VTL § 1192 ISSUES

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CHAPTER 11

VTL § 1192 ISSUES

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§ 11:1 In general

Despite the fact that VTL § 1192 has the generic title "Operating a motor vehicle while under the influence of alcohol or drugs," New York does not have a charge entitled Operating Under the Influence (a.k.a. "OUI"). Rather, New York characterizes the relevant offenses as:

(a) Driving while ability impaired (a.k.a. "DWAI"). See VTL § 1192(1);

(b) Driving while intoxicated; per se (a.k.a. "per se DWI"). See VTL § 1192(2);

(c) Driving while intoxicated (a.k.a. "common law DWI"). See VTL § 1192(3);

(d) Aggravated driving while intoxicated (a.k.a. "Aggravated DWI"). See VTL § 1192(2-a);

(e) Driving while ability impaired by drugs (a.k.a. "DWAI Drugs"). See VTL § 1192(4); and

(f) Driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs (a.k.a. "DWAI Combined Influence"). See VTL § 1192(4-a).

This chapter addresses various issues pertinent to VTL § 1192(1), (2), (2-a) and (3) charges. Issues pertinent to VTL § 1192(4) and (4-a) charges are addressed in Chapter 10, *supra*. Issues pertinent to VTL § 1192(5) and (6) charges are addressed in Chapter 14, *infra*.

§ 11:2 It is not illegal to drink and drive

Unless a person is under 21 years of age, the mere

act of driving after consuming alcohol is not illegal in New York. In this regard, in People v. Cruz, 48 N.Y.2d 419, 426, 423 N.Y.S.2d 625, 628 (1979), the Court of Appeals made clear that:

> That is not to say, of course, that every person who drinks before driving violates the law. On the contrary the Legislature recognized that the average person can consume a certain amount of alcohol without impairing his ability to operate a motor vehicle as he should. Otherwise the Legislature would not have provided that proof of .05 of 1% or less of blood alcohol content is prima facie evidence that the driver was not impaired or intoxicated (Vehicle and Traffic Law, § 1195, subd. 2, par. (a)). Of course some persons may find their driving faculties impaired by the least consumption of alcohol and, therefore, would be guilty of driving while impaired while others would not. And the Legislature also recognized that some individuals may be able to consume greater amounts of alcohol without being impaired, as would the average driver (Vehicle and Traffic Law, § 1195, subd. 2, par. (c)). Thus the impairment statute, by simply providing prima facie standards, takes into account the "subjective" tolerance of individuals in determining the ability to drive possessed by a defendant at the time of arrest. But in determining whether that ability is less than he *should* possess, the statute necessarily contemplates the use of the objective standard expected of the average driver.

(Citation omitted). See also People v. Hagmann, 175

A.D.2d 502, ___, 572 N.Y.S.2d 952, 954 (3d Dep't 1991) (same).

§ 11:3 Legislative history of VTL § 1192

In People v. Mertz, 68 N.Y.2d 136, 142, 506 N.Y.S.2d 290, 293 (1986), the Court of Appeals endorsed the recitation of the Legislative history of VTL § 1192 contained in People v. Schmidt, 124 Misc. 2d 102, 478 N.Y.S.2d 482 (N.Y. City Crim. Ct. 1984). In this regard, the Schmidt Court wrote:

> Traffic deaths in the United States exceed 50,000 annually. Of the fatalities on the nation's highways, approximately one-half of the fatalities are alcohol related. The Supreme Court has observed that "[t]he increasing slaughter on our highways . . . now reaches astounding figures only heard of on the battlefield." Specifically, in New York State alone, there were 1,947 fatal accidents in 1982. Alcohol was an apparent contributing factor in 785 of those deaths.
>
> The Legislature's response to this growing problem has been to increase the penalties for operating a motor vehicle while under the influence of alcohol and to make convictions easier to obtain.
>
> Driving while intoxicated was first classified as an offense in the laws of New York in 1910. Convictions under that statute were based solely on the defendant's conduct and demeanor at the time of arrest. The statute did not define "intoxication" or "operation of a motor vehicle." Its focus was on punishment; a first offense was treated as a misdemeanor

and the second as a felony. The Appellate Division, in 1910, interpreted the prohibition against driving while intoxicated to mean "that one shall not be affected by alcoholic beverages to such an extent as to impair his judgment or his ability to operate an automobile."

The next statutory modification came in 1926 when a new felony was created -- causing serious bodily injury to another while driving in an intoxicated condition. This was followed in 1929, by the repeal of the 1910 statute and the enactment of Section 70(5). The felony/misdemeanor distinction was retained and the major difference between the two provisions involved license suspension and revocation. Under the earlier statute, suspension and revocation were discretionary, whereas the later statute mandated revocation if the driver was convicted of driving while intoxicated.

In 1939, the National Safety Council Committee on tests for intoxication reported on the relationship between blood alcohol content and intoxication. The Committee established three "zones of influence" -- (1) any person having up to .05 percent of alcohol in the blood was considered not to be under the influence of alcohol; (2) any person having .05 percent and less than .15 percent of alcohol in the blood was considered to be possibly under the influence of alcohol; (3) any person having .15 percent or more of alcohol in the blood was presumed to be under the influence of alcohol. The

American Medical Association officially adopted this classification scheme.

In 1941[,] the New York Legislature allowed test results indicating blood alcohol content (hereinafter, BAC) to be admitted at trial. It was at this point in the evolution of the drunk driving statute that the Legislature attempted to define intoxication in scientific, mathematical terms. Specifically, a finding that a driver had .05 of one percent or less by weight of alcohol in his blood was admissible as prima facie evidence of no intoxication. A test result indicating more than .05 but less than .15 of one percent BAC was considered relevant evidence of intoxication. A BAC of .15 or above was deemed prima facie evidence of intoxication.

In the post-war period, the incidence of motor vehicle accidents and fatalities received national attention. The existence of blood alcohol evidentiary provisions and license revocation penalties did not serve as an adequate deterrent. In 1953, the New York State Joint Legislative Committee on Motor Vehicle Problems took the position that observational testimony of the indicia of intoxication was inaccurate and unpersuasive before a jury. The scientific blood alcohol content test was viewed as producing a more reliable type of evidence. Thus, in July, 1953, apparently acting on this assumption, Sec. 71-a of the New York Vehicle and Traffic Law was passed by the Legislature. This provision stated that any person driving a

vehicle in New York State *implicitly consents* to a BAC test, administered at the direction of an officer who has reasonable grounds to suspect that the driver is intoxicated. If the driver refused to submit to such test, the Commissioner of Motor Vehicles was obligated to revoke the driver's license or permit.

Shortly after its enactment, Sec. 71-a was successfully challenged on due process grounds. The constitutional infirmity was two-fold: (1) the statute did not require a valid arrest as a basis for the officer's demand that the driver submit to a BAC test; and (2) a license could be revoked without a hearing. The Legislature responded, in 1954, by amending Sec. 71-a to provide the following: (1) the police officer needed reasonable grounds to *believe* (as opposed to reasonable grounds to suspect) that the driver was intoxicated; (2) an arrest had to precede the request to submit to the chemical test; and (3) the accused had to be granted an opportunity to be heard before revocation of a license or permit.

Despite the new laws, the problems increased and the concerns of the Legislature were more pronounced. Under the auspices of the Temporary State Commission on Coordination of State Activities the Vehicle and Traffic Law was recodified. The evidentiary weight to be given BAC measurements remained unchanged. Soon after the new VTL took effect, the American Medical Association, in November of 1960, adopted a policy that .10 percent should be considered

prima facie evidence of being under the influence of alcohol.

Within the first year of its enactment, the New York Legislature added a new classification of proscribed conduct to VTL Section 1192 -- the traffic infraction of driving while impaired. Blood alcohol content of .10 of one percent was deemed evidence of impairment. Originally, impairment could *only* be established by scientific proof showing a specific blood alcohol content. This requirement was subsequently eliminated.FN13

> FN13. In 1963, the Legislature focused upon the problem of minors (defined as persons under the age of 21) who drink and drive. Section 1192 was amended to provide that a BAC of more than .05 was prima facie evidence of impairment for a minor driver. BAC of .15 or more continued to be prima facie evidence of intoxication for minor and adult drivers.
>
> In 1966, Section 1192 was revised to state that a driver who operates a motor vehicle while his ability is impaired by the use of drugs is guilty of a misdemeanor.

In 1970, the Legislature undertook a major revision of Section 1192 and enacted the general format in effect today. The proscription against driving while ability was impaired by alcohol remained a traffic infraction. Operation of a motor vehicle while in an intoxicated condition was

classified as a misdemeanor. The evidentiary significance of BAC levels (contained in a new section -- Section 1195) was as follows:

> *.05 BAC or less* -- prima facie evidence of no impairment, and no intoxication;
>
> *more than .05 and less than .10* -- prima facie evidence of no intoxication; relevant evidence of impairment;
>
> *.05 or more for driver under 21* -- prima facie impairment (repealed);
>
> *.10 or more* -- prima facie evidence of impairment; relevant evidence of intoxication.

Finally, and most importantly, the 1970 Legislature enacted an absolute liability provision. It substituted the former presumption of intoxication with the *per se* crime of driving with a certain percentage of alcohol in the blood. Specifically, the 1970 statute stated that it was a misdemeanor to drive with a BAC of .15. That provision was the direct forerunner of the present Section 1192(2).

In 1971, the Legislature lowered the prima facie standards for intoxication and impairment. Replacing the .15 BAC level, it established .12 of one percent by weight of alcohol in the blood as the baseline standard of intoxication.FN17 The Legislature also lowered the BAC levels admissible as evidence of intoxication or impairment:

> *more than .05 and less than .08* -- prima facie evidence of no intoxication; relevant evidence of impairment;
>
> *.08 or more* -- prima facie evidence of impairment; relevant evidence of intoxication.
>
> FN17. In addition, separate BAC levels for minor drivers were eliminated.

Aware of the view advocated by the National Highway Safety Bureau, and adopted by an increasing number of states, that the liability level of blood alcohol content should be still lower, the New York Legislature finally acquiesced in 1972. Sec. 1192(2) was revised to its present form, which establishes a *per se* crime if a person operates a motor vehicle with a blood alcohol content of .10. In addition, the BAC levels admissible as evidence of impairment and intoxication were simultaneously modified:

> *.05 or less* -- prima facie evidence that the operator is not impaired or intoxicated;
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> *more than .07 but less than .10* -- prima facie evidence that the driver is not intoxicated; prima facie evidence of impairment.

In 1974, a final provision was enacted stating that more than .05 of one percent, but not more than .07 of one percent, BAC is prima facie evidence of no intoxication, but is relevant evidence of impairment. These are the

> quantitative standards in effect today.
>
> The statutory development set forth above reveals a gradual but deliberate attempt on the part of the Legislature to fortify the effectiveness of the drunk driving laws. The culmination of this effort -- the enactment of a .10 *per se* liability standard -- reflects a determination that when a defendant drives with that amount of alcohol in his blood, the question of guilt need not be defined by his subjective behavior and condition. Rather, what is required is that the People prove, by objective, scientific criteria that at the time defendant was driving, his BAC was .10 percent.

Id. at ___-___, 478 N.Y.S.2d at 483-87 (citations and footnotes omitted).

In 2001, the Court of Appeals updated the legislative history of New York's DWI laws:

> In the early 1980's, drunk driving became a dominant social issue. Drunk drivers were the leading cause of highway deaths in New York. In response, the Legislature enacted a series of reforms and in 1988 consolidated and recodified pertinent provisions into a single article. Article 31 emerged as a tightly and carefully integrated statute the sole purpose of which is to address drunk driving.FN3
>
> > FN3. Under article 31, the offenses and penalties are systematically interwoven with police procedures and rehabilitative programs. Section

1192 defines the offenses and section 1193 sets forth the sanctions (both criminal and administrative). Section 1194 details arrest and field test guidelines for section 1192 violations including the administration of chemical tests and penalties for driver refusals of testing. Section 1195 prescribes the circumstances when and how chemical test evidence is to be admitted. Section 1196 establishes an alcohol and drug rehabilitation program and sets forth eligibility criteria in the context of section 1192 violations. Section 1196 also creates a "conditional license" for program participants that affords limited and essential driving privileges to a holder. The section also authorizes, with some restrictions, termination of the license suspension or revocation after completion of the program. Finally, section 1197 authorizes counties to establish their own driving while intoxicated prevention programs.

The penalties for section 1192 violations are specific; each offense is accorded its own criminal punishment. Violations incurred during the operation of special motor vehicles are subject to different penalties. Section 1193 classifies each section 1192 violation and correlates penalties to the specific degree of the violation. The penalties for multiple section 1192 violations increase with each violation that occurs over a specific

> period of time. Unlike the Penal Law, section 1193 mandates minimum fines where a fine is imposed.
>
> In addition to criminal penalties, section 1193 further imposes mandatory minimum periods for license suspension or revocation. These sanctions, like the criminal penalties, are correlated to the specific nature and degree of the section 1192 violation.
>
> The Legislature placed great significance on the enforcement of specific statutory penalties for drunk driving. The statute provides that sentences for special vehicle offenses must be imposed despite contrary provisions in the Penal Law. Moreover, a sentencing court is prohibited from imposing an unconditional discharge for a section 1192 violation, and conditional discharges or probation sentences must be accompanied by a fine. When a person is convicted of a felony under the Vehicle and Traffic Law where a minimum fine has been established, the sentencing court is authorized to impose the minimum notwithstanding the fines schedule established for Penal Law felonies. Thus, the Legislature has made it clear that the courts must look to section 1193 for the appropriate penalties and sentencing options for drunk driving offenses.

People v. Prescott, 95 N.Y.2d 655, 659-61, 722 N.Y.S.2d 778, 780-82 (2001) (citations and footnotes omitted). See also People v. Litto, 8 N.Y.3d 692, 840 N.Y.S.2d 736 (2007).

There have been numerous amendments to the DWI laws since 2001. For example, on July 1, 2003, New York

became a ".08" State. That is, the threshold BAC currently deemed to constitute legal intoxication was lowered from .10% to .08%. See VTL § 1192(2). In a conforming amendment, VTL § 1195(2) was amended to change the probative values to be accorded BAC readings under .08%.

In 2006, the Legislature enacted major, sweeping changes to New York's DWI laws. For example, the Legislature:

1. Created the crime of Aggravated DWI (*i.e.*, driving with a BAC of .18% or more). See VTL § 1192(2-a);

2. Created the crime of DWAI Combined Influence. See VTL § 1192(4-a);

3. Created a new category of AUO 1st. See VTL § 511(3)(a)(iii);

4. Made many more people subject to prosecution for Vehicular Assault 1st and Vehicular Manslaughter 1st. See PL §§ 120.04 and 125.13;

5. Increased the penalties for refusal to submit to a chemical test. See VTL § 1194(2)(d);

6. Increased the plea bargaining restrictions applicable to DWI cases. See VTL § 1192(10);

7. Created "permanent" driver's license revocations for certain repeat offenders. See VTL § 1193(2)(b)(12);

8. Required alcohol/substance abuse screening and/or treatment in virtually every VTL § 1192 case. See VTL § 1198-a; and

9. Amended VTL § 1192(8) to permit certain out-of-state DWI convictions to be used as predicates to raise the level of a subsequent in-state DWI to a felony.

In 2007, the Legislature created the crimes of Aggravated Vehicular Assault and Aggravated Vehicular Homicide. See PL §§ 120.04-a and 125.14.

In 2009, the Legislature enacted "Leandra's Law," which (a) makes it a felony to commit DWI, DWAI Drugs or DWAI Combined Influence with a child under the age of 16 in the vehicle, and (b) requires everyone who is sentenced on or after August 15, 2010, for a conviction of DWI or Aggravated DWI (committed on or after November 18, 2009) to install an ignition interlock device in any vehicle that they own or operate (with the exception of certain employer-owned vehicles) for at least 6 months. See VTL §§ 1192(2-a)(b) and 1198.

§ 11:4 What are the primary DWI statutes?

The primary DWI-related statutes are contained in VTL Article 31, which is comprised of VTL §§ 1192-1199. VTL § 1192 defines offenses such as DWAI, per se DWI, common law DWI, Aggravated DWI, DWAI Drugs, DWI Combined Influence, and DWI in commercial motor vehicles. It also, *inter alia*, sets forth the roadways upon which VTL § 1192 applies; the effect of a prior out-of-state DWI/DUI conviction; the effect of a prior Zero Tolerance law adjudication; and various plea bargain limitations applicable to DWI-related charges.

VTL § 1192-a is the so-called Zero-Tolerance law applicable to underage drinking drivers.

VTL § 1193 sets forth the criminal and civil penalties, including driver's license sanctions, that apply to convictions for VTL § 1192 offenses (as well as to convictions for out-of-state DWI/DUI offenses committed by NY licensees). It also, *inter alia*, addresses issues such as suspension pending prosecution; the effect of successful DDP completion on certain driver's license revocation periods; and re-application for a driver's license following revocation.

VTL § 1194 addresses breath screening tests, chemical tests, and chemical test refusals. It also,

inter alia, sets forth the procedures for DMV chemical test refusal hearings; the consequences of a chemical test refusal; the effect of successful DDP completion on a chemical test refusal revocation; the defendant's right to an independent chemical test; and the procedures applicable to compulsory chemical tests. VTL § 1194 further requires the Department of Health ("DOH") to promulgate rules and regulations pertaining to chemical testing (the relevant regulations are contained in 10 NYCRR Part 59).

VTL § 1194-a sets forth the procedures applicable to Zero Tolerance law hearings, as well as the civil consequences of a Zero Tolerance law adjudication.

VTL § 1195 addresses the admissibility and probative value of a chemical test result administered pursuant to VTL § 1194.

VTL § 1196 creates and regulates the Drinking Driver Program ("DDP") and conditional driver's licenses. In particular, it establishes eligibility for the DDP and/or for a conditional license; sets forth the scope of a conditional license; sets forth the consequences of driving in violation of the scope of a conditional license; and sets forth the effect of successful DDP completion on the reinstatement of full driving privileges.

VTL § 1197 provides the authority for counties to establish a Special Traffic Options Program for Driving While Intoxicated (a.k.a. "STOP-DWI"), and addresses issues such as Program organization, approval and audit, required reports, and the functions of the county STOP-DWI coordinator.

VTL § 1198 addresses ignition interlock devices ("IIDs"), including issues such as the scope of the IID program; who is required to install and maintain an IID; proof of compliance with the IID requirement; cost, installation and maintenance of IIDs; applicability of IID requirement to employer-owned vehicles; and penalties for circumvention of IID or violation of IID requirement. VTL § 1198 further

requires the DOH and the Office of Probation and Correctional Alternatives ("OPCA") to promulgate rules and regulations pertaining to IIDs (the relevant DOH regulations are contained in 10 NYCRR Part 59; the relevant OPCA regulations are contained in 9 NYCRR Part 358).

VTL § 1198-a establishes "special procedures" regarding mandatory alcohol/substance abuse screening and/or treatment that are applicable to most VTL § 1192 cases.

VTL § 1199 establishes Driver Responsibility Assessments, which are, in effect, additional fines imposed on defendants convicted of alcohol- and drug-related driving offenses above and beyond the mandatory fines, surcharges and fees associated with such convictions.

§ 11:5 What is "common law DWI"?

VTL § 1192(3) is commonly referred to as "common law DWI." In essence, it means to drive drunk. No proof of the defendant's BAC is required to sustain a charge of common law DWI. In fact, an argument can be made that the defendant's BAC is irrelevant to a common law DWI charge. In this regard, VTL § 1195 provides that certain BACs constitute evidence of impairment -- but provides no guidance as to the probative value of a BAC of .08% or more. This is presumably because having a BAC of .08% or more is itself a form of DWI. See VTL § 1192(2).

Defendants who refuse to submit to a chemical test are typically charged with common law DWI. Indeed, it is almost unheard of for a defendant who refuses to submit to a chemical test to only be charged with DWAI.

Common law DWI is based upon whether the defendant's driving, appearance, demeanor, manner of speech, motor coordination, performance on field sobriety tests, etc. establish that he or she was intoxicated. Not all of the symptoms of intoxication must be present; nor is erratic driving a requirement.

Rather, the totality of the circumstances must lead to the conclusion that the defendant "voluntarily consumed alcohol to the extent that he is incapable of employing the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver." People v. Cruz, 48 N.Y.2d 419, 428, 423 N.Y.S.2d 625, 629 (1979).

New York's test for intoxication is objective as opposed to subjective. See, e.g., Matter of Johnston, 75 N.Y.2d 403, 409, 554 N.Y.S.2d 88, 91 (1990). Accordingly, to sustain a charge of common law DWI the defendant must actually appear intoxicated. Thus, if a particular defendant has a higher tolerance for alcohol than the average person, that subjective tolerance benefits him or her with respect to a common law DWI charge. See, e.g., Cruz, 48 N.Y.2d at 426, 423 N.Y.S.2d at 628; People v. Haqmann, 175 A.D.2d 502, ___, 572 N.Y.S.2d 952, 954 (3d Dep't 1991).

§ 11:6 VTL § 1192(3) only applies to intoxication caused by alcohol

Unlike VTL §§ 1192(1), (2), (2-a), (4) and (4-a) -- VTL § 1192(3) does not expressly mandate that the defendant's intoxication be caused by any particular substance. Nonetheless, the Court of Appeals has made clear that the phrase "driving while intoxicated," as used in VTL § 1192(3), means driving while intoxicated by alcohol. See People v. Litto, 8 N.Y.3d 692, 840 N.Y.S.2d 736 (2007). Specifically, the Litto Court held that:

> Over the last 97 years, the Legislature has crafted and repeatedly refined statutes with the goal of removing from the road those who drive while intoxicated. This appeal centers on the phrase "driving while intoxicated" in Vehicle and Traffic Law § 1192(3). Based on the language, history and scheme of the statute, we conclude that the Legislature here intended to use "intoxication" to

> refer to a disordered state of mind caused by alcohol, not by drugs.

Id. at 693-94, 840 N.Y.S.2d at 736-37. See also People v. Farmer, 36 N.Y.2d 386, 390, 369 N.Y.S.2d 44, 45 (1979) ("subdivisions 1, 2 and 3 of section 1192 proscribe separable offenses based upon the degree of impairment caused by alcohol ingestion"); People v. Bayer, 132 A.D.2d 920, ___, 518 N.Y.S.2d 475, 476 (4th Dep't 1987) (VTL § 1192 "[s]ubdivision (3) prohibits operation of a motor vehicle while defendant 'is in an intoxicated condition', but does not refer to a substance creating the condition. It is clear as a matter of law, however, that the subdivision is intended to apply only to intoxication caused by alcohol"). See generally People v. Cruz, 48 N.Y.2d 419, 428, 423 N.Y.S.2d 625, 629 (1979) (for purposes of VTL § 1192(3), "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").

