To be argued by
V. MARIKA MEIS
Time Requested: 15 minutes

Court of Appeals

State of New York

In the Matter of the Application of PEDRO ENDARA-CAICEDO,

Petitioner-Appellant,

-against-

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES et al.,

Respondents-Respondents

For an Order and Judgment Pursuant to Article 78 of the
New York Civil Practice Law and Rules

APL-2020-00133

BRIEF FOR PETITIONER-APPELLANT

Robert S. Dean
Attorney for Petitioner-Appellant
Center for Appellate Litigation
120 Wall Street – 28th Floor
New York, NY 10005
mmeis@cfal.org
TEL (212) 577-2523 Ext. 551
FAX (212) 577-2535

V. MARIKA MEIS, *Of Counsel*
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PRELIMINARY STATEMENT

By permission of this Court, granted September 10, 2020, this appeal is taken from an order of the Appellate Division, First Department, entered February 13, 2020, affirming a judgment of the Supreme Court, Bronx County (Brigantti, J.), rendered January 4, 2019, denying petitioner-appellant Pedro Endara-Caicedo's Article 78 petition. Timely notice of appeal was filed, and this Court granted petitioner-appellant poor person relief.

QUESTION PRESENTED

QUESTION: Under Vehicle and Traffic Law § 1194(2)(a), a motorist is only deemed to have consented to a blood-alcohol-content chemical test within two hours of the arrest. If a person refuses to submit to a breath test after two hours has passed

– and is thus outside the deemed consent period – has the person "refused such chemical test" under VTL § 1194(2)(c), thus justifying the punishment of license revocation?

ANSWER: No, such a person has not refused "such chemical test" under § 1194(2) and the Appellate Division erred in interpreting the statute to the contrary. The plain language of the governing statute sets a period of two hours from arrest as governing both when a motorist must submit to a chemical test (under VTL § 1194(2)(a)), and what criminal and administrative consequences flow from a motorist's exercise of the right of "refusal," withdrawing consent to "such chemical test." *See* VTL § 1194(2)(b) & (c) (license revocation) and § 1194(2)(f) (admissibility of the refusal at a criminal trial). The statute's plain language, its interpretation by courts, and its legislative history forbid the consequence of license revocation when a motorist decides not to take a chemical test after the two-hour period of deemed consent expires.

JURISDICTION AND REVIEWABILITY

This case presents a question of law – a pure question of statutory construction – which was fully preserved by Endara-Caicedo's Article 78 petition. *See* C.P.L.R. § 5501. A. 1-117.

RELEVANT STATUTORY PROVISIONS

Vehicle and Traffic Law § 1194(2) provides, in relevant part,

> (a) When Authorized. Any person who operates a motor vehicle in this state shall be deemed to have given consent to a chemical test . . . for the purpose of determining the

alcoholic and/or drug content of the blood provided that such test is administered . . . (1) within two hours after such person has been placed under arrest for any such violation.

(b) Report of Refusal. (1) If such person . . . having [] been requested to submit to such chemical test[1]. . . refuses to submit to such 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.

(c) Any person whose license . . . has been suspended pursuant to paragraph (b) of this subdivision is entitled to a hearing. . . . The hearing shall be limited to the following issues:

(1) did the police officer have reasonable grounds to believe that such person had been driving in violation of any subdivision of section [1192] of this article;

(2) did the police officer make a lawful arrest of such person;

(3) was such person given sufficient warning, in clear or unequivocal language, prior to such refusal that such refusal to submit to such chemical test or any portion thereof, would result in the immediate suspension and subsequent revocation of such person's license or operating privilege whether or not such person is found guilty of the charge for which the arrest was made; and

(4) did such person refuse to submit to such chemical test or any portion thereof.

If, after such hearing, the hearing officer . . . finds all of

[1] "[A]nd having been informed that the person's license or permit to drive and any non-resident operating privilege shall be immediately suspended and subsequently revoked for refusal to submit to such chemical."

the issues in the affirmative, such officer shall immediately revoke the license . . . in accordance with the provisions of paragraph (d) of this subdivision.

(d) Sanctions. (1) Revocations. Any license which has been revoked pursuant to paragraph (c) of this subdivision shall not be restored for at least one year after such revocation, nor thereafter, except in the discretion of the commissioner . . . (2) [such a person is] liable for a civil penalty in the amount of five hundred dollars. . . . No new driver's license or permit shall be issued, or non-resident operating privilege restored to such person unless such penalty has been paid.

(f) Evidence. Evidence of a refusal to submit to such chemical test . . . shall be admissible in any trial, proceeding or hearing based upon a violation of the provisions of [§ 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.

INTRODUCTION

Under Vehicle and Traffic Law § 1194(2)(a), a motorist is only deemed to have consented to a breath test within two hours of arrest. This provision is known as the deemed consent provision.

During this two-hour period, a motorist must submit to a chemical test. A motorist has a right to refuse the chemical test, but if a motorist refuses, the motorist's license is revoked and the refusal is admissible at a criminal proceeding. The term "refusal" thus has a specific meaning in the context of this statute as previously recognized by this Court in *People v. Atkins*, 85 N.Y.2d 1007 (1995) and *People v. Smith*,18 N.Y.3d 544 (2012). Recently, this Court interpreted this statute to mean that a

motorist's declining to take a chemical test is only a "refusal" under the statute when the test is offered within that two-hour period. *People v. Odum*, 31 N.Y.3d 344 (2018) (construing VTL § 1194(2)(f)'s reference to "such chemical test" as meaning a test offered within two hours under § 1194(2)(a)).

A "refusal" during the two-hour period results in license revocation following an administrative hearing. VTL §§ 1194(2)(b) and (c). Subsections (b) and (c) provide for the imposition of substantial fines on motorists arrested for driving while intoxicated or impaired who refuse to take a chemical test to which they are deemed to have consented. These subsections are part of the same statutory scheme as subsection (f). They use the same language "refusal to submit to such chemical test" as used in subsection (f), which *Odum* interpreted to mean a refusal to submit to a test sought within the two-hour of deemed-consent period.

A motorist thus risks license revocation only if the motorist refuses to take a chemical test offered within two hours of the motorist's arrest. It is under those circumstances that the chemical test referenced in VTL § 1192(a) has been "refused."

After the two-hour period of deemed consent expires, a motorist has a choice whether to submit to a chemical test. Because a motorist has a choice whether to consent, the decision not to voluntarily consent to a test is not a "refusal." Nonetheless, in this case, DMV treated Endara-Caicedo's decision not to take a chemical test – offered long after the two-hour period – as a "refusal," revoked his driver's license and imposed a fine.

As argued below, VTL § 1194's plain language, this Court's prior precedent, and, if resorted to, the statute's legislative history, foreclosed the consequence of license revocation when Petitioner Endara-Caicedo decided not to take a test offered to him nearly four hours after his arrest. This Court must reverse.

