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October 1, 2019

Hon. Adrian N. Armstrong
Mount Vernon City Court
2 Roosevelt Square
Mount Vernon, New York 10550

**Re: People v. Avriel Hillman**
Case Number: CR-09437-18

Dear Judge Armstrong:

## INTRODUCTION

This firm represents Avriel Hillman ("Ms. Hillman") in the matter of People v. Avriel Hillman, case number CR-09437-18. This Court ordered pre-trial hearings (the "Hearings") to resolve some of the issues raised by Ms. Hillman in her Omnibus Motion.[1] On May 15, 2019,[2] August 7, 2019,[3] and September 9, 2019,[4] the court conducted a combined *Huntley*, *Dunaway*, *Mapp*, Breath Test Hearing, which the Court also directed should include issues surrounding Ms.

[1] Some of the issues raised by Ms. Hillman in her Omnibus Motion are still unresolved, including the failure of the People to disclose to Ms. Hillman the records of Gas Chromatography relating to the testing of the simulator solution used during her breath test.

[2] A copy of the transcript of the hearing conducted on May 15, 2019 is attached as Exhibit "A." References to pages of that Hearing transcript will be preceded by the letter "TA."

[3] A copy of the transcript of the hearing conducted on August 7, 2019 is attached as Exhibit "B." References to pages of that Hearing transcript will be preceded by the letter "TB."

[4] A copy of the transcript of the hearing conducted on September 9, 2019 is attached as Exhibit "C." References to pages of that Hearing transcript will be preceded by the letter "TC."

Hillman's right to counsel. (TA 1-6). We write to summarize Ms. Hillman's arguments based on the evidence presented at the Hearings.

The People called two witnesses: Police Officer Peter Carcaterra and Police Officer Harry Butting. The Defendant called two witnesses: Anthony Palacios, an expert in DWI detection and standardized field sobriety testing (TC 12-14) and Police Officer Elena Cotto ("PO Cotto"). In addition, the defense introduced video recordings ("Dash Cam" - Defense Exhibit "A" at the Hearing) of the stop of Ms. Hillman's vehicle and while only a portion of that video was played during the testimony in court, the defense requested that the court review the entire Dash Cam before making findings of fact and conclusions of law. (TA 62) The defense again requests the court closely examine the Dash Cam of the stop and standardized field sobriety tests conducted on Ms. Hillman on the Dash Cam admitted into evidence before making determinations of credibility and resolving questions of fact and law in this matter, we specifically request the Court closely examine the clarity of Ms. Hillman's speech and the lack of any slur in her speech. Such a review of that Dash Cam is critical to not only determinations of fact but also in evaluating the credibility of witnesses.

Ms. Hillman requests the Court closely examine the following three essential questions presented, as well as any other issues the Court deems appropriate based upon its review of the testimony, evidence, and law in this matter:

## QUESTIONS PRESENTED

**Question Presented:** Once the law affords a person in custody the right to counsel, is it a violation of such a right for law enforcement officers to remain with the person in custody during the communication with the attorney and prevent confidential communications with counsel?

**Brief Answer:** Yes. Unless a person in custody can speak with counsel without fear of their communications being listened to by law enforcement officers, the right to counsel is meaningless.

**Question Presented:** May a police officer who makes a traffic stop arrest a person for driving while intoxicated in the absence of facts upon which a police officer could conclude that a person's ability to drive was actually impaired by alcohol as opposed to a disability or other factors, and in the absence of properly administered standardized field sobriety tests and/or a portable breath test?

**Brief Answer:** No. Where subsequent to making a traffic stop a police officer does not observe any cues that relate to a person's ability to drive being impaired by alcohol, and when such officer fails to properly administer standardized field sobriety tests, there is no support for a probable cause determination, especially in the absence of a portable breath test being administered.

**Question Presented:** Can a sufficient foundation be laid for the introduction into evidence a breath test in the absence of evidence that here was a properly administered observation period as required by 10 NYCRR 59.5?

**Brief Answer:** No. In order to be admissible, a breath test must be administered in compliance with VTL §1194, which delegates the authority of how the test should be

administered to the Department of Health, which enacted 10 NYCRR 59.5 including the requirement that an observation period be conducted.

**STATEMENT OF FACTS**

On December 23, 2018, PO Peter Carcaterra (PO Carcaterra) was working on the Cross-County Parkway. PO Carcaterra initially testified that he was on the Cross-County Parkway westbound express lanes in the shoulder monitoring traffic. (TA 12).[5] PO Carcaterra claimed that he observed a Volkswagen driving too slow and too fast intermittently, claiming well under 25 miles per hour and as fast as 85 miles per hour, and that he observed numerous vehicles beeping and driving around it and slamming on their brakes approaching it. (TA 12). This testimony was contradicted by the Dash Cam footage received in evidence on multiple counts, and the later testimony of Police Officer Cotto (TB 66). PO Carcaterra later contradicted his own speed estimate when he testified that Ms. Hillman was driving "as low as 25 miles per hour" (TA 69) (as opposed to under 25 miles per hour). Dash Cam does not show her driving that slow, nor does it show multiple cars being obstructed by her driving in any capacity. In fact, it reveals that she was driving consistent with cars around her. Officer Carcarterra claimed that Ms. Hillman was obstructing cars on the highway. Dash Cam also reveals that there were very few cars on the highway at all, which is logical considering the time of night and location, and time of year, which the defense questioned Officer Carcarterra about, and which he had no explanation for. The actual speed limit at that location was 45 miles per hour. PO Carcaterra testified rather remarkably that because the minimum speed limit at that location is 45 miles per hour he can pull people over for doing 44 miles per hour or 46 miles per hour. (TA 58-59) This odd assertion was especially disconcerting given his prior testimony that he was unaware whether there was a

[5] PO Carcaterra later changed this testimony to reflect that he was in fact in the eastbound lanes.

minimum speed limit on the roadway (TA 57). One of the traffic tickets issued to Ms. Hillman and the alleged basis for the stop of her vehicle by PO Carcaterra was for driving too slowly but since the officer did not know if there was a minimum driving speed, this calls into question the basis for the violation. (TA 54). PO Carcaterra followed Ms. Hillman's vehicle as it was driving forty-five miles per hour (TA14), which was the speed limit at the location.

