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

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

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

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

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

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

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

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

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

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

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

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

> "The only reason the opportunity to revoke is given is to eliminate the need for the use of force by police officers if an individual in a drunken condition should refuse to submit to the test" (Report of Joint Legislative Committee on Motor Vehicle Problems, McKinney's 1953 Session Laws of N.Y., pp. 1912-1928). * * *
>
> It was reasonable for the Legislature, concerned with avoiding potentially violent conflicts between the police and drivers arrested for intoxication, to provide that the police must request the driver's consent, advise him of the consequences of refusal and honor his wishes if he decides to refuse.

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

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

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

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

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

§ 41:22 Refusal warnings -- Generally

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

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

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

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

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

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

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

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

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

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

In this regard, the Rosado Court stated:

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

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

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

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

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

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

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

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

In this regard, the Smith Court noted that:

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

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

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

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

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

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

§ 41:25 Incomplete refusal warnings invalidates chemical test refusal

VTL § 1194(2)(f) provides that:

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

(Emphasis added).

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

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

(Emphasis added).

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

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

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

(Emphasis added).

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

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

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

In so holding, the Court reasoned as follows:

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

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

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

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

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

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

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

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

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

> "A state plainly has the right to offer incentives for taking a test that provides the most reliable form of evidence of intoxication for use in subsequent proceedings." The issuance of a DAT is such an incentive. * * *
>
> When the police informed the defendant of the consequences of his failure to submit to a breathalyzer test they were simply providing him a factual recitation of what would happen. . . .
>
> The VTL requires that persons who refuse the test have their licenses "immediately" suspended and sets forth a magistrate as one of those persons who have the right to effectuate the suspension[.] VTL § 1194(2). The policy to withhold the issuance of the DAT and bring "refusers" to the magistrate is reasonable and not shown to be part of any systemic plan or desire to coerce persons arrested to take the breathalyzer test.
>
> In fact, it would have been unreasonable and unfair not to tell the defendant of the policy to be followed upon his refusal to take the test. Giving the defendant knowledge of his choices concerning his liberty undoubtedly put pressure upon him to take the test. This was not a pressure, however, which rose to the level of impermissible coercion by any constitutional standard.

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

§ 41:27 What constitutes a chemical test refusal?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> the statute is directed only at an intentional or willful refusal to take the breathalyzer test. The statute is *not* directed at a mere unintentional failure by the defendant to comply with the requirements of the breathalyzer test.
>
> The requirement that defendant's refusal be intentional grows out of the evidentiary theory underlying the statute. Evidence of a refusal is admissible on the theory that it evinces a defendant's consciousness of guilt. Obviously, an unintentional failure to complete the test does not evidence consciousness of guilt. * * *
>
> The crucial consideration in this regard is whether defendant's conduct was deliberate. Where a defendant does not consciously intend to evade the breathalyzer test, his mere failure to take or complete the test cannot properly be regarded either as a true "refusal" within the meaning of § 1194(2)(f) or as evidence of consciousness of guilt.

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

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

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

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

(Citations omitted).

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

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

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

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

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

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

VTL § 1194(2)(f) provides that:

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

(Emphases added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 41:32 Suppression of chemical test refusal

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

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

(b) As the fruit of an illegal arrest. See, e.g., Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248 (1979); Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254 (1975); Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961). See generally Welsh v. Wisconsin, 466 U.S. 740, 744, 104 S.Ct. 2091, 2095 (1984);

(c) If it is obtained in violation of the right to counsel. See, e.g., People v. Washington, 23 N.Y.3d 228, 989 N.Y.S.2d 670 (2014); People v. Smith, 18 N.Y.3d 544, 550, 942 N.Y.S.2d 426, 430 (2012); People v. Shaw, 72 N.Y.2d 1032, 534 N.Y.S.2d 929 (1988); People v. Gursey, 22 N.Y.2d 224, 292 N.Y.S.2d 416 (1968); and/or

(d) If it is obtained in violation of VTL § 1194. See, e.g., VTL § 1194(2)(f); People v. Boone, 71 A.D.2d 859, 419 N.Y.S.2d 187 (2d Dep't 1979).

