IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2013

No. 52

MOTOR VEHICLE ADMINISTRATION,

Petitioner,

v.

APRIL MARIE DEERING,

Respondent.

On Appeal from the Circuit Court for Somerset County
(D. William Simpson, Judge)
Pursuant to a writ of Certiorari to the Circuit Court for Somerset County

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BRIEF OF
THE NATIONAL COLLEGE FOR DUI DEFENSE AND THE MARYLAND CRIMINAL DEFENSE ATTORNEYS' ASSOCIATION

AS AMICI CURIAE

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STATEMENT OF THE CASE

Petitioner Motor Vehicle Administration filed a petition for a writ of certiorari, to review the circuit court's reversal of the Motor Vehicle Administration's decision to suspend the driver's license of Respondent April Marie Deering for 90 days, pursuant to Md. Code Ann., Transportation Article § 16-205.1(b)(1)(i)(2). On September 4, 2013,

the National College for DUI Defense (NCDD) and the Maryland Criminal Defense Attorneys' Association (MCDAA) filed a Motion to File Brief as Amici Curiae, which this Court granted. Pursuant to Maryland Rule 8-511, the NCDD and MCDAA files this Amicus Brief, arguing that an Administrative Law Judge (ALJ) must take no action in an implied consent (test refusal) or administrative per se (test failure) hearing conducted pursuant to Transportation Article, § 16-205.1 where the arresting officer has refused a request of the driver to talk to counsel under *Sites v. State*, 300 Md. 702, 481 A.2d 192 (1984) that would not have interfered with a test.

STATEMENT OF FACTS

The MCDAA incorporates by reference the Statement of Facts set forth in Respondent April Marie Deering's Brief.

SUMMARY OF ARGUMENT

This case presents an opportunity for this Court to reconsider the dicta in its opinion in *Najafi v. Motor Vehicle Admin.*, 418 Md. 164, 12 A.3d 1255 (2011), and hold that a person accused of failing or refusing a breath test may raise deprivation of counsel at a license suspension hearing conducted pursuant to Transportation Article § 16-205.1.

There are many reasons why this Court should hold that denial of counsel should be recognized as a defense at an MVA implied consent or administrative per se license suspension hearing. The considerations governing a choice of submitting to or refusing an alcohol test are much more complex now, than when *Sites* was decided in 1984, the consequences of a wrong choice, which cannot be remedied later, more severe, and the

need for counsel greater. The limited due process right to counsel on request recognized by this Court in *Sites v. State*, 300 Md. 702, 481 A.2d 192 (1984) and reaffirmed in *Brosan v. Cochran*, 307 Md. 662, 516 A.2d 970 (1986), was largely based upon the severe consequences of making a wrong choice, primarily losing the ability to maintain or obtain employment as a result of a suspension of a driver's license. A person accused of drunk driving is more likely to suffer loss of employment as a result of an MVA hearing, than as a result of the court proceeding. The legislature recognized these problems when it amended Md. Code Ann., Transp. § 16-205.1 in 1989, and added the requirement that the officer "fully advise" the driver of the administrative sanctions for failing and refusing the test to the bill, in order to allow for due process defenses to be raised at the administrative hearing. The *definition* of the right recognized in *Sites* is that it not interfere with the State's ability obtain a timely chemical test, thus public safety is not affected by recognizing the right at the MVA hearing. Since 1984, and until this Court decided *Najafi*, deprivation of counsel was almost uniformly allowed as a defense at MVA hearings. No action is required where counsel is found by the ALJ to have been denied because that finding negates the findings the driver was "fully advised" of the administrative penalties, that the driver validly refused or consented to take a test, and because the violation of due process requires it. If fundamental fairness requires allowing a phone call to counsel on request, then it is fundamentally unfair to deny the only meaningful remedy for its denial, and will be perceived by the public as fundamentally unfair.

ARGUMENT

I. The considerations governing the choice of submitting to or refusing an alcohol test are much more complex now than when *Sites* was decided in 1984, the consequences of a wrong choice more severe, and the need for counsel greater.

In 1984, when *Sites* was decided, there was no administrative penalty for failing a chemical test, only for refusing. The penalty for refusing was then a 60 day to 6 month suspension, and MVA hearing officers then had discretion to ameliorate the harshness of the sanction by allowing the driver a restricted license or privilege for purposes of employment, education and/or alcohol education.[1] At present the penalty for refusal is a 120 day suspension of a drivers license or privilege to drive for a first offense and one year for a second or subsequent offense. For a person who fails the test with a result of 0.08[2] or higher but less than 0.15, the applicable suspension is 45 days for a first offense and 90 days for a second or subsequent offense. The suspension for a driver who fails with a test result of 0.15 or higher, is 90 days for a first offense and 180 days for a second or subsequent offense.

A driver who refuses the test, fails with a reading of 0.15 or higher, or fails with a reading of 0.08 or higher but less than 0.15 within five years of a prior § 16-205.1 suspension is ineligible for any restriction other than a one-year ignition interlock restriction. Md. Code Ann., Transp., §§ 16-205.1(n), (o). However, the ignition

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[1] *Sites v. State*, 300 Md. 702, 707 n.1, 481 A.2d 192,194 n.1.

[2] All blood or breath test concentrations in this brief refer to grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath. *See* Md. Code Ann., Cts. & Jud. Proc. § 10-307.

interlock program is only available to Maryland licensees. Md. Code Ann., Transp. § 16-404.1(c). Thus with respect to out of state licensees who live and/or work in Maryland, such as students, military members, and residents of nearby jurisdictions, or Maryland residents who cannot for some reason participate in the ignition interlock program, a refusal or test of .0.15 or higher can be devastating.[3]

In many cases taking the test, where the result is under 0.15, leads to little significant detriment to the licensee. An ALJ has discretion to allow both Maryland and out-of-state drivers with first test failure between 0.08 and 0.15 in a five year period, who face a 45 day license suspension on a first offense or 90 days on a second or subsequent offense, a restricted license or privilege for purposes of employment, education, alcohol education, and for medical purposes for the driver and family members. On a first offense, the entries related to the order of suspension and hearing issued for a test failure are recorded on a private driving record at the MVA, while entries related to a refusal go on the public driving record.[4] Additionally, on a first offense most offenders receive probation before judgment (PBJ) under Md. Code Ann., Crim. Proc. § 6-220.