Based upon the driving he observed, without any further investigation, PO Carcaterra claimed he was thinking the person was possibly intoxicated just based on her driving. (TA16). These conclusions were made by PO Carcaterra without any personal contact with Ms. Hillman, even though one of the critical components in evaluating impairment by use of alcohol is personal contact.

At approximately the intersection of the Hutchinson River Parkway and Cross County Parkway, PO Carcaterra activated his overhead lights to stop Ms. Hillman's vehicle. Ms. Hillman safely pulled over and when directed by the officer, drove even further for a period of time both safely and smoothly in order to exit as directed at Webster Avenue exit. (TA 18). This action taken by PO Carcaterra was inconsistent with his opinion that he had already formed the belief the driver may be intoxicated as there would be no reason for a police officer to allow a motorist to continue to drive after forming the opinion that they may be intoxicated.

PO Carcaterra approached Ms. Hillman's vehicle and claimed he noticed an odor of alcohol from the rear of the vehicle (TA 19). PO Carcaterra subsequently stated the odor came from Ms. Hillman's breath, described Ms. Hillman's eyes as bloodshot and watery and stated that she appeared nervous (TA19). PO Carcaterra stated he *believed* he asked Ms. Hillman if she had been drinking that night. Ms. Hillman replied and stated that she had one drink. PO

Carcaterra asked Ms. Hillman to provide identification, which she did without hesitation or problem.

PO Cotto was called to the scene to assist. (TA 20-22). Ms. Hillman was ordered out of her vehicle and asked to perform standardized field sobriety tests ("SFSTs"). (TA 23). Ms. Hillman stated she had a physical disability called avascular necrosis. She stated that one of her legs was shorter than the other resulting in a limp. (TA 24-25). PO Carcaterra administered the three SFSTs to Ms. Hillman and each was recorded on video.

The first SFST administered to Ms Hillman was the Horizontal Gaze Nystagmus Test ("HGN"). PO Carcaterra claimed that Ms Hillman demonstrated 6 clues on the HGN test and that it takes 4 clues to fail the HGN test. PO Carcaterra asserted Ms Hillman had lack of smooth pursuit in both eyes, her eyes were jerking at maximum deviation, and she had onset of nystagmus prior to 45 degrees (TA 28, 29). Anthony Palacios is a law enforcement consultant for both defense attorneys and prosecutors and specializes in the National Highway Traffic Safety Administration ("NHTSA") impaired driving training curriculum. He has consulted on almost 2,000 impaired driving cases for attorneys across the country and prior to that had approximately 14 years of law enforcement experience. In those14 years, about ten of them focused on traffic enforcement and DUI enforcement. The last four years of Mr. Palacios' law enforcement career were spent as a full-time impaired driving staff instructor for the Georgia Police Academy where he trained approximately 3000 students, 95 percent of whom were law enforcement officers and the balance were prosecutors. As a law enforcement officer, Mr. Palacios made over 800 DUI arrests. Mr. Palacios served as the coordinator for the State of Georgia's SFST program and in that role was the overseer of the entire impaired driving training curriculum for the state of Georgia. Mr. Palacios was selected by the National Highway Traffic

and Safety Administration to serve on its national assessment team to evaluate its programs throughout the country to make sure law enforcement agencies were teaching the NHTSA training courses correctly to their officers. (TC 4-12). Mr. Palacios was accepted by the Court as an expert witness in DWI detection and standardized field sobriety testing (TC 12-14).

It was the opinion of Mr. Palacios that the HGN test was done incorrectly by PO Carcaterra. His conclusion, based on observing the video and reading the transcripts, was that the test was "invalid and all clues are unreliable." (TC 20). Mr. Palacios explained that the required standardized distance and height for holding the stimulus during HGN is 12 to 15 inches away from a person's face and *slightly above eye level*. Mr. Palacios pointed out that the Dash Cam demonstrates that it was clear that PO Carcaterra held the stimulus he was using *well above* Ms. Hillman's head to where it was *not even close to slightly above eye level*, it was well above her head. Mr. Palacios explained that the consequence of putting a stimulus as far above eye level as Police Officer Carcaterra did in this case was that, according to NHTSA, it can cause a very high false positive rate (61 percent to be exact, based on a notable 2008 study called *Robustness of the HGN Test)*. (TC 21-23). Mr. Palacios testified that the stimulus was placed too high above Ms. Hillman's eye level for not just a portion, but for the entire test. (TC 25).