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

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

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

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

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

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

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

§ 41:33 Invalid stop voids chemical test refusal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 41:36 Report of Refusal -- Verification

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

§ 41:37 Report of Refusal -- Contents

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> intoxication or upon refusal to submit to the blood test. Time schedules specified in similar legislation for performance of certain acts on the part of an administrative agency have been held to be directory only.
> . . .
>
> No physical characteristic or condition could be more closely related to incompetence to operate a motor vehicle than inebriation, and no aspect of motor vehicle regulation can be more important to the welfare of both operators and the public than keeping inebriated drivers off the public highways. . . . [Recent amendments to VTL § 1194] should more effectively accomplish the intent to protect the public, not the impaired driver.

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

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

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

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

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

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

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

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

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

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

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

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

§ 41:46 DMV regulations pertaining to chemical test refusals

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

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

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

§ 41:47 DMV refusal hearings -- Generally

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Emphasis added).

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

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

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

(Emphasis added).

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

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

(Citations omitted).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 41:56 DMV refusal hearings -- Adjournment requests

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 41:57 DMV refusal hearings -- Responsive pleadings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 41:61 DMV refusal hearings -- Due Process

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> In People v. Rosario, . . . it was held that in a criminal trial a defendant is entitled to examine any pre-trial statement of a witness as long as the statement relates to the subject matter of the witness' testimony and is not confidential. We conclude that a similar rule should be applied in this proceeding which, at least in form, is not of a criminal character but, like a criminal proceeding, is brought to penalize for the commission of an offense against the law.
>
> There should be a new hearing at which the reports of any police officers testifying thereat should be made available to petitioners prior to the commencement of cross-examination.

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

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

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

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

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

VTL § 1194(2)(c) provides that:

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

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

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

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

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

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

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

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

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

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

> (a) The hearing officer may announce his or her decision at the conclusion of the hearing or may reserve decision. A written determination of the case, specifying the findings of fact, conclusions of law and disposition, including any penalty or penalties imposed, shall be sent to the respondent and his or her designated representative by first-class mail.
>
> (b) Except where otherwise specified by statute, the effective date of any penalty or sanction shall be a date established by the hearing officer, which shall in no event be more than 60 days from the date of the determination.
>
> (c) If the hearing officer does not render a decision within 45 days of the conclusion of the hearing, the respondent may serve a demand for decision on the hearing officer. Upon receipt of such demand, the hearing officer must render a decision within 45 days, or the charges shall be deemed dismissed.

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

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

> The arresting officer's refusal report, admitted in evidence at the hearing, indicates that upon stopping petitioner because he was speeding, following too closely, and changing lanes without signaling, the officer observed that petitioner was unsteady on his feet, had bloodshot eyes, slurred speech and "a strong odor of alcoholic beverage on [his] breath." However, the field sobriety test, administered approximately 25 minutes later, a video of which was admitted in evidence at the hearing, establishes that petitioner was not impaired or intoxicated. Specifically, the video demonstrates that over the course of four minutes, petitioner was subjected to standardized field sobriety testing and at all times clearly communicated with the arresting officer, never slurred his speech, never demonstrated an inability to comprehend what he was being asked, and followed all of the officer's commands. Petitioner successfully completed the three tests he was asked to perform; thus never exhibiting any signs of impairment or intoxication.
>
> Certainly, the contents of the arresting officer's refusal report, standing alone, establish reasonable grounds for the arrest under the Vehicle and Traffic Law. However, where, as here, a field sobriety test conducted less than 30 minutes after the officer's initial observations, convincingly establishes that petitioner was not impaired or intoxicated, respondent's determination that there existed reasonable grounds to believe that petitioner was intoxicated has no rational basis and is not inferable from the record. . . . Here, the field sobriety test, conducted shortly after petitioner was operating his motor vehicle, which failed to establish that petitioner was intoxicated or otherwise impaired, leads us to conclude that respondent's determination is not supported by substantial evidence.

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

(Citations omitted).

