

CLARIFYING THE ADMISSIBILITY OF DWI CHEMICAL TEST REFUSALS IN NEW YORK: THE “TWO-HOUR RULE” DOES NOT APPLY

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INTRODUCTION

On May 5, 2006, a driver was stopped at the guard station while exiting the United States Merchant Marine Academy at Kings Point. The military guards approached, noticing that the driver appeared to be intoxicated. When they tried to speak to him, the driver sped off with one of the guards clinging to the car door, the vehicle swerving into the oncoming lane of traffic. The man was eventually stopped by the Kings Point Police and arrested; he was later brought to a Nassau County drunk driver testing location and, two hours and five minutes after his arrest, refused to provide a breath sample to the police. The legal question implicated by this case is whether a defendant's refusal to consent to a Breathalyzer test,¹ when such refusal transpires longer than two hours after his arrest, is admissible as evidence against that defendant in a subsequent criminal trial for a drunk-driving offense. In the early 1980s, when big hair, Member's Only jackets, and Pat Benatar were still popular, the answer would have been “no.”² But many things have changed since 1981. If Paris Hilton confronted this choice today, refusing

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¹ A Breathalyzer is “[a] device used to measure the blood alcohol content of a person's breath.” BLACK'S LAW DICTIONARY 202 (8th ed. 2004).

² See *People v. Brol*, 81 A.D.2d 739, 438 N.Y.S.2d 424 (4th Dep't 1981), *modified*, 89 A.D.2d 813, 453 N.Y.S.2d 540 (4th Dep't 1982).

to blow more than two hours after her arrest, the refusal would almost certainly be admissible at her trial. In fact, over the past fourteen years virtually every New York court has held that no such time limit for the admission of refusal evidence exists, a conclusion supported by legislative history, statutory plain meaning, and binding New York caselaw. Yet recently this issue has arisen once again as an unlikely bone of judicial contention.

The genesis of the present disagreement was a pair of aberrant 2005 trial court decisions, the holdings of which seemingly turned back the clock and found that a two-hour lapse between arrest and refusal renders such refusal inadmissible. These cases relied on an overly-broad conception of the so-called "two-hour rule" once prevalent in New York decisional law. This Essay examines the language and history of the statutory provision at issue, Vehicle and Traffic Law section 1194, in the context of nearly two decades of New York caselaw. It concludes that application of the two-hour rule to chemical test refusals is simply not the law in New York . . . nor should it be.

I. REFUSALS UNDER VEHICLE AND TRAFFIC LAW SECTION 1194

Vehicle and Traffic Law ("VTL") section 1194 establishes the procedures governing the arrest and testing of an individual suspected of driving while under the influence of drugs or alcohol. As a result of a 1970 change to the enabling statute, conflict emerged as to the current application of the two-hour rule.

The original two-hour rule contained in VTL section 70(5) provided that chemical evidence of the amount of alcohol in a driver's blood was only admissible if the test was performed within two hours of his arrest. This rule, as a matter of construction, applied to the entire statute, serving as a "rule of an evidentiary nature."³ In 1970, however, the New York legislature changed the statutory placement of the two-hour rule, relocating it from the VTL's evidentiary provision to its "deemed consent" provision.⁴

³ *People v. Morales*, 161 Misc. 2d 128, 130, 611 N.Y.S.2d 980, 981 (N.Y.C. Crim. Ct. Kings County 1994).

⁴ The legislature moved the two-hour provision from VTL section 70(5), the statutory predecessor to section 1195(1), and placed it within the "implied consent" language of section 1194. *Id.* Note that, for the purposes of this essay, the terms

This change removed the two-hour stricture from the overarching statute which provided for admissibility of chemical test evidence and wedded it with the statute which conferred authority on police officers to obtain relevant evidence of intoxication[, specifically] in cases where the police would have to rely upon implied consent because of the *driver's inability to acquiesce in or refuse a chemical test*.⁵

The only remnant of the two-hour rule, and, in fact, the only time that the words "two hours" even appear in VTL section 1194, is in section 1194(2)(a).⁶ The statute is thus very straightforward: When the deemed consent provision of section 1194 applies, a chemical test analysis must be conducted within two hours of the driver's arrest. Failure to do so renders such evidence inadmissible at trial. This two-hour prescription exists nowhere else in the statute, dictating that its scope was likewise meant to be limited to that provision.

In *People v. Finnegan*,⁷ finding the two-hour rule inapplicable to independently performed chemical tests,⁸ the New York Court of Appeals held that "[t]he governing rule of statutory construction is that courts are obliged to interpret a statute to effectuate the intent of the legislature, and when the statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of [the] words' used." The court further stated, "[w]e have firmly held that the failure of the Legislature to include a substantive, significant prescription in a statute is a strong indication that its exclusion was intended,"

"implied consent" and "deemed consent" are used interchangeably.