In addition to the problems associated with the placing of the stimulus too high above eye level, Mr. Palacios testified to other errors in the timing rates used by PO Carcaterra in the administration of the HGN test, which are standardized for a scientific reason. Mr. Palacios explained that each step or each clue has a specific timing rate the officer is supposed to move the driver's eyes. To evaluate lack of smooth pursuit, the officer is supposed to move the driver's eyes two seconds from the center out to end point and then two seconds back to center and then repeat it for each eye, taking a total of sixteen seconds. PO Carcaterra completed the entire check

in thirteen seconds which according to a study conducted by Dr. Karl Citek, NHTSA's national HGN expert, can cause catch-up saccades. This is where the eye tries to catch up to an object that is moving too fast, and can induce a reaction that the officer can mistake for alcohol-induced nystagmus.(TC 27). Mr. Palacios went on to explain the next portion of the HGN test, distinct and sustained nystagmus at maximum deviation. He stated that the officer moves the driver's eye out to where there is no longer white in the corner of the eye. Once they get to that section, they hold the eye there for a minimum of four seconds. During that time, they look for the eyes to jerk the entire time. Mr. Palacios explained that the officer must hold it there for a minimum of four seconds because when the clue was developed and validated, scientists had found that when you move a person's eye out to maximum deviation, even when sober, the first couple seconds the person's eye muscle can jerk. If it's caused by alcohol, then the jerking will go on past four seconds and continue. (TC 28-29). The two passes that PO Carcaterra did on Ms. Hillman's left eye, which were pass number one and pass number three, were only held for one second, not the required four seconds out to maximum deviation. The other two passes, PO Carcaterra did not hold the eye out at maximum deviation at all. He just moved it to end point and immediately came back in. (TC 30).

In conclusion on the HGN, Palacios distinctly stated that all three portions of the HGN were conducted improperly, resulting in potential false positives and eliminating their validity as a cause for arrest.

The next two SFSTs administered to Ms. Hillman were the walk and turn and one leg stand. PO Carcaterra was aware that Ms. Hillman had a physical disability and needed a crutch to walk (TA 31, 35). He did not take time to thoroughly understand her condition. Ms. Hillman's physical disability, called avascular necrosis, results in a severe limp and the officer was told one

of her legs was shorter than the other. (TA 24-25). Ms. Hillman required a crutch that she had in the vehicle she was driving during the traffic stop. (TC 34).

PO Carcaterra could not say whether her failure to do the walk and turn and one leg stand correctly was due to her disability or intoxication (TA 107, 108). Mr. Palacios testified that the NHTSA training curriculum provides that drivers with back, leg, or inner ear problems could have difficulty with the tests even when sober. (TC 34). In fact, an officer is not supposed to administer the walk and turn or one leg stand test to individuals who have back leg or inner ear problems (TC 35) because someone with a leg problem may be truly doing the best they can but they still may be displaying clues that officers are trained to look for and that an officer may misinterpret as alcohol related.

At the conclusion of the SFSTs, PO Carcaterra placed Ms. Hillman under arrest at 1:57 a.m. (TA 33) without administering a preliminary breath test ("PBT"). PO Carcaterra based his conclusion that Ms. Hillman was intoxicated on the odor of alcohol, her motor skills (which he did not detail), her glassy, bloodshot eyes, inability to make sense of the night (PO Carcaterra did not explain what he meant by this statement) and her anxiety. (TA 45). PO Carcaterra himself admitted that glassy eyes is not an indicator of alcohol impairment (TA 96). PO Carcaterra admitted that bloodshot eyes is only an indicator of alcohol use and not impairment (TA 96). While PO Carcaterra testified that he could smell the odor of alcohol from Ms. Hillman, his testimony that he could smell it from as far away as the rear bumper of her vehicle was incredulous and renders such implausible and indicates bias and credibility issues. (TA 119). The Court itself recognized this and interjected to question the witness' account of how far away he was when he first detected the odor. Upon the Court's inquiry, PO Carcaterra changed his testimony to state he smelled the odor from the rear door.

Mr. Palacios testified that in phase two of the NHTSA protocol for detecting an alcohol impaired driver, which is the personal contact phase, there are 28 cues of impairment by alcohol, of which PO Carcaterra testified to observing only three at the Hearing: bloodshot eyes, admission to drinking, and the odor of alcohol. Mr. Palacios further pointed out that none of those three cues noted by PO Carcaterra are cues that relate to the impairment of one's ability to drive being caused by alcohol. (TC 39-40).

Mr. Palacios testified that the importance of the PBT is that it helps an officer establish that whatever signs of possible impairment they seeing are due to alcohol. (TC 38). PO Carcaterra did not administer a PBT to Ms. Hillman before her arrest. When Officer Carcarterra called for Cotto to provide assistance, he could have requested a PBT device be brought from the station, but he did not.

Based upon the evidence Mr. Palacios reviewed, including the Dash Cam footage, how Ms. Hillman appeared and spoke and interacted, the performance of the standardized field sobriety tests, given all his training and experience as a trainer, expert, and officer, he was not able to conclude that Ms. Hillman's ability to operate a motor vehicle was actually impaired by alcohol. (TC 43).

Alcohol impairs fine motor skills before gross motor skills (TA 89). Ms. Hillman had no difficulty producing her driver's license, which is an example of a fine motor skill (TA 88-89).

PO Carcaterra agreed he did not notice Ms. Hillman had slurred speech (TA 92), even though he initially stated it as one of his justifications for cause. Mr. Palacios noted that one of the common indicators of alcohol impairment is slurred speech, and stated that after reviewing the video he did not find her speech to be slurred or altered or impaired to any degree indicating

impairment by alcohol. PO Carcaterra described Ms. Hillman as polite and respectful (TA86). Both factors are indications that there was no impairment due to alcohol.