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[3] Importantly, since this Court has defined "reasonable grounds" as "articulable reasonable suspicion" and has allowed officers to make the detention required under Md. Code Ann., Transp. § 16-205.1 with very little evidence, some of the drivers who refuse will be factually innocent. Where the refusal resulted from denial of counsel, suspending those drivers' licenses cannot be said to protect public safety. *See e.g., Motor Vehicle Administration v. Shepard*, 399 Md. 241, 923 A.2d 100 (2007); *Motor Vehicle Admin. v. Sanner*, 434 Md. 20, 73 A.3d 214 (2013).

[4] This Court in *Hare v. Motor Vehicle Admin.,* 326 Md. 296, 604 A.2d 914 (1992), recognized that there are significant differences between the effects on one's license when one refuses the chemical test, as compared to when one fails the chemical test.

For some DUI suspects, however, taking the test can be a worse decision. If the reading is high, some ALJs may choose to impose an alcohol restriction on the driver's license, Md. Code Ann., Transp. Art., § 16-113, which may be seen by employers or insurance companies, they can refer the person to the Medical Advisory Board, *Motor Vehicle Admin. v. Delawter*, 941 A.2d 1067, 403 Md. 243 (2008), or deny restriction or modification of the proposed suspension, since the decision to offer a restricted license is discretionary. *Motor Vehicle Admin. v. Lindsay*, 309 Md. 557, 525 A.2d 1051 (1987). If the driver is found guilty, a driver with a conviction or PBJ can never expunge his or her court and police records. Md. Code Ann., Crim. Proc. § 10-105(a)(3). Guilty findings can also cause immigration problems.

Many subsequent offenders are better off refusing the test, since most offenders who refuse and are convicted are convicted under the lesser offense of Md. Code Ann., Transp. § 21-902(b), with a lesser penalty of 60 days and/or a $500 fine, and eight points. A second or third conviction under Md. Code Ann., Transp. § 21-902(a) within five years of a first conviction subjects the driver to mandatory minimum jail sentences. Md. Code

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> If they refuse the test, as we have seen, their licenses will be suspended, without possibility of modification or of obtaining restrictive licenses, and the suspensions maybe considered by insurance companies in setting insurance premiums. If, on the other hand, they take the test and fail, their licenses will be suspended for a shorter period, but the suspensions could be modified or restrictive licenses issued and, if it is for a first offense of driving with an alcohol concentration of 0.10, the suspension may not be considered by an insurance company in setting insurance premiums.

Hare, 326 Md. at 302, 604 A.2d at 917.

Ann., Transp. § 27-101(j)(2). A conviction under § 21-902(a) where the result is 0.15 or higher also leads to a mandatory ignition interlock. Md. Code Ann., Transp. § 16-404.1(d)(1).

The considerations relevant to a driver with a commercial driver's license (CDL) are even more complicated. In 2005, the legislature required the disqualification of the commercial driver's license of CDL holders who refuse to submit to a chemical test, even after being suspected of driving a non-commercial vehicle while impaired, 2005 Maryland Laws, Ch. 167.[5] In 2006, the legislature required advisement of interlock eligibility for suspected drunk drivers who refuse to submit to a chemical alcohol test, 2006 Maryland Laws, Ch. 461.[6] However, Md. Code Ann., Transp. § 16-205.1(g)(8)(vii) provides:

> (vii) A disqualification of a commercial driver's license is not subject to any modifications, nor may a restricted commercial driver's license be issued in lieu of a disqualification.

Md. Code Regs. 11. 11. 12. 07 also provides:

> The Administration may not issue any type of temporary, conditional, or work restricted license permitting an individual to drive a commercial motor vehicle during any period in which the individual's driving privilege is disqualified or revoked in this or any other state in accordance with Transportation Article, § 16-808, Annotated Code of Maryland, and 49 CFR § 384.210.

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[5] Codified at Md. Code Ann., Transp. § 16-205.1(b)(1)(iii).

[6] Codified at Md. Code Ann., Transp. § 16-205.1(b)(2)(iv). The legislative move came after this court held that Md. Code Ann., Transp. § 16-205.1 and due process considerations do not require a suspected drunk driver to be told that if he refuses a chemical alcohol test that he would be eligible for the issuance of an ignition interlock restriction in lieu of a straight suspension in *Meanor v. State*, 364 Md. 511, 774 A.2d 394 (2001).

This provision is currently interpreted by the MVA, under the authority of *Embrey v. Motor Vehicle Admin.*, 339 Md. 691, 664 A.2d 911 (1995), to require that even CDL holders who submit to but fail the chemical alcohol test and would be eligible for a work restricted license because the test result was .08 or more but less than .15 must relinquish their CDL during the period they hold a work restricted license ordered by an administrative law judge. This is because the MVA interprets *Embrey* to require considering a work restricted license as the equivalent of a suspension under Md. Code Regs. 11.11.12.07. *Embrey* held that for purposes of imposing subsequent offender penalties on a driver who has twice failed a chemical test under Md. Code Ann., Transp. § 16-205.1, a prior work restricted license counted as a prior suspension. *None* of these sanctions are mentioned in the DR-15 form. Although the DR-15 advice regarding CDLs was approved by this Court in *Hill v. Motor Vehicle Admin.*, 415 Md. 231, 999 A.2d 1019 (2010), counsel can advise confused drivers to submit to the test.

The driver is supposed to make a decision based on the DR-15 form. This form, that contains the information required regarding administrative sanctions, is confusing at best to a sober person, not to mention lawyers. A contract or mortgage made by an extremely intoxicated party would be voidable due to incompetence. E.g. *Lynn v. Magness*, 191 Md. 674, 62 A.2d 604 (1949). Here however, the driver is *presumably* impaired or intoxicated, and is required to make a decision while intoxicated that can be life altering, and once final cannot be changed.