STATEMENT OF FACTS

A. Arrest

On January 30, 2016, Endara-Caicedo was arrested for driving while intoxicated. Nearly four hours after his arrest, police officers asked Endara-Caicedo to take a chemical breath test. Endara-Caicedo declined. As a result, his license was suspended at his criminal court arraignment and a DMV refusal hearing scheduled. A. 12-13.

B. DMV Refusal Hearing

On July 5, 2016, the DMV conducted a hearing to determine if Endara-Caicedo's license was properly suspended for "refusing" to take a breathalyzer test. *See* A. 15-40. At the hearing, it was established that Endara-Caicedo was offered the opportunity to take a chemical test nearly four hours after his arrest. *Id.* Endara-Caicedo chose not to take the chemical test. *Id.*

Endara-Caicedo argued that he could not be deemed to have consented to a chemical test more than two hours after his arrest, and thus, his license could not be suspended and revoked. A. 49, 51.

The ALJ rejected Endara-Caicedo's argument. The ALJ found that Endara-Caicedo had refused a chemical test to which he had impliedly consented, even though the test was not offered until almost four hours after his arrest. *See* A. 57-58.

The ALJ revoked Endara-Caicedo's license for one year for refusing to take the breathalyzer test. *Id.* The ALJ also imposed a $500 fine. *Id.*

C. Administrative Appeal to DMV Appeals Board

Endara-Caicedo timely appealed the ALJ's decision to the DMV Appeals Board on August 25, 2016. *See* A. 60-81.

On September 29, 2016, the DMV stayed the revocation of Endara-Caicedo's license pending the determination of the Appeals Board. *See* A. 82-83.

On February 1, 2017, Endara-Caicedo sent a Notice of New Authority to the Appeals Board, providing information and a copy of a First Department, Appellate Term decision in *People v. Odum*, 54 Misc.3d 128(A) (App. Term, 1st Dept. Dec. 23, 2016), rendered after Endara-Caicedo had filed his appeal. *See* A. 84-86.

On February 28, 2017, the Appeals Board affirmed the revocation of Endara-Caicedo's license. *See* A. 87-90. The Appeals Board conclusorily asserted that the two-hour rule is an "evidentiary rule applicable to criminal prosecutions" that does not apply in the context of a license revocation hearing. *Id.*

On April 16, 2017, the DMV reinstated the one-year revocation of Endara-Caicedo's license and the imposition of a $500 fine before his license could be restored. *See* A. 91-92.

D. Article 78 Petition

Endara-Caicedo timely filed a petition pursuant to Article 78 of the CPLR arguing the DMV's decision was based on an error of law. *See* A. 1-117. Endara-Caicedo argued that VTL § 1194 provides for the imposition of substantial civil penalties on motorists arrested for driving while intoxicated or impaired who refuse to take a chemical test to which they are deemed to have consented. The plain language of V.T.L. § 1194(2)(a) states that a motorist is deemed to have consented to a chemical test within two hours of his arrest. The civil penalties of license revocation and a fine can thus only be imposed for refusals made during the two-hour time frame. *See* A. 93-94.

E. DMV's Cross-Motion to Dismiss, Endara-Caicedo's Opposition, and DMV's Reply

DMV filed a "cross-motion" to dismiss, arguing that the civil penalty of license revocation and a fine are mandatory regardless of when a "refusal" is made. *See* A. 118-136.

Endara-Caicedo opposed the motion, arguing that DMV's own long-standing policy demonstrated that the administrative penalties for "refusals" were only applicable when such refusal was made within two hours. *See* A. 162-89 (citing 2012 DMV Counsel's Memo (A. 178-79)(showing a change of DMV's "long-standing position" that a motorist is only deemed to have refused during if the refusal occurs within two hours of arrest)).

DMV replied, arguing the statutory language provides for license revocation for refusals regardless of timing, and that DMV's prior position was irrelevant. A. 190-94.

F. Lower Court's April 6, 2018 Decision

On April 6, 2018, the court (Brigantti, J.) found that a plain reading of V.T.L. § 1194 "supports Petitioner's interpretation" that a "refusal" under the statute is only one made during the two-hour period of deemed consent. *See Matter of Endara-Caicedo v. NYS DMV*, 59 Misc. 3d 984 (Sup. Ct., Bronx Cty. 2018); A. 195-202. The court found that it "logically follows that following this two-hour period, a driver is no longer deemed to have consented to a chemical test, and thus the driver cannot be subject to civil penalties for refusing to take the test." A. 200.

The court further found an absence of clear Court of Appeals authority supporting Respondent's argument that the two-hour limitation in the implied consent provision only applies to incapacitated drivers. A. 201. The court ordered DMV to answer the petition. *Id.*

G. This Court's *Odum* Decision

Days later, on May 3, 2018, this Court decided *People v. Odum*, 31 N.Y.3d 344 (2018). The Court explicitly adopted Endara-Caicedo's interpretation of the two-hour period of deemed consent, and rejected the interpretation argued by DMV.

Odum involved a motorist who was issued refusal warnings more than two hours after his arrest. *Id.* at 346-47. The two warnings were: (1) that the refusal was admissible in court in criminal proceeding stemming from the arrest; and (2) that the refusal would

result in license suspension. *Id.* After receiving the warnings, Mr. Odum took the chemical test. *Id.* He subsequently argued at a suppression hearing that the test result and refusal were inadmissible because consent was involuntary. Specifically, he argued that his consent was the product of coercive warnings, which conveyed incorrect legal information—that is, even though the test occurred after two hours of his arrest, his (1) refusal would be evidence against him and (2) refusal would result in license revocation. *Odum* thus turned on the accuracy of these warnings. *Id.*

This Court held that a refusal is only admissible if it occurs within two hours of arrest under VTL § 1194(2)(a). *Id.* at 348-49. The Court found that the text of VTL § 1194(f)— which states that "evidence of a refusal to submit to such chemical test" is admissible—mandates this result. "[T]he use of the word 'such' in section 1194(2)(f) ties that provision back to subdivision 2(a)—a different subparagraph within the same subdivision—so that the two must be read together. [Subdivision 2(a)] provides, in turn, that a defendant is 'deemed' to have given consent . . . ." *Id.* at 351. The majority concluded that a person cannot be deemed to have "refused" "such chemical test" after the two-hour period because, at that point, the VTL no longer requires their submission to the test:

> Inasmuch as "such chemical test" is no longer authorized under the deemed consent provision in section 1194(2)(a) after the two-hour period has expired, the motorist cannot, as a matter of law, refuse to take the test *within the meaning of section 1194(2)(f)*. Any evidence of a refusal after that point must be suppressed because it does not fall within the parameters of the statute.

Id. at 351-52 (emphasis in original)(footnote omitted). *Odum* thus confirms that an adverse consequence cannot follow from the motorist's decision to exercise a right – the right to decline a test after two hours. This Court, however, did not reach the question of whether a warning that a license will be suspended even if the test violates the two-hour rule was also legally incorrect. *Id.* at 353.

