NYSACDL
NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
An Affiliate of the National Association of Criminal Defense Lawyers | Founded in 1986

MEMO IN OPPOSITION
Field testing mobile phones and portable electronic devices
A3955/S2305

The New York State Association of Criminal Defense Lawyers (NYSACDL) **STRONGLY OPPOSES** the enactment of A3955/S2305.

NYSACDL recognizes that distracted driving is a serious threat to public safety on public highways. This proposed legislation, however, does not in any way deter or even attempt to deter distracted driving. Instead, this legislation provides for the coerced gathering of evidence of a traffic infraction (not even a crime) in the absence of any facts that give rise to the existence of probable cause. The proposed legislation creates a new level of 'implied consent' with threats of draconian license forfeiture that will have critical and far reaching implications to Fourth Amendment guarantees.

Among the justifications for this proposed legislation is the tragic death of Evan Lieberman, a young man who died in a car accident. While we empathize with any parent who has lost a child in a car accident and that parent's difficulty in obtaining all the information regarding how the accident occurred, it must be noted that the police never arrested the driver of the vehicle. At a subsequent DMV 'fatality' hearing, the administrative law judge found that cell phone use was not a contributing factor to the accident. The justification Memo claims that Evan was killed in an accident 'caused by a distracted driver'. That is just not true. As tragic as Evan's death is, it does not provide the justification for this legislation.

The proposed legislation would permit a police officer to demand the mobile phone or portable electronic device (PED) of any operator of a motor vehicle involved in an automobile accident for the purpose of 'scanning' the mobile phone or PED. This is supposedly to determine whether or not, at or near the time of the accident, the mobile phone or PED was being 'used' in violation of VTL §§ 1225-c (1)(a) (mobile phone use) or 1225-d (2)(b) (PED use). If the 'scan' reveals that the mobile phone or PED was 'used' at or near the time of the accident, the officer can then issue a traffic ticket for the alleged violation of VTL §§ 1225-c or -d. Each ticket is a traffic infraction and carries a penalty of only a fine : $50-$200 for a first offense in 18 months, up to $50-$400 for a THIRD violation within 18 months. The Commissioner of Motor Vehicles imposes 5 points upon a conviction.

Should a driver fail to comply with the demand of the police officer to turn over their mobile phone or PED for scanning, the driver will face the most severe and
immediate license sanctions. These include revocation of their driver's license for a period of 12 months.

THE LAW IS FATALLY FLAWED:

- With regard to that portion of the law regarding using a mobile phone, the proposed § 1225-e (d) adopts the definition of "using" as the same is defined in 1225-c (1) (c). That section defines "using" as (c) "Using" shall mean (i**) holding a mobile telephone to, or in the immediate proximity of, the user's ear**; How will electronic scanning determine whether or not a mobile phone was in "use" as that term is legally defined? The scan cannot determine if the mobile phone was 'at or near' the driver's ear. Will the scan be able to determine whether or not the phone was being used through a "blue tooth" device? Therefore, by definition, unless the officer has some evidence that the mobile phone was 'being held at or near' the driver's ear, the officer would not even have the right to scan to determine if the mobile phone was in 'use'.

- It is readily apparent to those of us who practice in criminal law on a day to day basis that this definitional defect will lead to immediate conflicts between officers who will feel compelled to demand to scan mobile phones and operators who never had the mobile phone near their ears.

- The purpose of this law is to obtain the phone for the purpose of determining whether or not the phone or PED was being "used" "at or near" the time of the accident. Nowhere in the law is the word "near" the time of the accident defined. Does it mean thirty (30) minutes before? twenty (20) minutes before? five (5) minutes before? Since most accidents are not observed by the police and the precise time of the accident is generally not determined, how can the scan determine use 'at or near' the time of the accident?

IMPLIED CONSENT:

The existence of 'reasonable cause to believe' that a significant violation of law has occurred provides the constitutional justification for the implied consent to submit to a 'chemical test'. This proposed law elevates the mere presence of a mobile phone or PED in an automobile to the level of 'reasonable cause to believe' that a significant violation of the Vehicle and Traffic law has occurred.

Criminal Procedure Law §70.10(2) defines 'reasonable cause' as follows: *2. "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.*

This law creates a presumption that every mobile phone or PED in a car in an accident belonging to the driver caused such accident. No one believes that and that certainly is not the case. It is the absence of legitimate 'reasonable cause' that distinguishes the constitutionally authorized request for a chemical test from what is likely an unconstitutional demand to scan a driver's mobile phone or PED after an accident.

The proposed law borrows from the DWI statute (VTL§ 1194) the legal concept of 'implied consent' to provide the basis for the seizure of the mobile phone or PED for scanning. The proposed law, however, borrows from 2 separate and distinct 'implied consent' statutes and improperly conflates them: Field testing, pursuant to VTL§

1194(1)(b),[1] which provides for submission to a breath test where an accident has occurred and Chemical testing, pursuant to VTL§ 1194(2),[2] which codified implied consent where there are "reasonable grounds to believe a person is operating a motor vehicle in violation of any subdivision of section eleven hundred ninety-two.