In People v. Tracey, 25 Misc. 3d 849, 885 N.Y.S.2d 559 (Livingston Co. Ct. 2009), the Court confronted the issue of whether ethylene glycol (*i.e.*, anti-freeze) constitutes "alcohol" for purposes of VTL § 1192(3). Concluding that it does not, the Court reasoned as follows:

> This court must now determine whether the consumption of alcohol refers to ethyl alcohol or any substance chemically defined as an alcohol. * * *
>
> This court could find no reported case directly on point. However, the language used and history recited by the Court of Appeals in Litto was highly instructive on the issue before this court. * * *

The term "intoxication" is now defined using the phrase "consumed alcohol" in place of "imbibed enough liquor." But, "alcohol" has virtually the same meaning as "liquor" did in 1919. While "alcohol" is not defined in the Vehicle and Traffic Law (as "liquor" was not in 1910), the legislature has defined it in the Alcoholic Beverage Control Law. "'Alcohol' means ethyl alcohol, hydrated oxide of ethyl or spirit of wine." "Alcoholic beverages" are defined as spirits, wine, liquor, beer, cider and every liquid containing alcohol and capable of being consumed by a human being.

Therefore, the conclusion is inescapable that "intoxication" meant in 1910 and still means today intoxication by the consumption of alcoholic beverages. Alcoholic beverages meaning spirits, wine, liquor, beer, cider and every liquid containing alcohol and capable of being consumed by a human being. In other words, ethyl alcohol. Ethyl alcohol is also known as ethanol or drinking alcohol. * * *

Ethylene glycol, while technically defined as an alcohol, is not an alcoholic beverage. It is not manufactured for human consumption and it is hazardous to human health. * * *

Therefore, to be charged with driving while intoxicated, a defendant must be "intoxicated" by the consumption of alcohol, more specifically an alcoholic beverage.

A defendant may not be charged with driving while intoxicated based upon

the presence of *ethylene glycol*.

Id. at ___, ___, ___, ___, 885 N.Y.S.2d at 560, 561, 562, 563 (citations omitted).

§ 11:7 Attempted DWI is not a legally cognizable offense

Penal Law § 110.00 provides that "[a] person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime." In terms of punishment, an attempt to commit a crime is generally punished one level lower than the crime itself. See PL § 110.05.

In People v. Prescott, 263 A.D.2d 254, 704 N.Y.S.2d 410 (4th Dep't 2000), the Appellate Division, Fourth Department, temporarily created the crime of attempted DWI. On appeal, however, the Court of Appeals reversed, holding that attempted DWI is *not* a legally cognizable offense. People v. Prescott, 95 N.Y.2d 655, 722 N.Y.S.2d 778 (2001).

Ironically, although attempted DWI is not an appropriate *charge*, it apparently can be a valid *plea bargain*. See People v. Foster, 19 N.Y.2d 150, 278 N.Y.S.2d 603 (1967) (plea of guilty to nonexistent crime not invalid where defendant sought, and freely and knowingly accepted, such plea as part of a plea bargain struck for defendant's benefit). See also People v. Francis, 38 N.Y.2d 150, 155, 379 N.Y.S.2d 21, 26 (1975) ("a plea may be to a hypothetical crime"); People v. Keizer, 100 N.Y.2d 114, 118 n.2, 760 N.Y.S.2d 720, 723 n.2 (2003) (same); Donnino, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 39, Penal Law § 110.00, at 85 ("Though there may not logically be an attempt to commit a particular substantive crime, a bargained-for guilt plea to such an attempt struck for the defendant's benefit may not be set aside on appeal").

One reason why a defendant might find a plea bargain to attempted DWI to be advantageous is that

"license sanctions could not be administered because it is not apparent under the Vehicle and Traffic Law what period of revocation or suspension should be imposed upon someone who commits 'attempted' driving while intoxicated." Prescott, 95 N.Y.2d at 662 n.7, 722 N.Y.S.2d at 782 n.7.

§ 11:8 Can driving while intoxicated ever be "justified"?

In People v. Maher, 79 N.Y.2d 978, 980, 584 N.Y.S.2d 421, 421-22 (1992):

> At 4:20 on a Saturday morning, after consuming alcohol, defendant was involved in a minor traffic accident on a New York City street. According to defendant, the driver of the second vehicle became belligerent when defendant attempted to exchange license and insurance information with him and the driver reached into the back seat of his car. Believing that the driver was about to produce a weapon, defendant returned to his own car and fled the scene. A short distance from the first accident defendant struck and killed a pedestrian.

The defendant claimed that he was justified in his actions based upon the perceived threat to his safety. The trial court agreed to instruct the jury with a justification defense, see PL § 35.05(2), with regard to the "leaving the scene of an accident" charge, but refused to do so with regard to the DWI and vehicular crimes charges. The defendant was acquitted of the leaving the scene charge based upon the justification theory, but was convicted of DWAI and Criminally Negligent Homicide.

The Court of Appeals reversed the convictions, holding that the defendant was entitled to the justification instruction with regard to all of the

charges:

> If on any reasonable view of the evidence, the jury might have decided that defendant's actions were justified, the failure to charge the defense constitutes reversible error. It is not for the trial court to hypothesize other reasonable alternatives to the course of action chosen by the defendant. By giving the charge to the jury on the leaving the scene charge, the Judge concluded that one reasonable view of the evidence justified that conduct. Defendant argues, and we agree, that under these circumstances he was entitled to have the jury determine if the manner in which he fled the scene was also justified. That no weapon was observed does not act to bar the charge, but rather is one element of the circumstances that gave rise to the conduct.
>
> Finally, there was no testimony that the emergency had ceased. Defendant stated only that he no longer observed the car following him and that he had started to reduce his speed. It was for the jury to determine whether the threat of harm that the defendant perceived had ceased to exist and if so whether defendant had sufficient time to react prior to the crash.

Id. at 982, 584 N.Y.S.2d at 423 (citation omitted).

In People v. Asche, 175 Misc. 2d 639, ___, 669 N.Y.S.2d 788, 790 (Nassau Co. Dist. Ct. 1998), the Court held that DWI charges would be dismissed in the interest of justice where "a probably-intoxicated defendant who otherwise had no intention of driving in that condition, . . . operated a motor vehicle for a

short distance at the direct command of a police officer."

Similarly, in People v. Donovan, 53 Misc. 2d 687, 279 N.Y.S.2d 404 (Scarsdale Ct. of Special Sessions 1967), the Court held that the People were "estopped to prosecute this defendant" for DWAI where the defendant had been found sleeping in the driveway of a private residence and only drove because the police woke her up and said "Lady, you're on private property; you can't stay here; you'll have to leave."

By contrast, in People v. Kaeppel, 74 Misc. 2d 220, 342 N.Y.S.2d 882 (Suffolk Co. Dist. Ct. 1973), the Court held that the defense of entrapment was not available to the defendant where, among other things, there was conflicting testimony as to whether the police had commanded him to drive and, in any event, he had clearly driven the vehicle prior to the police arriving.

§ 11:9 What is "per se DWI"?

VTL § 1192(2) is commonly referred to as "per se DWI." Per se DWI is the converse of common law DWI. See § 11:5, *supra*. The charge is called "per se" because it makes it illegal for a person to drive with a BAC of .08% or more regardless of whether such BAC rendered the person "intoxicated." See, e.g., People v. Farmer, 36 N.Y.2d 386, 393, 369 N.Y.S.2d 44, 47 (1979) (Fuchsberg, J., concurring) ("Obviously, it is possible for a defendant to have had the quantity of alcohol in his blood required for conviction under subdivision 2 and yet not be found to be in an intoxicated condition under subdivision 3. Likewise, he could be found to be in an intoxicated condition though the level of the weight of alcohol in his blood fell below the '.[08] of one per centum' statutory level"); People v. Miller, 199 A.D.2d 692, ___, 605 N.Y.S.2d 160, 163 (3d Dep't 1993) ("§ 1192(2) is based upon a defendant's blood alcohol content while § 1192(3) is based upon the manner a defendant operated his vehicle and his condition"); People v. Blowers, 79 Misc. 2d 462, ___, 360 N.Y.S.2d 369, 373 (Rensselaer

Co. Ct. 1974) (VTL § 1192(2) "prohibits the operation of a motor vehicle while the operator has .[08] of one percentum or more by weight of alcohol in his blood and that is unrelated to whether or not the operator was in fact intoxicated"). Thus, if a particular defendant has a higher tolerance for alcohol than the average person, that subjective tolerance is no defense with respect to a per se DWI charge.

On the other hand, the term per se DWI can be misleading, because the defendant's BAC is never determined while the defendant is driving (and thus the defendant's chemical test result is only circumstantial proof of his or her BAC at the time of operation). In this regard, the Court of Appeals has made clear that "in this State a positive breathalyzer test establishes only a prima facie case and is not per se evidence of guilt, thus allowing defendant to argue, for example, that his blood alcohol content was lower when he was driving than when the test was given." People v. Alvarez, 70 N.Y.2d 375, 380, 521 N.Y.S.2d 212, 214 (1987).

The Court of Appeals addressed this issue more specifically in People v. Mertz, 68 N.Y.2d 136, 139, 506 N.Y.S.2d 290, 291 (1986):

> A violation of Vehicle and Traffic Law § 1192(2) is not established unless the trier of fact finds that *while* operating a motor vehicle defendant had a blood alcohol content (BAC) of .[08] of 1% or more. Evidence that a breathalyzer test administered within two hours of arrest showed defendant to have such a BAC is sufficient to establish prima facie a violation of the subdivision. It is, however, error not to permit defendant's attorney to argue on the basis of evidence, whether through cross-examination of the People's witnesses or testimony of defendant's witnesses, expert or other, from which it could

> be found that defendant's BAC at the time of vehicle operation was less than .[08]%, that if the jury so found defendant was not guilty of violating the subdivision.

(Emphasis added). The Mertz Court further made clear that:

> [T]he BAC count shown within two hours after arrest is strong but not conclusive evidence of the BAC during operation. . . . We conclude, therefore, that proof of a breathalyzer reading of [.08] or more within two hours after arrest establishes prima facie a violation of Vehicle and Traffic Law § 1192(2) which, together with evidence of one or more of defendant's deportment, speech, stability and the odor of his or her breath, is sufficient to sustain a conviction, absent evidence, expert or other and by whichever party produced, from which the trier of fact could conclude that defendant's BAC at the time of vehicle operation was less than [.08].

Id. at 146, 506 N.Y.S.2d at 295. See also id. at 143-44, 506 N.Y.S.2d at 294 (it is a "scientifically accepted fact that a .[08] reading within two hours after operation does not establish a .[08] reading while operating").

§ 11:10 Reversal of VTL § 1192(2) conviction generally requires reversal of VTL § 1192(1)/(3) conviction(s)

In People v. Gower, 42 N.Y.2d 117, 122, 397 N.Y.S.2d 368, 371 (1977), the Court of Appeals reversed the defendant's VTL § 1192(2) conviction, and also held that:

> It is not possible . . . to determine that the erroneous admission of the breathalyzer results did not also infect the convictions for violation of subdivisions 1 and 3 of section 1192.
>
> Accordingly, in each case the order of County Court . . . should be reversed, and the same remitted for a new trial.

Similarly, in People v. English, 103 A.D.2d 979, ___, 480 N.Y.S.2d 56, 58 (3d Dep't 1984), the Appellate Division, Third Department, held that "[a] chemical test result is highly probative evidence and it is impossible to assess the effect of such evidence on the jury as opposed to the weight given to the other evidence. Therefore, the conviction on the [VTL § 1192(3)] count should also be reversed." (Citation omitted). See also People v. Corley, 124 A.D.2d 390, ___, 507 N.Y.S.2d 491, 493 (3d Dep't 1986) (same); People v. Griesbeck, 17 A.D.3d 717, ___, 793 N.Y.S.2d 227, 228 (3d Dep't 2005); People v. Baker, 51 A.D.3d 1047, ___, 856 N.Y.S.2d 707, 709-10 (3d Dep't 2008). Cf. People v. Grune, 12 A.D.3d 944, 785 N.Y.S.2d 178 (3d Dep't 2004).

§ 11:11 What is "Aggravated DWI"?

VTL § 1192(2-a) is commonly referred to as "Aggravated DWI." There are two types of Aggravated DWI. The first type, per se Aggravated DWI, makes it illegal to operate a motor vehicle with a BAC of .18% or more. See VTL § 1192(2-a)(a). Although the name Aggravated DWI implies that the defendant is highly intoxicated, it is not an element of this crime that the defendant's high BAC actually rendered him or her "intoxicated."

The second type of Aggravated DWI makes it illegal to violate VTL § 1192(2), (3), (4) or (4-a) with a child under the age of 16 in the vehicle. See VTL § 1192(2-a)(b). This offense is known as "Leandra's Law" -- in memory of a child killed by a drunk driver. A

Leandra's Law violation is a felony, even for a first offense. See VTL § 1193(1)(c)(i)(B).

§ 11:12 High BAC is not synonymous with intoxication

The Court of Appeals has made clear that "it is well known that the effects of alcohol consumption 'may differ greatly from person to person' and that tolerance for alcohol is subject to wide individual variation. Thus, even where it can be established, a high blood alcohol count in the person served may not provide a sound basis for drawing inferences about the individual's appearance or demeanor." Romano v. Stanley, 90 N.Y.2d 444, 450-51, 661 N.Y.S.2d 589, 592 (1997) (citations and footnote omitted).

§ 11:13 What is "felony DWI"?

A defendant who is charged with DWI, Aggravated DWI, DWAI Drugs or DWAI Combined Influence after having been convicted of a violation of VTL § 1192(2), (2-a), (3), (4) or (4-a) (or of Vehicular Assault in the 1st or 2nd degree, Vehicular Manslaughter in the 1st or 2nd degree, Aggravated Vehicular Assault or Aggravated Vehicular Homicide) within the preceding 10 years can be charged with a class E felony. VTL § 1193(1)(c)(i).

A defendant who is charged with DWI, Aggravated DWI, DWAI Drugs or DWAI Combined Influence after having been convicted of a violation of VTL § 1192(2), (2-a), (3), (4) or (4-a) (or of Vehicular Assault in the 1st or 2nd degree, Vehicular Manslaughter in the 1st or 2nd degree, Aggravated Vehicular Assault or Aggravated Vehicular Homicide) *twice* within the preceding 10 years can be charged with a class D felony. VTL § 1193(1)(c)(ii).

This topic is covered at length in Chapter 9, *supra*.

§ 11:14 Effect of out-of-state convictions

Prior to November 1, 2006, VTL § 1192(8) provided that, for purposes of determining the consequences of a violation of VTL § 1192, a prior out-of-state conviction for operating a motor vehicle while under the influence of alcohol or drugs was deemed to be a prior conviction of DWAI in violation of VTL § 1192(1). See also People v. Pardee, 202 Misc. 238, 117 N.Y.S.2d 515 (Westchester Co. Ct. 1952), aff'd, 282 A.D. 735, 122 N.Y.S.2d 902 (2d Dep't), aff'd, 306 N.Y. 660 (1953); People v. Gagne, 127 Misc. 2d 327, 485 N.Y.S.2d 938 (Ontario Co. Ct. 1985). Effective November 1, 2006, VTL § 1192(8) now provides as follows:

> Effect of prior out-of-state conviction. A prior out-of-state conviction for operating a motor vehicle while under the influence of alcohol or drugs shall be deemed to be a prior conviction of a violation of this section for purposes of determining penalties imposed under this section or for purposes of any administrative action required to be taken pursuant to [VTL § 1193(2)]; provided, however, that such conduct, had it occurred in this state, would have constituted a misdemeanor or felony violation of any of the provisions of [VTL § 1192]. Provided, however, that if such conduct, had it occurred in this state, would have constituted a violation of any provisions of [VTL § 1192] which are not misdemeanor or felony offenses, then such conduct shall be deemed to be a prior conviction of a violation of [VTL § 1192(1)] for purposes of determining penalties imposed under this section or for purposes of any administrative action required to be taken pursuant to [VTL § 1193(2)].

As a result, a prior out-of-state DWI conviction can now potentially be used as a predicate conviction for a felony DWI charge.

Critically, however, the enabling portion of this amendment to VTL § 1192(8) expressly provides that the new law only applies to out-of-state convictions that occurred on or after November 1, 2006. See also People v. Ballman, 15 N.Y.3d 68, 70, 904 N.Y.S.2d 361, 362 (2010) ("This appeal raises the issue whether Vehicle and Traffic Law § 1192(8) allows an out-of-state conviction occurring prior to November 1, 2006 to be considered for purposes of elevating a charge of driving while intoxicated from a misdemeanor to a felony. We hold that it does not").

§ 11:15 Proving a predicate DWI conviction

A defendant who commits DWI within 10 years of a prior DWI conviction or convictions can be charged with felony DWI. See VTL § 1193(1)(c). In this regard, if the People indict the defendant for felony DWI, they must properly prove the defendant's predicate DWI conviction(s) before the Grand Jury. In People v. Van Buren, 82 N.Y.2d 878, 879-80, 609 N.Y.S.2d 170, 170 (1993):

> The only evidence submitted by the prosecutor to the Grand Jury as prima facie proof of defendant's prior conviction was a certificate of conviction for driving while intoxicated (DWI), indicating that within the last 10 years a Robert L. Van Buren had been convicted in Genesee County for a DWI violation under Vehicle and Traffic Law § 1192. No additional evidence as to the identity of the previously convicted individual was presented.

The Court of Appeals held that:

> To make a prima facie showing that the offense of felony DWI (Vehicle and Traffic Law § 1192[3]; § 1193[1][c]) has been committed, sufficient proof must be adduced before the Grand Jury to establish that the person charged has a prior conviction for driving while intoxicated or alcohol-impaired within the last 10 years. That a person named Robert L. Van Buren was convicted of driving while intoxicated within the preceding 10-year period even in the same county did not constitute prima facie proof that defendant was the person previously convicted of DWI within the last 10 years. The certificate of conviction standing alone, without some further, connecting evidence tending to show that defendant was the same Robert L. Van Buren named in the certificate, was insufficient to "establish every element of [the] offense charged."

Id. at 880-81, 609 N.Y.S.2d at 171 (citation omitted).

In People v. Smith, 258 A.D.2d 245, 697 N.Y.S.2d 783 (4th Dep't 1999), the Appellate Division, Fourth Department, affirmed the reduction of a class D felony DWI to a class E felony DWI where the copy of the defendant's DMV abstract that was presented to the Grand Jury was not properly certified and/or authenticated.

§ 11:16 Challenging a predicate DWI conviction

A previous conviction obtained in violation of the United States Constitution cannot be "counted" in determining whether a defendant is a predicate and/or persistent felony offender. See CPL § 400.20(6); CPL § 400.21(7)(b). In this regard, the CPL provides a legislatively created procedure for challenging the constitutionality of felony convictions sought to be used to enhance a defendant's *sentence*. See CPL §

400.20; CPL § 400.21. By contrast, no such statutory authority exists permitting a defendant to challenge the constitutionality of a prior conviction sought to be used to enhance a current *charge*.

In People v. Knack, 72 N.Y.2d 825, 530 N.Y.S.2d 541 (1988), aff'g 128 A.D.2d 307, 516 N.Y.S.2d 465 (2d Dep't 1987), the Court of Appeals refused to judicially create such a procedure. See also People v. DeJesus, 122 Misc. 2d 190, 471 N.Y.S.2d 195 (N.Y. Co. Sup. Ct. 1983). Pursuant to Knack, a defendant cannot file a motion *in limine*, a motion to suppress, or a motion to controvert a special information challenging the constitutionality of a prior, aggravating DWI conviction *within the context of a pending criminal action*. See also People v. Brown, 160 A.D.2d 1037, ___, 553 N.Y.S.2d 875, 877 (3d Dep't 1990) (validity of prior conviction is question of law for Court, *not* question of fact for jury).

Several lower Court decisions reaching the opposite conclusion should thus be disregarded. See, e.g., People v. Ryan, 127 Misc. 2d 138, 485 N.Y.S.2d 933 (Westchester Co. Ct. 1985); People v. Solomon, 113 Misc. 2d 790, 449 N.Y.S.2d 875 (Kings Co. Sup. Ct. 1982); People v. Sirianni, 109 Misc. 2d 781, 440 N.Y.S.2d 988 (Cattaraugus Co. Ct. 1981), rev'd, 89 A.D.2d 775, 453 N.Y.S.2d 485 (4th Dep't 1982); People v. Dorn, 105 Misc. 2d 244, 431 N.Y.S.2d 974 (Oneida Co. Ct. 1980). See generally People v. Knickerbocker, 136 A.D.2d 769, ___, 523 N.Y.S.2d 227, 228 (3d Dep't 1988) ("A misdemeanor conviction which was obtained when the defendant was not represented by counsel or had not intelligently waived counsel cannot be used as the basis to enhance a subsequent crime from a misdemeanor to a felony"). Notably, Ryan, Solomon, Sirianni, Dorn and Knickerbocker all rely on Baldasar v. Illinois, 446 U.S. 222, 100 S.Ct. 1585 (1980), which was overruled by Nichols v. United States, 511 U.S. 738, 114 S.Ct. 1921 (1994).

In any event, the rationale of the Knack Court was that a judicially created procedure permitting a constitutional challenge to a prior DWI conviction

within the context of a pending DWI case is unnecessary, "since there already exist several procedural vehicles for challenging the constitutional propriety of guilty pleas under the facts presented here." Knack, 72 N.Y.2d at 827, 530 N.Y.S.2d at 542. For example, the defendant could have challenged the constitutionality of the prior conviction by utilizing one (or more) of the following procedures:

(a) A motion to withdraw the plea. See CPL § 220.60(3);

(b) A direct appeal from the judgment of conviction; and/or

(c) A motion to vacate the judgment of conviction (*i.e.*, a *coram nobis* application). See CPL § 440.10.

§ 11:17 What are the elements of DWI?

Surprisingly, there does not appear to be a single published case that sets forth a comprehensive list of the elements of a DWI charge. The elements of common law DWI, in violation of VTL § 1192(3), are:

1. Identification;

2. Operation;

3. Motor vehicle;

4. Roadway listed in VTL § 1192(7);

5. While (*i.e.*, operation and intoxication must be simultaneous); and

6. Intoxicated by alcohol.

Technically, there is another element (*i.e.*, the defendant's consumption of alcohol must be "voluntary"). See § 11:22, *infra*. However, "[c]ases of involuntary intoxication are virtually nonexistent." People v. Van Tuyl, 79 Misc. 2d 262, ___, 359 N.Y.S.2d

958, 961 (App. Term, 9th & 10th Jud. Dist. 1974).