Judge Wilson joined the majority opinion and wrote a brief concurrence, stating that the license-suspension warning was not inaccurate, and thus not coercive, given that the DMV has, since 2012, suspended licenses for refusals that occur beyond the two-hour limit. Judge Wilson's brief concurrence did not, however, consider whether the DMV's analysis was actually consistent with the VTL. *Id.* at 354 (Wilson, J., concurring).

H. <u>Verified Answer and Reply</u>

DMV answered the petition, arguing the license suspension scheme in V.T.L. § 1192(b) and (c) is a separate statutory scheme concerning an administrative proceeding to which the two-hour "evidentiary rule" rule does not apply. *See* A. 207-545 (Answer and Exhibits). Further, DMV argued that the *Odum* dissenters and concurring judge (Wilson, J.) found the two-hour rule should not apply in an administrative context. *Id.* at 25-26.

In reply, Endara-Caicedo argued the statutory scheme providing for the administrative suspension and revocation of a driver's license (V.T.L. § 1194(2)(b) and

(c)) is part of the same unitary statute that governs when police are authorized to take a breath test (V.T.L. § 1194(2)(a), the deemed consent provision) and when a refusal is admissible in a criminal proceeding (V.T.L. § 1194(2)(f)) and these provisions must be interpreted the same way. *See* A. 544-54. Further, Endara-Caicedo argued the *Odum* decision foreclosed DMV's arguments by making clear that the rationale underlying the 2012 DMV Memo—and the ALJ's decision here—was contrary to this legislative scheme. *Id.*

I. Lower Court's January 4, 2019 Decision

On January 4, 2019, the court denied Mr. Endara-Caicedo's Article 78 petition. *See* A. 555-66. Noting *Odum* did not "precisely address or resolve the issue[,]" the court found "four Judges on the Court of Appeals have indicated that a motorist arrested for driving under the influence of alcohol may have his or her license suspended or revoked upon the refusal to take a chemical breath test . . . even if that refusal occurs more than two hours after the motorist's arrest." Decision at 6; A. 562.

J. Appellate Division, First Department Decision

The Appellate Division affirmed, holding that § 1194(2) permits a motorist's refusal to submit to a chemical test, at any time, to be used against a motorist in administrative license revocation hearings. *Matter of Endara-Caicedo v. NYS* DMV, 180 A.D.3d 499 (1st Dept. 2020); (A. 572). This Court granted leave to appeal.

ARGUMENT

POINT

VEHICLE AND TRAFFIC LAW § 1194(3) BARS LICENSE REVOCATION WHEN A MOTORIST DECLINES A CHEMICAL TEST BEYOND THE STATUTORY TWO-HOUR PERIOD OF DEEMED CONSENT.

A. Standard of Review

This Court's review is de novo because this case involves an issue of statutory interpretation. *See In re Walsh v. New York State Comptroller*, 34 N.Y.3d 520, 523-24 (2019). In *Walsh*, this Court was tasked with interpreting the meaning of the phrase "any act of any inmate"' in Retirement and Social Security Law § 607-c (a). Because this was an issue of pure statutory interpretation, this Court undertook de novo review and was not required to "accord any deference to the agency's determination." *Id.* at 524.

Here, this Court is interpreting VTL § 1194(2), a question of pure statutory reading and analysis. Accordingly, "there is little basis to rely on any special competence or expertise of the administrative agency," and "the judiciary need not accord any deference to the agency's determination, and is free to ascertain the proper interpretation from the statutory language and legislative intent." *Belmonte v. Snashall*, 2 N.Y.3d 560, 566 (2004)*; Polan v. State of N.Y. Ins. Dep't*, 3 N.Y.3d 54, 58 (2004); *Matter of Leggio v. Devine*, 34 N.Y.3d 448, 459 (2020).

B. <u>The History of the Statute</u>

Eighty years ago, in 1941, chemical tests became admissible at criminal proceedings so long as the test was obtained within two hours and there was express consent.[2] Because alcohol is metabolized by the body, the two-hour rule was settled on as a "bright-line," easily enforceable compromise to "ensure that the results of the blood test constituted probative evidence of the defendant's blood alcohol level at the time of operation of the vehicle." *People v. Atkins*, 85 N.Y.2d 1007, 1009-10 (1995)(Simons, J. dissenting)(citing Assembly Sponsor's Memorandum, Bill Jacket, L.1941, ch. 726; *People v. Gursey*, 22 N.Y.2d 224, 229 [1968])).

In 1953, the legislature passed the deemed consent provision, § 71-a, as a new provision of the VTL.[3] Section 71-a deemed a motorist to have consented to a chemical test of blood alcohol content thereby eliminating the need for police to obtain consent. *See* Ch. 854, § 1, [1953] Laws of N.Y. 1876; *See People v. Kates*, 53 N.Y.2d 591, 595-96 (1981).

Along with the deemed consent provision, the Legislature created a "right" to refuse a chemical test, but the consequence was that, upon refusal, the Commissioner of Motor Vehicles "shall revoke" a driver's license or permit. *See* Ch. 854, § 1, [1953] Laws of N.Y. 1876.

[2] Ch. 726, § 1, [1941] Laws of N.Y. 1623, amending ch. 54, § 70(5), [1929] Laws of N.Y. 91.

[3] Ch. 854, § 1, [1953] Laws of N.Y. 1876.

Recognizing the difficulty of proving intoxicated driving absent a chemical test, license revocation for a refusal was intended to procure chemical tests for use in criminal prosecution, and to deter drivers from exercising the right of refusal. *See Odum*, 31 N.Y.3d at 348 (the statute "is designed to encourage those suspected of alcohol-related driving offenses to comply with requests to submit to chemical tests in order to obviate the need for securing court orders authorizing blood tests", or " 'the need for the use of force by police officers if an individual in a drunken condition should refuse to submit to the test.'")(internal citations mitted); *Id.* at 357; *People v. Craft*, 28 N.Y.2d 274, 278 (1971). Thus, from inception, license revocation worked in tandem with the admissibility of chemical tests at criminal proceedings, which, from enactment in 1941, was limited to two hours.

In 1959, the two-hour rule was moved to VTL § 1192. [4] The deemed consent law became VTL § 1194 of the 1959 statute as part of a major reorganization and recodification of the VTL.[5]

From early on, the DMV and courts interpreted the two-hour limit to apply to license revocation for a refusal. *See, e.g.*, *Matter of Lundin v. Hultz,* 29 A.D.2d 581, 582 (3d Dept. 1967)(affirming license revocation where, "[t]he Referee found that the petitioner refused to submit to a chemical test and that the refusal occurred within a

[4] Ch. 775, § 1194, [1959] Laws of N.Y. 2403.