⁵ *Morales*, 161 Misc. 2d at 131, 611 N.Y.S.2d at 982 (emphasis added).

⁶ The statute states, in pertinent part:

Chemical tests. (a) When authorized.

Any person who operates a motor vehicle in this state shall be deemed to have given consent to a chemical test . . . at the direction of a police officer:

(1) having reasonable grounds to believe such person to have been operating in violation of any subdivision of section eleven hundred ninety-two of this article and within *two hours* after such person has been placed under arrest for any such violation; or having reasonable grounds to believe such person to have been operating in violation of section eleven hundred ninety-two-a of this article and within *two hours* after the stop of such person for any such violation,

(2) within *two hours* after a breath test, as provided in paragraph (b) of subdivision one of this section, indicates that alcohol has been consumed by such person . . .

N.Y. VEH. & TRAF. LAW § 1194(2) (McKinney 2007) (emphasis added).

⁷ 85 N.Y.2d 53, 647 N.E.2d 758, 623 N.Y.S.2d 546 (1995).

⁸ See § 1194(4)(b); see also *infra* Part II.B.

and that “the omission of . . . substantive elements [from this] fully integrated and comprehensive driving while intoxicated protocol compellingly suggests that the Legislature intended no such additional obligations.”⁹

Pursuant to this logic, the omission of a two-hour component from the refusal provision of an otherwise complete and comprehensive “driving while intoxicated” (“DWI”) section demonstrates legislative intent to exempt refusals from the two-hour rule. After all, “[i]t is a fundamental canon of statutory construction that courts ‘do not sit in review of the discretion of the Legislature or determine the expediency, wisdom, or propriety of its actions on matters within its powers.’”¹⁰

Examining other subsections of VTL section 1194 confirms that the two-hour rule does not exist anywhere but within the deemed consent provision. Outside of that provision, the statute provides that upon refusal, “the test shall not be given and a written report of such refusal shall be immediately made by the police officer before whom such refusal was made.”¹¹ The text goes on to describe the necessary contents of such report,¹² the fact that the license of the driver shall be suspended pending a hearing, and the time by which notice of the refusal shall be sent to the Commissioner of the Department of Motor Vehicles (“DMV”).¹³ Furthermore, it sets forth in explicit detail the procedural rules governing the DMV hearing, which is held once a police officer files a written report stating that a driver refused submission to chemical test analysis.¹⁴

⁹ *Finnegan*, 85 N.Y.2d at 58, 647 N.E.2d at 761, 623 N.Y.S.2d at 549; *see also* *People v. Tychanski*, 78 N.Y.2d 909, 911–12, 577 N.E.2d 1046, 1047–48, 573 N.Y.S.2d 454, 455–56 (1991) (holding that where the language of Criminal Procedure Law section 30.30(5)(c) omitted misdemeanor indictments from a list of accusatory instruments that trigger a less-than-six-month speedy trial period, the statute “must be read and given effect as it is written by the Legislature,” noting further that “the failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended,” and therefore concluding that the Legislature’s failure was deliberate (internal quotation marks omitted)).

¹⁰ *Pajak v. Pajak*, 56 N.Y.2d 394, 397, 437 N.E.2d 1138, 1139, 452 N.Y.S.2d 381, 382 (1982) (quoting N.Y. STAT. LAW § 73 (McKinney 1982)).

¹¹ N.Y. VEH. & TRAF. LAW § 1194(2)(b)(1).

¹² *Id.* § 1194(2)(b)(2) (“The report of the police officer shall set forth reasonable grounds to believe such arrested person . . . had refused to submit to such chemical test, and that no chemical test was administered pursuant to the requirements of subdivision three of this section.”).

¹³ *Id.* § 1194(2)(b)(3).

¹⁴ *See id.* § 1194(2)(c).

The VTL also provides that if a hearing is not conducted within fifteen days after the driver's arraignment, his operating privileges are reinstated pending the hearing.¹⁵ VTL section 1194(2)(c) establishes that the determinations to be made at this hearing are limited to whether: (1) the police officer had reasonable grounds to believe the defendant was driving in violation of VTL section 1192(1)–(4); (2) the officer lawfully arrested the driver; (3) the driver was given sufficient warnings, clearly and unequivocally, that test refusal would result in the immediate suspension and subsequent revocation of the driver's operating privilege, notwithstanding the driver's guilt or innocence; and (4) the driver in fact refused to submit to the test. The statute then addresses the only two available dispositions: license restoration or revocation. VTL section 1194(2)(c) states that if the hearing officer

finds on any one of said issues in the negative, [he] shall immediately terminate any suspension arising from such refusal. If, after such hearing, the hearing officer, acting on behalf of the commissioner finds all of the issues in the affirmative, such officer *shall* immediately revoke the license or permit to drive.¹⁶

The legislature's mandate to the DMV is as clear as day: If the enumerated statutory criteria are met, the administrative law judge has no other choice but to suspend the operator's privilege to drive.