The elements of most other VTL § 1192 offenses, such as DWAI, per se DWI, Aggravated DWI, DWAI Drugs, etc. differ from the elements of common law DWI only with respect to element "6" above. Thus, for example, the elements of DWAI, in violation of VTL § 1192(1), are:

1. Identification;

2. Operation;

3. Motor vehicle;

4. Roadway listed in VTL § 1192(7);

5. While; and

6. Impaired by alcohol.

§ 11:18 Reasonable cause to arrest defendant is not an element of DWI

In People v. Thomas, 70 N.Y.2d 823, 825, 523 N.Y.S.2d 437, 438 (1987), aff'g 121 A.D.2d 73, 509 N.Y.S.2d 668 (4th Dep't 1986), the Court of Appeals held that:

> We agree with the Appellate Division that the trial court erred in admitting evidence, over defendant's objection, that he was arrested "based on the results" of an Alco-Sensor test. The stated purpose of this proof was to permit the prosecution to establish that the arresting officer had "reasonable grounds" to give defendant a breathalyzer test. The evidence should have been excluded as irrelevant since reasonable cause is not an element of the crime charged (see, Vehicle and Traffic Law § 1192[2]).

§ 11:19 Erratic driving is not an element of DWI

A defendant can, of course, drive erratically without being intoxicated. Conversely, it is possible for a defendant to drive while intoxicated without driving erratically. See, e.g., People v. Krause, 71 A.D.3d 1506, ___, 896 N.Y.S.2d 755, 756 (4th Dep't 2010) ("Contrary to defendant's contention with respect to the conviction of DWI, there is no requirement that an officer observe a defendant driving improperly to support such a conviction"); People v. Shank, 26 A.D.3d 812, ___, 808 N.Y.S.2d 533, 535 (4th Dep't 2006) ("Contrary to the contention of defendant, the fact that the officer had not observed anything improper in the manner in which defendant drove his vehicle was merely one factor for the trier of fact to consider in determining whether defendant was intoxicated and did not preclude the trier of fact from finding that defendant was guilty of driving while intoxicated").

§ 11:20 What does it mean to be "intoxicated"?

The Court of Appeals defined what it means to be "intoxicated" in People v. Cruz, 48 N.Y.2d 419, 428, 423 N.Y.S.2d 625, 629 (1979):

> In sum, intoxication is a greater degree of impairment which is reached when the driver has voluntarily consumed alcohol to the extent that he is incapable of employing the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver.

See also People v. Hagmann, 175 A.D.2d 502, ___, 572 N.Y.S.2d 952, 953-54 (3d Dep't 1991); People v. Stack, 140 A.D.2d 389, ___, 527 N.Y.S.2d 569, 570-71 (2d Dep't 1988); People v. Ottomanelli, 107 A.D.2d 212, ___, 486 N.Y.S.2d 748, 752 (2d Dep't 1985).

In other words, a person is not "intoxicated" for purposes of VTL § 1192(3) unless he is *highly* impaired

(*i.e.*, "drunk"). In this regard, in Ottomanelli, *supra*, the Appellate Division, Second Department, expressly considered the issue of "the proper legal standard for determining if the accused was driving while intoxicated within the meaning of Vehicle and Traffic Law § 1192(3)." 107 A.D.2d at ___, 486 N.Y.S.2d at 749. The Court found that Cruz imposes a "total incapacity test":

> Before a defendant may be convicted of driving while intoxicated, under the Cruz definition of intoxication, the accused's voluntary consumption of alcohol must have rendered him *incapable* of performing the physical or mental acts required to operate a motor vehicle as a reasonable and prudent driver.

Id. at ___, 486 N.Y.S.2d at 752.

The Court of Appeals reiterated the "total incapacity test" standard in Matter of Johnston, 75 N.Y.2d 403, 409, 554 N.Y.S.2d 88, 91 (1990). See also People v. Ardila, 85 N.Y.2d 846, 847, 623 N.Y.S.2d 847, 847 (1995) (Cruz test is semantically the same as "being so inebriated that one's 'ability to drive safely is impaired to a substantial extent'").

§ 11:21 Cruz imposes an objective standard in determining whether a person was intoxicated

In People v. Cruz, 48 N.Y.2d 419, 426, 423 N.Y.S.2d 625, 628 (1979), the Court of Appeals held that VTL §§ 1192(1) and 1192(3) require the use of an objective, as opposed to a subjective, standard in determining whether a person was intoxicated. See also Matter of Johnston, 75 N.Y.2d 403, 409, 554 N.Y.S.2d 88, 91 (1990) ("The New York test . . . is objective and measures the actor's ability to employ physical and mental faculties against that of a reasonable prudent driver"). See generally Romano v. Stanley, 90 N.Y.2d 444, 450-51, 661 N.Y.S.2d 589, 592 (1997) ("it is well

known that the effects of alcohol consumption 'may differ greatly from person to person' and that tolerance for alcohol is subject to wide individual variation") (citation omitted).

Thus, if a particular defendant has a higher tolerance for alcohol than the average person, that subjective tolerance benefits him or her with respect to a VTL § 1192(1) or 1192(3) charge, and *vice versa*. By contrast, a high tolerance for alcohol is not helpful with respect to a VTL § 1192(2) or 1192(2-a) charge -- as a person's tolerance for alcohol does not affect his or her BAC.

§ 11:22 Intoxication must be voluntary

In People v. Koch, 250 A.D. 623, ___, 294 N.Y.S. 987, 989 (2d Dep't 1937), the Appellate Division, Second Department, held that "[t]he statute contemplates only voluntary intoxication." The Court of Appeals reiterated this requirement in its landmark decision in 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).

However, "[c]ases of involuntary intoxication are virtually nonexistent." People v. Van Tuyl, 79 Misc. 2d 262, ___, 359 N.Y.S.2d 958, 961 (App. Term, 9th & 10th Jud. Dist. 1974). In this regard, Courts have rejected the claim that the defendant's intoxication was involuntary because the defendant is a chronic alcoholic. See People v. Starowicz, 207 A.D.2d 994, ___, 617 N.Y.S.2d 100, 101 (4th Dep't 1994) ("Defendant's drinking was not involuntary in the sense intended by the Penal Law merely because it was the result of chronic alcoholism or post-traumatic stress disorder"); People v. Williams, 186 A.D.2d 770, ___, 589 N.Y.S.2d 70, 71 (2d Dep't 1992) ("Contrary to the defendant's contention, alcoholism does not render an

alcoholic's intoxication involuntary so as to relieve him from liability for the reckless acts committed while he is intoxicated"). See generally People v. Wells, 53 A.D.3d 181, ___, 862 N.Y.S.2d 20, 21 (1st Dep't 2008); People v. Berkley, 152 A.D.2d 788, 543 N.Y.S.2d 568 (3d Dep't 1989); People v. Wondolowski, 116 A.D.2d 959, 498 N.Y.S.2d 528 (3d Dep't 1986).

§ 11:23 A person can be intoxicated with a BAC below .08%, and can have a BAC above .08% without being intoxicated

It is well settled that a person can be intoxicated with a BAC below .08%, and can have a BAC above .08% without being intoxicated. See, e.g., People v. Farmer, 36 N.Y.2d 386, 393, 369 N.Y.S.2d 44, 47 (1979) (Fuchsberg, J., concurring) ("Obviously, it is possible for a defendant to have had the quantity of alcohol in his blood required for conviction under subdivision 2 and yet not be found to be in an intoxicated condition under subdivision 3. Likewise, he could be found to be in an intoxicated condition though the level of the weight of alcohol in his blood fell below the '.[08] of one per centum' statutory level"); People v. Miller, 199 A.D.2d 692, ___, 605 N.Y.S.2d 160, 163 (3d Dep't 1993) ("§ 1192(2) is based upon a defendant's blood alcohol content while § 1192(3) is based upon the manner a defendant operated his vehicle and his condition"); People v. Blowers, 79 Misc. 2d 462, ___, 360 N.Y.S.2d 369, 373 (Rensselaer Co. Ct. 1974) (VTL § 1192(2) "prohibits the operation of a motor vehicle while the operator has .[08] of one percentum or more by weight of alcohol in his blood and that is unrelated to whether or not the operator was in fact intoxicated"). See generally People v. Blair, 98 N.Y.2d 722, 749 N.Y.S.2d 809 (2002) (chemical test result below "legal limit" does not preclude VTL § 1192(3) charge); People v. Lawrence, 53 A.D.2d 705, ___, 384 N.Y.S.2d 37, 38 (3d Dep't 1976) ("the results of the breathalyzer test showing less than .05 of 1% by weight of alcohol in the blood do not establish

conclusively that the defendant was innocent of the charge of driving while intoxicated. It is merely prima facie evidence that defendant's ability was not impaired and that he was not intoxicated").

In this regard, case law makes clear that jury verdicts convicting a defendant of VTL § 1192(2) yet acquitting him or her of VTL § 1192(3), and *vice versa*, are neither inconsistent nor repugnant (because being "intoxicated" and having an elevated BAC are distinct concepts). See, e.g., People v. Brown, 53 N.Y.2d 979, 441 N.Y.S.2d 662 (1981); People v. Lawson, 191 A.D.2d 514, 594 N.Y.S.2d 346 (2d Dep't 1993); People v. Mascolo, 175 A.D.2d 812, 572 N.Y.S.2d 937 (2d Dep't 1991); People v. Carvalho, 174 A.D.2d 687, 571 N.Y.S.2d 332 (2d Dep't 1991); People v. Vancasselle, 115 A.D.2d 255, 496 N.Y.S.2d 172 (4th Dep't 1985); People v. Collins, 92 A.D.2d 740, 461 N.Y.S.2d 90 (4th Dep't 1983). See generally People v. Loughlin, 76 N.Y.2d 804, 559 N.Y.S.2d 962 (1990) (jury's verdicts acquitting defendant of Vehicular Manslaughter yet convicting him of Vehicular Assault were inconsistent/repugnant -- as these charges share the essential element of intoxication).

§ 11:24 Intoxication alone does not constitute criminal negligence

It has long been the law of this State that:

> Proof of intoxication alone is not enough to sustain a conviction of criminal negligence. The People must also prove that the defendant's intoxication affected his physical and mental capacity to the extent that it caused him to operate his vehicle in a culpably reckless manner.

People v. Bast, 19 N.Y.2d 813, 815, 280 N.Y.S.2d 149, 150 (1967). See also Matter of Johnston, 75 N.Y.2d 403, 409-10, 554 N.Y.S.2d 88, 91 (1990) (same).

Notably, it appears that the use of the phrase "criminal negligence" in Bast refers not to the *mens rea* of criminal negligence, but rather to the crime currently denominated Criminally Negligent Homicide. See PL § 125.10. In this regard, the statute at issue in Bast (*i.e.*, PL § 1053-a), a predecessor statute to PL § 125.10, provided:

> § 1053-a. Criminal negligence in operation of vehicle resulting in death. A person who operates or drives any vehicle of any kind in a reckless or culpably negligent manner, whereby a human being is killed, is guilty of criminal negligence in the operation of a vehicle resulting in death.

Taken in this context, the above quote from Bast probably should have read as follows:

> Proof of intoxication alone is not enough to sustain a conviction of the crime of criminal negligence in the operation of a vehicle resulting in death. The People must also prove that the defendant's intoxication affected his physical and mental capacity to the extent that it caused him to operate his vehicle in a reckless or culpably negligent manner.

Indeed, the Bast Court went on to say: "The evidence adduced by the People failed to establish that defendant drove at an excessive rate of speed or that his intoxication caused him to strike the decedent." 19 N.Y.2d at 815, 280 N.Y.S.2d at 150. Simply stated, it appears that, as a result of Bast, the issue of "criminal negligence" has long been confused with the issue of "causation." However, the 2005 amendments to the Vehicular Assault/Vehicular Manslaughter statutes, which removed the *mens rea* requirement therefrom (except where AUO is an element of the offense), rendered this issue moot.

§ 11:25 Opinion of intoxication can be rendered by layman

In People v. Cruz, 48 N.Y.2d 419, 428, 423 N.Y.S.2d 625, 629 (1979), the Court of Appeals held that "the concept of intoxication does not require expert opinion. A layman, including the defendant and those charged with administering the law, should be able to determine whether the defendant's consumption of alcohol has rendered him incapable of operating a motor vehicle as he should." See also People v. Cronin, 60 N.Y.2d 430, 433, 470 N.Y.S.2d 110, 112 (1983) ("While jurors might be familiar with the effects of alcohol on one's mental state, the combined impact of a case of beer, several marihuana cigarettes and 5 to 10 Valium tablets on a person's ability to act purposefully cannot be said as a matter of law to be within the ken of the typical juror"); People v. Kehn, 109 A.D.2d 912, ___, 486 N.Y.S.2d 380, 383 (3d Dep't 1985) ("jurors have been recognized as being 'familiar with the effects of alcohol on one's mental state'") (citation omitted).

§ 11:26 What does it mean to be "impaired"?

The Court of Appeals defined what it means to be "impaired" in People v. Cruz, 48 N.Y.2d 419, 427, 423 N.Y.S.2d 625, 628 (1979):

> [T]he question in each case is whether, by voluntarily consuming alcohol, this particular defendant has actually impaired, to any extent, the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver.

There are three critical issues to note here. First, the defendant's physical and mental abilities are only required to be impaired *to any extent*. Second, the defendant's consumption of alcohol is required to have *actually impaired* his or her physical and mental abilities. Third, while the Cruz definition

of impairment appears to be quite simple for the prosecution to meet, the Cruz Court noted that:

> That is not to say, of course, that every person who drinks before driving violates the law. On the contrary the Legislature recognized that the average person can consume a certain amount of alcohol without impairing his ability to operate a motor vehicle as he should. Otherwise the Legislature would not have provided that proof of .05 of 1% or less of blood alcohol content is prima facie evidence that the driver was not impaired or intoxicated (Vehicle and Traffic Law, § 1195, subd. 2, par. (a)). Of course some persons may find their driving faculties impaired by the least consumption of alcohol and, therefore, would be guilty of driving while impaired while others would not. And the Legislature also recognized that some individuals may be able to consume greater amounts of alcohol without being impaired, as would the average driver (Vehicle and Traffic Law, § 1195, subd. 2, par. (c)). Thus the impairment statute, by simply providing prima facie standards, takes into account the "subjective" tolerance of individuals in determining the ability to drive possessed by a defendant at the time of arrest. But in determining whether that ability is less than he *should* possess, the statute necessarily contemplates the use of the objective standard expected of the average driver.

Id. at 426, 423 N.Y.S.2d at 628 (citation omitted).

§ 11:27 Significance of an odor of alcoholic beverage, or lack thereof

"The odor of alcohol simply is evidence that the defendant had consumed an alcoholic beverage." People v. Koch, 135 Misc. 2d 352, ___, 515 N.Y.S.2d 405, 407 (Rochester City Ct. 1987). See also People v. Alberto, 22 Misc. 3d 786, ___, 877 N.Y.S.2d 628, 632 (Suffolk Co. Dist. Ct. 2008) ("The trooper's remaining observation of the odor of alcohol on the defendant's breath raised a possibility that the defendant may have consumed alcohol, but was not sufficient, in itself, to provide the trooper with probable cause to arrest the defendant for Driving While Intoxicated"); People v. Butts, 21 Misc. 2d 799, ___, 201 N.Y.S.2d 926, 932 (Poughkeepsie City Ct. 1960) ("'The test for odor of liquor on the breath is unsatisfactory for the breath odor observed is really the flavoring matter of the liquor and the strength of the odor depends not only on the amount of the alcohol consumed, but also on the particular beverage which happened to have been used'") (citation omitted); People on Complaint of Mulrean v. Fox, 256 A.D. 578, ___, 10 N.Y.S.2d 694, 696 (1st Dep't 1939) ("The odor of liquor on the defendant's breath was not proof of intoxication, . . . for it was entirely consistent with the defendant's explanation to the officer and with his testimony at the trial, that 'he had a couple of beers'"). See generally Coleman v. New York City Transit Auth., 37 N.Y.2d 137, 144, 371 N.Y.S.2d 663, 669 (1975) ("The evidence of alcoholic breath and the three drinks is not in itself proof of intoxication"); Senn v. Scudieri, 165 A.D.2d 346, ___, 567 N.Y.S.2d 665, 668 (1st Dep't 1991) ("Evidence that a person has consumed alcohol, and has the odor of alcohol on his or her breath, is not conclusive proof of intoxication").

In other words, while the odor of an alcoholic beverage constitutes evidence that a person has been drinking, it does not distinguish between a person who recently took a sip of alcohol, a person who had a couple of drinks, and a person who is intoxicated. Furthermore, it does not provide any guidance as to the actual effect of the alcohol on a particular individual.

Indeed, the odor of an alcoholic beverage is of such limited probativeness in a DWI case that even the *absence* of such an odor has been found to be of limited significance. See, e.g., People v. Farrell, 89 A.D.2d 987, ___, 454 N.Y.S.2d 306, 307 (2d Dep't 1982) ("Since it is possible to produce intoxicating beverages which can be imbibed without leaving any odor[,] the absence of an odor of alcohol would not necessarily negate a finding of reasonable cause for defendant's arrest. . . . The mere absence of an odor of alcohol is insufficient to minimize the arresting officer's other observations as established by the record before us"); People v. Alfaro, 179 Misc. 2d 589, ___, 686 N.Y.S.2d 638, 639 (Greenburgh Just. Ct. 1999). Cf. People v. Khuns, 191 Misc. 2d 655, ___, 746 N.Y.S.2d 230, 232 (Greece Just. Ct. 2001) ("Although the record demonstrates that the defendant was driving erratically and failed the field sobriety tests, without proof of the presence of alcohol, the court must conclude that the People have not met their burden. Proof that an arresting officer in some manner detected an odor of an alcoholic beverage during his investigation is an essential element to support a finding of probable cause for a driving while intoxicated arrest. Absent such proof, the defendant's failure to properly perform the field sobriety tests, her physical appearance and condition, or the fact that she operated a motor vehicle in violation of the vehicle and traffic laws, can reasonably be attributed to causes other than intoxication") (citations omitted).

§ 11:27A What constitutes probable cause to arrest in a VTL § 1192 case?

CPL § 70.10(2) provides, in pertinent part, that:

> "Reasonable cause to believe that a person has committed an offense" exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person

> of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it.

Although the CPL uses the phrase "reasonable cause," it is well settled that "[r]easonable cause means probable cause." People v. Maldonado, 86 N.Y.2d 631, 635, 635 N.Y.S.2d 155, 158 (1995). See also People v. Johnson, 66 N.Y.2d 398, 402 n.2, 497 N.Y.S.2d 618, 621 n.2 (1985). The Court of Appeals has consistently made clear that:

> In passing on whether there was probable cause for an arrest, . . . the basis for such a belief must not only be reasonable, but it must appear to be at least more probable than not that a crime has taken place and that the one arrested is its perpetrator, for conduct equally compatible with guilt or innocence will not suffice.

People v. Carrasquillo, 54 N.Y.2d 248, 254, 445 N.Y.S.2d 97, 100 (1981). See also People v. Vandover, 20 N.Y.3d 235, 237, 958 N.Y.S.2d 83, 84 (2013) (same); People v. DeBour, 40 N.Y.2d 210, 216, 386 N.Y.S.2d 375, 380 (1976) ("We have frequently rejected the notion that behavior which is susceptible of innocent as well as culpable interpretation, will constitute probable cause").

Interestingly, the Court of Appeals had never addressed the issue of what constitutes probable cause to arrest in a VTL § 1192 case until it decided Vandover, *supra*, in 2013. In Vandover, the Court held that "[t]he standard to be followed is that it is more probable than not that defendant is actually impaired." 20 N.Y.3d at 239, 958 N.Y.S.2d at 85. See also § 1:28, *supra*.

§ 11:28 What constitutes "operation" of a motor vehicle?

The Office of Court Administration Pattern Criminal Jury Instructions define operation as follows:

> **To OPERATE a motor vehicle means to drive it.**
>
> [NOTE: Add the following if there is an issue as to operation:
>
> **A person also OPERATES a motor vehicle when such person is sitting behind the wheel of a motor vehicle for the purpose of placing it in operation, and when the motor vehicle is moving, or even if it is not moving, the engine is running.**]

CJI(NY) (2d ed.) VTL 1192, at 1002-03 (footnote omitted). A former version of this instruction reads as follows:

> [NOTE: If "operation" is placed in issue, add:
>
> **"Operation" of a motor vehicle is established upon proof beyond a reasonable doubt that the defendant had recently driven the vehicle or by such proof that he was seated at the wheel, with the motor running and with a present intention of placing the vehicle in operation.**]

3 CJI(NY) V. & T.L. § 1192(1), (2), & (3), at 2306.

In People v. Prescott, 95 N.Y.2d 655, 662, 722 N.Y.S.2d 778, 782 (2001), the Court of Appeals stated that:

> Our courts have long recognized that the definition of operation is broader

> than that of driving and that "'[a] person operates a motor vehicle within the meaning of [the statute] when, in the vehicle, he intentionally does any act or makes use of any mechanical or electrical agency which alone or in sequence will set in motion the motive power of the vehicle.'" Thus, criminal liability under section 1192 can attach to conduct 'dangerously close' to driving, as long as that conduct occurs upon locations covered by the statute.

(Citations and footnote omitted). See also People v. Alamo, 34 N.Y.2d 453, 458, 358 N.Y.S.2d 375, 379 (1974); People v. Marriott, 37 A.D.2d 868, ___, 325 N.Y.S.2d 177, 178 (3d Dep't 1971).

This topic is covered at length in Chapter 2, *supra*.

§ 11:29 Operation and intoxication must be simultaneous

Although often overlooked, in a DWI case the defendant's operation of a motor vehicle and his or her intoxication must occur simultaneously (*i.e.*, the crime is driving *while* intoxicated). See, e.g., People v. Mertz, 68 N.Y.2d 136, 139, 506 N.Y.S.2d 290, 291 (1986) ("A violation of Vehicle and Traffic Law § 1192(2) is not established unless the trier of fact finds that *while* operating a motor vehicle defendant had a blood alcohol content (BAC) of .[08] of 1% or more") (emphasis added); People v. Schools, 122 A.D.2d 502, ___, 505 N.Y.S.2d 462, 463 (3d Dep't 1986) ("The *sine qua non* for conviction is the operation of a vehicle simultaneously with intoxication"); People v. Strauss, 260 A.D. 880, ___, 22 N.Y.S.2d 880, 881 (2d Dep't 1940) ("intoxication and operation must be simultaneous or there is no crime"); People v. Hust, 74 Misc. 2d 887, ___, 346 N.Y.S.2d 303, 307 (Broome Co. Ct. 1973). See generally People v. Spencer, 289 A.D.2d 877, ___, 736 N.Y.S.2d 428, 431 (3d Dep't 2001); People v. Saplin,

122 A.D.2d 498, ___, 505 N.Y.S.2d 460, 461 (3d Dep't 1986); People v. Matthews, 11 A.D.2d 784, 205 N.Y.S.2d 26 (2d Dep't 1960); People v. Hemleb, 4 A.D.2d 878, 166 N.Y.S.2d 837 (2d Dep't 1957).