[5] Ch. 775, § 1194, [1959] Laws of N.Y. 2008-09; Ch. 775, § 1192, [1959] Laws of N.Y. 2008, amending ch. 726, § 1 [1941] Laws of N.Y. 1623.

two-hour period following the arrest."); *In re Donahue v. Tofany*, 33 A.D.2d 590, 591 (3d Dept. 1969)(same). This was the case even though the DMV and courts acknowledged that "[t]he two-hour limitation provided by [VTL § 1192(3)] is for the purpose of qualifying the results of the test for admission in evidence." *In re Donahue* at 591.

In 1970, the legislature rewrote § 1192 and amended § 1194.[6] By this amendment, the Legislature moved the two-hour rule into the deemed consent provision, VTL § 1194(2)(a), providing that a motorist was deemed to have consented to a chemical test administered at the direction of a police officer within two hours after arrest.[7] This amendment made clear that a chemical test was only authorized – and a motorist only deemed to have consented to a chemical test – within two hours of arrest.[8] In turn, a "refusal" could only result in license revocation during this two-hour period.

The supporting memoranda referred to this amendment as mere "conforming changes" being made to "substantially reenact" the drunk-driving laws with the new drunk driving offense definitions. *See* A. 513-514, 524-525. This was because the amendment was consistent with prior interpretations of the statutes finding that there was a two-hour requirement on license revocation for "refusals." *See In re Donahue*, 33 A.D.2d at 591.

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[6] N.Y. VEH. & TRAF. LAW §1194(4)(McKinneySupp.1974).

[7] N.Y. VEH. & TRAF. LAW § 1194(4) (McKinney Supp. 1974)(emphasis added)

[8] *See* L. 1970, ch. 275, 1970 McKinney's Session Laws of N.Y.; VTL § 1194(1) (McKinney's Supp. 1974).

After the 1970 amendment moved the two-hour rule to VTL § 1194, the DMV and courts continued to hold that license revocation only stemmed from a refusal made within two hours. *See, e.g.*, *Matter of Kennedy v. Melton*, 62 A.D.2d 1152 (3d Dept. 1978)(affirming refusal where motorist vacillated in agreeing to take the test and then agreed to submit to a blood test, was taken to a hospital for that purpose, but recanted shortly before "the two-hour period within which the test must be performed (see Vehicle and Traffic Law s 1194) was due to expire"); *Matter of Reed v. New York State DMV*, 59 A.D.2d 974 (3d Dept. 1977)(rejecting petitioner's "conten[tion] that by recanting his refusal within the two-hour period he effectively consented to the test and, therefore, is not subject to the penalty for refusal."); *Matter of White v. Fisher*, 49 A.D.2d 450 (3d Dept. 1975)(affirming license revocation where petitioner's vacillation deemed a refusal even though, "the trooper admitted that at the time of petitioner's last offer to take the test, more than an hour remained of the statutory two-hour period. . . .").

Despite this long history of interpreting the two-hour limit as applying to administrative license revocations for "refusals," the DMV changed its position in 2012 and began revoking driver's licenses for refusals made after two hours. *See* A. 178-79.

C. Under the Plain Language of VTL § 1194(2), the Rules of Statutory Interpretation, and This Court's Precedent, the Two-Hour Limit Applies to Administrative License Revocation Proceedings for Refusals.

1. The Deemed Consent Provision, the Right of Refusal and the Two-Hour Rule Are Part of an Integrated Statute."

Vehicle and Traffic Law § 1194(2)(a)(1), the deemed consent provision, limits a police officer's power to perform a blood-alcohol test of a motorist. That provision only deems motorists to have "consented" to a breath test within two hours of arrest:

> Any person who operates a motor vehicle in this state shall be deemed to have given consent to a chemical test . . . for the purpose of determining the alcoholic and/or drug content of the blood. . . . provided that such test is administered . . . *within two hours after such person has been placed under arrest* . . .

V.T.L. § 1194(2)(a).

The Legislature has thus defined the scope of the deemed consent provision: the police are authorized to take a chemical test from a driver, regardless of whether the driver has personally consented, but only during the two-hour period of deemed consent.

The other subsections of § 1194(2) explain the consequences for a motorist's "refusal" to take the chemical test during the period in which the motorist is deemed to have consented to that test.

Subsection 1194(2)(b), regarding license suspensions, requires the police officer to prepare a report detailing refusal when the driver "refuses to submit to such chemical test."

Subsection 1194(2)(c) provides for a motorist to receive a hearing before suffering the civil penalties that flow from withdrawing deemed consent to a chemical test. Subsection (2)(c) also uses the language "refuses to submit to such chemical test," in defining the issues for an ALJ to determine at the hearing. V.T.L. § 1192(2)(c)(4) provides that the ALJ must determine whether "such person refuse[d] to submit to such chemical test."' *Id.*

Subsection 1194(2)(d) outlines the civil penalties that the motorist suffers from withdrawing his deemed consent, including license revocation of at least a year and a $500 fine. VTL § 1192(2)(d).

Finally, subsection 1194(2)(f) governs admissibility of a refusal at a criminal proceeding as follows:

> Evidence of a refusal to submit to such chemical test . . . shall be admissible in any trial, proceeding or hearing based upon a violation of the provisions of [§ 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.

V.T.L. § 1192(2)(f) (emphasis added). This is the provision interpreted by this Court in *Odum*. 31 N.Y.3d at 351-52 ("Inasmuch as 'such chemical test' is no longer authorized under the deemed consent provision in section 1194(2)(a) after the two-hour period has

expired, the motorist cannot, as a matter of law, refuse to take the test *within the meaning of section 1194(2)(f)*.")(emphasis in original).

This scheme thus applies VTL § 1194(2)(a) to the other subsections by using the language "refuse/refusal to submit to such chemical test" (emphasis added). The phrase "such chemical test" in the license-revocation section (1194(2)(c)), is thus linked back to VTL § 1194(2)(a), which defines a "chemical test" as one requested within two hours. *Odum*, 31 N.Y.3d at 351-52.

2. Vehicle and Traffic Law § 1194(2) Does Not Permit License Revocation When a Motorist Decides Not to Take a Chemical Test the Motorist Was Not Deemed to Have Consented to.

The rules of statutory interpretation require applying the two-hour limit to the admissibility of the refusal (VTL § 1194(2)(f)) and to the power to revoke an individual's license. Under the statute's plain language, a "refusal" within the period of deemed consent, or two hours, is the only act that, for this appeal's purposes, can lead to license revocation. VTL §§ 1194(2)(b), and (c); *see Odum* at 351-52.

As "a general rule, a statute's plain language is dispositive." *Polan v. State of N.Y. Ins. Dept.*, 3 N.Y. 54, 58 (2004) (citation omitted). "[W]hen the statutory 'language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of [the] words' used." *People v. Finnegan*, 85 N.Y.2d 53, 58 (1995) (citations omitted) (interpreting VTL § 1194(4)(b) governing a motorist's right to an independent chemical test); *see also* Statutes § 94 ("The legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its

natural and most obvious sense, without resorting to an artificial or forced construction.").