There is absolutely no mention of the two-hour rule in this highly specific statutory subsection. The legislature carefully defined the pertinent deadlines, stating that a refusal report be sent to the commissioner within forty-eight hours of arraignment,¹⁷ and that a hearing be conducted within fifteen days of arraignment.¹⁸ If the legislature intended that a two-hour rule apply to refusals, surely some mention of its existence would appear in these statutory provisions. Yet, the fact remains that there is no requirement, explicit or implied, that a driver's refusal to submit to a chemical test be obtained within two hours of arrest.

¹⁵ *Id.*

¹⁶ *Id.* (emphasis added).

¹⁷ *Id.* § 1194(2)(b)(3).

¹⁸ *Id.* § 1194(2)(c).

VTL section 1194(2)(f) further provides:

Evidence of a refusal to submit to a chemical test or any portion thereof shall be admissible in any trial, proceeding or hearing . . . but only upon a showing that the person was given sufficient warning, in clear and unequivocal language, of the effect of such refusal and that the person persisted in the refusal.

The statute is once again clear: If a defendant is given the requisite notice as to the consequences of his refusal, that refusal is admissible at trial. Absent again is any mention of a two-hour requirement.

Guided by the rules of statutory construction, plainly there is no requirement in VTL section 1194(2)(b) that a refusal be obtained within two hours of arrest in order for the refusal evidence to be admissible at trial. When a provision is absent from a statute, its exclusion by the legislature must be construed as intentional, and it cannot be inserted by judicial decree.

II. THE RELUCTANCE OF THE NEW YORK COURT OF APPEALS TO EXPAND THE "TWO-HOUR RULE" BEYOND DEEMED CONSENT

Despite the VTL's clarity as to this matter, caselaw from the early 1980s bred confusion concerning the existence and application of the two-hour rule. As this Essay demonstrates, several New York Court of Appeals cases—culminating in *People v. Atkins*¹⁹—repudiate the incorrect, and yet lingering, contention that a statutory time limit exists beyond which a driver's blood alcohol test refusal is per se inadmissible. In this line of cases, the court explicitly held that additional subsections in VTL section 1194 are to be construed as written—i.e., without a two-hour cap when such limit is absent from the pertinent statutory provision.

A. *The "Two-Hour Rule" Held Inapplicable to Court-Ordered Chemical Tests*

In *People v. McGrath*,²⁰ the Second Department held that chemical tests performed pursuant to court order are not subject

¹⁹ 85 N.Y.2d 1007, 654 N.E.2d 1213, 630 N.Y.S.2d 965 (1995).

²⁰ 135 A.D.2d 60, 524 N.Y.S.2d 214 (2d Dep't 1988), *aff'd*, 73 N.Y.2d 826, 534 N.E.2d 318, 537 N.Y.S.2d 480 (1988).

to the two-hour limitation, or to any other time limit.²¹ The driver in *McGrath* was involved in a car accident that resulted in serious injuries. A police officer asked him to consent to a blood alcohol test several times, and each time the defendant refused. The officer eventually obtained a court order, and two hours and twenty minutes after the defendant was arrested a blood test was performed. The court held:

Nothing in the unambiguous language of [current VTL section 1194(3)(b)] indicates that the Legislature intended to impose a specific time limitation on the performance of court-ordered chemical tests. The omission of such a restriction reflects a rational legislative determination that it was unnecessary. It is reasonable to assume that the intervention of an impartial magistrate in the issuance of an order for a chemical test insures that the test will not be administered at a time so remote that the results are irrelevant to the central question of the driver’s blood-alcohol count at the time of the automobile accident.²²

The court rejected the defendant’s argument that the two-hour rule was incorporated by reference into court-ordered chemical tests: “If the legislature had intended for the two-hour rule . . . to apply to chemical tests ordered by a court . . . it certainly would have included an unequivocal statement to that effect.”²³ This explicit recognition of the legislature’s failure to incorporate the two-hour rule into the VTL’s court-ordered test provision reinforces the view that the two-hour rule applies *only* when specifically mentioned.