Prior to being placed in the patrol car, Ms. Hillman requested an opportunity to speak to her attorney (TA 35). Ms. Hillman repeated this request at the station and was permitted to make phone calls (TA 36) which included a call to her attorney (TB 88, 89) and spoke with him in the main holding cell area where three officers were present, including Officer Cotto, Officer Carcarterra and Officer Butting. PO Cotto admitted that during the phone conversation between Ms. Hillman and her lawyer, she stood next to Ms. Hillman for the length of the conversation, and that PO Butting and PO Carcaterra were both in earshot of the conversation between Ms. Hillman and her attorney. (TC 88, 89, TA 113). Ms. Hillman's attorney had earlier placed a phone call to headquarters requesting the opportunity to speak with Ms. Hillman, the lawyer's client, and the client was not informed or given the opportunity to communicate. (TA 112, 113, 126).

Ms. Hillman consented to a breath test and one was administered by PO Butting. PO Butting was responsible for doing an observation period (TA 39). The observation period began at 2:34 a.m. (TB 9). At 3:49 a.m. a final breath sample was collected after conducting multiple samples into one machine. PO Cotto testified that PO Butting was walking in and out of the booking area prior to the test (TB 74) and was gone for a few minutes each time (TB 74) leaving Ms. Hillman alone each time during the observation period prior to the breath test.

## DISCUSSION

**Question Presented**: Once the law affords a person in custody the right to counsel, is it a violation of such a right for law enforcement officers to remain with the person in custody during the communication with the attorney and prevent confidential communications with counsel?

**Brief Answer**: Yes. Unless a person in custody can speak with counsel without fear of their communications being listened into by law enforcement officers, the right to counsel is meaningless.

If a motorist is arrested for driving while intoxicated, the New York Courts have long recognized a limited right to counsel associated with the criminal proceeding. *See People v. Smith*, 18 N.Y.3d 544, 549, 942 N.Y.S.2d 426, 965 N.E.2d 928 (2012); *People v. Gursey*, 22 N.Y.2d 224, 227, 292 N.Y.S.2d 416, 239 N.E.2d 351(1968).

In the case at hand there is no question that Ms. Hillman requested counsel. In fact, at the onset of her detention and even prior to being placed in the patrol car, Ms. Hillman requested an opportunity to speak to her attorney (TA 35). This effectively invoked her limited right to counsel under New York law. *People v. Gursey*, 22 N.Y.2d 224. Ms. Hillman's attorney also reached out to her, effectively asserting that same right. *See People v. Washington*, 107 A.D3d 4 (App. 2d Dept. 2013).

The record makes clear that Ms. Hillman was permitted to make phone calls (TA 36) which included a call to her attorney (TB 88, 89). Initially, this may seem to have satisfied the obligation to provide Ms. Hillman with access to counsel, however during the phone conversation between Ms. Hillman and her lawyer, PO Cotto stood next to Ms. Hillman for the length of the conversation. Also, in earshot of Ms. Hillman's conversation with her attorney were PO Butting and PO Carcaterra, who were both present and able to listen to the conversation between Ms. Hillman and her attorney. (TC 88, 89, TA 113).

The right to counsel includes "the right to consult counsel in private, without fear or danger that the People, in a criminal prosecution, will have access to what has been said." *People v. Cooper*, 307 N.Y. 253, 259, 120 N.E.2d 813 (1954); *see also People v. Gamble*, 18 N.Y.3d 386, 396, 941 N.Y.S.2d 1, 964 N.E.2d 372 (2012)("[i]ntrusion upon a client-lawyer conference, whether in the privacy of an office or at the counsel table in court, contravenes our sense of traditional fair play and due process"); *Coplon v. United States*, 191 F.2d 749, 759 (D.C.Cir.1951) (the Fifth and Sixth Amendments "guarantee to persons accused of crime the right privately to consult with counsel both before and during trial. This is a fundamental right which cannot be abridged, interfered with, or impinged upon in any manner").

The facts in this case are very similar to those in *People v. Moffitt*, 50 Misc3d 803, 19 N.Y.S.3d 713 (N.Y. Crim. Ct. 2015). In *Moffitt*, the Defendant, charged with driving while intoxicated requested the opportunity to speak with an attorney after arrest but prior to taking a breath test. While police afforded the defendant the opportunity to make a call to counsel, they remained in the room with the defendant and listened into to the conversation between the defendant and his attorney. The conversation in *Moffitt* was also recorded on video camera. While the conversation between Ms. Hillman and her attorney was not recorded, it was listened to by three law enforcement officers, a distinction without merit because it creates the same concerns expressed by the court in Moffitt, *i.e.* the chilling effect caused by the fear that a defendant's words spoken during the communication with her lawyer could be later used against her. As the Court put it best in *Moffitt*, "**[o]nce afforded, if the right to counsel is to have any meaning, the communication between lawyer and client must be private.**" *Moffitt* 50 Misc. 3d at 803 (emphasis supplied). The Court in *Moffitt* cited to another case directly on point with

the facts as presented here, *People v. O'Neil*, 43 Misc.3d 693, 986 N.Y.S.2d 302 (Nassau Co. Dist. Ct. 2014). Consider the following language from *O'Neil:*