§ 11:30 Defense must be allowed to argue that defendant's BAC was less than .08% at time of operation

In People v. Mertz, 68 N.Y.2d 136, 139, 506 N.Y.S.2d 290, 291 (1986), the Court of Appeals held that:

> A violation of Vehicle and Traffic Law § 1192(2) is not established unless the trier of fact finds that while operating a motor vehicle defendant had a blood alcohol content (BAC) of .[08] of 1% or more. . . . It is . . . error not to permit defendant's attorney to argue on the basis of evidence, whether through cross-examination of the People's witnesses or testimony of defendant's witnesses, expert or other, from which it could be found that defendant's BAC at the time of vehicle operation was less than .[08]%, that if the jury so found defendant was not guilty of violating the subdivision.

See also id. at 146-47, 506 N.Y.S.2d at 295-96 ("When . . . such evidence has been presented, defendant must be permitted to argue its significance to the jury. Because he was foreclosed from doing so and because the court's ruling during defendant's attorney's summation and its instructions at the close of the case were in conflict on this issue, there must be a reversal").

§ 11:31 Operation must occur on a roadway covered by VTL § 1192(7)

VTL § 1100(a) provides that "[t]he provisions of [VTL Title VII] apply upon public highways, private

roads open to public motor vehicle traffic and any other parking lot, *except where a different place is specifically referred to in a given section*." (Emphasis added). VTL § 1192 is part of VTL Title VII. However, VTL § 1192(7) provides an exception of the type referred to in VTL § 1100(a). Specifically, VTL § 1192(7) expressly lists the types of roadways upon which the provisions of VTL § 1192 apply:

> Where applicable. The provisions of this section shall apply upon public highways, private roads open to motor vehicle traffic and any other parking lot. For the purposes of this section "parking lot" shall mean any area or areas of private property, including a driveway, near or contiguous to and provided in connection with premises and used as a means of access to and egress from a public highway to such premises and having a capacity for the parking of four or more motor vehicles. The provisions of this section shall not apply to any area or areas of private property comprising all or part of property on which is situated a one or two family residence.

The current definition of the term "parking lot" in VTL § 1192(7) was designed to legislatively overrule cases which had applied the VTL § 129-b "store or business establishment" test to determine whether a parking lot is a "parking lot" for purposes of VTL § 1192, see, e.g., People v. Williams, 66 N.Y.2d 659, 495 N.Y.S.2d 964 (1985); People v. McDonnell, 27 Misc. 3d 56, 901 N.Y.S.2d 451 (App. Term, 9th & 10th Jud. Dist. 2010); People v. Copeland, 132 Misc. 2d 990, 506 N.Y.S.2d 249 (Suffolk Co. Dist. Ct. 1986), replacing that test with a "capacity for the parking of four or more motor vehicles" test.

Proof that a parking lot constitutes a "parking lot" as defined in VTL § 1192(7) is an element of a VTL

§ 1192 charge. See People v. Whipple, 97 N.Y.2d 1, 7, 734 N.Y.S.2d 549, 552 (2001).

This topic is covered at length in Chapter 3, *supra*.

§ 11:32 Unless a Penal Law charge is involved

In People v. Harris, 81 N.Y.2d 850, 597 N.Y.S.2d 620 (1993), the defendant was convicted of, among other things, Vehicular Manslaughter in the 2nd Degree, in violation of Penal Law § 125.12, after a passenger in the vehicle he was driving (while intoxicated) died. Defendant argued that, since the driving at issue took place in a farmer's field, he did not operate the vehicle on a roadway encompassed by VTL § 1192(7), and thus that he did not violate VTL § 1192.

Since, on the date of the offense, a violation of VTL § 1192(2), (3) or (4) was an element of Vehicular Manslaughter, defendant claimed that he was improperly convicted thereof. The Court of Appeals disagreed, reasoning that:

> With the understanding that penal laws have different purposes than vehicle and traffic laws, we conclude the vehicular manslaughter statute applies to any person causing a death by driving under the influence of alcohol or drugs, *regardless of location*, even though there could be no separate punishment for such driving under Vehicle and Traffic Law § 1192 where the driving did not occur on public roads or other areas defined in that section.

Id. at 852, 597 N.Y.S.2d at 622 (emphasis added).

§ 11:33 Corroboration of admission of operation

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 People v. Booden, 69 N.Y.2d 185, 513 N.Y.S.2d 87 (1987), the Court of Appeals held that CPL § 60.50:

> [D]oes not require corroboration of confessions or admissions in every detail, but only "some proof, of whatever weight", that the offense charged has in fact been committed by someone. Its purpose is to avoid the possibility that a crime may be confessed when, in fact, no crime has been committed. The requirements of the rule are not rigorous and sufficient corroboration exists when the confession is "supported" by independent evidence of the corpus delicti. The necessary additional evidence may be found in the presence of defendant at the scene of the crime, his guilty appearance afterward, or other circumstances supporting an inference of guilt.

Id. at 187, 513 N.Y.S.2d at 89 (citations omitted). Applying the foregoing to the facts of the case, the Court found that:

> There was sufficient corroborative evidence in this case that the offense of driving while impaired had been committed on the evening in question. The vehicle owned by defendant's father was found in a ditch, facing in the wrong direction of travel; the pavement of the highway was dry, negativing suggestions of an accidental skid; defendant and his companions were standing next to the vehicle when the investigating officer arrived and, when defendant and his companions were asked who had been driving the vehicle, defendant

> volunteered to answer the question and produced his identification, indicating by his conduct that he was the driver. The officer noticed that defendant exhibited outward signs of intoxication and his breath smelled of alcohol.

Id. at 187-88, 513 N.Y.S.2d at 89. See also People v. Tatro, 245 A.D.2d 1040, 667 N.Y.S.2d 560 (4th Dep't 1997); People v. Kestler, 201 A.D.2d 955, 607 N.Y.S.2d 823 (4th Dep't 1994); People v. Cook, 191 A.D.2d 993, 595 N.Y.S.2d 163 (4th Dep't 1993); People v. Hennigan, 135 A.D.2d 1082, 523 N.Y.S.2d 302 (4th Dep't 1987); Matter of Van Tassell v. New York State Comm'r of Motor Vehicles, 46 A.D.2d 984, 362 N.Y.S.2d 281 (3d Dep't 1974) (corroboration requirement lower at refusal hearing than at criminal trial). Cf. People v. Matthews, 11 A.D.2d 784, ___, 205 N.Y.S.2d 26, 27 (2d Dep't 1960) ("Except for defendant's alleged admission, made while intoxicated, that he had been driving the motor vehicle, there is no proof in the record that he was the one who, while intoxicated, operated the vehicle. In the absence of additional proof the conviction may not stand"); People v. Hemleb, 4 A.D.2d 878, ___, 166 N.Y.S.2d 837, 838 (2d Dep't 1957) (same).

Judge Bellacosa filed a dissenting opinion in Booden, stating that:

> [T]he publicly and statutorily induced campaigns for rigorous enforcement of drunk driving offenses, laudable as they are, require a proportionate and judicious neutralization against excessive zeal at the expense of the rights of those affected with potentially serious criminal and even felony prosecutions and records. I am confident that law enforcement officials will be able to enforce properly not only the new and more serious drunk driving laws but also can concomitantly safeguard the

> procedural rights of all citizens affected by all these laws.

69 N.Y.2d at 189, 513 N.Y.S.2d at 90 (Bellacosa, J., dissenting).

§ 11:34 DWI is a "continuing crime"

"A continuing crime is one 'that by its nature may be committed either by one act or by multiple acts and readily permits characterization as a continuing offense over a period of time.'" People v. Shack, 86 N.Y.2d 529, 540, 634 N.Y.S.2d 660, 667 (1995) (citation omitted). DWI is a continuing crime. People v. Miller, 163 A.D.2d 627, ___, 558 N.Y.S.2d 269, 270 (3d Dep't 1990). See also People v. Tuszynski, 57 A.D.3d 1380, ___, 871 N.Y.S.2d 542, 542 (4th Dep't 2008) ("We agree with defendant that the sentences of two consecutive terms of imprisonment of 1 1/3 to 4 years are illegal on the ground that his operation of a motor vehicle while intoxicated consisted of a single, continuous act").

§ 11:35 DWI is a "strict liability" offense

DWI has been referred to as a "strict liability" offense, in that there is no traditional *mens rea* component. While the defendant's intoxication must be "voluntary," see § 11:22, *supra*, and the defendant must "intend" to operate the vehicle, see § 2:4, *supra*, the defendant does not need to otherwise act "intentionally," "knowingly," "recklessly," or with "criminal negligence." See PL § 15.05.

Thus, for example, there is no requirement that the defendant intend to get drunk, or that the defendant have knowledge that his or her BAC is above the legal limit. Similarly, the defendant is not required to drive recklessly to be guilty of DWI. All that is required is that the defendant operate a motor vehicle while intoxicated on a roadway covered by VTL § 1192(7).

§ 11:36 DWAI as a lesser included offense of common law DWI

It is well settled that DWAI, in violation of VTL § 1192(1), is a lesser included offense of common law DWI, in violation of VTL § 1192(3). See, e.g., People v. Litto, 8 N.Y.3d 692, 705-06, 840 N.Y.S.2d 736, 744-45 (2007); People v. Green, 96 N.Y.2d 195, 197-98, 726 N.Y.S.2d 357, 359 (2001); People v. Brown, 53 N.Y.2d 979, 981, 441 N.Y.S.2d 662, 663 (1981); People v. Hoag, 51 N.Y.2d 632, 634, 435 N.Y.S.2d 698, 698 (1981); People v. Cruz, 48 N.Y.2d 419, 428, 423 N.Y.S.2d 625, 629 (1979).

In fact, in Green, *supra*, the Court of Appeals held that an accusatory "instrument charging driving while intoxicated also, by operation of law, charge[s] the offense of driving while impaired." 96 N.Y.2d at 199, 726 N.Y.S.2d at 361.

§ 11:37 DWAI as a lesser included offense of per se DWI

It has been held that DWAI, in violation of VTL § 1192(1), is *not* a lesser included offense of per se DWI, in violation of VTL § 1192(2). See, e.g., People v. Brown, 53 N.Y.2d 979, 981, 441 N.Y.S.2d 662, 663 (1981); People v. Maharaj, 89 N.Y.2d 997, 998-99, 657 N.Y.S.2d 392, 393 (1997); People v. Poole, 41 A.D.3d 867, ___, 841 N.Y.S.2d 588, 589 (2d Dep't 2007); People v. Abel, 166 A.D.2d 841, ___, 563 N.Y.S.2d 531, 533 (3d Dep't 1990). The reason why is spelled out in Brown:

> A lesser included offense is one which must by definition be concomitantly committed in the commission of the greater offense (CPL 1.20, subd. 37). Here that was not true, since driving while ability is impaired pertains to the driver's motor coordination, while the charge on which defendant was convicted pertains only to blood alcohol level without regard to the effect which that alcohol may have on

> the driver. A driver need not be impaired to be convicted under subdivision 2 of section 1192, and therefore driving while impaired is not a lesser included offense of that crime.

53 N.Y.2d at 981, 441 N.Y.S.2d at 663 (citation omitted).

On the other hand, the Court of Appeals has more recently stated that:

> Subdivision 1 is a lesser-included offense of subdivisions 2 and 3. Subdivisions 2 and 2-a require a showing of a specific amount of blood alcohol content to result in a per se criminal violation, whereas subdivision 3 -- "in an intoxicated condition" -- allows for a circumstantial showing of inability to operate a motor vehicle while under the influence of alcohol. Confirming this scheme, subdivision 9 explicitly permits a conviction under subdivision 1, 2 or 3 even when the charge alleges a violation of either subdivision 2 or 3.

People v. Litto, 8 N.Y.3d 692, 705-06, 840 N.Y.S.2d 736, 744-45 (2007). See also next section.

§ 11:38 What about VTL § 1192(9)?

VTL § 1192(9) (formerly VTL § 1196(1)) provides as follows:

> Conviction of a different charge. A driver may be convicted of a violation of subdivision one, two or three of this section, notwithstanding that the charge laid before the court alleged a violation of subdivision two or three

> of this section, and regardless of whether or not such conviction is based on a plea of guilty.

In other words, VTL § 1192(9) expressly provides that a person charged with VTL § 1192(2) can be convicted of VTL § 1192(1) -- either by plea of guilty or after trial. Doesn't that clearly make DWAI a codified lesser included offense of per se DWI? While the Appellate Division, Third Department, answered this question in the negative in People v. Sawinski, 148 A.D.2d 888, ___, 539 N.Y.S.2d 522, 523-24 (3d Dep't 1989), the Court of Appeals appeared to reach the opposite conclusion in People v. Litto, 8 N.Y.3d 692, 705-06, 840 N.Y.S.2d 736, 744-45 (2007). See previous section. See also People v. Green, 96 N.Y.2d 195, 198, 726 N.Y.S.2d 357, 359 (2001); People v. Farmer, 36 N.Y.2d 386, 390, 369 N.Y.S.2d 44, 45 (1979).

In addition, since VTL § 1195(2) correlates BACs with impairment (e.g., a BAC of .05% or less constitutes legal sobriety; a BAC of .06% constitutes relevant evidence of impairment; a BAC of .07% constitutes *prima facie* evidence of impairment), it is clear that the Legislature does not view per se DWI and DWAI as being completely separate and distinct from one another.

Simply stated, while DWAI may not be a lesser included offense of per se DWI in the traditional sense, a strong argument can be made, in light of Litto, that the Legislature has made it a codified lesser included offense. In this regard, the Court of Appeals' decision in Litto is clearly not reconcilable with its decision in People v. Brown, 53 N.Y.2d 979, 981, 441 N.Y.S.2d 662, 663 (1981), on this issue. Rather, Litto appears to agree with the Appellate Division majority in Brown. See People v. Brown, 73 A.D.2d 112, 426 N.Y.S.2d 128 (3d Dep't 1980), rev'd, 53 N.Y.2d 979, 441 N.Y.S.2d 662 (1981).

* * * * * * * * * *

VTL § 1192(9) raises another vexing issue. If a person refused to submit to a chemical test, how can he or she be proven guilty beyond a reasonable doubt of violating VTL § 1192(2) -- which requires proof of ".08 of one per centum or more by weight of alcohol in the person's blood as shown by chemical analysis of such person's blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this article"? Simply stated, regardless of what VTL § 1192(9) says, in the absence of a chemical test there cannot be a valid conviction of VTL § 1192(2). See People v. Freeman, 46 A.D.3d 1375, ___, 848 N.Y.S.2d 800, 802 (4th Dep't 2007) ("a conviction of driving while intoxicated per se must be proved by chemical analysis (see Vehicle and Traffic Law § 1192[2])").

§ 11:39 Refusal to charge DWAI as a lesser included offense can be reversible error

In People v. Hoaq, 51 N.Y.2d 632, 634, 435 N.Y.S.2d 698, 698 (1981), the Court of Appeals held that:

> [A] Trial Judge, who declines to submit DWAI as a lesser included offense to DWI on the ground that there is no reasonable view of the evidence that would support a finding that defendant committed the lesser charge makes a ruling on the law rather than in the exercise of discretion. In such a case, there being a reasonable view of the evidence to support submission of DWAI, defendant's DWI conviction must be reversed and a new trial ordered.

51 N.Y.2d at 634, 435 N.Y.S.2d at 698. In so holding, the Court reasoned that:

> To entitle defendant to a DWAI charge the evidence need not establish that she acted as a "normal, sober person," but only that she had not been

> rendered incapable by alcoholic beverage of employing the physical or mental abilities needed to operate a car, even though her abilities to do so were to some degree impaired. The standard by which that determination is to be made was succinctly stated in People v. Henderson, 41 N.Y.2d 233, 236, 391 N.Y.S.2d 563, 359 N.E.2d 1357: "The court's appraisal of the persuasiveness of the evidence indicating guilt of the higher count is irrelevant; the question simply is whether on any reasonable view of the evidence it is possible for the trier of the facts to acquit the defendant on the higher count * * * and still find him guilty on the lesser one."

Id. at 636, 435 N.Y.S.2d at 700 (citation omitted). See also People v. Carota, 93 A.D.3d 1072, ___, 941 N.Y.S.2d 302, 306-07 (3d Dep't 2012). See generally People v. Maharaj, 89 N.Y.2d 997, 999, 657 N.Y.S.2d 392, 393 (1997) (In DWI case involving bench trial, "[d]efendant was entitled to the court's consideration of the lesser included offense under the common-law count as he requested, and the court's misapprehension [of the applicable law] and failure to do so constitutes reversible error"); People v. Yost, 50 A.D.2d 577, ___, 374 N.Y.S.2d 704, 707 (2d Dep't 1975) ("There was also error in refusing defendant's request to charge the lesser included offense of operating a vehicle while impaired"); People v. Weinert, 178 Misc. 2d 675, ___, 683 N.Y.S.2d 690, 691 (App. Term, 2d Dep't 1998) (trial court's failure to include lesser included offense of DWAI on verdict sheet provided to jury constituted reversible error).

If the jury is unable to agree on a verdict with regard to the greater offense (*i.e.*, DWI), and asks the Court if it can proceed to consider the lesser included offense (*i.e.*, DWAI), the proper response from the Court is to instruct the jury "to consider the lesser included offense only upon reaching a unanimous verdict

of not guilty of the greater." People v. Boettcher, 69 N.Y.2d 174, 183, 513 N.Y.S.2d 83, 87 (1987).

§ 11:40 Misdemeanor DWAI as a lesser included offense of DWI

A defendant who is charged with DWAI after having been convicted of 2 or more violations of any subdivision of VTL § 1192 within the preceding 10 years can be charged with *misdemeanor* DWAI. See VTL § 1193(1)(a). Misdemeanor DWAI is not a lesser included offense of misdemeanor DWI. See People v. Harris, 23 Misc. 3d 250, ___, 870 N.Y.S.2d 859, 865 (Monroe Co. Ct. 2008); People v. Jamison, 170 Misc. 2d 974, ___, 652 N.Y.S.2d 495, 496 (Rochester City Ct. 1996).

On the other hand, misdemeanor DWAI is a lesser included offense of class D felony DWI, which also requires 2 prior VTL § 1192 convictions within the preceding 10 years. See VTL § 1193(1)(c)(ii).

§ 11:41 Reckless driving as a lesser included offense of DWI

Reckless driving, in violation of VTL § 1212, is not a lesser included offense of DWI. See People v. Crandall, 39 A.D.3d 1077, 832 N.Y.S.2d 828 (3d Dep't 2007); People v. Darling, 50 A.D.2d 1038, ___, 377 N.Y.S.2d 718, 721 (3d Dep't 1975). See also People v. Starowicz, 207 A.D.2d 994, ___, 617 N.Y.S.2d 100, 101 (4th Dep't 1994) ("One can drive recklessly without being intoxicated and, as the jury apparently found, one can drive while intoxicated without being reckless"); People v. Byrne, 65 Misc. 2d 174, ___, 317 N.Y.S.2d 242, 243 (App. Term, 2d Dep't 1970) (per curiam).

§ 11:42 Speeding as a lesser included offense of DWI

In Matter of Blumberg v. Lennon, 44 A.D.2d 769, 354 N.Y.S.2d 261 (4th Dep't 1974), a Village Justice allowed the defendant to plead guilty -- without the People's consent -- to speeding, in violation of VTL §

1180(a), in satisfaction of a charge of DWI, in violation of VTL § 1192(2). Aside from finding that this was clearly improper, the Appellate Division, Fourth Department, also made clear that speeding is not a lesser included offense of DWI. Id. at ___, 354 N.Y.S.2d at 263.

§ 11:43 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 (a.k.a. a "PBT"). See Chapter 7, *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 generally 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 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.

In People v. Jones, 118 Misc. 2d 687, ___, 461 N.Y.S.2d 962, 966 (Albany Co. Ct. 1983), the Court rejected the defendant's claim that modern infrared breath testing devices do not constitute "chemical tests" because, unlike the old Breathalyzers, no chemical reaction takes place.

§ 11:44 Breath test result constitutes suppressible evidence

By its terms, CPL § 710.20(1) only authorizes the suppression of "tangible property obtained by means of an unlawful search and seizure." Prosecutor's occasionally seize upon this language and claim that a DWI defendant's breath test result is not suppressible, *even if it was illegally obtained*, because such evidence does not constitute "tangible property."

However, the United States Supreme Court has made clear both (a) that "*all* evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court," Mapp v. Ohio, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691 (1961) (emphasis added), and (b) that obtaining a breath sample from a DWI suspect for alcohol analysis constitutes a "search" within the meaning of the 4th Amendment. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616-17, 109 S.Ct. 1402, 1413 (1989) ("Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or "deep lung" breath for chemical analysis, implicates similar concerns about bodily integrity and, like the blood-alcohol test we considered in Schmerber, should also be deemed a search") (citation omitted). See also Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248 (1979); Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254 (1975); People v. Johnson, 134 Misc. 2d 474, ___, 511 N.Y.S.2d 773, 774-75 (N.Y. City Crim. Ct. 1987) ("the Court holds that a breathalyzer test result is evidence as contemplated by Mapp v. Ohio, (supra) and CPL Section 710.60. It is, in fact, significant evidence and may not be proferred [sic] if it is the result of an illegal search"); People v. Thomas, 164 Misc. 2d 721, ___, 626 N.Y.S.2d 405, 407-08 (N.Y. City Crim. Ct. 1995) ("The doctrine of the 'fruit of the poisonous tree' . . . is not limited to suppression of physical tangible evidence but applies as well to evidence which flows from the illegal seizure and search, such as verbal statements, identifications, tests performed upon the defendant, and testimony at trial as to matters observed during the unlawful intrusion").

In addition, in People v. Ayala, 89 N.Y.2d 874, 653 N.Y.S.2d 92 (1996), the Court of Appeals made clear that CPL § 710.20(5) is applicable to consented-to breath tests as well as to compulsory blood tests.

§ 11:45 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); Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966); People v. Smith, 18 N.Y.3d 544, 548, 942 N.Y.S.2d 426, 429 (2012); 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., Smith, 18 N.Y.3d at 548, 942 N.Y.S.2d at 429; 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, both of which appear 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.