B. The “Two-Hour Rule” Held Inapplicable to Independently-Obtained Chemical Tests

In *Finnegan*, police arrested the defendant for driving while intoxicated and informed him that, pursuant to VTL section 1194(4)(b), he possessed a right to an independent blood test performed at his own expense. The defendant was given a Breathalyzer test within two hours of his arrest, and was subsequently convicted of a DWI offense. The defendant

²¹ The court did note that the “time for administering court-ordered chemical tests is limited only by considerations of due process.” *Id.* at 61, 524 N.Y.S.2d at 215.

²² *Id.* at 62, 524 N.Y.S.2d at 216.

²³ *Id.* at 63, 524 N.Y.S.2d at 217; *see also* *People v. Demetsenare*, 243 A.D.2d 777, 780, 663 N.Y.S.2d 299, 302 (3d Dep’t 1997) (noting that there is no two-hour time limit in cases involving court-ordered blood tests).

appealed, arguing that the police had an affirmative obligation to assist him in obtaining an independent blood test. The court rejected this assertion,²⁴ though noting that police should never impede arrestees from procuring an independent test.²⁵

Noteworthy was the court's response to Mr. Finnegan's contention that police assistance for conducting the independent test be promptly offered, so that the test would be completed within two hours of his arrest. The Court of Appeals held that "[VTL] § 1194(2)(a)(1), which mandates that the [B]reathalyzer test be performed within a two-hour time period following arrest, applies only to the official test. That prerequisite is not referenced to the accused's independent test option nor is it controlling with respect to the private, personal test."²⁶ *Finnegan* thus definitively held that "[n]othing in the unambiguous language of [VTL] § 1194(4)(b) indicates that the Legislature intended to cross-reference or incorporate the official test time limitation into obtaining the independent test."²⁷ As a result, the two-hour rule does not apply to independent tests, the results of which are admissible despite the lapse of more than two hours. This holding again strengthens the argument that test refusals

²⁴ The defendant in *Finnegan* wanted the court to: (1) require the police to advise defendants of their right to an independent test; (2) require police to transport defendants to a hospital or make provisions for a technician to appear at the precinct; and (3) require the police to obtain the independent test within two hours of defendants' arrests. 85 N.Y.2d at 57, 647 N.E.2d at 760, 623 N.Y.S.2d at 548. The court, finding the statute "starkly silent as to any implementary duties imposed on the law enforcement personnel," held that the "statutory right is the defendant's and so is the responsibility to take advantage of it," and thus refused to require any affirmative police action. *Id.* at 58, 647 N.E.2d at 760-61, 623 N.Y.S.2d at 548-49.

²⁵ *Id.* at 58, 647 N.E.2d at 761, 623 N.Y.S.2d at 549. The court did note that while police should assist those in custody by providing telephone calls, etc., "the police have no affirmative duty to gather or help gather evidence for an accused." *Id.* at 58, 647 N.E.2d at 761, 623 N.Y.S.2d at 549 (citing *People v. Alvarez*, 70 N.Y.2d 375, 515 N.E.2d 898, 521 N.Y.S.2d 212 (1987)).

²⁶ *Id.* at 59, 647 N.E.2d at 761, 623 N.Y.S.2d at 549. Note that this opinion, written in February of 1995, still applied the two-hour rule within section 1194(2)(a)(1), despite the defendant's consent to the Breathalyzer test. As discussed in Part II.C, *infra*, the two-hour rule only applies to situations of so-called "deemed consent." *People v. Atkins*, 85 N.Y.2d 1007, 1008-09, 654 N.E.2d 1213, 1214, 630 N.Y.S.2d 965, 966 (1995), decided four months after *Finnegan*, conclusively held the two-hour rule inapplicable to cases in which the driver expressly consents to a chemical test.

²⁷ *Finnegan*, 85 N.Y.2d at 59, 647 N.E.2d at 761, 623 N.Y.S.2d at 549.

remain valid despite the passage of more than two hours from the time of arrest.

C. The “Two-Hour Rule” Held Inapplicable When a Defendant Expressly Consents to a Chemical Test

In *People v. Atkins*,²⁸ the defendant was charged with violating VTL section 1192(4) after colliding with a parked vehicle. He consented to a blood test, which was conducted two hours and twenty-eight minutes after his arrest.²⁹ The test results confirmed the presence of phencyclidine (“PCP”) in the defendant’s bloodstream.