The manner in which the officer reads the form can also detract from its ability to be understood. The advice of rights form is most often allegedly read verbatim (fully advised) by the police officer to the driver. The form is lengthy and complicated and takes a minimum of five minutes to read. The potential for misunderstanding and confusion is great when one factors an officer's reading style. Whether the officer speaks fast, slow, with an accent, articulates words properly, and frankly, motivation to spend the appropriate amount of time to read the document in its entirety can impact the ability of the driver to understand it. Additionally, most suspect have no legal training or understanding to assist them in making an intelligent decision, that usually occurs late at night, when they are tired, afraid, upset, and traumatized.

For those offenders that can navigate the DR-15 labyrinth, to be able to understand the possible sanctions, few if any drinkers can reliably predict what the result of a test will be, they do not have a clue. An experienced lawyer can take the information provided by the driver and calculate a range of likely readings, or rush to the police station to administer a private preliminary breath test. *See*, *Brosan v. Cochran*, 307 Md. 662, 516 A.2d 970 (1986).

In light of the above, a competent lawyer might conclude as follows:

1. A first offender within five years who needs to drive in Maryland for employment, school, alcohol education or medical purposes should submit to the test unless it appears the reading will be extremely high.

2. A first offender with an out of state license that does not need to drive in Maryland should probably refuse.

3. A second offender within five years of a prior offense should probably refuse the test.
4. A second offender, where the prior offense was more than five years prior might submit if the reading would likely be under 0.15, if he needs to drive in Maryland for employment purposes.
5. A driver with a CDL should submit to the test.
6. A third or higher offender should probably refuse unless the reading is likely to exonerate the driver.

With these considerations in mind, it is a miracle that some drivers reach the most beneficial decision in the limited time available without the benefit of counsel, given that many, if not most, of them are ignorant of the likely breath test range and myriad of consequences, have no legal training, and are distraught. The consequences of a wrong decision due to being denied access to counsel are irreversible, if deprivation of counsel cannot be raised at the MVA hearing.

II. The due process right to contact counsel was recognized by this Court in *Sites* primarily due to a potential loss of the ability to earn a livelihood, and the MVA hearing is the only forum where loss of employment or inability to obtain employment can meaningfully be addressed.

Undoubtedly, the primary concern driving the decision in *Sites v. State*, 300 Md. 702, 481 A.2d 192 (1984), was loss of employment caused by loss of a driver's license. In 1984, and at present, loss of ability to earn a livelihood is more likely to occur as a result of the MVA hearing, than as a direct result of the court hearing. Thus it makes no sense to recognize a limited right to counsel to be fair to the driver and to minimize the risk of loss of employment, and then deny a driver denied counsel an opportunity to

meaningfully challenge the violation at the proceeding that will result in the loss of employment.

This Court stated in *Sites*:

> By affording a suspect the power to refuse chemical testing, Maryland's implied consent statute deliberately gives the driver a choice between two different potential sanctions, each affecting vitally important interests. Indeed, revocation of a driver's license may burden the ordinary driver as much or more than the traditional criminal sanctions of fine or imprisonment. The continued possession of a driver's license, as the Supreme Court has said, may become essential to earning a livelihood; as such, it is an entitlement which cannot be taken without the due process mandated by the Fourteenth Amendment.

Sites, 300 Md. at 717, 481 A.2d at 200.

The legislature took discretion away from ALJs to allow any restriction or modification other than an interlock restriction for offenders who refuse the test, who submit with a result of 0.15 or higher, or who submit with a result of 0.08 or more but less than 0.15 within five years of a previous suspension under Md. Code Ann., Transp. §§ 16-205.1(n), (o). There are many forms of employment that are simply incompatible with ignition interlock. Additionally, as noted, not all drivers subject to Md. Code Ann., Transp. § 16-205.1 are eligible to participate in the ignition interlock system program. A "hard" suspension (i.e. without any driving whatsoever) is more likely to result in a loss of employment than any sanction likely to be imposed in the court case.

In court, judges who deem incarceration to be appropriate can impose home detention, work release, or weekend programs. *See* Md. Code Ann., Transp. Art., § 27-101(j). In counsel's experience, very few DUI cases in court result in a sentence that

would cause a loss of employment. Only the most egregious cases result in straight jail time without work release.

Since most DUI court cases result in guilty pleas, allowing a defendant to challenge the test only in court rings hollow. The court hearing is unlikely to be contested, and the least likely to result in a loss of ability to earn a livelihood. Since the MVA hearing is the only forum where loss of employment is a realistic possibility, it is critical that drivers denied counsel be able to raise the issue at the MVA hearing.

III. Addressing due process concerns, the legislature amended § 16-205.1(f) to include a requirement that the officer "fully advise" the driver of the administrative sanctions for failing and for refusing the test.

The legislative history of Md. Code Ann., Transp. § 16-205.1(f) supports allowing drivers a right to counsel as necessary to ensure their due process right to be "fully advised" of potential administrative sanctions. Md. Code Ann., § 16-205.1(f)(7)(i)(3).[7] The language in the Section 16-205.1, as originally drafted, only allowed for license suspensions of drivers who refused to submit to the chemical test. In 1989, after receiving numerous comments expressing concern for the driver's due process rights, the legislature added language in section § 16-205.1(f)(7)(i)(3)(as repeated verbatim in § (f)(8)(i)(3)) to allow suspension only after a driver has been *fully advised* of potential

[7] In 1989, the legislature considered and adopted the proposals of a Joint Task Force, to enact an administrative per se law, to sanction a driver who fails the test, as well as the person who refuses. 1989 Md. Laws, ch. 284.

administrative sanctions. Accordingly, the express language now permits suspension only when a hearing officer finds that:

> 3. The police officer requested a test after the person was *fully advised*, as required under subsection (b)(2) of this section, of the administrative sanctions that shall be imposed;

(Emphasis added).

Consistently, this Court affirmed this interpretation in *Forman v. Motor Vehicle Admin.* stating:

> [a] prerequisite to the MVA's suspension of a driver's license after a hearing is a finding that the police officer "requested a test after the person was *fully advised* of the administrative sanctions that shall be imposed...." § 16-205.1(f)(8)(i)(3). "Fully advised" means not only advised initially, but the detaining officer must also take care not to subsequently confuse or mislead the driver as to his or her rights under the statute.