The specific words chosen by the Legislature must be given meaning and effect. *See* Statutes § 231 ("In the construction of a statute, meaning and effect should be given to all its language, if possible, and words are not to be rejected as superfluous when it is practicable to give to each a distinct and separate meaning."); *Leader v. Maroney, Ponzi and Spencer*, 97 N.Y.2d 95, 104 (2001) ("We have recognized that meaning and effect should be given to every word of a statute.").

A statute "must be construed as a whole and . . . its various sections must be considered together and with reference to each other." *Matter of New York County Lawyers' Assn. v Bloomberg*, 19 N.Y.3d 712, 721 (2012). "Words, phrases, and sentences of a statutory section should be interpreted with reference to the scheme of the entire section . . . and the meaning of a single section may not be determined by splitting it up into several parts." *Odum*, 31 N.Y.3d at 351 (quoting Statutes § 97, Comment at 213-214, 216 [1971 ed]).

Here, VTL § 1194(2)(c), which only permits license revocation for a "refus[al] to submit to such chemical test," requires that the person decline the test within two hours of arrest. *See* VTL § 1194(2)(a). This inescapable result flows from the plain meaning of "such chemical test" and the simple rule that the statute's subdivisions must be read in harmony. *Odum*, 31 N.Y.3d at 351. The various sections of VTL § 1194(2) can only be understood in reference to each other. The term "such chemical test" in the various

subsections of VTL § 1194 must be read to have the same meaning. "Such chemical test," as recognized by this Court in *Odum* can only refer to a test authorized under subdivision (2)(a) – a test within two hours of arrest when a motorist is deemed to have consented to a test. *See People v. Odum*, 31 N.Y.3d 344, 351-52 (2018)("Inasmuch as 'such chemical test' is no longer authorized under the deemed consent provision in section 1194(2)(a) after the two-hour period has expired, the motorist cannot, as a matter of law, refuse to take the test. . . . ."). Thus, a "refus[al] to submit to such chemical test" under VTL § 1194(2)(c)) is, just as under VTL § 1194(2)(f), one that occurs within two hours of arrest.

3. Prior Precedent From This Court, and Appellate Divisions, Demonstrates That the Two-Hour Rule Applies Equally to Criminal and Administrative Proceedings.

Applying the two-hour limit to administrative license revocation is consistent with this Court's precedent distinguishing between the time when a motorist is required to submit (during the period of deemed consent) and the time thereafter (when consent must be voluntary). *See People v. Ward*, 307 N.Y. 73, 76-77 (1954)("This new section [71-a of the VTL] was directed at the problem of compelling submission to the test; it was concerned, not with those who consented to take the test, but with those who were required to submit."); *Finnegan*, 85 N.Y.2d at 59 (the statute "mandates that the breathalyzer test be performed within a two-hour time period following arrest" when the test is conducted pursuant to the deemed consent provision of § 1194 (2)(a)).

Similarly, in *People v. Atkins*, 85 N.Y.2d 1007, 1008 (1995), this Court held that, after the expiration of the two-hour period, a motorist has a choice whether to submit to a chemical test. Accordingly, a chemical test obtained after two hours is admissible if expressly and voluntarily consented to, *id.*, and subject to a showing of reliability. *See, e.g., People v. Victory*, 166 Misc.2d 549, 565 (Crim. Ct., King Cty., 1995)(holding "the People must now prove at a hearing by expert testimony the scientific reliability of such BAC test administered more than two hours from arrest" prior to admission in a criminal proceeding). Under *Atkins,* "The results of a test also may be admissible absent compliance with section 1194 where a defendant has voluntarily consented to the test because section "1194 . . . ha[s] no application where the defendant expressly and voluntarily consented to a [chemical] test."' *Odum*, 31 N.Y.3d at 346 (quoting *Atkins*).

Next, in *People v. Smith*,18 N.Y.3d 544 (2012), this Court explained that the two-hour time restriction is unique to VTL § 1194(2)(a):

> Although time is of the essence in obtaining chemical test evidence, if a defendant agrees to take the test, there is no per se statutory bar on admission of the results if the test was administered more than two hours after defendant's arrest. Similarly, there is no time restriction on admission of the results of court-ordered chemical testing under Vehicle and Traffic Law § 1194 (3) or any additional test conducted by a physician at the behest of the motorist pursuant to Vehicle and Traffic Law § 1194 (4) (b). However, Vehicle and Traffic Law § 1194 (2) (a), the implied consent provision governing when a motorist "shall be deemed to have given consent to a chemical test," does contain a two-hour limitation.

Id. at fn. 1 (internal citations omitted).

Smith thus made clear that both statutory consequences (license revocation and use of a refusal at criminal proceedings) flow only from refusal within two hours. Accordingly, in *In Re Lamb v. Egan*, 150 A.D.3d 854 (2d Dept.), *mot. for lv. to appeal denied*, 29 N.Y.3d 918 (2017), the Appellate Division, Second Department held that both criminal and DMV administrative forums apply consequences for a single act -- a "refusal" -- defined by a single statute -- VTL § 1194(2)(a). *In re Lamb* at 586).

Similarly, the First Department has interpreted the consequence of license revocation to only apply to a refusal made within two hours. *See People v. Rosa*, 112 A.D.3d 551, 552 (1st Dept. 2013), *lv. denied*, 22 N.Y.3d 1202 (2014) ("[b]ecause more than two hours had passed since defendant's arrest, the officer who administered the breathalyzer should not have advised defendant that, if he refused to take the test, his driver's license would be suspended and the refusal could be used against him in court"); *Iovino v. Martinez*, 39 A.D.3d 311, 312 (1st Dept. 2007)("Petitioner's remaining objection is without merit, as his refusal clearly took place within two hours of his arrest (Vehicle and Traffic Law § 1194 [2] [a] [1]).")

Finally, in *Odum*, this Court interpreted § 1192(2)(f), holding that that a motorist cannot "refus[e] to submit to such chemical test" beyond the two-hour-deemed-consent window. 31 N.Y.3d at 351-52. *Odum* addressed whether Mr. Odum's "refusal," made after two hours and after police administered refusal warnings vitiated his consent to take the chemical test. *Id.* at 346-48. Because a chemical test may still be admissible if a motorist voluntarily consents to take the test, this Court had to determine if Mr.

Odum voluntarily consented to take the test. *See People v. Atkins*, 85 N.Y.2d 1007 (1995). To answer that question this Court had to determine whether the warnings were legally accurate. *Id.* at 350-52. The warnings were: (1) that the refusal would be admissible in court; and (2) that the refusal would result in license revocation.