§ 11:46 Breath test foundation -- Generally

Assuming that the breath test device in question is included on the Department of Health's list of accepted breath test instruments, see § 11:50, *infra*, a proper foundation for the admission of a breath test result at trial requires proof (a) that the device was properly calibrated and otherwise in proper working order, (b) that any chemicals used in conducting the test were of the proper kind and mixed in the proper proportions, and (c) that the test was properly administered. See, e.g., People v. Boscic, 15 N.Y.3d 494, 497, 912 N.Y.S.2d 556, 558 (2010); Matter of Constantine v. Leto, 157 A.D.2d 376, ___, 557 N.Y.S.2d 611, 613 (3d Dep't 1990), aff'd for the reasons stated in the opinion below, 77 N.Y.2d 975, 571 N.Y.S.2d 906 (1991); People v. Campbell, 73 N.Y.2d 481, 484, 541 N.Y.S.2d 756, 757 (1989); People v. Alvarez, 70 N.Y.2d 375, 380, 521 N.Y.S.2d 212, 214 (1987); People v. Freeland, 68 N.Y.2d 699, 700, 506 N.Y.S.2d 306, 307 (1986); People v. Mertz, 68 N.Y.2d 136, 148, 506 N.Y.S.2d 290, 296-97 (1986); People v. Gower, 42 N.Y.2d 117, 121-22, 397 N.Y.S.2d 368, 370-71 (1977); People v. Todd, 38 N.Y.2d 755, 381 N.Y.S.2d 50 (1975); People v. Robinson, 53 A.D.3d 63, ___, 860 N.Y.S.2d 159, 165 (2d Dep't 2008); People v. Hampe, 181 A.D.2d 238, ___ n.1, 585 N.Y.S.2d 861, 862 n.1 (3d Dep't 1992); People v. Donaldson, 36 A.D.2d 37, 319 N.Y.S.2d 172 (4th Dep't 1971); People v. Meikrantz, 77 Misc. 2d 892, 351 N.Y.S.2d 549 (Broome Co. Ct. 1974).

This topic is covered at length in Chapter 42, *infra*.

§ 11:47 Timeliness of instrument calibration

In People v. Todd, 79 Misc. 2d 630, ___, 360 N.Y.S.2d 754, 759 (Delaware Co. Ct. 1974), the breath test machine used to test the defendant's breath "had not been calibrated for more than six months." County Court found that:

> By analogy in speeding cases, there is a requirement that speedometers of police vehicles be calibrated at least once every six months and it would appear that the same standard should apply to the breathalyzer machine and any similar type of evidence which is used in a criminal prosecution and may deprive a citizen of his right to operate a motor vehicle in this state.

Id. at ___, 360 N.Y.S.2d at 759. On appeal, the Court of Appeals held that "[t]he People failed to establish that the breathalyzer apparatus had been timely calibrated; hence, the results of the breath test were inadmissible. It was incumbent upon the District Attorney to show that the machine was in proper working order." People v. Todd, 38 N.Y.2d 755, 756, 381 N.Y.S.2d 50, 50 (1975).

Based upon the above, it had been generally accepted that Todd created a "six-month rule" pursuant to which a breath test result obtained from a machine that had not been calibrated for more than six months is inadmissible. In this regard, in People v. Mickle, 187 Misc. 2d 718, ___, 724 N.Y.S.2d 570, 573 (Canaan Just. Ct. 2001), the Court stated:

> [M]any courts view People v. Todd as a clear and controlling authority for support of the proposition of a "six-month rule." This court agrees and finds it to be dispositive here. The rule may be modified at some point by a higher court; however, this court sees no lower court rulings that have

> been confirmed or overruled by the Court of Appeals. In the absence of such pronouncement, six months is the rule of Todd.

(Citation omitted).

The pronouncement that the Mickle Court was seeking has come. See People v. Boscic, 15 N.Y.3d 494, 912 N.Y.S.2d 556 (2010). In Boscic, the Court of Appeals held as follows:

> In this case, we consider whether our decision in People v. Todd adopted a standard requiring that breath-alcohol detection devices must be calibrated at least every six months in order for the test results to be admissible at trial. We hold that there is no per se, six-month rule and that the People must instead lay a foundation demonstrating that the particular device used was in proper working order when the test was administered.

Id. at 496, 912 N.Y.S.2d at 557 (citation omitted). In so holding, the Court reasoned as follows:

> Defendant claims that People v. Todd established a six-month calibration requirement . . . . Although Todd is susceptible to such an interpretation, we do not read it in such a rigid manner. * * *
>
> Todd did not explicitly articulate a six-month standard or allude to a specific calibration time frame.
>
> We have not relied on a six-month, bright-line rule in subsequent cases that dealt with the foundation requirements for breath-alcohol evidence. Rather than applying a

specific temporal limitation, our post-Todd decisions have repeatedly emphasized that the applicable principle is whether the detection instrument was in "proper working order" at the time a test was administered. The Third and Fourth Departments have interpreted our precedent similarly and rejected the notion that it is impossible for a breath-alcohol device to function properly simply because it has not been calibrated for six months. We concur with that view and therefore hold that such evidence is admissible if the People demonstrate that the machine was in proper working order at the time it issued the test results in question.

Todd was decided almost 35 years ago and in the ensuing decades, scientific knowledge has advanced dramatically, leading to significant technological changes in breath-alcohol detection devices. The scientific methods incorporated in modern-day breath testing instruments are substantially different from the earlier generations of these devices. . . . More recent technology relies on infrared absorption spectrometry. This technology -- which is used in the BAC DataMaster -- calculates blood-alcohol concentration by passing infrared light through a chamber holding the breath sample to gauge the absorption rate of "infrared radiation at specific wavelengths." Given the technological advances that have occurred and will continue to evolve, paired with the proliferation of available breath-alcohol detection devices approved for use by the New

> York State Department of Health (DOH) (see 10 NYCRR 59.4), we do not believe that a court-imposed calibration timing rule for all current technologies would be helpful in achieving the primary objective, which is to provide the factfinder a basis to determine whether the particular instrument used produced reliable results in a specific instance. Even if we had articulated a bright-line calibration rule more than three decades ago, the changes in scientific testing methods would have provided reason to revisit it.
>
> It further bears noting that both parties to this litigation recognize that DOH has been charged by the Legislature to evaluate and approve specific models of breath-alcohol testing machines (see Vehicle and Traffic Law § 1194[4][c]). In its regulatory capacity, DOH has determined that such instruments must be calibrated "at a frequency as recommended by the device manufacturer" *but not less than once a year*. The promulgation of these regulations will . . . provide courts with information regarding recommended calibration intervals, *not to exceed one year*, when assessing the adequacy of foundation requirements for the admissibility of breath-alcohol test results.

Id. at 497-500, 912 N.Y.S.2d at 558-59 (emphases added) (citations and footnote omitted).

In light of the last portion of this quote from Boscic, it can now be persuasively argued that there exists a "one-year rule" for breath test instrument calibration.

The Boscic Court also noted that:

> Our conclusion does not mean that appropriate and adequate calibration procedures can be disregarded by law enforcement. Rather, the admissibility of breath-alcohol analysis results remains premised on the People's ability to demonstrate, among other requirements, that the device was in "proper working order" when it was used to test an accused. And nothing prevents an accused from seeking to introduce relevant evidence that may affect other foundational issues or the weight that should be given to results generated by a particular device, as defendant attempted during his trial.

Id. at 500, 912 N.Y.S.2d at 560 (citation omitted).

§ 11:48 Admissibility of calibration records

In People v. Mertz, 68 N.Y.2d 136, 147-48, 506 N.Y.S.2d 290, 296 (1986), the Court of Appeals held that:

> Admission of the breathalyzer logs over objection that it had not been shown that the entries were made at the time of the acts recorded in them or within a reasonable time thereafter was also error. CPLR 4518(a) expressly requires such foundation evidence. * * *
>
> [In addition,] admissibility under [CPLR § 4518(c)] is governed by the same standards as the general business record exception in subdivision (a). Thus, a certificate made under CPLR 4518(c) which does not set forth that the entries in the certified record

> were made at the time of the events they record or within a reasonable time thereafter is not admissible under that subdivision. * * *
>
> While the scientific reliability of breathalyzers in general is no longer open to question, there must still be either proper foundation testimony under CPLR 4518(a) or a proper CPLR 4518(c) certificate to establish that the particular instrument used to test a defendant's BAC and the ampoules used with it had been tested within a reasonable period in relation to defendant's test and found to be properly calibrated and in working order.

(Citations omitted). See generally People v. Freeland, 68 N.Y.2d 699, 506 N.Y.S.2d 306 (1986); People v. Gower, 42 N.Y.2d 117, 121, 397 N.Y.S.2d 368, 370 (1977) ("It would seem that the requirements of CPLR 4518 could very easily be met and thus its benefits be realized by the prosecution").

§ 11:49 The arresting officer can also be the breath test operator (*i.e.*, no "witness" to the test is required)

In People v. Evers, 68 N.Y.2d 658, 659, 505 N.Y.S.2d 68, 69 (1986), the Court of Appeals held that:

> Vehicle and Traffic Law § 1194(1) [currently VTL § 1194(2)(a)], which requires chemical testing of a motor vehicle operator's breath, blood, urine or saliva to be administered "at the direction of" a police officer, does not preclude the police officer who determines that testing is warranted from administering the test as well. Where the test is given by an officer trained to administer it

and no unusual circumstances have been shown, corroboration of the results is not required.

§ 11:50 Necessity of expert witness testimony as part of chemical test foundation

"In criminal matters the scientific reliability and accuracy of a machine measuring blood alcohol content for forensic purposes must be established before such test results may be admitted in evidence." People v. Campbell, 73 N.Y.2d 481, 485, 541 N.Y.S.2d 756, 758 (1989). With respect to breath testing, the inclusion of a particular testing device on the Department of Health's list of accepted breath test instruments, see 10 NYCRR § 59.4, satisfies this requirement. See, e.g., People v. Robinson, 53 A.D.3d 63, ___, 860 N.Y.S.2d 159, 165 (2d Dep't 2008) ("the Intoxilyzer, manufactured by CMI, Inc., appears on the list of approved breath-testing instruments compiled by the New York State Department of Health, and the machine is thus presumed reliable"); People v. Hampe, 181 A.D.2d 238, ___, 585 N.Y.S.2d 861, 862-63 (3d Dep't 1992) ("the general acceptance of the reliability and accuracy of the test results of the BAC Verifier, sufficient to dispense with the foundational evidence thereof through expert testimony, was established by reason of the specific inclusion of the BAC Verifier in the list of breath-testing instruments approved by DOH in regulations promulgated pursuant to Vehicle and Traffic Law § 1194(4)(c)").

On the other hand, since there is no corresponding list of approved blood test instruments, the results of such tests are inadmissible absent expert witness testimony. See Campbell, *supra*. See also People v. Dean, 74 N.Y.2d 643, 644, 542 N.Y.S.2d 512, 512 (1989) ("We agree with defendant, for the reasons stated in People v. Campbell, 73 N.Y.2d 481, 541 N.Y.S.2d 756, 539 N.E.2d 584 [decided herewith], that County Court properly reversed defendant's conviction for violating Vehicle and Traffic Law § 1192(3)").

§ 11:51 Significance of failure to follow police department's chemical test rules and regulations

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

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

(Emphasis added).

In response to this statute, many police departments have enacted rules and regulations pertaining to chemical testing. This raises the following issues: (1) is proof of compliance with such rules and regulations required; and (2) if not, what is the significance of a failure to comply with the applicable police department rules and regulations?

The Court of Appeals resolved the first issue in People v. Monahan, 25 N.Y.2d 378, 306 N.Y.S.2d 453 (1969). In Monahan, the defendant was convicted of violating VTL § 1192(2). On appeal, County Court

reversed on the ground that "the People had failed to prove by competent evidence the content of, and police compliance with[,] the police 'rules and regulations'" pursuant to VTL § 1194(1) (currently VTL § 1194(2)(a)(2)). Id. at 380, 306 N.Y.S.2d at 453-54. The Court of Appeals reversed, reasoning as follows:

> We have concluded that the evidence was not necessary to the People's case and, in consequence, that the reversal was in error. The intent of the statute seems to be twofold, first, to provide that the police officer, and not the accused, shall determine which of the several permitted forms of test shall be employed, and, second, to assure that the accused, whose implied consent, although revocable, is under the compulsion of the statute, will receive fair treatment in the selection and administering of the testing procedure, this pursuant to rules and regulations and not according to a police officer's *ad hoc* determination in the particular case. It follows that proof of the existent regulations is unnecessary in cases such as this, in which there is presented no substantial question with respect to the validity of the consent or the propriety of the particular form of test selected to be given. The provision for rules and regulations does not bear upon the substantive results of the test, for their reliability is determinable in accordance with medical and scientific standards generally and not according to regulations promulgated by one "police force" or another.

Id. at 380, 306 N.Y.S.2d at 454.

The Monahan Court further stated that:

> In dealing with medical evidence or scientific proof generally, a foundation does, of course, have to be laid. The blood tested must be identified as that taken from defendant within the prescribed period and it must be shown that the tests were properly and accurately made, pursuant to proper and accepted scientific and technological standards. If, as here, the taking, handling and testing of the blood are items unassailably proven as to reliability, it would then appear irrelevant what the departmental rules contained or whether they were complied with. It could not well be argued that substandard regulations would qualify the report of a scientifically inadequate test or exclude proof of a test meeting otherwise recognized standards.

Id. at 381, 306 N.Y.S.2d at 454-55. See also People v. Fogerty, 18 N.Y.2d 664, 666, 273 N.Y.S.2d 343, 344 (1966) ("The failure to file, in a public office, rules governing the [taking of blood] tests does not affect the admissibility in evidence of the results of the tests if found by the court to be intrinsically accurate and reliable").

* * * * * * * * * *

With regard to the second issue, in People v. Williams, 62 N.Y.2d 765, 767, 477 N.Y.S.2d 315, 316 (1984), the Court of Appeals held that "it was error on the part of the trial court . . . to instruct the jury in effect that they could ignore the failure of the police to have administered the breathalyzer test in accordance with the rules and regulations of the Tioga County Sheriff's Department (Vehicle and Traffic Law, § 1194)."

In sum, Monahan makes clear that the failure of the police to follow the applicable police department rules and regulations does not affect the admissibility of the defendant's chemical test result, but Williams makes clear that the defense can argue that an officer's failure to follow his or her department's rules and regulations affects the weight to be afforded to such result.

Notably, in Matter of Constantine v. Leto, 157 A.D.2d 376, ___, 557 N.Y.S.2d 611, 613 (3d Dep't 1990), aff'd for the reasons stated in the opinion below, 77 N.Y.2d 975, 571 N.Y.S.2d 906 (1991), the Court, citing Williams, made clear that a police agency's chemical test rules and regulations are discoverable. Cf. Matter of Dzialak v. Hults, 19 N.Y.2d 805, 806, 279 N.Y.S.2d 964, 964 (1967) (rules and regulations not discoverable for purposes of DMV chemical test refusal hearing).

§ 11:52 Preservation of sample of defendant's breath for independent testing is not required

Both the United States Supreme Court and the New York State Court of Appeals have expressly held that, where a breath alcohol test is utilized, preservation of a sample of the defendant's breath for independent testing is *not* required under either the Federal or State Constitutions. See, e.g., California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528 (1984); People v. Alvarez, 70 N.Y.2d 375, 381, 521 N.Y.S.2d 212, 215 (1987) ("as a matter of State constitutional law the police are not required to obtain and preserve a second breath sample for later use by the accused"). See also Chapter 34, *infra*.

§ 11:53 Chain of custody of blood sample

In People v. Malone, 14 N.Y.2d 8, 247 N.Y.S.2d 641 (1964), the chain of custody of the defendant's blood sample was at issue on appeal. The proof at trial was as follows:

> The doctor who took the blood sample testified that he asked the nurse to furnish him with a nonalcoholic solution with which to sterilize defendant's arm. Although he could not swear that she did so, he assumed that she did since he was not conscious of an alcoholic odor when the solution was used by him. The sample was then placed in a vial, sealed and placed in a container for mailing. A State Trooper took the container home with him when he went off duty, locking it in a strongbox to which he alone had a key. The next day, the sample was mailed to the State Police Laboratory in Albany by certified mail. At the laboratory, the sample was tested by a college graduate, a major in chemistry with two years' graduate work in biochemistry, employed by the State as a chemist for some ten years.

Id. at 10, 247 N.Y.S.2d at 642-43.

Under these circumstances, the Court of Appeals held that:

> We think that, since a proper chain of identification linking the defendant with the unadulterated fluid which was examined by a qualified person was established, the results of the blood test were competent evidence and thereby properly admitted into evidence by the trial court. * * *
>
> Since there was ample proof that the liquid tested at the laboratory was the same as that taken from the arm of the defendant, it was not necessary to conduct an additional test to ascertain whether the sample was blood

> as suggested by the County Court. Moreover the doctor's testimony was sufficiently positive to allow the jury to find that a nonalcoholic preparation was used. The State Trooper's testimony indicates that the specimen was not accessible to persons not called as witnesses, hence there was no possibility that it had been tampered with.

Id. at 10, 11, 247 N.Y.S.2d at 642, 643.

By contrast, in Amaro v. City of New York, 40 N.Y.2d 30, 35, 386 N.Y.S.2d 19, 22 (1976), the Court of Appeals held that there was insufficient proof of the chain of custody of a blood sample under the following circumstances:

> Here the doctor who drew the sample gave it to a fire department chauffeur whose name he could not recall and who was not produced at trial. Moreover, the sample was given to the chauffeur on Saturday evening and not delivered until Monday morning, "at the earliest", leaving over 36 hours of custody completely unaccounted for. No testimony was adduced to indicate who received the sample at the laboratory, its condition on receipt, the size of the vial containing the specimen, whether it was refrigerated during the long weekend, how the vial was labeled or identified, or the quantity or condition of its contents upon arrival. Hence, there can be no reasonable assurance of the unchanged condition of the blood sample. Nonetheless, it is argued that there is no indication that the sample was tampered with while it was in the chauffeur's possession and that it ought to be admitted for that reason.

> This claim, of course, begs the question for the driver was never produced and could not be examined regarding his care and custody of the sample.

§ 11:54 There is no constitutional right to refuse to submit to a chemical test

"[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"); id. at 109, 412 N.Y.S.2d at 850 ("defendant had no constitutional privilege or statutory right to refuse to take the test; hence comment on his refusal represents no infringement of privilege or right"); People v. Shaw, 72 N.Y.2d 1032, 1033, 534 N.Y.S.2d 929, 930 (1988); People v. Haitz, 65 A.D.2d 172, ___, 411 N.Y.S.2d 57, 60 (4th Dep't 1978) ("The admission of defendant's refusal is not a penalty exacted for his exercise of a constitutional right, for he has no constitutional privilege to refuse to take the test"). 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) (citation omitted). See also Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966); Missouri v. McNeely, 133 S.Ct. 1552 (2013).

Test refusals are covered at length in Chapter 41, *infra*.

§ 11:55 Chemical tests and the 4th Amendment

Obtaining a blood sample from a DWI suspect for alcohol/drug analysis constitutes a "search and seizure" within the meaning of the 4th Amendment. See Missouri v. McNeely, 133 S.Ct. 1552, 1558 (2013); Schmerber v. California, 384 U.S. 757, 767, 86 S.Ct. 1826, 1834 (1966); People v. Kates, 53 N.Y.2d 591, 594-95, 444 N.Y.S.2d 446, 448 (1981). Similarly, obtaining a breath sample from a DWI suspect for alcohol analysis constitutes a 4th Amendment "search." See Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616-17, 109 S.Ct. 1402, 1413 (1989).

In addition, a lawful VTL § 1192 arrest is a prerequisite to a valid request that a DWI suspect submit to a chemical test. See, e.g., People v. Daniger, 227 A.D.2d 846, ___, 642 N.Y.S.2d 732, 733-34 (3d Dep't 1996) (probable cause to arrest defendant for DWI is predicate for request to submit to chemical test); 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"); Matter of June v. Tofany, 34 A.D.2d 732, ___, 311 N.Y.S.2d 782, 783 (4th Dep't 1970) ("a prerequisite to a valid request to submit to a chemical test for alcoholic content of the blood under . . . section 1194 of the Vehicle and Traffic Law is that there be a valid arrest"). 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").

§ 11:56 Miranda warnings need not precede request to submit to chemical test

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. 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. Kates, 53 N.Y.2d 591, 594, 444 N.Y.S.2d 446, 448 (1981) ("Taking a driver's blood for alcohol analysis does not call for testimonial compulsion prohibited by the Fifth Amendment"); 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).

§ 11:57 Miranda warnings need not precede most field sobriety tests

In Schmerber v. California, 384 U.S. 757, 761, 86 S.Ct. 1826, 1830 (1966), the Supreme Court held that the Fifth Amendment protects a defendant only from

being compelled to either testify against himself or herself "or otherwise provide the State with evidence of a testimonial or communicative nature." See also People v. Hager, 69 N.Y.2d 141, 142, 512 N.Y.S.2d 794, 795 (1987) ("Evidence is 'testimonial or communicative' when it reveals a person's subjective knowledge or thought processes").

In Pennsylvania v. Muniz, 496 U.S. 582, 110 S.Ct. 2638 (1990), the Court addressed the issue of "whether various incriminating utterances of a drunken-driving suspect, made while performing a series of sobriety tests, constitute testimonial responses to custodial interrogation for purposes of the Self-Incrimination Clause of the Fifth Amendment." 496 U.S. at 584, 110 S.Ct. at 2641. The defendant in Muniz was asked to perform various tests both at a roadside stop and later after he was arrested and transported back to the police station.

The Supreme Court held that Muniz's response to the question "Do you know what the date was of your sixth birthday?" was testimonial:

> When Officer Hosterman asked Muniz if he knew the date of his sixth birthday and Muniz, for whatever reason, could not remember or calculate that date, . . . Muniz was left with the choice of incriminating himself by admitting that he did not then know the date of his sixth birthday, or answering untruthfully by reporting a date that he did not then believe to be accurate (an incorrect guess would be incriminating as well as untruthful). The content of his truthful answer supported an inference that his mental faculties were impaired, because his assertion (he did not know the date of his sixth birthday) was different from the assertion (he knew the date was (correct date)) that the trier of fact might reasonably have expected a lucid

> person to provide. Hence, the incriminating inference of impaired mental faculties stemmed, not just from the fact that Muniz slurred his response, but also from a testimonial aspect of that response.

Id. at 598-99, 110 S.Ct. at 2649.

By contrast, the results of physical performance tests are not testimonial. As a result, they do not implicate the 5th Amendment, and thus need not be preceded by Miranda warnings. See, e.g., id. at 592, 110 S.Ct. at 2645 ("Under Schmerber and its progeny, . . . any slurring of speech and other evidence of lack of muscular coordination revealed by Muniz's responses to Officer Hosterman's direct questions constitute nontestimonial components of those responses"); 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 to allow the results of field sobriety tests into evidence"); id. at 705, 685 N.Y.S.2d at 908-09 ("Results of field sobriety tests such as the horizontal gaze nystagmus, walk and turn and one-leg stand are not deemed testimonial or communicative because they 'do not reveal a person's subjective knowledge or thought processes but, rather, exhibit a person's degree of physical coordination for observation by police officers.' Responses to such tests incriminate an intoxicated suspect 'not because the tests [reveal] defendant's thoughts, but because [defendant's] body's responses [differ] from those of a sober person.' Thus, the results of such tests may be introduced despite the failure of the police to administer Miranda warnings") (citations omitted); People v. Jacquin, 71 N.Y.2d 825, 826, 527 N.Y.S.2d 728, 729 (1988) ("Performance tests need not be preceded by Miranda warnings and, generally an audio/visual tape of such tests, including any colloquy between the test-giver and the defendant not constituting custodial interrogation, is admissible"); People v. Hager, 69 N.Y.2d 141, 142, 512 N.Y.S.2d 794, 795 (1987).