Forman v. Motor Vehicle Admin., 332 Md. 201, 217, 630 A.2d 753, 762 (1993) (emphasis added).

It is reasonable to conclude that the legislature intended this phrase to be given a more expanded meaning. The requirement that the licensee be "fully advised" *did not* appear in the original bill. *See* Summary of Amendments by Del. Horne for H.B. 556 (on file with the Department of Legislative Services, Annapolis, Maryland)(DLS), Appx. at i. Notably, the "Summary of Amendments" by Delegate Horne states:

> "[Amendment No. 8] Provides that the driver has procedural due process rights and expands the number of issues which may be raised at the administrative per se hearing to include:
> [inter alia. . .] "(3) whether the police officer *fully* advised the driver of the administrative sanctions."
> The original bill only included the issues of whether the driver:

(4) refused the test, or
(5) had an .10 or more alcohol concentration"

(Underlined emphasis in original, italicized emphasis added).

The new "due process" language at subparagraph 3 was apparently included in response to letters the legislature received from attorneys discussing their due process concerns. Notably, counsel with the Maryland Criminal Defense Attorneys' Association (MCDAA) complained that the hearing proposed by the bill was "a sham hearing that makes a mockery of due process." *See,* Letter from attorney James F. Garrity, MCDAA, to William S. Horne, Chairman House Judiciary Committee (Feb. 20, 1989)(on file with DLS). Appx. at iv. *See* also, letter from attorney William T.S. Bricker complaining that House Bill 556 posed "serious constitutional due process questions." (On file with DLS), Appx. at vii *see also,* The marked up version of the First Reading of House Bill 556 (with "fully" penciled in before "advise") (On file with DLS), *see* Appx. at iv.

Although *Sites* was not specifically mentioned in these letters and comments, the due process concerns that underlay the *expansion* of issues that could be raised in the original bill must be considered to have included *Sites.* Significantly, to Amici's knowledge, no legislators, a number of whom represented drivers at MVA hearings, and who helped to enact the 1989 legislation, proposed any changes in legislation after 1989 to clarify what was a very well settled practice of allowing a defense based on *Sites* at the administrative hearing. It is unlikely that the expansion of issues by the legislature was intended to preclude a defense based on denial of counsel, when considered in light of the prevailing practice both before and after the 1989 amendments. It is more likely that the

addition of the phrase "fully advised" included requiring the officer to comply with *Sites*. It also included the concept of either a knowing intelligent refusal to submit or express consent to take the test, with at least the opportunity to understand the choices presented.

Thus the express language of the statute, as well as the legislative history, all support continuing to allow a defense based on *Sites* at the administrative hearing.

IV. The practice of raising a *Sites* based defense at MVA hearings has been firmly entrenched since *Sites* was decided in 1984, and Transp. § 16-205.1 amended in 1989.

Since 1984, and notwithstanding the passage of the sections (f)(7) and (f)(8) in 1989, Laws of Maryland 1989, ch. 284, the then MVA hearing officers, and since 1990 administrative law judges (ALJs), *see*, Md. Code Ann., State Gov't §§ 9-1601 et seq., have recognized denial of counsel under *Sites* as a defense. In its brief, the MVA claims the circuit court's decision below was "an unprecedented application of this Court's limited holding" to allow the denial of counsel defense at an MVA hearing. Brief for Petitioner at 15, *Motor Vehicle Admin. v. Deering* (No. 52). The MVA has it upside down. What is unprecedented here is the MVA's effort, with repeated encouragement from this Court in *Najafi* and other cases limiting defenses at implied consent and administrative per se hearings, to reverse the *status quo.*

The *Sites* defense has been almost uniformly accepted at MVA hearings since *Sites* was decided in 1984, almost 30 years ago. It has been firmly entrenched in MVA practice. It was only shortly before *Najafi* was decided that a very small minority of ALJs started disallowing the defense. After *Najafi* was decided, the number of ALJs

disallowing the defense appeared to increase, with a significant number of ALJs still disagreeing with the dicta in *Najafi*, and continuing to adhere to the previous practice.[8]

The following statement from *Dickerson v. United States*, where the Supreme Court considered the consequences of overruling *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), is relevant here.

> We do not think there is such justification for overruling *Miranda*. *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture. *See Mitchell v. United States*, 526 U.S. 314, 331–332, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999) (SCALIA, J., dissenting) (stating that the fact that a rule has found " 'wide acceptance in the legal culture' " is "adequate reason not to overrule" it). While we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings, *see, e.g., Patterson v. McLean Credit Union*, 491 U.S. 164, 173, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989), we do not believe that this has happened to the *Miranda* decision. If anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief.

Dickerson v. United States, 530 U.S. 428, 443-44, 120 S. Ct. 2326, 2336, 147 L. Ed. 2d 405 (2000). The limited right to counsel recognized in *Sites* has found wide acceptance in the legal culture of this state, and its observance at MVA hearings should remain intact.

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[8] Other states where a right to counsel similar to *Sites* is recognized have allowed denial of counsel to be raised at a license revocation hearing for many years. *See* e.g., *Hall v. Sec'y of State*, 60 Mich. App. 431, 231 N.W.2d 396 (1975)(refusal after denial of counsel is not unreasonable); *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828 (Minn. 1991); *Moore v. State, Motor Vehicles Div. of Oregon Dep't of Transp.*, 293 Or. 715, 652 P.2d 794 (1982).

Thus the legislative history, subsequent entrenched practice, and legislative acceptance of that practice supports continuing to allow a defense based on *Sites* at the administrative hearing.

V. Requiring officers to adhere to *Sites* does not prejudice the MVA, because the right to counsel *by definition* does not impair the State's ability to obtain a chemical test.

