

# **DWI Issues, Problems & Pitfalls**

Peter Gerstenzang, Esq.  
210 Great Oaks Boulevard  
Albany, New York 12203  
Office: (518) 456-6456  
Cell: (518) 441-7011

**§ 11:43**

**Chemical test vs. breath  
test**

**Breath test – VTL § 1194(1)(b)**

**§ 11:58**

**Chemical tests and the  
right to counsel**

People v. Washington, 107 A.D.3d 4 (2d Dep't 2013);  
aff'd, ---N.E.3d ----, 2014 WL 1767700 (N.Y.), 2014  
N.Y. Slip Op. 03190

# § 11:61 "Two-hour rule"

People v. Atkins, 85 N.Y.2d 1007 (1995)

# **EFFECT OF PRIOR CONVICTION**

**(VTL 1192(8) Eff. November 1, 2006)**

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

- A. Public highway, and private roads open to motor vehicle traffic
- B. Parking lot defined as 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

Have a capacity for the parking of 4 or more motor vehicles

Exclusion – 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.

# § 11:32 Penal Law Exception

- People v. Harris, 81 N.Y.2d 850, 852 (1993)

Vehicular manslaughter statute –  
where applicable

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

- People v. Litto, 8 N.Y.3d 692 (2007)
- VTL § 1192(9)
- What about VTL § 1192(2) and test refusals?



# **§ 11:40 Misdemeanor DWAI**

Lesser included of Class D felony DWI

# **§ 11:47      6-Month Calibration**

People v. Boscic, 15 N.Y.3d 494 (2010)

**§ 11:47**

**Constitutional right to  
refuse a chemical test**

# DWI Per Se-VTL § 1192(2)

People v. Mertz, 68 N.Y.2d 136

“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).”

**§ 11:41 Can the arresting officer also be the breath test operator?**

People v. Evers, 68 N.Y.2d 658 (1986)

# Breath testing and blood alcohol concentration