The *Atkins* opinion cited to *People v. Ward*,³⁰ in which the Court of Appeals found it “difficult to perceive any necessity for the protections embodied in [the deemed consent statute] where the driver freely volunteers to take the test and have his blood analyzed.”³¹ *Atkins* then held, “[i]t follows from our decision in *Ward* that the two-hour limitation contained in [VTL] § 1194(2)(a) has no application here where, as found by the Appellate Term, [the] defendant expressly and voluntarily consented to administration of the blood test.”³²

Thus, while the Court of Appeals has not yet squarely faced the question of refusal evidence admissibility after two hours, in every relevant decision addressing VTL section 1194, it has refused to expand the scope of the two-hour rule beyond the deemed consent provision. This refusal to apply a time limit when addressing VTL subsections beyond the deemed consent provision clearly implies that if the Court of Appeals ever confronts this issue, it will not subject test refusal admissibility to a two-hour rule.

²⁸ 85 N.Y.2d 1007, 654 N.E.2d 1213, 630 N.Y.S.2d 965 (1995).

²⁹ *Id.* at 1008, 654 N.E.2d at 1214, 630 N.Y.S.2d at 966.

³⁰ 307 N.Y. 73, 120 N.E.2d 211 (1954).

³¹ *Atkins*, 85 N.Y.2d at 1008, 654 N.E.2d at 1214, 630 N.Y.S.2d at 966 (quoting *Ward*, 307 N.Y. at 77, 120 N.E.2d at 213 (alteration in original) (internal quotation marks omitted)).

³² *Id.* at 1008–09, 654 N.E.2d at 1214, 630 N.Y.S.2d at 966.

III. *PEOPLE V. BROL*: THE ORIGIN AND MOST PROMINENT MISAPPLICATION OF THE "TWO-HOUR RULE"

A. *Brol's Holding: Fundamentally Flawed and Obsolete*

People v. Brol,³³ decided in 1981, is widely viewed as the most significant case to posit the potential inadmissibility of a refusal that occurs more than two hours after a defendant's arrest. Ironically, the Fourth Department in *Brol* actually remanded the case back to the trial court in order to ascertain the timing of the refusal.³⁴ As it turns out, Mr. Brol refused the chemical test within two hours of his arrest.³⁵ Thus, the entire appellate analysis was unnecessary, and its pronouncement as to the two-hour rule can fairly be considered dicta. Regardless of that salient history, *Brol* is the foundation for the widespread misapplication of the two-hour rule to test refusals. It is therefore instructive to examine the decision's reasoning, history, treatment, and interpretation over the last twenty-six years.

Brol held that a chemical test not performed within two hours after the driver's arrest would be inadmissible at trial. The court then expanded upon this holding, stating that "if the test's results are incompetent if . . . not administered within the two-hour limit, [then] evidence of the refusal is similarly incompetent . . . against defendant unless obtained within two hours of the arrest."³⁶ *Brol's* conclusions are, however, clearly unsound in light of subsequent caselaw. As discussed above, the Court of Appeals has since determined that test results obtained more than two hours after a driver's arrest are indeed admissible when obtained either through voluntary consent, court order, or at a defendant's request; *Brol's* underlying premise is, resultingly, based on an incorrect assessment of New York law.

Notably, employing *Brol's* logic—a post-two-hour result lacks probative value and is therefore inadmissible, and, assuming the evidentiary significance of a refusal is directly linked to the propriety of its precedent request, a post-two-hour refusal also lacks probative value and is likewise inadmissible—leads to the

³³ 81 A.D.2d 739, 438 N.Y.S.2d 424 (4th Dep't 1981), *modified*, 89 A.D.2d 813, 453 N.Y.S.2d 540 (4th Dep't 1982).

³⁴ *Id.* at 740, 438 N.Y.S. at 425.

³⁵ *People v. Brol*, 89 A.D.2d 813, 813, 453 N.Y.S.2d 540, 541 (4th Dep't 1982).

³⁶ *Brol*, 81 A.D.2d at 740, 438 N.Y.S.2d at 425.

conclusion that if the court’s first holding³⁷ is misguided, its second pronouncement³⁸ is also wrong. *Brol*’s first prong, that the VTL requires a breath test be administered within two hours of arrest, has been directly overruled by a plethora of New York cases.³⁹ Therefore, if a post-two-hour breath test is admissible, a post-two-hour refusal is “similarly” competent and admissible. In other words, the evidentiary validity of a post-two-hour test result yields the evidentiary validity of a post-two-hour test refusal. It is only through the application of this simple logical construct that the past thirteen years of New York caselaw makes any sense. Examining the judicial treatment of *Brol* since 1994, most courts have indeed reached this very conclusion and admitted evidence of such refusals. Crucially, these decisions have done so despite acknowledging, and even discussing, *Brol*.⁴⁰

B. Lower Court Caselaw in the Wake of *Brol*

The first widely cited refusal case to follow *Brol* was *People v. Walsh*,⁴¹ which adhered to *Brol*’s dictate without comment or question. The *Walsh* court’s complete deference to *Brol* is unsurprising when viewed in the context of the evolving caselaw at the time, which still largely applied the two-hour cap to all chemical tests and, by extension, to all refusals. This view predominated despite the legislative changes noted above, and it

³⁷ The statutory interpretation of the VTL required a person’s breath to be gathered within two hours of arrest. *Id.* at 740, 438 N.Y.S.2d at 424–25; *see also supra* note 36 and accompanying text.