As noted, this Court in *Sites* and subsequent cases was very careful to limit the right it recognized. The right was the right to consult with counsel by phone, or in person under *Brosan v. Cochran*, only on request, see *McAvoy v. State*, 314 Md. 509, 520, 551 A.2d 875, 880 (1989), and only "as long as such attempted communication will not substantially interfere with the timely and efficacious administration of the testing process." *Sites v. State*, 300 Md. 702, 717-18, 481 A.2d 192, 200 (1984). Thus by its terms, the right recognized is limited by and does not impair the State's ability to gather evidence is not impaired. Although the preferred result is for the driver to submit to the test, the legislature has expressly allowed drivers to choose to refuse and accept the applicable penalties. Today most drivers have cell phones and can easily retrieve counsel's number from a contacts list, or search for counsel on the internet. Allowing drivers to contact counsel does not inconvenience the police; and there is no good reason for disallowing the hopefully very few drivers who have been arrested by police officers who are either ignorant of or deliberately disregard the law, to raise denial of counsel at an MVA hearing. *See Motor Vehicle Admin. v. Atterbeary*, 368 Md. 480, 796 A.2d 75 (2002).

VI. The remedy for denial of counsel should be to take no action, because a driver denied counsel has neither been "fully advised" of the administrative sanctions, nor intelligently and knowingly refused or consented to a test, because it would be fundamentally unfair to suspend the driver's license of a driver denied due process, and will be perceived by the public as fundamentally unfair.

Undoubtedly, some sober drivers, who could have been advised to submit to the test and exonerate themselves, will incorrectly decide to refuse the test after being denied counsel. Other drivers will incorrectly decide to submit to the test after being denied counsel, and their astronomically high readings may be used to deny an ignition interlock restriction, impose an alcohol restriction under Md. Code Ann., Transp. § 16-113, or a referral to the Medical Advisory Board at the MVA hearing.[9] *See*, *Motor Vehicle Admin. v. Delawter*, 403 Md. 243, 941 A.2d 1067 (2008). Importantly, since the vast majority of DUI cases result in guilty pleas, leaving it to the courts to vindicate the driver's rights and to remedy deprivation of counsel is no remedy. This would completely eviscerate *Sites*.

The MVA argues, and this Court in *Najafi* noted that there is no exclusionary rule at an MVA hearing. *Motor Vehicle Admin. v. Richards*, 356 Md. 356, 739 A.2d 58 (1999). Claiming that affirming the circuit court can only occur by application of an exclusionary rule frames the issue incorrectly. The issue in this case is not the issue presented in *Richards*. *See T.M.M. ex rel. D.L.M. v. Lake Oswego Sch. Dist.,* 198 Or. App. 572, 580-81, 108 P.3d 1211, 1215 (2005)(explaining why denying license

[9] A high reading may also be the justification for a court denying PBJ, imposing a jail sentence, referring the driver to the Medical Advisory Board, or imposing ignition interlock. *See* Md. Code Ann., Crim. Proc. § 6-220; Md. Code Ann., Transp. §§ 16-404.1(d), 27-107(b).

suspension after denial of counsel was not an application of the exclusionary rule). And although it is incredible that almost 30 years after *Sites* was decided police officers remain ignorant of its command, there a number of reasons why it is necessary to take no action on the MVA's request for a suspension where the officer unreasonably denies a driver the opportunity to contact counsel.

In order for a suspension to occur, the MVA is required to prove, and the ALJ is required to find, that the driver was "fully advised" of the administrative penalties that shall be imposed . . . Md. Code Ann., Transp. §§ 16-205.1(f)(7)(i)(3) and (f)(8)(i)(3). The term "fully advised" must include allowing a driver who makes the request a reasonable opportunity to contact counsel that comports with *Sites*.

Md. Code Ann., Transp. § 16-205.1(f)(7)(i)(4) also requires the MVA to prove, and § 16-205.1(f)(8)(i)(4) requires the ALJ to find (1) either a knowing intentional refusal or (2) a test failure impliedly conditioned on express consent to submit to the test. *See Borbon v. Motor Vehicle Admin.*, 345 Md. 267, 276, 691 A.2d 1328, 1332 (1997). This Court has already held that a request for counsel is not a refusal in *Atterbeary*. Where counsel is denied there can be neither a knowing intelligent refusal nor valid consent, each an alternative required element of a suspension. *See, Hall v. Sec'y of State*, 60 Mich. App. 431, 231 N.W.2d 396 (1975)(refusal after denial of counsel is not unreasonable and results in no license suspension).

Additionally, if the police officer violated due process by denying the phone call, then the due process violation requires a dismissal, even if due process is not expressly or

impliedly made an element of §§ 16-205.1(f)(7) and (8). If the legislature deemed denial of counsel to be an issue that could not be raised at the MVA hearing, this Court just recently recognized that a due process right to counsel trumps a statutory provision denying it in *DeWolfe v. Richmond*, 76 A.3d 1019 (Md. 2013). Prejudice is usually presumed when a person's right to counsel is violated. *See e.g., United States v. Gonzalez-Lopez*, 548 U.S. 140, 148, 126 S. Ct. 2557, 2563, 165 L. Ed. 2d 409 (2006)(denial of counsel of choice is a structural error and prejudice is presumed); *State v. Goldsberry*, 419 Md. 100, 126, 18 A.3d 836, 852 (2011)(following *Gonzalez-Lopez*). As noted above, the right to consult with counsel before deciding to refuse or submit to testing is entrenched in the law of this state. Deciding at this late date that denial of counsel cannot be raised at an administrative hearing would be perceived as unfair by the public. *See Dickerson.*

Moreover, as already noted, it would be illogical to hold, as this Court did hold in *Sites*, *Brosan*, *McAvoy*, and *Atterbeary* that fundamental fairness requires allowing a call on request that does not interfere with the State's ability to collect a sample, and then to find in the present case that it is fundamentally fair to subject the driver to the consequences of the denial of counsel. The same thing cannot be fundamentally unfair and fair at the same time.

CONCLUSION

It would be ironic, having recently decided that an indigent arrestee has a right to appointed counsel before a court commissioner at a bail hearing in *Richmond*, based in part on *Sites*, and where there is some opportunity to rectify a wrong decision, if this Court were to eviscerate *Sites* by denying drivers a meaningful opportunity to rectify the consequence of being denied counsel, which denial is irreversible, and which consequence could have a much more devastating and long term effect on the driver at the MVA than in court. Let there be no mistake, if the MVA prevails in this case, there will be some sober drivers for whom counsel was denied who will lose their means to earn a livelihood as a consequence of having made the wrong decision and refused. There will also be impaired drivers for whom counsel was denied who will lose their ability to earn a livelihood because they submitted to the test. The National College for DUI Defense and the Maryland Criminal Defense Attorneys' Association urge this court to find unequivocally that deprivation of counsel may continue to be raised as a defense at implied consent and administrative per se hearings conducted pursuant to Md. Code Ann., Transp. § 16-205.1, in the same manner in which it has been raised for almost 30 years.[10]

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[10] The author also wishes to acknowledge and thank and attorneys Robin Earnest, Pat Maher, Gary Bernstein, and Bruce Marcus, who provided editorial assistance for this brief.