Odum first explained that "[a]lthough there is no time limit expressly set forth in section 1194(2)(f), that provision refers directly back to the chemical test authorized in subdivision (2)(a)." *Id.* at 351. The Court then explained that "such chemical test" as used in 1194(2)(f) means "the one to which a defendant is deemed to have consented in subdivision (2)(a)." *Id.* Under basic rules of statutory interpretation, the use of the same word "such" within the same subdivision required the two provisions to be read in tandem:

> In other words, the use of the word "such" in section 1194(2)(f) ties that provision back to subdivision (2)(a)—a different subparagraph within the same subdivision—so that the two must be read together
>
> Section 1194(2)(a) provides, in turn, that a defendant is "deemed to have given consent to a chemical [breath] test," so long as the test is performed "within two hours after such person has been placed under arrest for" driving while intoxicated.

Id. at 351 (paragraph breaks added)(citing Statutes § 97, Comment at 213-14, 216). Accordingly, "[a]ny evidence of a refusal after that point must be suppressed because it does not fall within the parameters of the statute. *Id.* at 352.

Odum recognized that, "[W]hile the statute is designed to compel compliance, it also sets express limits on police authority to perform the breathalyzer test when, due to the absence of express and voluntary consent, they must rely on a motorist's 'deemed consent' under [VTL] § 1194 (2)(a). Those limits, which we cannot simply dismiss as meaningless, include the requirement that the test be performed within two hours." *Odum*, 31 N.Y.3d at 349.

The *Odum* dissenters likewise recognized that "a defendant's refusal—[] is inextricably linked to the revocation of a license and more readily understood as a revocation of the deemed consent created by the legislature as a condition of a license grant . . . ." *Odum*, 31 N.Y.3d at 358, 360 (DiFiore, C.J., dissenting).[9] The dissent recognized that the consequences of a refusal only flow from a motorist's revocation of statutory consent under the deemed-consent provision's two-hour limit:

> [T]he second compulsory test is provided in section 1194(2)(a) and covers the deemed consent of motorists to submit to a demand for a chemical test under penalty of losing their license and incorporates the two-hour rule. A persistent refusal triggers section 1194(2)(b) requiring a report of refusal to submit to a chemical test when a motorist revokes the statutory consent presumed from the license to drive. . . . By this statutory scheme, the refusal warnings in section 1194(2)(b)—given to motorists who persist in revoking the deemed consent presumed to be given by any

[9] The dissent is based on a finding that Mr. Odum did not preserve his challenge to the validity of the warning that his post-two-hour refusal would result in license revocation, or the 2012 Memo. *See Odum*, 31 N.Y.3d at 354 ("Because it was undisputed that the DMV changed its policy to allow revocation of a license in the event a breath test is refused more than two hours after the arrest—and defendant never challenged that legal authority—our inquiry into alleged coerciveness as a result of the warnings given ends.").

> licensed driver—serve the purpose of alerting the driver to the consequences of blocking the compulsory method of evidence collection laid out in section 1194(2)(a).
>
> The two-hour rule, however, has no applicability outside the deemed consent scenario.

Id.

Applying the two-hour limit equally to criminal and administrative proceedings also makes sense.[10] The penalty of license revocation is intended to deter motorists from refusing within the two-hour window – the relevant period for gathering admissible evidence. *Odum*, 31 N.Y.3d at 347-49. License revocation is thus inextricably linked to the deemed consent provision and to the consequences of a refusal. The same two-hour period that governs the admissibility of evidence of a refusal must also govern the consequence of license revocation. After two hours, motorists have the choice whether to submit to a chemical test and if consent is expressly and voluntarily given, a chemical test is admissible. *Atkins*, 85 N.Y.2d 1008-09. In short, when a motorist is required to submit via the deemed-consent provision, it follows that the failure to do so has consequences. When a motorist has a choice, the same consequences cannot be imposed. Otherwise the distinction between being

[10] The Appellate Division found that permitting license revocation for a "refusal" after two hours was supported by "the same conclusions reached by courts of sister states that have similar statutory regimes." *Matter of Endara-Caicedo,* 180 A.D.3d 499, 499 (1st Dept. 2019) (citing *Motor Veh. Admin. v Jones*, 380 Md 164, 179, 844 A2d 388, 397 [2004]; *Cline v Ohio Bur. of Motor Vehs.*, 61 Ohio St 3d 93, 99, 573 NE2d 77, 82 [1991]; *see also Stumpf v Colorado Dept. of Revenue, Motor Veh. Div.*, 231 P3d 1 [Colo App 2009], *cert denied* 2010 WL 1948672, 2010 Colo LEXIS 378 [Colo 2010]). The Appellate Division's contention that other state courts have not required that the refusal occur within two hours of the arrest is not persuasive given those states have statutes worded and designed differently than New York's statute at issue here.

required to submit and having a choice would be, as *Odum* put it, "meaningless." *Odum*, 31 N.Y.3d at 349.

D. To the Extent it is Relevant, the Legislative History Supports Applying the Two-Hour Limit to Civil Penalties for "Refusals."

Where a statute is clear on its face, as is the case here, and its words are possessed of a definite and precise meaning, a court should not resort to extrinsic matter, such as legislative history to ascertain legislative intent. *See Giblin v. Nassau County Medical Center*, 61 N.Y.2d 67, 74 (1984). Nonetheless, the legislative history here supports the simple point that a person cannot be punished with license revocation for exercising their right to refuse consent beyond the deemed consent period. § 1194(2)(a)-(c).

From the time chemical tests became admissible in 1941, admissibility was subject to the two-hour rule and a motorist's express consent.[11] In 1953, when the legislature enacted the deemed consent provision and punished refusals with license revocation, (then VTL § 71-a) it did so in the backdrop of the existing two-hour rule, even though the two-hour rule was located in a different statutory section (§ 70(5)). The deemed consent provision was understood by DMV and courts to include the two-hour limit for license revocation, even though the two-hour rule and deemed consent provision were in separate statutory sections. *Matter of Lundin,* 29 A.D.2d at 582; *In re Donahue v. Tofany*, 33 A.D.2d at 591 The Legislature next moved the deemed consent law to VTL § 1194, and the two-hour rule was codified in VTL § 1192, and the

[11] Ch. 726, § 1, [1941] Laws of N.Y. 1623, amending ch. 54, § 70(5), [1929] Laws Of N.Y. 91.

provisions continued to be interpreted by the DMV and courts as working together.[12] In 1970, when the Legislature moved the two-hour rule to the deemed consent provision of VTL § 1194(2)(a), where it remains today, all it did was continue and fortify the tradition of reading these two rules together by placing them all in one comprehensive statute.[13] *See Odum*, 31 N.Y.3d at 351 ("Words, phrases, and sentences of a statutory section should be interpreted with reference to the scheme of the entire section . . . and the meaning of a single section may not be determined by splitting it up into several parts."); *Bloomberg*, 19 N.Y.3d at 721 (a statute "must be construed as a whole and . . . its various sections must be considered together and with reference to each other.").