³⁸ Namely, the application of this concept to refusals.

³⁹ *See* *People v. Finnegan*, 85 N.Y.2d 53, 59, 647 N.E.2d 758, 761, 623 N.Y.S.2d 546, 549 (1995); *People v. Atkins*, 85 N.Y.2d 1007, 1008–09, 654 N.E.2d 1213, 1213–14, 630 N.Y.S.2d 965, 965–66 (1995); *People v. Hoffman*, 283 A.D.2d 928, 929, 725 N.Y.S.2d 494, 497 (4th Dep’t 2001); *People v. Zawacki*, 244 A.D.2d 954, 955, 665 N.Y.S.2d 172, 173 (4th Dep’t 1997); *People v. Turner*, 234 A.D.2d 704, 706, 651 N.Y.S.2d 655, 657 (3d Dep’t 1996); *People v. Abel*, 166 A.D.2d 841, 841–42, 563 N.Y.S.2d 531, 532 (3d Dep’t 1990); *People v. McGrath*, 135 A.D.2d 60, 62, 524 N.Y.S.2d 214, 216 (2d Dep’t 1988), *aff’d*, 73 N.Y.2d 826, 534 N.E.2d 318, 537 N.Y.S.2d 480 (1988); *People v. Nemickas*, 5 Misc. 3d 133(A), 799 N.Y.S.2d 163 (Sup. Ct. App. T. 2d Dep’t 2004) (table decision); *People v. Byington*, N.Y. L.J., Dec. 8, 1989, at 21, col. 1 (Sup. Ct. App. T. 1st Dep’t), *appeal denied*, 76 N.Y.2d 732, 557 N.E.2d 1190, 558 N.Y.S.2d 894 (1990).

⁴⁰ *See, e.g.*, *People v. Morales*, 161 Misc. 2d 128, 129, 611 N.Y.S.2d 980, 983 (N.Y.C. Crim. Ct. Kings County 1994).

⁴¹ 139 Misc. 2d 161, 527 N.Y.S.2d 349 (Dist. Ct. Nassau County 1988). Judge Jonas, author of the *Walsh* opinion, did reference *People v. Mills*, 124 A.D.2d 600, 507 N.Y.S.2d 743 (2d Dep’t 1988), a precursor to *Atkins*.

was not until cases like *People v. Mills*⁴² and *McGrath* that a much narrower conception of the two-hour rule arose.⁴³ Moreover, it was not until 1995, when *Finnigan* and *Atkins* were decided by the New York Court of Appeals, that caselaw truly reflected the 1970 legislative change. When *Walsh* was decided, consequently, misperceptions still existed as to the two-hour rule's scope.

The next pertinent decision was *People v. Morales*,⁴⁴ a 1994 decision that focused on the incompatibility between *Brol* and *Mills*. In contrast to *Walsh*'s perfunctory analysis, the *Morales* court fully examined the relevant legislative and judicial changes since 1970,⁴⁵ including *Brol*, *Walsh*,⁴⁶ and *People v. Mertz*.⁴⁷

⁴² 124 A.D.2d 600, 507 N.Y.S.2d 743 (2d Dep't 1986).

⁴³ Legislatively, the two-hour rule applies only when the prosecution relies on statutorily deemed consent to introduce a breath test result at trial. That circumstance generally occurs only when an operator is unconscious or incoherent, and the police request medical personnel to take a blood sample.

⁴⁴ 161 Misc. 2d 128, 611 N.Y.S.2d 980 (N.Y.C. Crim. Ct. Kings County 1994).