A refusal to submit to a **breath test** does NOT carry with it any license sanctions at all. It cannot be coerced by threat of loss of license. It is important to note that this is a roadside breath screening test, not admissible at trial, to test for the presence of alcohol.

Field testing, on the other hand, is NOT the same as the chemical test provided for in VTL§ 1194(2). It - carries with a refusal significant license sanctions - revocation of license for 1 year. It requires the arresting officer to first have 'reasonable grounds' to believe that a violation of VTL 1192 has occurred and provides some examples of 'reasonable cause'. The officer is gathering evidence of the commission of a crime, (VTL 1192 -2,2-a,3, 4,) as well as 1192-1 - Driving while ability impaired, one of the most significant traffic infractions (non-criminal) in the statute. DWAI's potential consequences include: up to 15 days in jail, loss of license for 90 days, fines of between $300-$500, a surcharge of $260, a DMV imposed Driver Responsibility fee of $750, the requirement of

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[1] VTL§ 1194(1)(b) provides:
(*b) Field testing. Every person operating a motor vehicle which has been involved in an accident or which is operated in violation of any of the provisions of this chapter shall, at the request of a police officer,* ***submit to a breath test*** *to be administered by the police officer. If such test indicates that such operator has consumed alcohol, the police officer may request such operator to submit to a chemical test in the manner set forth in subdivision two of this section.* (emphasis added).

[2] VTL§ 1194(2). *Chemical tests. (a) When authorized.* ***Any person who operates a motor vehicle in this state shall be deemed to have given consent to a chemical test*** *of one or more of the following: breath, blood, urine, or saliva, for the purpose of determining the alcoholic and/or drug content of the blood provided that such test is administered by or at the direction of a police officer with respect to a chemical test of breath, urine or saliva or, with respect to a chemical test of blood,* ***at the direction of a police officer:***
(1) having reasonable grounds to believe such person to have been operating in violation of any subdivision of section eleven hundred ninety-two *of this article and within two hours after such person has been placed under arrest for any such violation; or having reasonable grounds to believe such person to have been operating in violation of section eleven hundred ninety-two-a of this article and within two hours after the stop of such person for any such violation,*
(2) within two hours after a breath test, as provided in paragraph (b) of subdivision one of this section, 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;
(3) for the purposes of this paragraph, "reasonable grounds" to believe that a person has been operating a motor vehicle after having consumed alcohol in violation of section eleven hundred ninety-two-a of this article shall be determined by viewing the totality of circumstances surrounding the incident which, when taken together, indicate that the operator was driving in violation of such subdivision. Such circumstances may include any visible or behavioral indication of alcohol consumption by the operator, the existence of an open container containing or having contained an alcoholic beverage in or around the vehicle driven by the operator, or any other evidence surrounding the circumstances of the incident which indicates that the operator has been operating a motor vehicle after having consumed alcohol at the time of the incident; or

alcohol assessment, and possibly treatment in order to have the suspension lifted. (Compare the relatively small fines that can be imposed for a violation of VTL 1225-c or -d).

The fungible nature of the evidence sought in 1192 cases - alcohol and drugs dissipate over relatively short periods of time - provides the exigent circumstances necessary for immediate testing. It is only after reasonable cause exists that significant license sanctions are threatened for a refusal to submit to a chemical test. In most mobile phone/PED cases, the evidence sought - whether the phone or device was in use - is well preserved and upon service of proper process in either a civil or criminal case, readily available. In the Lieberman case, the mobile phone information was available in civil discovery. The evidence sought would be available from internet service providers as well as from the mobile phone or PED itself. Even if erased from the mobile phone or PED, most users are incapable of erasing their user history from the cache memory.

This proposed legislation takes the basis for 'breath screening' - an accident - and utilizes it as the basis for a request to scan a driver's mobile phone or PED in the absence of any evidence that a violation of law was committed. Refusal to consent to such scan, in the absence of any other 'reasonable cause to believe' that the mobile phone or PED contributed to the accident, triggers the most onerous and draconian license sanctions, those associated with the refusal to submit to a CHEMICAL TEST. There is an overriding legal theory that 'the punishment should fit the crime'. These threatened license sanctions have no relation to the 'crime' - illegal use of a mobile phone or PED. License revocation, for refusal to submit to the scan, is grossly disproportionate to the traffic ticket that could be issued.

As stated above, this proposed law does not address or deter distracted driving. Instead, the proposed law seeks to coerce expedited evidence gathering to be used in the prosecution of a traffic infraction, and, more likely, the expedited commencement of civil litigation. For the most part, the evidence sought will be readily available at a later time.

NYSACDL strongly opposes this legislation.

New York State Association of Criminal Defense Lawyers (NYSACDL) is a statewide organization of criminal defense attorneys, representing approximately 1,000 private attorneys and public defenders who practice in courthouses in all parts of New York State. We are the New York affiliate of the National Association of Criminal Defense Lawyers, a professional bar association founded in 1958 that has over 40,000 members nationally.