> This right to access to counsel had been extended to consultation with counsel, under limited circumstances, prior to submitting to a chemical test in a driving while intoxicated case...*People v. Gursey*, 22 N.Y.2d 224, 228, 292 N.Y.S.2d 416, 418, 239 N.E.2d 351 (1968) *People v. Smith*, 18 N.Y.3d 544, 550, 942 N.Y.S.2d 426, 430, 965 N.E.2d 928 (2012)…As the Court noted in *Gursey*, id. at 228, 292 N.Y.S.2d 416, 418, 239 N.E.2d 351 (1968), when the Defendant was requested to submit to a chemical test of his breath he, "possessed a number of statutory options which could be asserted only during the transaction at the station house, and concerning which the advice of counsel, if available, was relevant." ***While Officer Quigley properly provided the Defendant with the opportunity to converse with counsel, given the fact that Officer Quigley would not step out of earshot of the conversation, the Defendant was placed in the untenable position of having to either forego providing his attorney with information essential to the advice sought, or waive his Fifth Amendment right against self-incrimination in order to exercise his fundamental right to counsel. The Defendant's Federal Sixth Amendment and New York State Art. 1 § 6 right to counsel is entitled to more than the lip service provided herein***.

*O'Neil*, 43 Misc.3d at 693 (emphasis supplied). The only factual difference between *O'Neil* and the case at hand is that in *O'Neil*, the fruit of the violation of right to counsel was the statement itself not a breath test.

Although Ms. Hillman was provided the opportunity to speak to counsel, she was denied the opportunity to have a private communication with counsel so that she could have a meaningful conversation in order to discuss and evaluate the choices she had which included whether to submit to a breath test. This conversation would likely include discussions of how much alcohol, if any she consumed and over what period of time it was consumed, ramifications of consenting to a test, all conversations that would be held in the presence of police officers. Because the police prevented that privacy here, just as in *Mofitt* and *O'Neil*, the court must

suppress the results of the breath test and all evidence obtained subsequent to her request to speak to her attorney.

**Question Presented:** May a police officer who makes a traffic stop arrest a person for driving while intoxicated in the absence of facts upon which a police officer could conclude that a person's ability to drive was actually impaired by alcohol and in the absence of properly administered standardized field sobriety tests and/or a portable breath test?

**Brief Answer:** No. Where subsequent to making a traffic stop a police officer does not observe any cues that relate to a person's ability to drive being impaired by alcohol and fails to properly administer field sobriety test there is no support for a probable cause determination, especially in the absence of a portable breath test being administered.

When a defendant seeks to suppress evidence on the ground that it was obtained as the result of an illegal arrest, the People have the burden of going forward with proof of specific facts supporting probable cause for her arrest. *People v Baldwin*, 25 NY2d 66, 70-71 (1969). Where the charges against a defendant include driving while intoxicated, the People must establish, from the totality of the circumstances, that it is more probable than not that the defendant was operating a motor vehicle while her ***physical or mental abilities are actually impaired, to any extent, after consuming alcohol***. *People v. Vandover*, 20 NY3d 235 (2012) (emphasis supplied).

Driving while impaired by alcohol occurs when a defendant's consumption of alcohol has actually impaired, to any extent, the physical and/or mental abilities expected of a reasonable and prudent driver. *People v. Cruz*, 48 NY2d 419 (1979).

Equally important, probable cause for an arrest does not arise where the People establish evidence of conduct that is equally compatible with guilt or innocence. *People* v. *Carrasquillo*, 54 NY2d 248 (1981).

There are three phases to a DWI investigation: operation phase, personal contact and testing phases. The testimony concerning the information gathered by PO Carcaterra in phase

one was, inconsistent and more importantly, was evidence which was of conduct that is equally compatible with guilt or innocence. The testimony concerning phase two observations consisted of evidence that Ms. Hillman consumed alcohol and did nothing to establish that her physical or mental abilities were actually impaired by alcohol. Finally, in phase three, the SFSTs were invalid, all clues are unreliable and no PBT was administered to Ms. Hillman.

With respect to the observations of PO Carcaterra that relate phase one and the manner Ms. Hillman operated her vehicle, PO Carcaterra initially claimed that he observed a Volkswagen driving extremely slowly, well under 25 miles per hour and that he observed numerous vehicles beeping and driving around it and slamming on their brakes approaching it. (TA 12). This testimony was contradicted by the Dash Cam footage received in evidence and the later testimony of Police Officer Cotto who reported prior inconsistent statements of PO Carcaterra relating to his speed estimates of Ms. Hillman's driving (TB 66). PO Carcaterra later contradicted his own speed estimate in court when he testified that Ms. Hillman was driving "as low as 25 miles per hour" (TA 69). The speed limit at that location was 45 miles per hour. PO Carcaterra testified rather remarkably that the minimum speed limit at that location is 45 miles per hour and he testified that he can pull people over for doing 44 miles per hour or 46 miles per hour. (TA 58-59). This was especially odd given his prior testimony that he was unaware whether there was a minimum speed limit on the roadway (TA 57). One of the traffic tickets issued to Ms. Hillman and the alleged basis for the stop of her vehicle by PO Carcaterra was for driving too slowly. (TA 54), but when PO Carcaterra followed Ms. Hillman's vehicle it was driving forty-five miles per hour (TA14), which was the speed limit at the location. Based upon the driving he observed, without any further investigation, PO Carcaterra jumped to the conclusion that the driver was possibly intoxicated just based on her driving, as he stated he

suspected. Subsequent to being directed to pull her vehicle over, Ms. Hillman responded and safely pulled her vehicle off the road, parking it safely in an appropriate location, and upon instruction driving it safely and smoothly to another location, without difficulty. Overall, the testimony of Ms. Hillman's driving, including the Dash Cam recording of her operation of her vehicle, and her driving and demeanor afterwards, is evidence of conduct that is equally compatible with guilt or innocence as it is just as likely to be the result of cautious driving, tired driving, driving in an area the driver is unfamiliar with, or even distracted driving. Even if the Court finds Ms. Hillman's driving provided a basis for a traffic stop, it was not the type of driving that should have led to the conclusion at that time in the investigation that the motorist was impaired by alcohol.