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

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

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

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

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

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

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

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

(Citations omitted).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 41:72 Chemical test refusals and conditional licenses

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

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

§ 41:73 Chemical test refusals and restricted use licenses

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

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

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

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

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

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

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

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

§ 41:74 Chemical test refusals as consciousness of guilt

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

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

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

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

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

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

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

§ 41:75 Test refusals -- Jury charge

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

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

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

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

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

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

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

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

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

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

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

CONSCIOUSNESS OF GUILT

> In this case the People contend that (*briefly specify the defendant's conduct; e.g. the defendant fled New York shortly after the crime*), and that such conduct demonstrates a consciousness of guilt.
>
> You must decide first, whether you believe that such conduct took place, and second, if it did take place, whether it demonstrates a consciousness of guilt on the part of the defendant.
>
> In determining whether conduct demonstrates a consciousness of guilt, you must consider whether the conduct has an innocent explanation. Common experience teaches that even an innocent person who finds himself or herself under suspicion may resort to conduct which gives the appearance of guilt.

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

(Footnotes omitted).

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

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

> The court properly exercised its discretion in declining to expand upon the Criminal Jury Instructions regarding defendant's refusal to take the test. The standard instruction sufficiently instructed the jury to consider all the surrounding facts and circumstances, and the additional language proposed by defendant concerning consciousness of guilt was unnecessary.
>
> In any event, any error was harmless in view of the overwhelming evidence, independent of the refusal, that defendant [who was only convicted of DWAI] drove while his ability was at least impaired by alcohol.

(Citation omitted).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> [T]he defendant invoked his right to counsel when first asked if he would submit to a chemical test of his blood, and again when he was read the <u>Miranda</u> warnings, also stating that he did not wish to speak to the officer without his attorney present. A defendant has a qualified right to consult with a lawyer before deciding whether to consent to a chemical test, provided he makes such a request and no danger of delay is posed. Although the defendant received a telephone call at 1:03 a.m., it cannot be determined from the record whether the person he spoke with was an attorney. The record does establish that John Demonico called the precinct at 1:36 a.m. and identified himself as the defendant's attorney.
>
> Officer Talay's two requests that the defendant submit to a chemical test, made before the 1:36 a.m. call by defendant's attorney, were made in violation of the defendant's qualified right to counsel, since the record does not clearly show that the defendant was able to speak with an attorney before the requests were made. After counsel's call at 1:36 a.m., the officer improperly asked the defendant to disclose the content of a privileged communication by asking him if his attorney had advised him to take a chemical test or not, interpreting the defendant's negative response to his question as a refusal.

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

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

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

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

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

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

(Citations omitted).

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

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

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

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

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

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

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

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

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

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

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

§ 41:80 Chemical test refusals and unconscious defendants

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

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

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

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

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

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

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

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

§ 41:81 Chemical test refusals and CPL § 60.50

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

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

§ 41:82 Chemical test refusals and CPL § 200.60

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

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

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

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

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

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

> In a situation such as the one before us -- where pleading and proving knowledge of a prior conviction necessarily reveals the conviction -- the protection afforded by CPL 200.60 can be effectuated only by reading the statute to require resort to the special information procedure for all of the conviction-related facts that constitute the enhancing element.
>
> Proper application of CPL 200.60 required that defendant be given an opportunity to admit -- outside the jury's presence -- the element that raised his crime in grade. That opportunity could have been afforded by a special information charging him with the prior conviction, the revocation of his license, and knowledge of the conviction and revocation. If defendant chose to admit those facts, no mention of them was necessary before the jury. If defendant denied all or any of those facts, the People could have proceeded with their proof, as the statute provides.

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

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

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

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

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

(b) As the fruit of an illegal arrest. See, e.g., Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248 (1979); Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254 (1975); Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961). See generally Welsh v. Wisconsin, 466 U.S. 740, 744, 104 S.Ct. 2091, 2095 (1984);

(c) If it is obtained in violation of the right to counsel. See, e.g., People v. Washington, 23 N.Y.3d 228, 989 N.Y.S.2d 670 (2014); People v. Smith, 18 N.Y.3d 544, 550, 942 N.Y.S.2d 426, 430 (2012); People v. Shaw, 72 N.Y.2d 1032, 534 N.Y.S.2d 929 (1988); People v. Gursey, 22 N.Y.2d 224, 292 N.Y.S.2d 416 (1968); and/or

(d) If it is obtained in violation of VTL § 1194. See, e.g., VTL § 1194(2)(f); People v. Boone, 71 A.D.2d 859, 419 N.Y.S.2d 187 (2d Dep't 1979).