Respectfully submitted,

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Rule 8-504(a)(9) Certification: This brief has been prepared with proportionally spaced type: Times New Roman – 13 point.

APPENDIX

SUMMARY OF AMENDMENTS
BY DEL. HORNE

AMENDMENT NO. 1 is a sponsor short title and purpose paragraph amendment.

AMENDMENT NO. 2 is a function paragraph amendment.

AMENDMENT NO. 3 strikes provisions providing for drug testing.

AMENDMENT NO. 4 alters the sanctions for the administrative per se offenses in the original bill to be:

.10 or more alcohol concentration
1st offense - at least 30 days and not more than 90 days.
2nd offense or subsequent offense - at least 60 days and not more than 180 days.

Test Refusal
1st offense - at least 60 days and not more than 180 days.
2nd offense or subsequent offense - at least 120 days and not more than 1 year.

The sanctions for refusal are double the sanctions for blowing a .10 or more (The sanctions for refusal are the same sanctions contained in the current law).

AMENDMENT NO. 5 Strikes references to drug testing of drivers.

AMENDMENT NO. 6 Alters the sanctions for the administrative per se offenses as described under Amendment No. 4.

AMENDMENT NO. 7 Rewrites the provisions contained in the original bill relating to stays of suspension due to a postponement of the administrative hearing.

The original bill required a stay of suspension only if the MVA did not provide a hearing within 45 days.

The amendments require a stay under 2 additional circumstances:

(1) If both the driver and the MVA agree to the postponement; or
(2) If the driver requests a subpoena for a witness as provided by current law and the MVA fails to issue the subpoena or the witness fails to attend the hearing.
Any postponement of the hearing described above requires the MVA to extend driving privileges until the hearing is rescheduled but, there is no requirement for a stay of the suspension if another hearing is rescheduled and held with the witness in attendance within the 45 day period.

A.1

AMENDMENT NO. 8	Provides that the driver has procedural due process rights and expands the number of issues which may be raised at the administrative per se hearing to include: (1) whether the police officer had reasonable grounds to stop a person for drunk driving; (2) whether there was evidence of alcohol consumption; and (3) whether the police officer fully advised the driver of the administrative sanctions. The original bill only included the issues of whether the driver: (4) refused the test, or (5) had an .10 or more alcohol concentration.
AMENDMENT NO. 9	Technical renumbering and strike reference to drug testing of drivers.
AMENDMENT NO. 10	Cross references right to procedural due process rights contained in Amendment No. 8.
AMENDMENT NO. 11	Requires the MVA to suspend driver's licenses for the periods of time described under Amendment No. 4 if the hearing officer makes ~~finds~~ findings on the issues described under Amendment No. 8.
AMENDMENT NO. 12	Provides that failure to attend an administrative hearing be excused for a compelling reason.
AMENDMENT NO. 13	Refers to the periods of suspension for the administrative per se offenses described under Amendment No. 4.
AMENDMENT NO. 14	Strikes language that would have prohibited modification of a suspension for a conviction. (Note: modifications of suspension for the administrative per se offenses remain prohibited.) Also, maintains the discretion to modify a suspension after a conviction if the suspension would adversely affect opportunity for employment.
AMENDMENT NO. 15	Strikes references to drug testing of drivers.
AMENDMENT NO. 16	Strikes references to drug testing of drivers and renumbers.
AMENDMENT NO. 17	Clarifying amendment.
AMENDMENT NO. 18	1. Alters the requirements of the content of a subpoena for the toxicologist to require only that the defendant's or his attorney's name, address, and telephone number be included.

A.Z

AMENDMENT NO. 11

~~(6) (I) AFTER THE HEARING, THE ADMINISTRATION SHALL SUSPEND THE DRIVER'S LICENSE OR PRIVILEGE TO DRIVE IF THE ADMINISTRATION DETERMINES THAT THE PERSON CHARGED AS SET FORTH IN SUBSECTION (B) OR (C) OF THIS SECTION EITHER:~~

~~1. REFUSED TO TAKE A TEST OR TESTS; OR~~

~~2. A TEST WAS TAKEN AND THE TEST RESULT INDICATED AN ALCOHOL CONCENTRATION OF 0.10 OR MORE AT THE TIME OF TESTING.~~

"(6)(I) AFTER THE HEARING, THE ADMINISTRATION SHALL SUSPEND THE DRIVER'S LICENSE OR PRIVILEGE TO DRIVE OF THE PERSON CHARGED UNDER SUBSECTION (B) OR (C) OF THIS SECTION IF:

1. THE POLICE OFFICER WHO STOPS OR DETAINS THE PERSON HAD REASONABLE GROUNDS TO BELIEVE THE PERSON WAS DRIVING OR ATTEMPTING TO DRIVE WHILE INTOXICATED, WHILE UNDER THE INFLUENCE OF ALCOHOL, OR IN VIOLATION OF AN ALCOHOL RESTRICTION;

2. THERE WAS EVIDENCE OF ALCOHOL CONSUMPTION;

3. THE POLICE OFFICER REQUESTED A CHEMICAL TEST TO DETERMINE ALCOHOL CONCENTRATION AFTER THE PERSON WAS FULLY ADVISED OF THE ADMINISTRATIVE SANCTIONS THAT SHALL BE IMPOSED; AND

4. THE PERSON:

A. REFUSED TO TAKE A CHEMICAL TEST FOR ALCOHOL CONCENTRATION; OR

B. A CHEMICAL TEST TO DETERMINE ALCOHOL CONCENTRATION WAS TAKEN AND THE TEST RESULT INDICATED AN ALCOHOL CONCENTRATION OF 0.10 OR MORE AT THE TIME OF TESTING.".