In phase two of the NHTSA protocol for detecting an alcohol impaired driver, the personal contact phase, there are 28 cues of impairment by alcohol, of which PO Carcaterra testified to observing only three such clues at the Hearing: bloodshot eyes, admission to drinking, and the odor of alcohol. Critical to this Court's analysis of the probable cause determination is that none of those three cues noted by PO Carcaterra are cues that relate to the impairment of one's ability to drive being caused by alcohol. (TC 39-40). It was learned during phase two of the investigation that Ms. Hillman had consumed some alcoholic beverage at some point earlier, but as part of PO Carcaterra's investigation it was never learned when that alcohol was consumed or exactly what it was. The consumption of alcohol alone is insufficient to prove impairment. All of the clues testified to by PO Carcaterra relate solely to the consumption of alcohol and not the ability to drive being impaired. PO Carcaterra himself admitted that glassy eyes is not an indicator of alcohol impairment (TA 96). PO Carcaterra admitted that bloodshot eyes is only an indicator of alcohol use and not impairment (TA 96).

Mr. Palacios, an expert in DWI detection and standardized field sobriety testing (TC 12-14) offered testimony related to the DWI investigation conducted by PO Carcaterra. Mr. Palacios's testimony focused on phases two and three of the DWI investigation. Anthony Palacios is a law enforcement consultant for both defense attorneys and prosecutors and specializes in the NHTSA impaired driving training curriculum, and was recognized by the Court as an expert. He has had approximately 14 years of law enforcement experience. In those 14 years, about ten of them focused on traffic enforcement and DUI enforcement. The last four years of Mr. Palacios' law enforcement career was spent as a full-time impaired driving staff instructor for the Georgia Police Academy where he trained approximately 3000 students, 95 percent of whom were law enforcement officers and the balance were prosecutors. As a law enforcement officer, Mr. Palacios made over 800 DUI arrests. Mr. Palacios served as the coordinator for the State of Georgia's SFST program and in that role was the overseer of the entire impaired driving training curriculum for the state of Georgia. Mr. Palacios was selected by the National Highway Traffic and Safety Administration to serve on its national assessment team to evaluate its programs throughout the country to make sure law enforcement agencies were teaching the NHTSA training courses correctly to their officers. (TC 4-12). Mr. Palacios testified that he reviewed the testimony offered by PO Carcaterra at the Hearing and none of the cues noted by PO Carcaterra are cues that relate to the impairment of one's ability to drive being caused by alcohol. (TC 39-40).

There was nothing learned in phase three of the investigation conducted by PO Carcaterra that helped establish probable cause. The SFSTs were invalid, all clues are unreliable and no PBT was administered to Ms. Hillman.

The HGN test was done incorrectly by PO Carcaterra. The test was invalid and all clues are unreliable. (TC 20). Mr. Palacios explained that the required standardized distance and height for holding the stimulus during HGN is 12 to 15 inches away from a person's face and *slightly above eye level*. The Dash Cam demonstrates and it was clear that PO Carcaterra held the stimulus he was using well above Ms. Hillman's head to where it was not even close to slightly above eye level, it was well above her head. Mr. Palacios explained that the consequence of putting a stimulus as far above eye level as Police Officer Carcaterra did in this case was that according to NHTSA, it can cause a very high false positive rate (61 percent to be exact, based on a 2008 study called *Robustness of the HGN Test)*. (TC 21-23). Mr. Palacios testified that the stimulus was placed too high above Ms. Hillman's eye level for the entire test. (TC 25).

In addition to the problems associated with the placing of the stimulus too high above eye level, Mr. Palacios testified to other errors in the timing rates used by PO Carcaterra in the administration of the HGN test. Mr. Palacios explained that each step or each clue has a specific timing rate the officer is supposed to move the driver's eyes. For lack of smooth pursuit, the officer's moving the driver's eyes two seconds from the center out to end point and then two seconds back to center and then repeating it for each eye, taking a total of sixteen seconds. PO Carcaterra completed the entire check in thirteen seconds which according to a study conducted by Dr. Karl Citek, NHTSA's national HGN expert, can cause catch-up saccades. This is where the eye is trying to catch up to an object that's moving too fast, and the officer can mistake it for alcohol-induced nystagmus. (TC 27). Mr. Palacios went on to explain that the next portion of the HGN test, distinct and sustained nystagmus at maximum deviation. He stated that the officer moves the driver's eye out to where there is no white in the corner of the eye. Once they get to that section, they hold the eye there for a minimum of four seconds. During that time, they look

for the eyes to jerk the entire time. Mr. Palacios explained that the officer must hold it there for a minimum of four seconds because when the clue was developed and validated, scientists had found that when you move a person's eye out to maximum deviation, even when sober, the first couple seconds the person's eye muscle can jerk. If it's caused by alcohol, then the jerking will go on past four seconds and continue. (TC 28-29). The two passes that PO Carcaterra did on Ms. Hillman's left eye, which were pass number one and pass number three, were only held for one second, not the required four seconds out to maximum deviation. During the other two passes, PO Carcaterra did not hold the eye out at maximum deviation at all. He just moved it to end point and immediately came back in. (TC 30). This last failure shows a careless disregard for the correct performance of this test.