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

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

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

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

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

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

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

§ 41:84 Chemical test refusals and collateral estoppel

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

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

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

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

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

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

§ 41:85 Chemical test refusals and equitable estoppel

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

§ 41:86 Chemical test refusal sanctions as Double Jeopardy

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

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

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

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

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

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

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

(a) Made clear that VTL § "1194 has pre-empted the administration of chemical tests for determining alcoholic blood content with respect to violations under [VTL §] 1192." Id. at 109, 454 N.Y.S.2d at 297; and

(b) Held that "[a]bsent a manifestation of a defendant's consent thereto, blood samples taken without a court order other than in conformity with the provisions of subdivisions 1 and 2 of section 1194 of the Vehicle and Traffic Law are inadmissible in prosecutions for operating a motor vehicle while under the influence of alcohol under section 1192 of that law. Beyond that, blood samples taken without a defendant's consent are inadmissible in prosecutions under the Penal Law unless taken pursuant to an authorizing court order." Id. at 101, 454 N.Y.S.2d at 293.

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

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

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

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

> Defendant interprets section 1194 (subd. 2) of the Vehicle and Traffic Law to mandate that once a defendant refuses to submit to a chemical test after being fully apprised of the consequences of such refusal, all further requests and prompting by the police for defendant to reconsider and submit must immediately cease and the chemical test not be given. . . . Defendant's suggested literal interpretation of the subject statutory provision is misplaced and without merit. . . .
>
> Section 1194 of the Vehicle and Traffic Law does not, either expressly or by implication, foreclose the police from resuming discussion with a defendant and renewing their request that he submit to a chemical test.

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

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

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

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

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

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

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

> N.Y.2d 97, 454 N.Y.S.2d 292, 439 N.E.2d 1235 that "[VTL §] 1194 has preempted the administration of chemical tests for determining alcoholic blood content with respect to violations under [VTL §] 1192."
> . . .
>
> [However], the statutory framework simply does not address itself to evidence of blood-alcohol levels derived as a result of bona fide medical procedures in diagnosing or treating an injured driver. In that context, it is apparent to us that the provision in section 1194 (subd. 2) that the test shall not be given to a person expressly declining the officer's request does not render inadmissible the results of tests not taken at the direction or on behalf of the police. The legislative purpose underlying that provision was "to eliminate the need for the use of force by police officers if an individual in a drunken condition should refuse to submit to the test."

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

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

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

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

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

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

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

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

> 2. Chemical tests. (a) When authorized. Any person who operates a motor vehicle in this state shall be deemed to have given consent to a chemical test of one or more of the following: breath, blood, urine, or saliva, for the purpose of determining the alcoholic and/or drug content of the blood *provided that* such test is administered by or at the direction of a police officer with respect to a chemical test of breath, urine or saliva or, with respect to a chemical test of blood, at the direction of a police officer:
>
>> (1) having reasonable grounds to believe such person to have been operating in violation of any subdivision of [VTL § 1192] *and within two hours* after such person has been placed under arrest for any such violation; or . . .
>>
>> (2) *within two hours* after a breath test, as provided in [VTL § 1194(1)(b)], indicates that alcohol has been consumed by such person and in accordance with the rules and regulations established by the police force of which the officer is a member.

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

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

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

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

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

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

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

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

(Citations omitted).

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

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

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

(Citations omitted).

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

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

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

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

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

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

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

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

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

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

§ 41:94 Dentures and test refusals

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

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

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

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

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

> During cross-examination, the prosecutor asked the defendant the following question: "[y]ou didn't say, I want to prove my innocence so give me the test,' right?" The court overruled defense counsel's objection and defendant indicated that he had not made such a request. During summation, the prosecutor remarked, "[w]ell, if he's innocent, then why doesn't he want to take the test to prove that?"
>
> It is well settled that the People have the unalterable burden of proving beyond a reasonable doubt every element of the crime charged. The prosecutor's inquiry during cross-examination and his remark during summation, in effect, suggested to the jury that it was defendant's burden to prove his innocence by submitting to a chemical test. . . . While refusal to take a chemical test

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

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

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

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

(Emphasis added).