⁴⁵ See *id.* at 130–34, 611 N.Y.S.2d at 981–84 (“The two-hour rule had its genesis in Vehicle and Traffic Law § 70(5) . . .”). The court discussed the 1970 legislative realignment of the two-hour rule into the implied consent provision of the VTL, calling it a “telling development.” *Id.* at 130, 611 N.Y.S.2d at 981. This change “wedded [the two-hour stricture] with the statute which conferred authority on police officers to obtain relevant evidence of intoxication in cases where the police would have to rely upon implied consent because of the driver’s inability to acquiesce in or refuse a chemical test.” *Id.* at 131, 611 N.Y.S.2d at 982. The organizational structure of VTL section 1194, the court reasoned, “segregated” the three methods through which police can obtain chemical test evidence: implied consent, express consent, and court orders. *Id.* *Morales* then summarized the relevant appellate division caselaw from the 1980s, identifying the gradual yet irrefutable constriction of the two-hour rule’s scope to only those cases involving implied consent. *Id.* at 131–32, 611 N.Y.S.2d at 982–83 (discussing *People v. Abel*, 166 A.D.2d 841, 563 N.Y.S.2d 531 (3d Dep’t 1990), *People v. Mills*, 124 A.D.2d 600, 507 N.Y.S.2d 743 (2d Dep’t 1986), and *People v. Kates*, 53 N.Y.2d 591, 428 N.E.2d 852, 444 N.Y.S.2d 446 (1981)). The court emphasized the Second Department’s extension of this underlying rationale to court-ordered chemical tests in *People v. McGrath*, 135 A.D.2d 60, 524 N.Y.S.2d 214 (2d Dep’t 1988), *aff’d*, 73 N.Y.2d 826, 534 N.E.2d 318, 537 N.Y.S.2d 480 (1988), the Court of Appeals’ affirmation of which validated the transformation of “the two-hour rule from one of evidentiary significance to one of procedural consequence.” *Morales*, 161 Misc. 2d at 132, 611 N.Y.S.2d at 982 (“The rule no longer has evidentiary significance because chemical test results obtained more than two hours after a defendant’s arrest by express consent or court order are now admissible.”).

⁴⁶ The court identified *Walsh*'s reliance on *Brol* as illogical: “[I]f an officer, pursuant to [VTL] § 1194(2)(b), has the authority to request that a driver take a chemical test more than two hours after the arrest, and the test results are deemed probative, why is a defendant’s refusal to take the authorized test not probative of a consciousness of guilt?” 161 Misc. 2d at 133, 611 N.Y.S.2d at 983. The opinion

Judge Garnett, author of the *Morales* opinion, felt bound by the Second Department's ruling in *Mills* to allow evidence of a refusal made after two hours into evidence.⁴⁸ Additionally, he presaged future Court of Appeals holdings⁴⁹ by emphasizing that the two-hour rule was not evidentiary but *procedural*,⁵⁰ a distinction nevertheless still ignored by some commentators today. That *Walsh* and *Morales* reached contrary conclusions is at least partly attributable to a change in the general perception among New York courts as to the two-hour rule, a shift that occurred during the period of time in between those two decisions. By the time *Morales* came about, several opinions in various departments had already followed *Mills*.⁵¹ In any event, *Morales* examined the proper scope of the two-hour rule in depth, conclusively holding that a chemical test refusal need not transpire within two hours from arrest to be admissible.

A year after *Morales*, Judge Ruchelsman in *People v. Coludro*⁵² found the two-hour rule inapplicable to refusals without referencing any cases beside *Morales*.⁵³ This direct

concluded that "*Walsh* is at odds with the binding statutory interpretation in *Mills* and inconsistent with the underlying reasoning of *Brol*." *Id.* (citations omitted).

⁴⁷ 68 N.Y.2d 136, 497 N.E.2d 657, 506 N.Y.S.2d 290 (1986). *Mertz* found that "proof of a [B]reathalyzer reading of .10 or more within two hours after arrest establishes prima facie a violation of [VTL] § 1192(2)." *Id.* at 146, 497 N.E.2d at 662, 506 N.Y.S.2d at 295. Judge Garnett in *Morales* rejected any argument that *Mertz*'s holding demonstrated the applicability of the two-hour rule to cases involving express consent and court orders: "[T]he Court was not applying a statutory presumption contained in the language of section 1192(2), but was, at most, fashioning a common-law rule to aid the prosecution in establishing a prima facie case." 161 Misc. 2d at 133, 611 N.Y.S.2d at 983.

⁴⁸ *Brol* is not binding on these lower courts because its reasoning lacks a basis in the plain meaning of the statutory language governing the law of refusals and is based on a conclusion since refuted by the Court of Appeals. If *Brol* in fact determined that the VTL required a refusal within two hours of arrest to permit admissibility, then all trial courts would need to adhere to this rule until either a court of concurrent or higher authority ruled differently or until the legislature took action. But, as noted above, that was not *Brol*'s holding. *See supra* text accompanying notes 36–37.

⁴⁹ *See supra* Part II.B–C (addressing *People v. Atkins* and *People v. Finnegan*).