Regardless of whether the results of sobriety tests are testimonial or not, where such tests are performed in the "field" the defendant is generally not yet in custody -- which is a further reason why Miranda warnings would not be required. See, e.g., Pennsylvania v. Bruder, 488 U.S. 9, 10-11, 109 S.Ct. 205, 206-07 (1988); Berkemer v. McCarty, 468 U.S. 420, 440, 104 S.Ct. 3138, 3150 (1984) ("The . . . noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of Miranda"). See also People v. Bennett, 70 N.Y.2d 891, 893-94, 524 N.Y.S.2d 378, 380 (1987); People v. Hasenflue, 252 A.D.2d 829, ___, 675 N.Y.S.2d 464, 466 (3d Dep't 1998); People v. McGreal, 190 A.D.2d 869, ___, 593 N.Y.S.2d 868, 869 (2d Dep't 1993); People v. Hampe, 181 A.D.2d 238, ___, 585 N.Y.S.2d 861, 863 (3d Dep't 1992); People v. McAleavey, 159 A.D.2d 646, ___, 553 N.Y.S.2d 38, 38-39 (2d Dep't 1990); People v. Mathis, 136 A.D.2d 746, ___, 523 N.Y.S.2d 915, 916 (2d Dep't 1988); People v. Brown, 104 A.D.2d 696, ___, 480 N.Y.S.2d 578, 579 (3d Dep't 1984). Cf. People v. Norton, 135 A.D.2d 984, 522 N.Y.S.2d 958 (3d Dep't 1987); People v. Benson, 114 A.D.2d 506, ___, 494 N.Y.S.2d 727, 728 (2d Dep't 1985).

§ 11:58 Chemical tests 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).

The reason why the right to counsel is more limited in this regard than it is in other contexts is because, where chemical testing is concerned, the right to counsel comes from the Due Process Clause rather than from the 6th Amendment.

Nonetheless, in People v. Washington, 107 A.D.3d 4, ___, 964 N.Y.S.2d 176, 179 (2d Dep't 2013), the Appellate Division, Second Department, held that:

> This case calls upon us to address a matter of first impression involving the right to counsel under the New York Constitution (see N.Y. Const., art. I, § 6), where the defendant consented to a chemical breath test to determine her blood alcohol content (hereinafter BAC), but, prior to the commencement of the test, the police made no effort to inform the defendant that her attorney had appeared in the matter. For the reasons which follow, we hold that where, as here, the police are aware that an attorney has appeared in a case before the chemical breath test begins, they must make reasonable efforts to inform the motorist of counsel's appearance if such notification will not substantially interfere with the timely administration of the test. Since the People failed to establish that notifying the defendant of her attorney's appearance would, in fact, have interfered with the timely administration of the chemical breath test, we conclude that the Supreme Court properly granted that branch of her omnibus motion which was to suppress the results of that test.

In so holding, the Court reasoned as follows:

"New York has long viewed the right to counsel as a cherished and valuable protection that must be guarded with the utmost vigilance." "The indelible right to counsel arises from the provision of the State Constitution that guarantees due process of law, the right to effective assistance of counsel and the privilege against compulsory self-incrimination." The right to counsel attaches indelibly (1) upon the commencement of formal proceedings, or (2) when a suspect in custody requests to speak to an attorney, or when an attorney who is retained to represent the suspect enters the matter under investigation.

[O]nce the police have been apprised that a lawyer has undertaken to represent a defendant in custody in connection with criminal charges under investigation, the person so held may not validly waive the assistance of counsel except in the presence of the lawyer." * * *

The sui generis nature of this case requires us to examine the gap between Gursey and Garofolo. To that end, we are asked to consider whether, as the defendant contends, the New York Constitution must be interpreted so as to obligate the police to: inform a motorist in custody that an attorney has appeared in the matter on his or her behalf; inform a motorist that an attorney has requested that the motorist not be subjected to chemical testing; or make efforts to allow counsel to consult with a motorist prior to the commencement of such a chemical test. In addressing these contentions, this Court must balance

the defendant's State constitutional right to counsel against the time-sensitive need to conduct the chemical breath test. "Our right to counsel jurisprudence has continuously evolved with the ultimate goal of 'achieving a balance between the competing interests of society in the protection of cherished individual rights, on the one hand, and in effective law enforcement and investigation of crime, on the other.'"

It is well settled that when the police are aware that a suspect has counsel, the suspect's "right or access" to counsel cannot be deprived. The principles which underlie the indelible right to counsel -- due process of law, the right to effective assistance of counsel, and the privilege against compulsory self-incrimination -- demand that the State constitutional right to counsel be interpreted so as to protect the rights of the defendant. Thus, we hold that when the police are aware that an attorney has appeared in a case where a motorist has consented to a chemical breath test, the police are obligated to exercise reasonable efforts to inform the motorist of counsel's appearance if such notification will not substantially interfere with the timely administration of the test. While we decline the defendant's request to hold that the police must act as an intermediary for a motorist by relaying messages from an attorney to a client, safeguarding the right to counsel requires a reasonable effort to provide notification of counsel's appearance. Once a motorist is so

> notified, that individual is free to, among other things, request to speak with counsel, refuse a test, or retract a consent to submit to a test. Where there is no evidence that the police made any efforts to notify a motorist that counsel has appeared in the matter, we must presume that a motorist would have requested to speak with counsel and would have withdrawn her consent to submit to a chemical breath test.

Id. at ___, ___, 964 N.Y.S.2d 182-83, 185-86 (citations and footnote omitted).

§ 11:59 Defendant's right to additional chemical test

VTL § 1194(4)(b) (formerly VTL § 1194[8]) provides:

> (b) Right to additional test. The person tested shall be permitted to choose a physician to administer a chemical test in addition to the one administered at the direction of the police officer.

This right is statutory (*i.e.*, not constitutional) in nature. People v. Finnegan, 85 N.Y.2d 53, 59, 623 N.Y.S.2d 546, 549 (1995). See also People v. Alvarez, 70 N.Y.2d 375, 381, 521 N.Y.S.2d 212, 215 (1987).

In Finnegan, *supra*, the Court of Appeals held that:

> The simple, straightforward declaration of Vehicle and Traffic Law § 1194(4)(b) is that defendants are entitled to their own additional chemical test. The statute is starkly silent as to any implementary duties imposed on the law enforcement personnel as to notice or to direct assistance in obtaining an independent

> chemical test. . . . The statutory right is the defendant's and so is the responsibility to take advantage of it.
>
> We hold, therefore, that law enforcement personnel are not required to arrange for an independent test or to transport defendant to a place or person where the test may be performed. Of course, the police should not impede arrested individuals from exerting or accomplishing their statutory prerogative. The authorities should even assist persons in custody with appropriate advice and communication means, e.g., a telephone call opportunity. On the other hand, we have settled the general question that the police have no affirmative duty to gather or help gather evidence for an accused.

85 N.Y.2d at 58, 623 N.Y.S.2d at 548-49 (citations omitted).

This topic is covered at length in Chapter 30, *infra*.

§ 11:60 Unconscious defendant need not be formally arrested for purposes of implied consent law

New York's implied consent law provides, in pertinent part, that:

> 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] of this article and within two hours *after such person has been placed under arrest* for any such violation.

VTL § 1194(2)(a)(1) (emphasis added).

In People v. Goodell, 79 N.Y.2d 869, 581 N.Y.S.2d 157 (1992), the defendant was unconscious at the time the police arrived at the accident scene, and remained so at all relevant times. He claimed that his blood test result should have been suppressed on the ground that VTL § 1194(2)(a)(1) requires an actual, formal arrest -- yet he was never formally arrested. In rejecting this claim, the Court of Appeals held as follows:

> [A] formal arrest would have been an empty gesture in defendant's case, since defendant was unconscious when the police first arrived at the scene of the accident and he remained comatose for approximately two more weeks. Under these circumstances, we decline to hold that the police officer's failure formally to announce defendant's arrest was alone sufficient to vitiate his Vehicle and Traffic Law § 1194(2)(a)(1) authority to direct the administration of a chemical blood alcohol test (cf., People v. Almond, 151 A.D.2d 820, 542 N.Y.S.2d 59 [blood test taken pursuant to Vehicle and Traffic Law § 1194(1)

(now § 1194[2][a][1]) suppressed where police found defendant in a conscious state but, without formally placing him under arrest, waited until subsequent medical treatment rendered him unconscious before administering test]).

Id. at 871, 581 N.Y.S.2d at 158.

§ 11:61 "Two-hour rule" inapplicable where defendant expressly and voluntarily consents to test

Virtually everyone involved in the field of DWI law is familiar with the so-called two-hour rule, which "provides that a chemical test must generally be 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, whichever is later." People v. Morris, 8 Misc. 3d 360, ___, 793 N.Y.S.2d 754, 758 (N.Y. City Crim. Ct. 2005). See also VTL § 1194(2)(a).

Less well known is the fact that, in People v. Atkins, 85 N.Y.2d 1007, 1009, 630 N.Y.S.2d 965, 966 (1995), the Court of Appeals all but eliminated the rule, holding that "the two-hour limitation contained in Vehicle and Traffic Law § 1194(2)(a) has no application here where, as found by Appellate Term, defendant expressly and voluntarily consented to administration of the blood test." See also People v. Ward, 307 N.Y. 73, 76 (1954). In so holding, the Atkins Court stated both:

(a) That the two-hour rule does not apply to "the additional test which the driver must be permitted to have administered by a physician of his or her choosing under [VTL] section 1194(4)(b)." 85 N.Y.2d at 1009, 630 N.Y.S.2d at 966. See also People v. Smith, 18 N.Y.3d 544, 548 n.1, 942 N.Y.S.2d 426, 428 n.1 (2012); People v. Finnegan, 85 N.Y.2d 53, 59, 623 N.Y.S.2d 546, 549 (1995); and

(b) That there is no two-hour "time limit for court-ordered chemical testing under [VTL] section 1194(3)." 85 N.Y.2d at 1009, 630 N.Y.S.2d at 966. See also People v. Smith, 18 N.Y.3d 544, 548 n.1, 942 N.Y.S.2d 426, 428 n.1 (2012); People v. McGrath, 135 A.D.2d 60, 524 N.Y.S.2d 214 (2d Dep't), aff'd for the reasons stated in the opinion below, 73 N.Y.2d 826, 537 N.Y.S.2d 480 (1988).

This topic is covered at length in Chapter 31, *infra*.

§ 11:62 Constitutionality of VTL §§ 1192(1), (2) and (3)

In People v. Cruz, 48 N.Y.2d 419, 422, 423 N.Y.S.2d 625, 626 (1979), the Court of Appeals addressed the issue of "whether subdivision 1 of section 1192 of the Vehicle and Traffic Law, which prohibits driving while the ability to operate a motor vehicle 'is impaired by the consumption of alcohol', and subdivision 3, which prohibits driving 'while * * * in an intoxicated condition', are unconstitutionally vague in a case where the driver has refused to submit to any scientific test for determining the amount of alcohol he has consumed." The lower courts in Cruz "held that the statutory terms, impaired and intoxicated, were too vague and indefinite to satisfy due process requirements when applied to cases where no chemical test results were available." Id. at 423, 423 N.Y.S.2d at 626.

The Court of Appeals reversed, holding that "subdivisions 1 and 3 of section 1192 of the Vehicle and Traffic Law are not unconstitutionally vague or indefinite when applied to a case where an analysis of the driver's blood alcohol content is unavailable." Id. at 428, 423 N.Y.S.2d at 630. See also People v. Stack, 140 A.D.2d 389, ___, 527 N.Y.S.2d 569, 570 (2d Dep't 1988).

VTL § 1192(2) has also been found to be constitutional. See, e.g., People v. Golley, 195

A.D.2d 713, 601 N.Y.S.2d 871 (3d Dep't 1993); People v. Mascolo, 175 A.D.2d 812, ___, 572 N.Y.S.2d 937, 938 (2d Dep't 1991); People v. Perez, 73 A.D.2d 677, 423 N.Y.S.2d 220 (2d Dep't 1979); People v. Lebron, 130 Misc. 2d 831, ___, 501 N.Y.S.2d 975, 976-77 (App. Term, 1st Dep't 1986); People v. Schmidt, 124 Misc. 2d 102, 478 N.Y.S.2d 482 (N.Y. City Crim. Ct. 1984).

§ 11:63 Constitutionality of VTL § 1192(4)

In People v. Rossi, 163 A.D.2d 660, ___, 558 N.Y.S.2d 698, 700-01 (3d Dep't 1990), the Appellate Division, Third Department, held that VTL § 1192(4) is constitutional. See also People v. Percz, 100 Misc. 2d 1018, 420 N.Y.S.2d 477 (Suffolk Co. Dist. Ct. 1979). See generally People v. Primiano, 16 Misc. 3d 1023, 843 N.Y.S.2d 799 (Sullivan Co. Ct. 2007) (addressing potential challenge to VTL § 1192(4-a)).

§ 11:64 Constitutionality of VTL § 1192(9)

VTL § 1192(9) (formerly VTL § 1196(1)) provides as follows:

> Conviction of a different charge. A driver may be convicted of a violation of subdivision one, two or three of this section, notwithstanding that the charge laid before the court alleged a violation of subdivision two or three of this section, and regardless of whether or not such conviction is based on a plea of guilty.

In People v. Farmer, 36 N.Y.2d 386, 390, 369 N.Y.S.2d 44, 45 (1979), the Court of Appeals held that this statute is constitutional. See generally People v. Clapper, 123 A.D.2d 484, ___, 506 N.Y.S.2d 494, 496 (3d Dep't 1986) ("The Legislature has specifically provided that a defendant may be convicted of violating subdivisions 1, 2 or 3 even if only charged with violating subdivisions 2 or 3 of Vehicle and Traffic Law § 1192"); People v. Crandall, 199 A.D.2d 867, ___, 606 N.Y.S.2d 357, 358 (3d Dep't 1993) (same); People v.

Ebner, 195 A.D.2d 1006, ___, 600 N.Y.S.2d 569, 570 (4th Dep't 1993) (same).

§ 11:65 Constitutionality of VTL § 1193(1)(c)

VTL § 1193(1)(c) (formerly VTL § 1192(5)), permits the charging of felony DWI where the defendant has been convicted of DWI one or more times within the previous 10 years. Such enhancement of a subsequent offense is constitutional. See, e.g., People v. Butler, 96 A.D.2d 140, 468 N.Y.S.2d 274 (4th Dep't 1983); People v. Maldonado, 173 Misc. 2d 612, ___, 661 N.Y.S.2d 937, 940-41 (Nassau Co. Sup. Ct. 1997). See generally Nichols v. United States, 511 U.S. 738, 747, 114 S.Ct. 1921, 1927 (1994) (enhancement statutes have repeatedly been upheld).

§ 11:66 Constitutionality of VTL § 1193(2)(b)(3)

VTL § 1193(2)(b)(3) addresses the length of the minimum driver's license revocation for repeat DWI offenders. In People v. Demperio, 86 N.Y.2d 549, 551, 634 N.Y.S.2d 672, 673 (1995) (per curiam), "[d]efendant argued, and both Town Court and County Court agreed, that Vehicle and Traffic Law § 1193(2)(b)(3) is unconstitutionally vague in that it does not inform violators that they must make a new application in order to have a revoked license reinstated." In reversing the lower courts, the Court of Appeals held as follows:

> The word "revoke" -- meaning to annul, void or cancel -- is commonly understood as having a core element of permanence. Moreover, any possible doubt as to the meaning of the word as used in Vehicle and Traffic Law § 1193(2)(b)(3) would be laid to rest by the immediately following paragraph (not cited in the opinion of either lower court):

> "(c) Reissuance of licenses; restrictions. (1) Except as otherwise provided in this paragraph, where a license is revoked pursuant to paragraph (b) of this subdivision, no new license shall be issued after the expiration of the minimum period specified in such paragraph, except in the discretion of the commissioner."
>
> This statute alone gave defendant reason to know that upon revocation of his license, a new license application was required.

Id. at 551-52, 634 N.Y.S.2d at 673 (footnote omitted).

In a footnote, the Court pointed out that DMV "sends the following written notices (form C-40) to persons whose drivers' licenses have been suspended or revoked because of alcohol-related offenses: 'If your license was revoked, you must apply to the Department of Motor Vehicles for a new license.'" Id. at 552 n.*, 634 N.Y.S.2d at 673 n.*.

§ 11:67 Constitutionality of VTL § 1194(2)(b)(3)

At arraignment in a chemical test 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).

In Matter of Ventura, 108 Misc. 2d 281, 437 N.Y.S.2d 538 (Monroe Co. Sup. Ct. 1981), the Court held that this procedure does not violate the Due Process

Clause. See generally Mackey v. Montrym, 443 U.S. 1, 99 S.Ct. 2612 (1979).

§ 11:68 Constitutionality of VTL § 1194(2)(c)

The provisions of VTL § 1194 pertaining to chemical testing and chemical test refusals were formerly contained in VTL § 71-a. In Matter of Schutt v. MacDuff, 205 Misc. 43, 127 N.Y.S.2d 116 (Orange Co. Sup. Ct. 1954), the Orange County Supreme Court found the chemical test refusal revocation portion of the statute to be unconstitutional "because of the failure to contain a provision limiting its application to a case where there has been a lawful arrest and in that there is no provision entitling the licensee to an ultimate hearing upon an adequate record before the final taking away of his license." Id. at ___, 127 N.Y.S.2d at 128. As a result of MacDuff, the statute was amended to require, *inter alia*, a lawful arrest and a meaningful Due Process hearing before a driver's license can be revoked for a chemical test refusal. See VTL § 1194(2)(c).

While the current procedure has never explicitly been found to be constitutional, the Court of Appeals' decision in Matter of Gray v. Adduci, 73 N.Y.2d 741, 536 N.Y.S.2d 40 (1988), makes clear that any challenge to the constitutionality of the statute would fail.

§ 11:69 Constitutionality of VTL § 1194(2)(f)

VTL § 1194(2)(f) (formerly VTL § 1194(4)) provides that:

> Evidence of a refusal to submit to [a] 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.

In People v. Thomas, 46 N.Y.2d 100, 103, 412 N.Y.S.2d 845, 846 (1978), the Court of Appeals held that this statute is constitutional, and that it "does not violate the defendant's privilege against self incrimination under either the Federal or the State Constitution." See also id. at 110, 412 N.Y.S.2d at 851 ("We conclude that the evidence of defendant's persistent refusal to take the test was properly admitted, that the jury was correctly charged that it could consider such evidence, and that [VTL § 1194(4)] is not violative of a defendant's rights under either [the] Federal or New York State Constitution").

§ 11:70 Constitutionality of implied consent law

New York's implied consent law provides, in pertinent part, that:

> 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] of this article 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).

In People v. Kates, 53 N.Y.2d 591, 594-96, 444 N.Y.S.2d 446, 448-49 (1981), the Court of Appeals held that this statute is constitutional. See generally People v. Thomas, 46 N.Y.2d 100, 110, 412 N.Y.S.2d 845, 851 (1978) ("the admissibility of refusal evidence may also be viewed as a permissible condition reasonably attached to the grant of permission to operate a motor vehicle on the highways of the State").

§ 11:71 Constitutionality of prompt suspension law

In Pringle v. Wolfe, 88 N.Y.2d 426, 646 N.Y.S.2d 82 (1996), the Court of Appeals declared VTL § 1193(2)(e)(7) to be constitutional. In so holding, the Court summed up the due process issue as follows:

> In sum, though the private interest affected by the prompt suspension law is substantial, the severity of the license suspension is mitigated by its temporary duration, the availability of a conditional license and hardship relief, and the significant protection of a presuspension judicial hearing, which militates heavily in favor of the statute's constitutionality. Further weighing against the driver's interest in maintaining his license are the slight risk of an erroneous deprivation and the overriding State interest in "the prompt removal of a safety hazard" from its streets. Based on the foregoing, we hold that the prompt suspension law affords the driver all the process that is constitutionally due.

Id. at 435, 646 N.Y.S.2d at 87-88 (citations omitted).

This topic is covered at length in Chapter 45, *infra*.

§ 11:72 Constitutionality of compulsory chemical tests

New York has two statutes which authorize a Court to order a compulsory chemical test prior to the filing of an accusatory instrument against the defendant. See VTL § 1194(3); CPL § 690.10. Both statutes have been found to be constitutional. See People v. Elysee, 12 N.Y.3d 100, 105, 876 N.Y.S.2d 677, 679-80 (2009) ("chemical tests can . . . be compelled by court order under Vehicle and Traffic Law § 1194(3) when, among other circumstances, 'a person other than the operator was killed or suffered serious physical injury . . .; and such person operated the vehicle in violation of any subdivision of section eleven hundred ninety-two of this article . . . and . . . has been placed under lawful arrest; and . . . has refused to submit to a chemical test . . . or is unable to give consent to such a test'") (internal quotation marks omitted); Matter of Abe A., 56 N.Y.2d 288, 291, 452 N.Y.S.2d 6, 7 (1982) ("we hold a court order to obtain a blood sample of a suspect may issue provided the People establish (1) probable cause to believe the suspect has committed the crime, (2) a 'clear indication' that relevant material evidence will be found, and (3) the method used to secure it is safe and reliable. In addition, the issuing court must weigh the seriousness of the crime, the importance of the evidence to the investigation and the unavailability of less intrusive means of obtaining it, on the one hand, against concern for the suspect's constitutional right to be free from bodily intrusion on the other. Only if this stringent standard is met, as we conclude it was here, may the intrusion be sustained"). See also § 11:82, *infra*.

In this regard, the Court of Appeals has made clear that:

> 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) (citation omitted). See also Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966); Missouri v. McNeely, 133 S.Ct. 1552 (2013).

This topic is covered at length in Chapter 40, *infra*.

§ 11:73 Constitutionality of pretext stops to hunt for drunk drivers

Where a police officer has probable cause to believe that a motorist has committed a traffic infraction, it is permissible for the officer to use such infraction as a pretext to stop the motorist in order to ascertain whether he or she is intoxicated. See, e.g., People v. Wright, 98 N.Y.2d 657, 658-59, 746 N.Y.S.2d 273, 273-74 (2002); People v. Robinson, 97 N.Y.2d 341, 349, 741 N.Y.S.2d 147, 151 (2001) ("We hold that where a police officer has probable cause to believe that the driver of an automobile has committed a traffic violation, a stop does not violate article I, § 12 of the New York State Constitution. In making that determination of probable cause, neither the primary motivation of the officer nor a determination of what a reasonable traffic officer would have done under the circumstances is relevant"). See generally People v. Pealer, 20 N.Y.3d 447, 457 n.2, 962 N.Y.S.2d 592, 598 n.2 (2013).