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

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

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

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

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

APPENDIX 39

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

STATE OF NEW YORK

DEPARTMENT OF MOTOR VEHICLES

THE GOVERNOR NELSON A. ROCKEFELLER

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May 15, 1985

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Albany, New York 12207

Dear Mr. Gerstenzang:

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

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

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

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

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

Sincerely,

STANLEY M. GRUSS
Deputy Commissioner and Counsel

SMG/do

APPENDIX 42

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

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

COMMISSIONER'S MEMORANDUM

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

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

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

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

*Section 1194(2) provides in pertinent part:

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

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

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

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

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

Accordingly, the determination is affirmed.

Patricia B. Adduci
Commissioner

Dated:

APPENDIX 44

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

State of New York - Department of Motor Vehicles

MEMORANDUM

TO: All Safety Administrative Law Judges DATE: June 5, 1986

FROM: Sidney W. Berke OFFICE: Administrative Adjudication

SUBJECT: C.T. Refusal Report: Police Officer Absent Implementation Commissioner's memorandum # 9492

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

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

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

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

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

SIDNEY W. BERKE
Director

SWB:smb
Enc.

11/26/86

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

APPENDIX 45

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

STATE OF NEW YORK

DEPARTMENT OF MOTOR VEHICLES

THE GOVERNOR NELSON A. ROCKEFELLER

EMPIRE STATE PLAZA

ALBANY, NEW YORK 12228

PATRICIA B. ADDUCI
COMMISSIONER

EDWARD A. SHERIDAN
DEPUTY COMMISSIONER AND COUNSEL

LEGAL DIVISION
JOSEPH R. DONOVAN
FIRST ASSISTANT COUNSEL

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

Dear Mr. Gerstenzang:

In your telephone conversation of March 12, 1986, with Mrs. Scrodanus of this office, you requested the departmental position on the requirement of police enforcement agencies to remove dentures prior to the administration of a breathalyzer exam.

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

1) the police enforcement personnel have advised the individual as to why the dentures must be removed and how such removal is necessary to the validity of the test, and

2) the police enforcement agency has incorporated the requirement for denture removal into its regulations for the administration of a breathalyzer exam.

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

Very truly yours,

JOSEPH R. DONOVAN
First Assistant Counsel

JRD/pr

APPENDIX 46

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

STATE OF NEW YORK
DEPARTMENT OF MOTOR VEHICLES
THE GOVERNOR NELSON A. ROCKEFELLER
EMPIRE STATE PLAZA
ALBANY, NEW YORK 12228

PATRICIA B. ADDUCI
COMMISSIONER

EDWARD A. SHERIDAN
DEPUTY COMMISSIONER AND COUNSEL

LEGAL DIVISION
JOSEPH R. DONOVAN
FIRST ASSISTANT COUNSEL

January 13, 1987

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

Dear Peter:

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

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

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

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

Very truly yours,

JOSEPH R. DONOVAN
First Assistant Counsel

JRD/NWS/ms

APPENDIX 47

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

State of New York—Department of Motor Vehicles

MEMORANDUM

TO:	All Safety ALJs	DATE:	May 8, 1990
FROM:	George Christian	OFFICE:	Admin. Adjudication
SUBJECT:	Chemical Test Refusal		
	(1) effect of DWI conviction		
	(2) refusal conduct—request for attorney		

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

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

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

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

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

APPENDIX 60

Letter from Department of Motor Vehicles Regarding Chemical Test Refusal

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

RAYMOND P. MARTINEZ
Commissioner

JILL A. DUNN
Deputy Commissioner and Counsel

Legal Division
NEAL W. SCHOEN
Chief Counsel

JAN

January 4, 2002

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

Re: Chemical Test Refusal

Dear Mr. Sills:

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

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

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

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

Very truly yours,

Ida L. Traschen

Ida L. Traschen
Associate Counsel

ILT/mw
cc: Lucia Ferrara
Sandy Sussman

APPENDIX 68

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

DEPARTMENT OF MOTOR VEHICLES
COUNSEL'S OFFICE

OPINION OF COUNSEL
(#1-12)

Subject: Time Limitations for Chemical Test Refusals

Date: June 29, 2012

Question

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

Discussion

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

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

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

2

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

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