The next two SFSTs administered to Ms. Hillman were the walk and turn and one leg stand. These last two tests are invalid and cannot help support a probable cause determination because they should not have been given to Ms. Hillman. Given her disability it cannot be known whether the clues that were observed by PO Carcaterra were due to her disability or intoxication. PO Carcaterra was aware that Ms. Hillman had a physical disability (TA 31, 35) and she required a crutch that she had in the vehicle she was driving during the traffic stop. (TC 34). PO Carcaterra failed to ask anything about how Ms. Hillman's disability might affect her ability to do the test after explaining what the test was, even though he knew of her need for a crutch and her disability, and could not say whether her failure to do the walk and turn and one leg stand correctly was due to her disability or intoxication (TA 107, 108). Mr. Palacios testified that the NHTSA training curriculum provides that drivers with back leg or inner ear problems could have difficulty with the tests even when sober. (TC 34). An officer is not supposed to administer the walk and turn or one leg stand tests individuals who have back leg or inner ear

problems. (TC 35) because someone with a leg problem may be truly doing the best they can but they're still may be displaying clues that officers are trained to look for and that an officer may interpret as alcohol related. Despite her disability PO Cotto testified that Ms. Hillman in fact "did a decent job" at doing the SFSTs. (TB 64). Without any sufficient reason being given by PO Carcaterra, no PBT was administered to Ms. Hillman. This was unfortunate because as Mr. Palacios testified, the importance of the PBT is that it helps an officer establish that whatever signs of possible impairment they're seeing are due to alcohol. (TC 38).

Based upon the evidence Mr. Palacios reviewed, including the Dash Cam footage of how Ms. Hillman appeared, the standardized field sobriety tests and his training and experience, he was not able to conclude that Ms. Hillman's ability to operate a motor vehicle was actually impaired by alcohol. (TC 43).

PO Carcaterra described Ms. Hillman as polite and respectful (TA86). Ms. Hillman had no difficulty producing her driver's license, which is an example of a fine motor skill (TA 88-89). Alcohol impairs fine motor skills before gross motor skills (TA 89). PO Carcaterra did not notice Ms. Hillman had slurred speech (TA 92).

In *People v. Brown,* Dkt. CR-017303-18QN (Crim. Ct. Queens Co. 2019) (a copy of this decision is attached for ease of reference), the Court was presented with a similar fact pattern to the one presented here. In *Brown,* the court found a basis for the stop of the defendant's car for driving at an improper speed. While conducting the traffic stop the officer in *Brown* detected watery eyes and an odor of alcohol on the motorist's breath. The Court's decision turned on the improperly administered HGN test. The Court pointed out that the question of whether a defendant's physical or mental abilities were impaired or compromised as a result turns primarily on his performance on the HGN test. The Court held:

> Generally speaking, the results of the HGN field sobriety test have been widely accepted as a reliable indicator of intoxication within the scientific community of optometrists, *citing to People v. Beaupre, 1*70 AD3d 1031, 1033 (2d Dept 2018). I find that Officer's Genovese and Cochran failed to employ the accepted techniques and procedures for administration of the HGN Test which may have resulted in a false or inaccurate determination that defendant exhibited indicators of intoxication. Given the unreliability of the HGN Test results, the People have failed to establish reasonable cause to believe that the defendant was operating a motor vehicle while actually impaired.

In *People v. Vandover*, 20 NY3d at 235, the case in which the Court of Appeals set forth the standard for what is required to establish probable cause in a DWI arrest, the Court found a lack of evidence sufficient to establish probable cause based on far more evidence than what has been testified to on this record. In *Vandover*, officers observed the driver to have glassy, bloodshot eyes, an odor of alcohol on her breath and seemed lethargic. Police officers in that case administered, field sobriety tests as well as a PBT which recorded a positive result, which the officers testified to was as consistent with an alcohol level above the statutory limit as it is with one below that level and the defendant made a statement that she had a "couple of drinks" but those were earlier and she was not currently under the influence of alcohol.

Critical in the legal analysis to this case is that probable cause for an arrest does not arise where the People establish evidence of conduct that is equally compatible with guilt or innocence. *People* v. *Carrasquillo,* 54 NY2d 248 (1981). The evidence presented at the hearing by the People does no more than establish evidence which is equally compatible with guilt or innocence. The failure of the police officers to properly conduct field sobriety testing or offer a valid reason for not administering a PBT which would have established that whatever signs of possible impairment they were seeing were due to alcohol should not be condoned by this court.

Their failure to do so is a failure to sustain their burden of establishing their burden of proof at the Hearing.

Since the People have not sustained their burden of establishing, from the totality of the circumstances, that it is more probable than not that the defendant was operating a motor vehicle while his/her physical or mental abilities are actually impaired, to any extent, after consuming alcohol, all the evidence obtained subsequent to the stop of Ms. Hillman's vehicle should be suppressed on the ground that it was obtained as the result of an illegal detention and/or arrest, in that the People have failed to meet their burden of going forward with proof of specific facts supporting reasonable grounds for stopping defendant and probable cause for her arrest. *People v. Vandover,* 20 NY3d 235 (2012).

**Question Presented:** Can a sufficient foundation be laid for the introduction into evidence a breath test in the absence of evidence that here was a properly administered observation period as required by 10 NYCRR 59.5?