On the other hand, the Robinson Court made clear that:

> To be sure, the story does not end when the police stop a vehicle for a traffic infraction. Our holding in this case addresses only the initial police action upon which the vehicular stop was predicated. The scope, duration and intensity of the seizure, as well as any search made by the police subsequent to that stop, remain subject to the strictures of article I, § 12, and judicial review.

97 N.Y.2d at 353, 741 N.Y.S.2d at 154.

§ 11:74 Constitutionality of DWI checkpoints

A properly administered DWI checkpoint is constitutional. See, e.g., Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 110 S.Ct. 2481 (1990); People v. Scott, 63 N.Y.2d 518, 483 N.Y.S.2d 649 (1984). In Scott, the Court of Appeals held that:

> A roadblock established pursuant to a written directive of the County Sheriff for the purpose of detecting and deterring driving while intoxicated or while impaired, and as to which operating personnel are prohibited from administering sobriety tests unless they observe listed criteria, indicative of intoxication, which give substantial cause to believe that the operator is intoxicated, is constitutionally permissible, notwithstanding that the location of the roadblock is moved several times during the three- to four-hour period of operation, and notwithstanding that legislative initiatives have also played a part in reducing the incidence of driving while intoxicated in recent years.

Id. at 522, 483 N.Y.S.2d at 650.

In so holding, the Scott Court made clear that, to be constitutional, a sobriety checkpoint (1) may not "intrude to an impermissible degree upon the privacy of motorists approaching the checkpoint," (2) must be "maintained in accordance with a uniform procedure which afford[s] little discretion to operating personnel," and (3) must utilize "adequate precautions as to safety, lighting and fair warning of the existence of the checkpoint." Id. at 526, 483 N.Y.S.2d at 652.

This topic is covered at length in Chapter 5, *supra*.

§ 11:75 Constitutionality of vehicle seizure/forfeiture laws

As long as sufficient Due Process protections are in place, the seizure and subsequent forfeiture of a drunk driver's vehicle is permissible. See, e.g., County of Nassau v. Canavan, 1 N.Y.3d 134, 138, 770 N.Y.S.2d 277, 281 (2003) ("when implemented pursuant to a carefully drafted statute, civil forfeiture of automobiles can be an extremely effective tool in the battle against drunk driving. . . . Driving while intoxicated poses a grave risk of injury or death to innocent motorists and pedestrians. Nevertheless, . . . we conclude that the ordinance adopted by Nassau County did not satisfy constitutional requirements").

Where a vehicle is seized pending a forfeiture proceeding, the defendant must be provided with a prompt, meaningful Due Process hearing. Id. at 144-45, 770 N.Y.S.2d at 286 ("due process requires that a prompt post-seizure retention hearing before a neutral magistrate be afforded, with adequate notice, to all defendants whose cars are seized and held for possible forfeiture. At such a hearing, the County must establish that probable cause existed for the defendant's initial warrantless arrest, that it is likely to succeed on the merits of the forfeiture action, and that retention is necessary to preserve the

vehicle from destruction or sale during the pendency of the proceeding"). See also Krimstock v. Kelly, 306 F.3d 40 (2d Cir. 2002); Property Clerk of Police Dep't of City of New York v. Harris, 9 N.Y.3d 237, 239-40, 848 N.Y.S.2d 588, 590 (2007) (pursuant to Krimstock and Canavan, "due process requires that an innocent co-owner be given an opportunity to demonstrate that his or her present possessory interest in a seized vehicle outweighs the City's interest in continuing impoundment") (footnote omitted).

Notably, where the People choose to impound a defendant's vehicle during the pendency of the case, the defendant is not responsible for storage fees. See, e.g., Catti v. W.E. Bryant's, Inc., 107 A.D.2d 865, ___, 484 N.Y.S.2d 307, 308 (3d Dep't 1985) ("Although the District Attorney has the power to impound plaintiff's tractor pending investigation to preserve possible evidence, such authority does not impose upon plaintiff the cost of said impoundment and investigatory work. Indeed, defendant has presented no authority to support such an argument") (citation omitted); Kane v. Caprara, 182 Misc. 2d 572, 699 N.Y.S.2d 275 (Schenectady City Ct. 1999).

§ 11:76 Court cannot impose "scarlet letter" penalty

In People v. Letterlough, the sentencing Court imposed a condition of probation that, if the defendant regained his driving privileges, he would have to affix a fluorescent sign stating "CONVICTED DWI" to the license plates of any vehicle that he operated. The Court of Appeals reversed, holding that "the condition is not reasonably related to defendant's rehabilitation, and, more generally, because, in the absence of more specific legislation, such a condition is outside the authority of the court to impose." 86 N.Y.2d 259, 261, 631 N.Y.S.2d 105, 106 (1995). In addition, the Court noted that "[t]he distraction occasioned by special judicially ordered 'scarlet letter' plates and the reactions of other motorists upon seeing them also poses a potential safety threat." Id. at 268, 631 N.Y.S.2d at 110. See also Bursac v.

Suozzi, 22 Misc. 3d 328, 868 N.Y.S.2d 470 (Nassau Co. Sup. Ct. 2008) (Court granted DWI defendant's petition seeking a permanent injunction enjoining and restraining County Executive from posting petitioner's name, picture and identifying information on "Wall of Shame" Internet website and directing the removal of same).

Similarly, a condition of probation that the defendant must attend A.A. meetings, which are religious in nature, without offering a choice of other alcohol treatment providers has been held to violate the Establishment Clause of the First Amendment. See Warner v. Orange County Dep't of Probation, 115 F.3d 1068 (2d Cir. 1997).

§ 11:77 Conviction of both VTL §§ 1192(2) and 1192(3) does not violate Double Jeopardy

In People v. Carvalho, 174 A.D.2d 687, ___, 571 N.Y.S.2d 332, 333 (2d Dep't 1991), "[t]he defendant contend[ed] that the indictment charging him with violating Vehicle and Traffic Law §§ 1192(2) and 1192(3) violated the constitutional prohibition against double jeopardy." In rejecting this claim, the Appellate Division, Second Department, held that:

> It is clear that subdivisions 2 and 3 of Vehicle and Traffic Law § 1192 were intended to be separate crimes, neither mutually inclusive nor mutually exclusive. To suggest that the People should be compelled to elect between the two counts at any stage of the criminal proceedings would run counter to the intention of the Legislature which has determined that the social evil in question -- driving while intoxicated -- warrants separate offenses.

Id. at ___, 571 N.Y.S.2d at 333. See also People v. Rudd, 41 A.D.2d 875, ___, 343 N.Y.S.2d 17, 19 (3d Dep't 1973); People v. McDonough, 39 A.D.2d 188, ___, 333 N.Y.S.2d 128, 129 (3d Dep't 1972).

§ 11:78 Prosecution for DWI following chemical test refusal revocation by DMV does not violate Double Jeopardy

The prosecution of a defendant for a violation of VTL § 1192 following a chemical test refusal revocation arising out of the same incident 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).

§ 11:79 Prosecution for DWI following suspension pending prosecution does not violate Double Jeopardy

The prosecution of a defendant for DWI following the suspension of his or her driver's license pending prosecution does not violate the Double Jeopardy Clause. See People v. Haishun, 238 A.D.2d 521, 656 N.Y.S.2d 660 (2d 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); People v. Malone, 175 Misc. 2d 893, 673 N.Y.S.2d 809 (App. Term, 2d Dep't 1997); People v. Busby, 175 Misc. 2d 509, 670 N.Y.S.2d 960 (App. Term, 2d Dep't 1997); People v. Steele, 172 Misc. 2d 860, 661 N.Y.S.2d 908 (App. Term, 2d Dep't 1997); People v. Uzquaino, 172 Misc. 2d 388, 661 N.Y.S.2d 438 (App. Term, 2d Dep't 1997); People v. Conrad, 169 Misc. 2d 1066, 654 N.Y.S.2d 226 (App. Term, 2d Dep't 1996). See generally People v. Demetsenare, 243 A.D.2d 777, ___, 663 N.Y.S.2d 299, 303 (3d Dep't 1997) ("We reject defendant's contention that double jeopardy forecloses his conviction based on a prior suspension of his license pursuant to Vehicle and Traffic Law § 510(3) for the same events").

Courts have similarly rejected the argument that the prompt suspension law violates the Equal Protection

Clause. See Roach, 226 A.D.2d at ___, 649 N.Y.S.2d at 610; People v. Condarco, 166 Misc. 2d 470, 633 N.Y.S.2d 930 (N.Y. City Crim. Ct. 1995); People v. Boulton, 164 Misc. 2d 604, 625 N.Y.S.2d 428 (Troy City Ct. 1995).

§ 11:80 Double Jeopardy effect of dismissal for prosecutor's failure to give sufficient opening statement

In People v. Kurtz, 51 N.Y.2d 380, 434 N.Y.S.2d 200 (1980), the prosecutor gave a legally insufficient opening statement at trial, in violation of CPL § 260.30(3), which resulted in the dismissal of DWI and speeding charges against the defendant. The primary issue in the case was whether re-trial was barred by the Double Jeopardy Clause. The Court of Appeals held that re-trial was not barred, reasoning as follows:

> [T]he doctrine [of Double Jeopardy] distinguishes between trial orders terminating the trial in the defendant's favor prior to any determination of guilt or innocence and those orders which terminate the trial based on evidentiary insufficiency. Because a dismissal based on insufficient evidence is tantamount to an acquittal, reprosecution is precluded in the latter category of cases. Retrial of cases falling within the former category of dismissals, however, is permissible because "the defendant, by deliberately choosing to seek termination of the proceeding against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause."
>
> In the case before us, the trial court dismissed the action on defendant's motion solely because of the

> insufficiency of the prosecutor's opening statement. As mentioned earlier, this dismissal was not premised on any evidentiary determination that the People were not entitled to a conviction or that the prosecutor had acted in bad faith by deliberately delivering an incomplete opening in order to terminate the trial over defendant's objection. Rather, dismissal here was the result of the trial court's misconception of the requirements of CPL 260.30 (subd. 3) and occurred without any evaluation on the trial court's part as to the factual elements of the offenses with which defendant was charged. Inasmuch as this dismissal . . . in no sense resembles an acquittal of the defendant and indeed appears functionally indistinguishable from the declaration of a mistrial, retrial of defendant is prohibited neither by the double jeopardy clauses of the State and Federal Constitutions nor by the statutory double jeopardy provisions.

Id. at 386-87, 434 N.Y.S.2d at 204-05 (citations and footnote omitted).

Notably, the Kurtz Court disapproved of the manner in which the trial court handled the defendant's motion to dismiss for failure of the People to give a sufficient opening statement, and set forth guidelines as to how trial courts should address such motions in the future:

> In this case, . . . the only deficiency in the opening statement was that it did not adequately amplify the charges against defendant and the facts to be proven in support thereof. Moreover, before dismissing the

> information, the Trial Judge not only failed to inform the prosecutor of the nature of the defect in his opening, but denied him the opportunity to correct this deficiency before permitting the trial to go forward. As County Court concluded, such action was an abuse of discretion, contrary to law.
>
> The better practice concerning such motions directed at the adequacy of the prosecutor's opening statement would be that a motion should be made immediately after the prosecutor has completed his opening to the jury. The trial court should then inform the prosecutor of the nature of the defect, if any, and afford him an opportunity to rectify it. If the prosecutor is unable to do so, then the motion to dismiss the accusatory instrument must be granted. Under no circumstances should the court allow the trial to proceed without first ruling on the motion. . . . [I]t was the belated disposition of the motion which has created the difficulty in this case, a problem which should be avoided in all other cases.

Id. at 385-86, 434 N.Y.S.2d at 203-04 (citation omitted). See also People v. Baltes, 75 A.D.3d 656, ___, 904 N.Y.S.2d 554, 558 (3d Dep't 2010); Matter of Lacerva v. Dwyer, 177 A.D.2d 747, 575 N.Y.S.2d 984 (3d Dep't 1991).

§ 11:81 Imposition of punitive damages in civil case arising out of DWI-related accident does not violate Double Jeopardy

In Wittman v. Gilson, 70 N.Y.2d 970, 971-72, 525 N.Y.S.2d 795, 796 (1988):

> Plaintiff's daughter died from injuries suffered in a head-on collision between the car she was driving and a vehicle driven by defendant while intoxicated. Defendant was charged with criminally negligent homicide and pleaded guilty. Shortly thereafter, plaintiff, administratrix of her daughter's estate, commenced this action seeking compensatory damages for wrongful death and for conscious pain and suffering of her decedent. Punitive damages were also sought. The trial court directed a verdict as to civil liability and the jury returned a verdict in the amount of $2,853 for wrongful death, $4,500 for conscious pain and suffering, and $45,000 in punitive damages.
>
> On appeal, defendant argue[d] that punitive damages following a criminal conviction arising out of the same drunk driving incident should not be imposed as a matter of policy as implicated by the constitutional prohibition against double jeopardy.

The Court of Appeals disagreed, holding as follows:

> [W]hile punitive damages and criminal sanctions share a common purpose of punishing misconduct, there are also significant distinctions between the two. Unlike the sanction imposed on behalf of all the people of the State in a criminal case, punitive damages in a civil case context afford the injured party a personal monetary recovery over and above compensatory loss. The procedures and standards of proof are also, of course, very different. Additionally, a civil

> verdict directing payment of punitive damages does not carry the same heavy societal stigma stamped by a criminal conviction no matter what sentence is imposed.

Id. at 972, 525 N.Y.S.2d at 796.

§ 11:82 Admissibility of Alco-Sensor test evidence at trial

Evidence concerning the administration of an Alco-Sensor test, as well as evidence of the actual Alco-Sensor test results, is clearly 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). See also People v. MacDonald, 227 A.D.2d 672, ___, 641 N.Y.S.2d 749, 751 (3d Dep't), aff'd, 89 N.Y.2d 908, 653 N.Y.S.2d 267 (1996). Thomas is the seminal case in this area. It provides, in pertinent part:

> The Alco-Sensor testimony was clearly not admissible to show intoxication. It is well settled that "[t]here must be a sufficient showing of reliability of the test results before scientific evidence may be introduced." "[S]cientific evidence will only be admitted at trial if the procedure and results are generally accepted as reliable in the scientific community." Thus, the Alco-Sensor evidence should have been excluded because as it was presented to the jury it served as proof of intoxication and the People failed to lay a proper foundation showing its reliability for this purpose. . . . Moreover, cases from other jurisdictions hold that the Alco-Sensor test is not reliable evidence of intoxication. * * *

> In our view, evidence regarding the Alco-Sensor test had no place in the trial and the objection to its admission should have been sustained. The jury should not have been given the opportunity "to use the screening test result to corroborate the evidential test result."

121 A.D.2d at ___, ___, 509 N.Y.S.2d at 671, 673 (citations omitted). See also People v. Santana, 31 Misc. 3d 1232(A), 2011 WL 2119503 (N.Y. City Crim. Ct. 2011); People v. Gray, 190 Misc. 2d 40, ___, 736 N.Y.S.2d 856, 860 (Kings Co. Sup. Ct. 2002).

This topic is covered at length in Chapter 7, *supra*.

§ 11:83 Admissibility of chemical test result obtained pursuant to CPL § 690.10 search warrant

In People v. Moselle, 57 N.Y.2d 97, 101, 454 N.Y.S.2d 292, 293 (1982), the Court of Appeals held that:

> Absent 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.

In People v. Casadei, 66 N.Y.2d 846, 847, 498 N.Y.S.2d 357, 358 (1985):

> Defendant was involved in a two-car accident in which the driver of the other vehicle was fatally injured. Subsequently charged in an eight-count indictment with manslaughter in the second degree, criminally negligent homicide, driving while intoxicated, and other violations of the Vehicle and Traffic Law, he sought to suppress the results of a chemical blood test administered without his consent pursuant to a search warrant (CPL 690.10).

Relying on Moselle, the defendant claimed that VTL § 1194 was the exclusive means of obtaining a blood sample for violations of Vehicle and Traffic Law § 1192. The Court of Appeals held that:

> Although two of the three prosecutions in Moselle involved Penal Law violations in addition to Vehicle and Traffic Law violations, there was not in those cases, as there is here, a court order based on probable cause, authorizing the taking of a blood sample. It is clear that a search warrant may validly be issued to obtain a blood sample, in the event of a violation of the Penal Law, and, in such circumstances, we decline to extend Moselle to require separate resort to Vehicle and Traffic Law § 1194 to sustain Vehicle and Traffic Law offenses which are part of the same indictment. Moreover, the Legislature has amended Vehicle and Traffic Law § 1194 (L. 1983, ch. 481) to overrule Moselle on its facts.

66 N.Y.2d at 848, 498 N.Y.S.2d at 358 (citation omitted). See also People v. Ladd, 89 N.Y.2d 893, 896, 653 N.Y.S.2d 259, 261 (1996).

§ 11:84 Admissibility of evidence of defendant's reputation for sobriety

In People v. Nester, 275 N.Y. 628, 628-29 (1937) (per curiam), the defendant claimed that the trial court improperly excluded evidence of his reputation for sobriety. In a 4-3 decision, the Court of Appeals affirmed the defendant's conviction of DWI.

In People v. O'Brien, 77 A.D.3d 1445, ___, 908 N.Y.S.2d 787, 788 (4th Dep't 2010), the Appellate Division, Fourth Department, held that:

> Although defendant preserved for our review his further contention that the court erred in precluding him from calling [two sitting] judges as character witnesses to testify concerning his reputation for "sobriety," we conclude that defendant's contention lacks merit inasmuch as the probative value of such testimony was "substantially outweighed by the danger that it [would] unfairly prejudice the [prosecution] or mislead the jury."

(Citation omitted).

§ 11:85 Sufficiency of "check box" Supporting Deposition/DWI Bill of Particulars

In People v. Hohmeyer, 70 N.Y.2d 41, 517 N.Y.S.2d 448 (1987), the Court of Appeals upheld the use of the "check box" format Supporting Deposition/DWI Bill of Particulars commonly used in DWI cases in much of the State. An example of such a supporting deposition is set forth at Appendix 14.

Supporting depositions are covered at length in Chapter 17, *infra*.

§ 11:86 Court must advise defendant of direct consequences of plea

Prior to accepting a guilty plea from a defendant, the Court is required to advise the defendant of "direct" consequences of the plea -- but is *not* required to advise the defendant of "collateral" consequences thereof. See, e.g., People v. Cornell, 16 N.Y.3d 801, 921 N.Y.S.2d 641 (2011); People v. Harnett, 16 N.Y.3d 200, 205, 920 N.Y.S.2d 246, 248 (2011); People v. Gravino, 14 N.Y.3d 546, 553, 902 N.Y.S.2d 851, 855 (2010); People v. Catu, 4 N.Y.3d 242, 244, 792 N.Y.S.2d 887, 888 (2005); People v. Ford, 86 N.Y.2d 397, 403, 633 N.Y.S.2d 270, 272 (1995).

In Harnett, the Court of Appeals summarized the law in this area:

> Our cases have drawn a line between the direct and collateral consequences of a plea. The importance of the distinction is that a trial court "*must* advise a defendant of the direct consequences." A court's failure to comply with that obligation "requires reversal" because harmless error analysis is inapposite. * * *
>
> Direct consequences, as we explained in Ford, are those that have "a definite, immediate and largely automatic effect on defendant's punishment." Consequences that are "peculiar to the individual's personal circumstances and . . . not within the control of the court system" have been held to be collateral. The direct consequences of a plea -- those whose omission from a plea colloquy makes the plea per se invalid -- are essentially the core components of a defendant's sentence: a term of probation or imprisonment, a term of post-release supervision, a fine. Our cases have identified no others.

16 N.Y.3d at 205, 920 N.Y.S.2d at 248-49 (citations omitted).

In this regard, the Harnett Court held that "failing to warn a defendant who pleads guilty to a sex offense that he may be subject to the Sex Offender Management and Treatment Act (SOMTA)" is a collateral consequence of the plea. Id. at 206, 920 N.Y.S.2d at 249. See also Gravino, 14 N.Y.3d at 550, 902 N.Y.S.2d at 852 ("We hold that because they are collateral rather than direct consequences of a guilty plea, Sex Offender Registration Act (SORA) registration and the terms and conditions of probation are not subjects that a trial court must address at the plea hearing. Put another way, a trial court's neglect to mention SORA or identify potential stipulations of probation during the plea colloquy does not undermine the knowing, voluntary and intelligent nature of a defendant's guilty plea").

In Catu, the defendant accepted a plea bargain pursuant to which he would be sentenced to a 3-year determinate prison sentence and a $1,000 fine. The Court of Appeals vacated the plea on the ground that the Court failed to advise the defendant that, as a second felony offender, his sentence would include a mandatory period of five years' post-release supervision. 4 N.Y.3d at 244, 792 N.Y.S.2d at 887.

In Ford, the Court of Appeals held that neither Trial Judges nor defense counsel are required to advise a defendant of the possible deportation consequences of his or her plea. 86 N.Y.2d at 401, 633 N.Y.S.2d at 271-72. Critically, while the Ford Court held that defense counsel's failure to advise the defendant of such consequences did not constitute ineffective assistance, id. at 404-05, 633 N.Y.S.2d at 273-74, the U.S. Supreme Court reached the opposite conclusion in Padilla v. Kentucky, ___ U.S. ___, ___, 130 S.Ct. 1473, 1486 (2010):

> It is our responsibility under the Constitution to ensure that no criminal defendant -- whether a citizen or not -- is left to the

> "mercies of incompetent counsel." To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.

(Citation omitted).

Another aspect of Ford has been called into question. Specifically, the Ford Court commented in *dicta* that:

> Illustrations of collateral consequences are loss of the right to vote or travel abroad, loss of civil service employment, *loss of a driver's license*, loss of the right to possess firearms or an undesirable discharge from the Armed Services. The failure to warn of such collateral consequences will not warrant vacating a plea because they are peculiar to the individual and generally result from the actions taken by agencies the court does not control.

86 N.Y.2d at 403, 633 N.Y.S.2d at 272-73 (emphasis added) (citations omitted).

In support of its claim that the loss of a driver's license is a collateral consequence, the Ford Court cited Moore v. Hinton, 513 F.2d 781 (5th Cir. 1975), a federal class action lawsuit challenging the manner in which DWI cases were being handled in Tuscaloosa, Alabama. Critically, however, the Moore Court pointed out that:

> *Of crucial importance here . . . is the fact that the Alabama Department of Public Safety, not the court, deprives the defendant of his license*, acting under authority of 36 Ala.Code § 68. The court merely accepts the defendant's plea, and sentences him to a fine and/or imprisonment. The Department of Public Safety then institutes a separate proceeding for suspension of his license; this suspension is not, therefore, punishment imposed by the court as a result of the guilty plea, but a collateral consequence of the defendant's conviction.