Applying the two-hour rule to license revocations for refusals is consistent with the DMV's interpretation of this statute for more than 50 years. *See* 2012 Memo ("[i]t has been the long-standing position of the [DMV] that a motorist is deemed to have refused to submit to a chemical test if the refusal occurs within two hours of the motorist's arrest.") (emphasis added), A. 178. Until 2012, the DMV determined that the two-hour rule did apply to refusal hearings based on its own statutory analysis. *Id.*

Respondent has previously claimed that, despite the statutory two-hour limit in the period of deemed consent, license revocation for a refusal occurs at any time, even

[12] Ch. 775, § 1194, [1959] Laws of N.Y. 2008-09, 2403.

[13] N.Y. VEH. & TRAF. LAW §1194(4)(McKinneySupp.1974).

when a motorist is no longer required to submit to a chemical test and has the ability to choose whether to consent. Respondent has claimed the language "such chemical test" existed in the revocation sections of the statute (VTL 1194(2)(c)) before the legislature moved the deemed consent provision to its current placement in VTL 1194(2)(a) in a supposed act of "housekeeping." Respondent's Brief, Appellate Division at 14 (citing A. 513-14, 524-25). This argument fails.

It is true that when the license revocation provision was drafted as part of the deemed consent law, the two-hour limitation was not in the same statutory section as the revocation provision. Yet, the two-hour rule predated the deemed consent provision.[14] The purpose of the deemed consent provision was to secure admissible chemical tests for criminal prosecutions, meaning tests obtained within two hours. "Such chemical test" as used in the license revocation sections for refusals has always meant a refusal within two hours, even though the two-hour rule and deemed consent provision were in different statutory sections.[15] Indeed, this is how DMV and courts interpreted the statute. *See In re Lundin*, 29 A.D.2d at 581; *In re Donahue*, 33 A.D.2d at 591. The 1970 redrafting of § 1194, which moved the two-hour rule to the deemed consent provision did not change the prior understanding that license revocation only followed for a refusal within two hours. The DMV and courts continued to so hold.

[14] Ch. 726, § 1, [1941] Laws of N.Y. 1623, amending ch. 54, § 70(5), [1929] Laws Of N.Y. 91 (to hour rule); Ch. 854, § 1, [1953] Laws of N.Y. 1876 (section 71-a, the deemed consent provision).

[15] *Matter of Lundin*, 29 A.D.2d at 582; *In re Donahue v. Tofany*, 33 A.D.2d at 591.

*See Matter of Burn*s, 59 A.D.2d at 975-76; *Matter of Reed*, 59 A.D.2d at 332; *Matter of White*, 49 A.D.2d at 451. That is why the 1970 amendment that moved the two-hour rule to the deemed consent provision in § 1194 was described as "conforming changes." (A. 513-514, 524-525).

Further, the 1970 amendment occurred prior to the passage of § 1194(2)(f), in 1973, that made refusals admissible at criminal trials.[16] Use of a refusal at criminal proceedings became a second tool to deter motorists from exercising the right to refusal during the deemed consent period. Like license revocation for refusals that preceded this amendment, a refusal had to be made within two hours to be admissible at a criminal proceeding. *See* VTL § 1194(2)(f). Accordingly, movement of the two-hour rule to the deemed consent provision (VTL § 1194(2)(a)) could not have been meant to apply only to the admissibility of refusals at criminal proceedings, as urged by DMV, because at the time of that amendment, refusals were not admissible in criminal proceedings. Rather, the language necessarily applied only to administrative license revocation proceedings (§ 1194(2)(b)-(d)) resulting from a motorist's withdrawal of deemed consent (i.e., their refusal) to take a chemical test authorized within two hours.

Had the legislature wanted to create a separate statute for administrative proceedings, it could have created a different subsection of the statute or provided a different definition of the chemical test or refusal for administrative proceedings. For

[16] N.Y. VEH. & TRAF. LAW § 1194(2)(McKinney Supp. 1974), amending ch. 445, § 1, [1971] Laws of N.Y. 1310.

example, the two-hour limit does not apply to court ordered tests under § 1194(3) because this is a different subsection than § 1194(2). Section 1194(3) defines the chemical test at issue in that section as "a chemical test of one or more of the following: breath, blood, urine or saliva" and specifies that no person can refuse "such chemical test" when a court has issued an order. *See* VTL § 1194(3). The phrase "such chemical test" in § 1194(3) does not relate back to the chemical test defined in § 1194(2) and has its own definition. There is no right of refusal for a court-ordered chemical test. Under § 1194(3), "[n]otwithstanding the provisions of subdivision two of this section [the deemed consent provision], no person who operates a motor vehicle in this state may refuse." Comparison to § 1194(3) thus supports that the right of refusal and the two-hour rule are unique to the deemed consent provision.

Ultimately, to the extent the DMV wants to change the law, its remedy is to seek legislative reform, not to pursue legal change in the courts. The rules of statutory construction instruct that courts "should avoid judicial legislation." *See* Statutes §§ 73, 74; *see also Finnegan*, 85 N.Y.2d at 58 ("Equally settled is the principle that courts are not to legislate under the guise of interpretation [citations omitted]."). As this Court held in interpreting VTL § 1194(2)(f), "it is not for this Court, by judicial fiat, to strike the express protections that the legislature has provided to motorists in Vehicle and Traffic Law § 1194(2)." *Odum*, 31 N.Y.3d at 353.

Respondent has correctly stated in past filings that the two-hour rule stemmed from concerns about the reliability of a chemical test after two hours for admissibility

in criminal proceedings. Yet, these concerns apply equally to administrative license revocation proceedings. The purpose of the deemed consent provision was to encourage drivers to submit to a chemical test for use at a criminal proceeding. Since the legislature settled on a compromise cut-off of two hours, it makes sense to have the consequence for refusing to provide this important reliable evidence limited by the same time frame. Why would the Legislature punish a motorist for failing to provide a breath test when the results of that test may no longer produce reliable evidence and the motorist is free to choose whether or not to submit to the test? Further, the delay in offering a chemical test is necessarily attributable to the police inaction, so imposing a punishment that shifts blame to the motorist for that delay is fundamentally unfair. *See People v. Morris,* 8 Misc.3d 360 (Crim. Ct., Richmond Cty. 2005) (recognizing that "refusals" after two hours are the result of "police error and folly" and that, "Clearly, Vehicle and Traffic Law § 1194 was not meant to protect incompetent police officers who dally in their effort to bring a defendant to the police station.")

As *Odum* recognized, "law enforcement agencies have been granted statutory authority [in VTL § 1194] to use an important investigative tool—chemical tests to determine blood alcohol content." *Odum*, at 347-48 (citing *People v Washington*, 23 NY3d 228, 231 (2014). That statutory scheme contains the right of refusal, the consequence of which is license revocation. "Section 1194 grants a motorist a qualified right to decline to voluntarily take a chemical test" after being warned of the consequence of license revocation and use of the refusal in criminal proceedings. *Smith*, 18 N.Y.3d at

548. It makes no sense for the Legislature to grant motorists the choice to decline a breath test after two hours and to then punish them for making that very choice. *See Long v. State*, 7 N.Y.3d 269, 273 (2006)("courts should construe [statutes] to avoid objectionable, unreasonable or absurd consequences").