AMENDMENT NO. 12

IN THE ABSENCE OF A COMPELLING REASON FOR FAILURE TO ATTEND,

(II) FAILURE OF A PERSON TO ATTEND THE HEARING IS PRIMA FACIE EVIDENCE OF THE PERSON'S INABILITY TO ANSWER THE SWORN STATEMENT OF THE POLICE OFFICER OR THE TEST TECHNICIAN OR ANALYST, AND THE ADMINISTRATION SUMMARILY SHALL SUSPEND THE DRIVER'S LICENSE OR PRIVILEGE TO DRIVE.

A.3

MARYLAND CRIMINAL DEFENSE ATTORNEYS' ASSOCIATION

510 Chesapeake Building • 305 West Chesapeake Avenue • Baltimore, MD 21204 • Phone: (301) 821-0270

HB 556

February 20, 1989

The Honorable William S. Horne,
Chairman, House Judiciary Committee
Room 121 Lowe Building
Annapolis, Maryland 21[illegible]

Re: HB-556 Drunk and Drugged Driving

Dear Chairman Horne:

On February 15, 1989 I [illegible] to present testimony in opposition to the above-captioned Bill, but unfortunately I was a little late in arriving in Annapolis, and the sign up sheet was already taken.

Fortunately, for this [illegible] one very articulate person spoke in opposition to the Bill, and that was William T. S. Bricker, [illegible] many of you will remember as being a one time Motor Vehicle Administrator and innovator of some of the toughest drunk driving laws adopted in this State or any State at the time. Our organization adopts Mr. Bricker's comments [illegible] a copy of which is enclosed with this letter.

It seems that the Administration is adopting MADD's "stance of frustration, anger and fear" and has rushed head long into shifting the burden in a criminal case from the State to that of the Defendant in an administrative hearing by requiring that a Defendant who blows a .10 blood alcohol content (BAC) loses his license. The sham hearing that is provided is a mockery to due process. The only issue would be whether or not the Defendant has a .10/BAC or whether or not he or she refused to take the test. The hearing officer would be divested of any right to impose any modifications of suspension due to employment hardship or the need to drive to alcohol rehabilitation programs.

IV

HB-2

The Bill does not change Section 21-902 of the Transportation Article defining what is driving while intoxicated, while under the influence of alcohol, or while under the influence of drugs, or drugs and alcohol. However, it does change some of the presumptions in Section 10-207 of the Courts and Judicial Proceedings Article concerning blood alcohol content. Under this Bill there would no longer be a presumption that the Defendant was not intoxicated nor under the influence of alcohol if he or she were to blow a .05 percent or less. This too would be taken away from the Defendant.

Even though a Judge or Jury may find that a Defendant who blows a .10 is not intoxicated or not even under the influence of alcohol, that mere fact of such .10 alone would be sufficient to deprive the Defendant of his license for 120 days. Such a not guilty finding by a Court or Jury could not be considered by hearing officer. He would be required to suspend a license.

One area that Mr. Bricker did not address is found on page 11 of the Bill starting at line 15. This is an area which Delegate Genn questioned at the hearing, but to which Mr. Bricker did not respond.

If a Defendant wishes to have a toxicologist testify at a trial, he must call that witness as a defense witness at least 30 days before the trial in the appropriate Court. If the case is transferred to the Circuit Court from the District Court, the defendant has to issue another subpoena at least 30 days before the trial in the Circuit Court and if for any reason the trial is postponed, once again the burden is on the Defendant to file a new subpoena for the toxicologist. In addition, the defense attorney must be sure that the subpoena contains the name, address and telephone number of the Defendant and the defendant's attorney "and the nature of the expected testimony". If for any reason a defendant fails to make a "timely and proper request", the subpoena can be quashed.

Not only does the Defendant and his attorney have to battle the State's Attorney, but the law would also permit intervention by the Attorney General. The Defendant has the burden of showing that the toxicologist's presence is necessary and material to the defense. On top of all of

this, the Defendant also has to pay "reasonable witness fees" and for "the time that the toxicologist and his staff spends in connection with the case" and "all reasonable costs connected with travelling to and from Court". This same burden is not placed on the prosecution. If the Court finds that the subpoena issued by the Defendant was frivolous or was filed to annoy or harass the toxicologist, "the Court shall order the Defendant to pay any witness fees accumulated to that point as well as reasonable attorney's fees owed for the time expended by the office of the State's Attorney and the office of the Attorney General". (emphasis supplied)

Not only are these revisions chilling to the confrontation rights of the Defendant, but they are well nigh frigid.

Thank you very much for this opportunity to submit our position.

Very truly yours,

James F. Garrity

JAMES F. GARRITY

JFG/dg

cc: Committee Members

M. Albert Figinski, Esquire

WILLIAM T. S. BRICKER
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COMMENTS ON HOUSE BILL 556

HB 556 is a sweeping attempt to address the perceived suspected drunk and drugged driver by changing long-tested administrative and judicial procedures that have reduced the alcohol-related traffic deaths in Maryland from 63 per cent in 1981 to 37 per cent in 1987.

It creates an "adminstrative per se" procedure that usurps the authority of the judicial branch of government and deters the rehabilitation process of persons addicted to alcohol and drugs.

It poses serious constitutional procedural due process questions by summarily suspending (for longer periods of time) and revoking licenses of persons convicted of alcohol related offenses with no possibility of obtaining a restricted license; which is often necessary to comply with the terms imposed by a court imposed probation term.

Until 1974, Maryland automatically madated revocations upon a conviction of drunk driving without a hearing. The Supreme Court (Bell v Burson) ruled that a person had an "important interest" in a driver's license and that it ought not be taken without a hearing. Subsequently, hearings have been conducted before a hearing officer who has the authority to impose the necessary rehabilitative or punitive action consistent with his experience and the intentions of the court.

HB 556 continues the hearing process, but literally divests the hearing officer of any authority. It literally mandates suspensions and revocations for test refusals or convictions without modification or restriction and stay of the sanctions pending an appeal to the courts. In effect, those limitations make the hearing procedure a sham!