Id. at 782 (emphasis added).

In stark contrast to the situation addressed in Moore, a definite, immediate and mandatory component of every DWI-related sentence in New York is that *the Court* is required to suspend or revoke the defendant's driver's license. See VTL § 1193(2)(d)(1). In this regard, in People v. Castellini, 24 Misc. 3d 66, ___, 884 N.Y.S.2d 550, 551 (App. Term, 1st Dep't 2009), the Appellate Term vacated the defendant's guilty plea to DWAI where the trial court misinformed the defendant with regard to the length of the mandatory driver's license revocation she would receive, reasoning as follows:

> In order for a guilty plea to be entered knowingly, intelligently and voluntarily, a defendant must be advised of the direct consequences of the plea. Although there is no mandatory catechism, a minimum requirement for a valid plea is that the defendant understands the direct penal consequences. Here, the plea minutes show that the court misinformed defendant of the nature and duration of the requisite driver's

> license sanction, erroneously stating that the sentence would include a 90-day license suspension, when in fact the mandatory sanction was a one-year license revocation. While in some jurisdictions the loss of a driver's license "result[s] from the actions taken by agencies the court does not control," and thus is considered a collateral consequence (People v. Ford, 86 N.Y.2d at 403, 633 N.Y.S.2d 270, 657 N.E.2d 265, citing Moore v. Hinton, 513 F.2d 781 [5th Cir.1975]), the license sanction here involved constituted punishment directly imposed by the court as a result of defendant's guilty plea (see Vehicle and Traffic Law § 1193[2][a], [b]), and was thus a direct consequence of the plea. The court's error is not subject to harmless error analysis, and renders the plea invalid.

(Citations omitted).

In People v. Lancaster, 260 A.D.2d 660, ___, 688 N.Y.S.2d 711, 712 (3d Dep't 1999), the Appellate Division, Third Department, held that a Court sentencing a defendant for DWI is not required to advise him or her "that a subsequent conviction of the crime of driving while intoxicated would constitute a felony[, as] [i]t is abundantly clear that the fact that a defendant is subject to enhanced criminal treatment for an offense that he or she may commit in the future is a collateral consequence of the plea, about which a defendant need not be advised." In this regard, "[a] second D.W.I. conviction leading to felony sanctions can be avoided simply by not drinking and driving." People v. Butler, 96 A.D.2d 140, ___, 468 N.Y.S.2d 274, 277 (4th Dep't 1983).

§ 11:87 People cannot comment on defendant's failure to advise them that someone else drove the vehicle

In People v. Petersen, 4 N.Y.2d 992, 993-94, 177 N.Y.S.2d 510, 511 (1958) (per curiam), the Court of Appeals held, in full, as follows:

> Prejudicial error was committed by the trial court in allowing the prosecution to exploit the fact that defendant had not told the police, the Judge, the District Attorney and the Grand Jury that he was not driving his car at the time he was so charged, but that it had been driven by someone else. Defendant was under no duty to speak when in the custody of the authorities, and his failure to do so cannot be the basis of an inference of guilt on his part.
>
> The further references to this subject in the prosecutor's summation aggravated the error, which error was not cured by the instruction of the trial court properly stating the applicable law.

(Citations omitted).

§ 11:88 Where defendant indicted for misdemeanor DWI, superior court can transfer case back to local court

The People occasionally indict a defendant for misdemeanor DWI. Such a procedure, which is highly unusual, certainly has the appearance of forum shopping. In Matter of Clute v. McGill, 229 A.D.2d 70, ___, 655 N.Y.S.2d 201, 203 (3d Dep't 1997), the Appellate Division, Third Department, noted that Article VI, § 19(b) of the New York State Constitution permits a superior court to transfer indicted misdemeanors to any local criminal court having

jurisdiction over the subject matter of the case; and recognized the superior court's right to effectuate such a transfer in order to prevent the People from gaining an unfair advantage not only over defendants, but also over neutral magistrates. In this regard, the Clute Court held that:

> [W]hile the People have a clear legal right to present misdemeanor charges to a Grand Jury in order to prosecute crimes by indictment "in a superior court" (CPL 170.20[2]), if the indictment returned does not charge a felony County Court has the constitutional authority to transfer the matter to any Justice Court having jurisdiction.

Id. at ___, 655 N.Y.S.2d at 203.

§ 11:89 Defendant indicted for misdemeanor DWI entitled to 12-person jury

Article VI, § 18(a) of the New York State Constitution provides that "crimes prosecuted by indictment shall be tried by a jury composed of twelve persons, unless a jury trial has been waived as provided in section two of article one of this constitution." In this regard, in People v. Dean, 80 A.D.2d 695, ___, 436 N.Y.S.2d 455, 456-57 (3d Dep't 1981), the Appellate Division, Third Department, made clear that a defendant indicted for misdemeanor DWI is constitutionally entitled to a 12-person jury. See also People v. Warren, 145 A.D.2d 966, ___, 536 N.Y.S.2d 337, 338 (4th Dep't 1988); People v. Griffin, 142 Misc. 2d 41, ___, 536 N.Y.S.2d 386, 387-88 (Monroe Co. Sup. Ct. 1988).

§ 11:90 Court conducting bench trial cannot reconsider its verdict after the fact

In People v. Cunningham, 95 N.Y.2d 909, 717 N.Y.S.2d 68 (2000), the trial court convicted the defendant of common law DWI following a bench trial.

However, "the Trial Judge applied a definition of intoxication which improperly lowered the prosecution's burden of proof." Id. at 910, 717 N.Y.S.2d at 68. When this issue was raised via a motion to set aside the verdict, the Court reconsidered the evidence using the correct legal standard, and again found the defendant guilty of DWI. On appeal, the Court of Appeals reversed, holding that:

> The Court's reconsideration of its verdict under a different standard constituted a factual determination that "comes too late and exceeds the scope of [the court's] authority." To allow the second verdict to stand would permit the Trial Judge to engage in postverdict fact finding that would not be possible in a jury trial, thereby according "less finality to the verdict of a Trial Judge when sitting as [the trier of fact] than to a jury verdict."

Id. at 910, 717 N.Y.S.2d at 68 (citations omitted). See also People v. Maharaj, 89 N.Y.2d 997, 657 N.Y.S.2d 392 (1997) (DWI conviction reversed because Trial Judge utilized incorrect legal standard in convicting defendant following bench trial).

§ 11:91 Police officer who arrests person for DWI is responsible for such person's safety

In Thomas v. State, 46 N.Y.2d 1043, 1044, 416 N.Y.S.2d 546, 547 (1979), the Court of Appeals held that "a police officer who arrests an intoxicated driver assumes the duty of exercising the care reasonably required in the circumstances to assure the safety of a person in that condition."

§ 11:92 Insurer's liability to motorist for injuries caused by driving in violation of VTL § 1192

Insurance Law § 5103(b)(2) provides that:

> (b) An insurer may exclude from coverage required by subsection (a) hereof a person who: * * *
>
> (2) Is injured as a result of operating a motor vehicle while in an intoxicated condition or while his ability to operate such vehicle is impaired by the use of a drug within the meaning of [VTL § 1192]; provided, however, that an insurer shall not exclude such person from coverage with respect to necessary emergency health services rendered in a general hospital, as defined in [Public Health Law § 2801(10)], including ambulance services attendant thereto and related medical screening. Notwithstanding any other law, where the covered person is found to have violated [VTL § 1192], the insurer has a cause of action for the amount of first party benefits paid or payable on behalf of such covered person against such covered person.

See also Fafinski v. Reliance Ins. Co., 65 N.Y.2d 990, 992, 494 N.Y.S.2d 92, 93 (1985) (conviction under VTL § 1192 not required for Insurance Law § 5103(b)(2) to apply).

§ 11:93 Applicability of "moral certainty" standard to DWI cases

Where the People's case is based *entirely* on circumstantial evidence, the defendant is entitled to a "circumstantial evidence charge" pursuant to which the jury is instructed that the defendant's guilt must be proven to a "moral certainty." See, e.g., People v. Barnes, 50 N.Y.2d 375, 379-80, 429 N.Y.S.2d 178, 180 (1980) ("While it is the oft-quoted rule in criminal cases which depend entirely upon circumstantial evidence that '"the facts from which the inference of the defendant's guilt is drawn must be established with

certainty -- they must be inconsistent with his innocence and must exclude to a moral certainty every other reasonable hypothesis,"' this legal standard does not apply to a situation where, as here, both direct and circumstantial evidence are employed to demonstrate a defendant's culpability") (citations omitted). See generally People v. Miller, 194 A.D.2d 230, ___, 607 N.Y.S.2d 507, 508 (4th Dep't 1993) ("trial judges are advised to avoid using 'moral certainty' language in their instructions except in circumstantial evidence cases where the words are appropriate. Trial judges are further advised to adhere to the charge set forth in 1 CJI(NY) 6.20 in order to help curb the recurring problems that arise in instructing a jury on reasonable doubt") (citations omitted).

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

Simply stated, a person can exhibit most, if not all, indicators commonly associated with intoxication without having consumed any alcohol whatsoever. For example, the person could be sick, tired, nervous,

embarrassed, injured, uncoordinated, mentally ill, diabetic or epileptic; and/or could have a speech impediment, allergies, other medical conditions, etc. See, e.g., People v. Butts, 21 Misc. 2d 799, 201 N.Y.S.2d 926 (Poughkeepsie City Ct. 1960).

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

Nonetheless, most of these types of evidence have been found to constitute direct evidence. See, e.g., People v. Crandall, 287 A.D.2d 881, ___, 731 N.Y.S.2d 553, 555 (3d Dep't 2001) ("we reject defendant's contention that County Court erred when it refused to charge the jury that the facts giving rise to defendant's guilt had to satisfy the 'moral certainty' standard. Defendant's admission that he had consumed four beers, together with police testimony regarding defendant's condition and demeanor and the eyewitness testimony regarding his erratic driving, constituted direct evidence of his impaired ability to operate his vehicle. Inasmuch as both direct and circumstantial evidence were present, defendant was not entitled to a circumstantial evidence charge") (citations omitted); People v. Merrick, 188 A.D.2d 764, ___, 591 N.Y.S.2d 564, 565-66 (3d Dep't 1992); People v. Heidorf, 186 A.D.2d 915, ___, 589 N.Y.S.2d 628, 629 (3d Dep't 1992); People v. Abel, 166 A.D.2d 841, ___, 563 N.Y.S.2d 531, 532 (3d Dep't 1990); People v. Green, 174 A.D.2d 511, ___, 571 N.Y.S.2d 290, 291 (1st Dep't 1991); People v. Becht, 163 A.D.2d 811, ___, 558 N.Y.S.2d 342, 343 (4th Dep't 1990); People v. Scallero, 122 A.D.2d 350, ___, 504 N.Y.S.2d 318, 319-20 (3d Dep't 1986).

Regardless, one type of evidence that is clearly direct in nature is eyewitness testimony from a witness who actually observed the defendant operate the vehicle on a roadway covered by VTL § 1192(7). Thus, the only situation where a circumstantial evidence charge would

potentially be applicable in a DWI case is a situation where the defendant (a) was not observed operating the vehicle, *and* (b) did not admit to operating the vehicle (*i.e.*, a case in which the evidence of operation is entirely circumstantial in nature). See, e.g., People v. Wells, 186 A.D.2d 867, 588 N.Y.S.2d 938 (3d Dep't 1992); People v. White, 173 A.D.2d 897, 569 N.Y.S.2d 816 (3d Dep't 1991); People v. Saplin, 122 A.D.2d 498, 505 N.Y.S.2d 460 (3d Dep't 1986); People v. Collins, 70 A.D.2d 986, 417 N.Y.S.2d 819 (3d Dep't 1979). See generally People v. Blake, 5 N.Y.2d 118, 180 N.Y.S.2d 775 (1958); People v. Eckert, 2 N.Y.2d 126, 157 N.Y.S.2d 551 (1956).

§ 11:94 Effect of VTL § 1192 conviction on pistol permit

A conviction of DWAI, in violation of VTL § 1192(1), as a first offense and with no aggravating factors (e.g., committing the offense with a loaded weapon in the vehicle), does not provide grounds for a pistol permit to be revoked -- but can result in a suspension thereof. See, e.g., Matter of Boersma v. Erie County Pistol Permit Dep't, 233 A.D.2d 938, ___, 649 N.Y.S.2d 879, 879 (4th Dep't Nov. 8, 1996) ("The record establishes and respondent Supreme Court Justice concedes that the sole reason that petitioner's pistol permit was revoked was petitioner's conviction of driving while ability impaired in violation of Vehicle and Traffic Law § 1192(1). Under the circumstances of this case, we conclude that the appropriate penalty is to suspend petitioner's pistol permit for six months commencing September 26, 1995"); Matter of Klein v. Police Comm'r of City of New York, 99 Misc. 2d 186, 415 N.Y.S.2d 735 (N.Y. Co. Sup. Ct. 1979).

By contrast, a conviction of DWI, or a conviction of DWAI with aggravating factors, can result in the revocation of a pistol permit. For example, in Matter of Biggerstaff v. Drago, 65 A.D.3d 728, ___, 883 N.Y.S.2d 657, 657 (3d Dep't 2009), the Appellate Division, Third Department, affirmed the revocation of a pistol permit where "petitioner had an extremely high blood alcohol content at the time of his arrest and

pleaded guilty to aggravated driving while intoxicated which, as respondent concluded, called his judgment and character into question."

In Matter of Broadus v. City of New York Police Dep't (License Div.), 62 A.D.3d 527, ___, 878 N.Y.S.2d 738, 739 (1st Dep't 2009), the Appellate Division, First Department, held that:

> The finding that petitioner lacks the good moral character required to possess a pistol license (Penal Law § 400.00[1][b]) is rationally supported by evidence of petitioner's arrest under Vehicle and Traffic Law § 1192 for driving while intoxicated, possession of a loaded firearm when arrested, refusal to take a breathalyzer test in violation of Vehicle and Traffic Law § 1194, subsequent conviction under Vehicle and Traffic Law § 1192(1) for driving while his ability to drive was impaired by alcohol, failure to immediately notify respondent of his arrest in violation of 38 RCNY 5-30(a) and (d), and failure to immediately voucher his second firearm in violation of 38 RCNY 5-30(f).

The same Court affirmed the revocation of a pistol permit in Matter of Papaioannou v. Kelly, 14 A.D.3d 459, ___, 788 N.Y.S.2d 378, 379 (1st Dep't 2005), where:

> In this matter, respondent's determination was based upon: petitioner's October 2000 arrest for driving while ability impaired by alcohol (Vehicle and Traffic Law § 1192[1]), which arrest cast doubt on his character and fitness to possess a firearm; petitioner's failure to promptly report his arrest to the

> License Division; his failure to report his change of address to the License Division in a timely manner; the fact that he transported his handguns to an address other than that designated on his license without permission from the agency; and his failure to cooperate with respondent's investigation of his arrest.

See also Matter of DiMonda v. Bristol, 219 A.D.2d 830, ___, 631 N.Y.S.2d 968, 969 (4th Dep't 1995) ("We reject the contention that respondent acted arbitrarily and capriciously in denying petitioner's application for a pistol permit. . . . The failure of petitioner to report on his application a prior arrest for driving while intoxicated provided a sufficient basis to deny the application"); Matter of Przybylowicz v. White, 115 A.D.2d 939, ___, 496 N.Y.S.2d 832, 832 (3d Dep't 1985) ("Petitioner's two convictions for driving while ability impaired and testimony from neighbors as to petitioner's proclivity for drinking were sufficient to support the decision" to deny his application for a pistol permit).

§ 11:95 Effect of VTL § 1192 conviction on law license

In New York, conviction of a felony results in an attorney's automatic disbarment. See Judiciary Law § 90(4). This includes felony DWI. See, e.g., Matter of McGee, 77 A.D.3d 376, 908 N.Y.S.2d 346 (2d Dep't 2010) (per curiam); Matter of Bailey, 57 A.D.3d 1529, 869 N.Y.S.2d 352 (4th Dep't 2008); Matter of Woods, 56 A.D.3d 184, 867 N.Y.S.2d 45 (1st Dep't 2008) (per curiam); Matter of Shmaruk, 29 A.D.3d 138, 812 N.Y.S.2d 623 (2d Dep't 2006) (per curiam); Matter of Baxter, 231 A.D.2d 964, 647 N.Y.S.2d 592 (4th Dep't 1996). Cf. Matter of Johnston, 75 N.Y.2d 403, 554 N.Y.S.2d 88 (1990) (felony of 1st degree involuntary manslaughter in Texas not sufficiently analogous to vehicular manslaughter in New York to constitute "felony" for purposes of automatic disbarment).

By contrast, misdemeanor DWI convictions have generally led to a letter of admonition, a letter of caution or public censure, depending upon the circumstances of the case. See, e.g., Matter of Antomattei, ___ A.D.3d ___, 945 N.Y.S.2d 31 (1st Dep't 2012) (per curiam); Matter of Piken, 86 A.D.3d 143, 924 N.Y.S.2d 527 (2d Dep't 2011) (per curiam); Shmaruk, *supra*; Matter of Gross, 34 A.D.3d 23, 824 N.Y.S.2d 825 (4th Dep't 2006) (per curiam); Matter of Brody, 23 A.D.3d 94, 803 N.Y.S.2d 605 (2d Dep't 2005) (per curiam); Matter of Shichman, 20 A.D.3d 111, 796 N.Y.S.2d 369 (2d Dep't 2005) (per curiam); Matter of Bach, 20 A.D.3d 114, 796 N.Y.S.2d 382 (2d Dep't 2005) (per curiam); Matter of Zalesak, 17 A.D.3d 66, 793 N.Y.S.2d 439 (2d Dep't 2005) (per curiam); Matter of McCarthy, 11 A.D.3d 162, 782 N.Y.S.2d 766 (2d Dep't 2004) (per curiam); Matter of O'Brien, 309 A.D.2d 184, 765 N.Y.S.2d 71 (2d Dep't 2003) (per curiam); Matter of Goldstein, 285 A.D.2d 187, 728 N.Y.S.2d 758 (2d Dep't 2001) (per curiam); Matter of Wynne, 283 A.D.2d 55, 726 N.Y.S.2d 111 (2d Dep't 2001) (per curiam); Matter of Valentine, 224 A.D.2d 70, 647 N.Y.S.2d 802 (2d Dep't 1996) (per curiam). Cf. Matter of LaPenta, 67 A.D.3d 117, 885 N.Y.S.2d 294 (2d Dep't 2009) (per curiam); Matter of Kinne, 17 A.D.3d 16, 794 N.Y.S.2d 757 (4th Dep't 2005) (per curiam). In this regard, the Gross Court ruled as follows:

> The Grievance Committee filed a petition charging respondent with misconduct arising from his two convictions of driving while intoxicated as a misdemeanor. Respondent filed an answer admitting the material allegations of the petition and raising, in mitigation, his alcoholism.
>
> We conclude that respondent violated the following Disciplinary Rules of the Code of Professional Responsibility:

> DR 1-102(A)(3) (22 NYCRR 1200.3[a][3]) -- engaging in illegal conduct that adversely reflects on his honesty, trustworthiness or fitness as a lawyer; and
>
> DR 1-102(A)(5) (22 NYCRR 1200.3[a][5]) -- engaging in conduct that is prejudicial to the administration of justice.
>
> Additionally, by failing to report his first conviction of driving while intoxicated to this Court, respondent violated Judiciary Law § 90(4)(c).
>
> We have considered, in mitigation, respondent's admitted alcoholism for which he is currently in treatment. Additionally, we note that respondent has an otherwise unblemished record and that his misconduct was unrelated to his practice of law. Accordingly, after consideration of all of the factors in this matter, we conclude that respondent should be censured on condition that he agrees to continue in treatment for his alcoholism for a period of 24 months. In the event that respondent fails to continue in treatment or commits additional misconduct during that period, the Grievance Committee shall immediately apply for an order returning the proceeding to this Court for imposition of appropriate discipline.

34 A.D.3d at ___, 824 N.Y.S.2d at 825-26.

§ 11:96 Arraigning Judge as witness for prosecution

In felony DWI cases, it is not uncommon for the defendant to be brought before a local criminal court Judge for arraignment shortly after his or her arrest.

Putting aside the issue of whether it is appropriate to arraign an intoxicated person without counsel, the issue has arisen as to whether the arraigning Judge can subsequently be called as a witness to the defendant's alleged intoxication.

In People v. Rossback, 243 A.D.2d 919, ___, 663 N.Y.S.2d 409, 409-10 (3d Dep't 1997), the Appellate Division, Third Department, held that:

> While certain courts have found no error in the admission of the testimony of the arraigning justice at a defendant's trial for driving while intoxicated, we need not decide this issue here since County Court granted defense counsel's objection and refused to allow the Justice who arraigned defendant to testify concerning his observations of defendant during the arraignment. Contrary to defendant's claim, no negative inferences could be drawn from the Justice's testimony inasmuch as he was immediately excused as a witness out of the presence of the jury before he made any statements regarding defendant's demeanor. Moreover, to the extent that the prosecutor made improper remarks regarding anticipated testimony of the Justice which was never received, we find this error harmless in light of the overwhelming evidence adduced at the trial of defendant's guilt.

(Citations omitted).

In People v. Ireland, 175 A.D.2d 139, ___, 572 N.Y.S.2d 29, 30-31 (2d Dep't 1991), the Appellate Division, Second Department, held that:

> The trial court properly permitted the People to call as a rebuttal witness

> the Town Justice who arraigned the defendant one hour after his arrest. The witness's testimony served to contradict the defendant's claim that, while he had refused the request of the arresting officers to submit to sobriety tests, he had offered to do so in the presence of the judge. Moreover, the Justice's opinion as to the defendant's sobriety was properly received to rebut the defendant's testimony that he had not consumed alcoholic beverages on the date in question. The defense advanced a theory that the arrest was the result of a personal vendetta by the local police department, and thereby attempted to undermine the veracity of the arresting officers' opinions as to the defendant's intoxication elicited on the People's case-in-chief. Accordingly, the rebuttal testimony of the Town Justice was highly relevant to this issue and was properly admitted. Even if this testimony were not technically of a rebuttal nature, the court properly exercised the discretion afforded it by CPL 260.30(7) to allow the presentation of evidence which is more properly a part of the direct case in the interest of justice.

See also People v. Jones, 158 A.D.2d 911, ___, 551 N.Y.S.2d 78, 78 (4th Dep't 1990) ("The trial court did not err in admitting testimony from a town justice regarding defendant's intoxication. Even if there were error it would be harmless because there is overwhelming evidence of defendant's guilt and there is no significant probability that the jury would have acquitted defendant had it not been for that testimony").