Moreover, the DMV's theory permits a limitless time for the police to seek license revocation – a very harsh civil remedy. The police would not likely seek – and a motorist would not likely decline to take – a chemical test far beyond five hours because alcohol would be metabolized. During the two to five-hour period following arrest, however, it is quite likely that the police would frequently seek a chemical test. Even if the test did not result in admissible evidence for a criminal prosecution because it fell outside the two hours, under the DMV's position, the motorist's decision not to take that test would still result in license revocation of at least a year and a substantial fine of $500. Permitting this substantial civil penalty to occur when a motorist is no longer deemed to have consented to the test is not only unfair to a motorist, but creates a disincentive for effective and timely police work of securing chemical tests within two hours.

Unless a motorist is deemed to have consented to a chemical test, there is no reason to impose civil penalties on a non-compliant motorist. The Legislature adopted a bright-line rule for the window of time during which a motorist is deemed to have consented to chemical tests as a compromise to obtain admissible chemical tests for criminal proceedings. Nowhere yet has the DMV explained why the deemed consent

two-hour window should be expanded, potentially indefinitely, thereby subjecting motorists to civil penalties for test refusals at any time after their arrest for driving while intoxicated.

E. *Odum* Overruled the 2012 DMV Memo.

The courts below based their decision on a misunderstanding of the 2012 Memo, *Odum* and Judge Wilson's concurrence. *See* A. 562 (noting that, in *Odum*, four Judges of this Court indicated a motorist arrested for driving under the influence of alcohol is subject to having his or her license revoked for refusal to take a chemical breath test even where that refusal occurs after two hours); *Matter of Endara-Caicedo*, 180 A.D.3d 499, 499 (1st Dept. 2019) ("the recent opinions of four Judges of the Court of Appeals").

In the 2012 DMV Memo, DMV announced "it is the Department's view that a motorist who refuses to submit to a chemical test more than two hours after the time of arrest is deemed to have refused." DMV's prior "long-standing position" that refusals had to be made within two hours for license revocation to occur was "based solely on statutory interpretation." A. 178. In scrapping that longstanding view, the DMV's 2012 memorandum relied on irrelevant cases, not the statute. *Id.* (citing *People v. Ward*, 176 Misc. 2d 398 (Sup. Ct., Richmond Cty. 1998)(involving the admissibility of a refusal at a criminal trial)). The *Ward* court reasoned that, if a chemical test expressly consented to after two hours is admissible, so too must a refusal after two hours be admissible. The Memo also noted that *Ward* was followed "in several other cases,"

including *People v. Elfe*, 33 Misc. 3d 1221 A (Sup. Ct., Bronx Cty. 2011) and *People v. Popko*, 33 Misc. 3d 277 (Crim. Ct., Kings Cty. 2011). A. 179.

Examining the 2012 Memo reveals that it is contrary to the statutory language of VTL § 1194(2) and rejected by *Odum*. The cases that supported DMV's change in position involved the admissibility of a refusal after two hours at a criminal proceeding under § 1194(2)(f). These cases are outright overruled by *Odum*. 31 N.Y.3d at 351-52 ("Inasmuch as 'such chemical test' is no longer authorized under the deemed consent provision in section 1194(2)(a) after the two-hour period has expired, the motorist cannot, as a matter of law, refuse to take the test *within the meaning of section 1194(2)(f)*. Any evidence of a refusal after that point must be suppressed because it does not fall within the parameters of the statute.")(emphasis in original).

Accordingly, the practice of DMV following the 2012 Memo, to revoke licenses for "deemed refusals" after two hours, violates *Odum*. In the 2012 Memo, the DMV stated, "it is the Department's view that a motorist who refuses to submit to a chemical test more than two hours after the time of arrest is deemed to have refused." A. 179. By "deeming" a motorist's decision not to take the test after two hours a refusal, the DMV recognized that its new position was outside the statutory language of VTL § 1194. But a motorist's decision not to take a chemical test after two hours is simply not a "refusal," and cannot be "deemed" such by the DMV. *See Matter of Allstate Ins. Co. v. Rivera*, 12 N.Y.3d 602, 608 (2009)(an administrative agency may not adopt regulations that are inconsistent with statutory language or its underlying purposes).

Contrary to the Appellate Division's theory below, *Matter of Endara-Caicedo*, 180 A.D.3d at 499, nothing in Judge Wilson's concurrence alters the conclusion that *Odum* overruled the 2012 Memo. As explained supra, at pages 25-28, *Odum* examined whether the warnings -- (1) that the refusal would be admissible in court; and (2) that the refusal would result in license revocation. -- were legally proper when issued, thus rendering the warnings accurate and non-coercive. *Id.* at 350-52. The majority explained, "[t]he issue before us, then, is whether defendant gave his voluntary consent to the administration of the test," and described the parties' dispute as, "whether the warnings were legally accurate and, consequently, whether [Mr. Odum's] consent was voluntary." *Odum*, 31 N.Y.3d at 350.

Judge Wilson's brief concurrence opined that the license-revocation warning was accurate because it correctly conveyed the legal consequences of refusal in light of the DMV memorandum:

> I join the majority, but write separately because law enforcement officials must have clear rules as to what they may tell a motorist suspected of impaired driving. I agree with my dissenting colleagues that the license suspension warning that police gave Mr. Odum—that the Department of Motor Vehicles would suspend or revoke his license if he refused the test—was correct (see 2012 NY St Dept of Motor Vehicles Op No. 1–12 at 2). Providing that warning to motorists, even after expiration of the two-hour period, does not constitute coercion, and does not render their subsequent consent involuntarily given.

Odum, 31 N.Y.3d at 354. Judge Wilson's concurrence did <u>not</u> say that DMV's policy was correct or lawful under the governing statutory scheme. And it is impossible to

read it that way because Judge Wilson concurred with the majority opinion of the Court which held that a refusal under § 1194(2)(f) could only mean one made with two hours. *Id.* at 350-51 ("because more than two hours had passed since defendant's arrest, the warning that evidence of his refusal to take the breathalyzer test would be admissible at trial was inaccurate as a matter of law and, therefore, the record supports the conclusion of the courts below that his consent to the test was involuntary."). Judge Wilson's concurrence simply meant that since the warning was accurate in light of DMV policy, it was not coercive.

The question here though is the proper construction of VTL § 1194(2)(c). And as shown above, that subdivision only permits license-revocation when a person declines to submit to a chemical test within two hours of the arrest.

CONCLUSION

FOR THE FOREGOING REASONS, THIS COURT SHOULD REVERSE.

Respectfully submitted,

ROBERT S. DEAN
CENTER FOR APPELLATE
LITIGATION
Attorney for Petitioner-Appellant

V. MARIKA MEIS
Of Counsel
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