Historically, contrary to popular belief, long-term suspensions are not effective in removing convicted drunk drivers from the highway, but rather, they encourage them to take a chance that they won't be caught. Dr. H. Laurence Ross, a foremost highway traffic researcher, has demonstrated through studies that suspensions of 15-30 days are the most effective; even in Scandanavia.

This comprehensive legislation needs much more review and consideration and should be deferred until the Legislative Task Force, which met only a dozen or so times, can further review information.

Perhaps, a better approach might be the consideration of Administrative Adjudication which transfers all minor traffic offenses from the District Court to the Motor Vehicle Administration in order that the courts can deal promptly and directly with serious alcohol related traffic offenses.

B-2

MARK-UP

HOUSE OF DELEGATES

91r2280 No. 556 R3
CF 91r1752

By: The Speaker (Administration) and Delegate Matthews
Introduced and read first time: January 25, 1989
Assigned to: Judiciary

A BILL ENTITLED

AN ACT concerning

Drunk ~~and Drugged~~ Driving

FOR the purpose of altering the administrative sanctions for driving or attempting to drive under certain conditions involving alcohol, ~~drugs, or controlled dangerous substances;~~ altering provisions relating to the implied consent to take certain tests; altering the penalties for refusing to take a test for alcohol ~~or drugs or both~~ or for certain tests results; establishing certain procedures and administrative penalties; authorizing certain tests for ~~drug content or alcohol concentration or both~~ and establishing certain procedures for the tests; providing that certain statements are prima facie evidence of certain facts, admissible without the necessity of a qualified medical person appearing in court; establishing a procedure for the appearance of the toxicologist in court; altering the definition of alcohol concentration; establishing a procedure for the suspension of registration for driving when a person's driver's license is suspended or revoked and for the impoundment of plates; ~~providing for the mandatory revocation or suspension of the license to drive of certain persons under certain conditions;~~ making ~~a stylistic change;~~ providing for the effective dates of this Act; and generally relating to the revision of laws pertaining to drunk ~~and drugged~~ driving in this State.

BY repealing and reenacting, with amendments,
Article - Transportation
Section 12-209, 16-205.1, and 16-405
Annotated Code of Maryland
(1987 Replacement Volume and 1988 Supplement)

BY repealing and reenacting, with amendments,
Article - Courts and Judicial Proceedings
Section 10-302 through ~~10-309~~ 10-308
Annotated Code of Maryland

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.
[Brackets] indicate matter deleted from existing law.

ALCOHOL CONCENTRATION

PROVI
FOR
CERTA
EXCEP

STYLISTIC CHANGES

AMENDMENT NO. 2

C-1

OF THE SUSPENSION ORDER, AND A SWORN STATEMENT TO THE ADMINISTRATION, THAT STATES:

1. THE OFFICER HAD REASONABLE GROUNDS TO BELIEVE THAT THE PERSON HAD BEEN DRIVING OR ATTEMPTING TO DRIVE A MOTOR VEHICLE ON A HIGHWAY OR ON ANY PRIVATE PROPERTY THAT IS USED BY THE PUBLIC IN GENERAL IN THIS STATE WHILE INTOXICATED, WHILE UNDER THE INFLUENCE OF ALCOHOL, ~~WHILE UNDER THE INFLUENCE OF DRUGS OR DRUGS AND ALCOHOL, WHILE UNDER THE INFLUENCE OF A CONTROLLED DANGEROUS SUBSTANCE,~~ OR IN VIOLATION OF AN ALCOHOL RESTRICTION;

2. THE PERSON REFUSED TO TAKE THE TEST FOR ALCOHOL ~~OR TEST FOR DRUGS OR BOTH~~ WHEN REQUESTED BY THE POLICE OFFICER OR THE PERSON SUBMITTED TO THE TEST FOR ALCOHOL WHICH INDICATED AN ALCOHOL CONCENTRATION OF 0.10 OR MORE AT THE TIME OF TESTING; AND

3. THE PERSON WAS FULLY ADVISED OF THE ADMINISTRATIVE SANCTIONS THAT SHALL BE IMPOSED.

(c) (1) If a person is involved in a motor vehicle accident that results in the death of another person and the person is detained by a police officer who has reasonable grounds to believe that the person has been driving or attempting to drive while intoxicated {or} while under the influence of alcohol, ~~WHILE UNDER THE INFLUENCE OF DRUGS OR DRUGS AND ALCOHOL, OR WHILE UNDER THE INFLUENCE OF A CONTROLLED DANGEROUS SUBSTANCE,~~ the person shall be required to submit to a {chemical} test ~~OR TESTS~~, as directed by the officer, [of the person's blood or breath] to determine the alcohol [content] CONCENTRATION of the person's blood OR BREATH ~~OR DRUG CONTENT OF THE PERSON'S BODY~~.

(2) If a police officer directs that a person's blood {or}, breath, ~~URINE, OR OTHER BODY FLUIDS~~ be tested for alcohol OR DRUGS OR BOTH, then the provisions of § 10-304 of the Courts and Judicial Proceedings Article shall apply.

(3) Any medical personnel who perform any {test} ~~TESTS~~ required by this section are not liable for any civil damages as the result of any act or omission related to such {test} ~~TESTS~~, not amounting to gross negligence.

(d) (1) If a police officer has reasonable grounds to believe [an individual] A PERSON has been driving or attempting to drive a motor vehicle while intoxicated {or} while under the influence of alcohol, ~~WHILE UNDER THE INFLUENCE OF DRUGS OR DRUGS AND ALCOHOL, OR WHILE UNDER THE INFLUENCE OF A CONTROLLED DANGEROUS SUBSTANCE,~~ and if the police officer determines the [individual] PERSON is unconscious or otherwise incapable of refusing to take a {chemical} test ~~OR TESTS~~ for alcohol, the police officer shall:

(i) Obtain prompt medical attention for the [individual] PERSON;

C-2

CERTIFICATE OF SERVICE

This is to certify that on this 27th day of November, 2013, two copies of the Brief of the National College for DUI Defense and the Maryland Criminal Defense Attorneys' Association as Amici Curiae were mailed first class, postage pre-paid to:

Leight D. Collins
Assistant Attorney General
Motor Vehicle Administration
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and

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