**Brief Answer:** No. In order to be admissible a breath test must be administered in compliance with VTL §1194 which delegates the authority of how the test should be administered to the Department of Health, which enacted 10 NYCRR 59.5 and the requirement that an observation period be conducted. Existing holdings this is a rule that goes to weight and not admissibility are wrong.

VTL §1195 provides for the admissibility of the results of a breath test. It provides in pertinent part that in any trial, action or proceeding arising out of actions alleged to have been committed by any person arrested for a violation of any subdivision of VTL §1192, the court shall admit evidence of the amount of alcohol or drugs in the defendant's blood as shown by a test administered pursuant to the provisions of VTL §1192. VTL§1195(1).

VTL §1194 in turn delegates the authority to approve satisfactory techniques or methods of conducting chemical analyses of a person's blood, urine, breath or saliva to the Department of Health. VTL §1194(4)(c).

Pursuant to the authority vested in them by VTL §1194(4)(c), the Department of Health enacted 10 NYCRR 59.5. The preamble to 10 NYCRR 59.5 makes clear that the rule is meant to apply to any breath sample being tested and admitted into evidence. It reads: "[t]he following breath analysis techniques and methods shall be a component of breath analysis instrument operator training provided by training agencies and shall be used by operators performing breath analysis for ***evidentiary purposes***" 10 NYCRR 59.5 (emphasis supplied). When read in conjunction with the two statutes which vest the Department of Health with the power to enact the statute it is clear that it is intended to be a minimum standard for the admissibility into evidence.

There have been a series of controlling cases that have held that the failure of the police to continuously observe a defendant for a 15- or 20-minute period prior to a breath test goes only to the weight of such evidence and does not render it automatically inadmissible. *People v Williams*, 96 AD2d 972 (3d Dept 1983); *People v Lebrecht*, 13 Misc 3d 45, 51 (App Term, 2d Dept 2006); *People v Schuessler*, 14 Misc 3d 30, 32 (App Term, 2d Dept 2006). While the defense understands this Court may feel constrained to follow those decisions, we also believe that they misconstrue the plain meaning of the statute and regulation and the requirements set forth go to more than simply weight. If they were interpreted to go to weight and not admissibility it would render the language of VTL 1195 and 1194 cited above to be moot and statutes should never be interpreted in such a manner.

There is support from the Court of Appeals that the Defendant's interpretation is correct. In *People v Boscic*, 15 NY3d 494 (2010), the Court eliminated the common law requirement that breath test devices be calibrated every six months, but the Court was faced with a fact pattern that preceded the regulations adopted by the Department of Health concerning the appropriate methods for breath testing. The Court in Boscic pointed this out when it stated:

> The promulgation of these **regulations** will, for arrests occurring after the effective date of the **regulations**, 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. But here, there is no question that section 59.4(c) of the **regulations**—the provision addressing calibration standards—was not effective at the time of defendant's arrest, and the People do not assert that this **regulation** supplies the applicable standard in this case. Boscic, 15 NY3d at 494 (emphasis supplied).

In fact, at least one court followed the lead of Boscic and held the observation period goes to admissibility, not weight. In *People v. Santiago*, 47 Misc. 3d 195 (Sup. Ct. Bx Co. 2014) (Newbauer, J.) the Court stated ruled that:

> The detective's decision to deviate from protocol by administering the **test** without a waiting period easily could have skewed the **test** results upward, to the prejudice of the defendant. The failure of the tester to adhere to established protocols for administering the **test** renders the results inadmissible. The Court rejects the contention that the officer's actions were justified under the circumstances and finds that the People have not sustained their burden to lay a proper foundation for the admission of the **test** results. *Santiago*, 47 Misc. 3d at 195.

It was PO Butting who was responsible for doing an observation period (TA 39). The Department of Health regulations were in effect on the day of Ms. Hillman's arrest. The observation period began at 2:34 a.m. (TB 9). At 3:49 a.m. a breath sample was collected after multiple blow samples into the same machine and generated a BAC reading; however, PO Cotto testified that PO Butting was walking in and out of the booking area. (TB 74) and was gone for a few minutes each time (TB 74) leaving Ms. Hillman alone each time during the prior to the

breath test. The testimony left many unanswered questions about how closely anyone paid attention to Ms. Hillman, if at all during the 15-minute period required by 10 NYCRR 595. In the absence of clear testimony showing the adherence to established protocols for administering the test and the reliability of the sample it should not be allowed into evidence at trial.

***CONCLUSION***

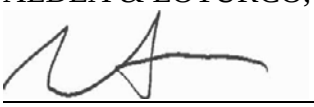
Once the law afforded Ms. Hillman the right to counsel, it was improper for police to remain with her during communication with her attorney and prevent confidential communications with counsel. Ms. Hillman was denied that right to confidential communications with counsel and all evidence obtained subsequent to that, including the breath test, must be suppressed.

PO Carcaterra arrested Ms. Hillman for driving while intoxicated in the absence of sufficient evidence that her ability to drive was actually impaired by alcohol. In the absence of properly administered SFSTs and/or a portable breath test the arrest was unlawful and all evidence obtained subsequent to that, including the breath test, must be suppressed.

Finally, despite the line of cases holding otherwise, the failure to establish the compliance with the mandates of 10 NYCRR 59.5 and the observation period require the breath sample be precluded from admission into evidence at trial.

Sincerely,

BARKET EPSTEIN KEARON
ALDEA & LOTURCO, LLP

By: 

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