⁵⁰ *Morales*, 161 Misc. 2d at 134, 611 N.Y.S.2d at 982.

⁵¹ *See* *People v. Stelmach*, 191 A.D.2d 733, 595 N.Y.S.2d 509 (2d Dep't 1993); *People v. Abel*, 166 A.D.2d 841, 563 N.Y.S.2d 531 (3d Dep't 1990); *People v. Byington*, N.Y. L.J., Dec. 8, 1989, at 21, col. 1 (Sup. Ct. App. T. 1st Dep't), *appeal denied*, 76 N.Y.2d 732, 557 N.E.2d 1190, 558 N.Y.S.2d 894 (1990).

⁵² 166 Misc. 2d 662, 634 N.Y.S.2d 964 (N.Y.C. Crim. Ct. Kings County 1995).

⁵³ One possible explanation is that Judge Garnett's analysis was so well reasoned and persuasive as to be irrefutable.

reliance reflected two influential Court of Appeals decisions that came down earlier that same year: *Finnigan* and *Atkins*. Just as the *Morales* court had envisioned, these two cases removed any and all force from *Brol*.⁵⁴ By the time Judge Ruchelman considered the issue in October of 1995, it was painstakingly clear that the two-hour rule did not apply to evidence of test refusals.

In 1996, *People v. Cosgrove*⁵⁵ provided yet another pertinent analysis, holding that “[t]his area of case law has progressed since *Brol* was decided in 1981.”⁵⁶ The court emphasized *Atkins*, adhered to *Morales*, and expressly rejected any claim that the two-hour rule was applicable to cases other than those involving deemed consent.⁵⁷

Two years later, *People v. Ward*⁵⁸ also held the two-hour rule inapplicable to test refusals. The court observed:

[C]onsidering the reasoning in *Brol*, in conjunction with several subsequent decisions interpreting the scope of the two hour rule, it seems clear that today the rule has no application in a determination of the admissibility of evidence that a defendant refused a chemical test. . . . In view of the foregoing decisions, particularly *People v. Atkins*, the premise upon which the Fourth Department relied in reaching its conclusion in *People v. Brol*, specifically, that test results are universally incompetent if the test is not administered within the two hour limit, is no longer valid. That being so, the conclusion itself, that evidence of a refusal not obtained within two hours is similarly incompetent, is unsupported. Indeed, logic now dictates a converse theorem: if evidence of the results of a chemical test expressly consented to by a defendant and administered beyond the two hour limit is competent, then evidence of a refusal to take such a test, obtained beyond the two-hour limit, must similarly be competent.⁵⁹

Ward, like *Morales*, reflected the broader consensus among New York courts as to the two-hour rule. While aberrant

⁵⁴ Ironically, Justice Simons, a member of the Fourth Department panel that decided *Brol* in 1981, wrote the dissent in *Atkins*. Clearly, Justice Simons's interpretation of the VTL has not been adopted in New York.

⁵⁵ No. 95X052915, slip op. (N.Y.C. Crim. Ct. Bronx County 1996).

⁵⁶ *Id.* at 6.

⁵⁷ *Id.* at 6.

⁵⁸ 176 Misc. 2d 398, 673 N.Y.S.2d 297 (Sup. Ct. Richmond County 1998).

⁵⁹ *Id.* at 402–03, 673 N.Y.S.2d at 300–01 (citations omitted).

decisions addressing issues surrounding *Atkins* do indeed exist,⁶⁰ the concept that the two-hour rule applies only in the context of deemed consent was finally accepted by most lower courts. The driving force behind this consensus was that the Court of Appeals had spoken: The two-hour rule was only applicable when a prosecutor relies upon the deemed consent provision to introduce a blood test gathered from an incoherent or unconscious defendant.

Finally, *People v. Torres*⁶¹ quietly followed precedent in ruling that the two-hour limit does not apply to refusals. Six years after *Ward*, and with not a single published appeal finding fault with the admission of refusal evidence gathered after two hours, *Torres* adhered to the correct statutory and case-driven analysis, admitting the refusal evidence at issue.⁶²

The caselaw therefore has developed in a linear fashion. Courts have consistently held that the two-hour rule does not apply to test refusals.⁶³ In fact, *Walsh* had never been cited in a published opinion to validate the suppression of a post-two-hour refusal—that is, until 2005 in *People v. Kenny*.⁶⁴ Additionally, no other published decision has followed *Walsh*'s analysis except *People v. Morris*,⁶⁵ coincidentally also decided in 2005 by the same court that decided *Kenny*. Even more remarkably, in the twenty-six years since *Brol* was decided, *Walsh* in 1988 and now *Morris* and *Kenny* constitute the only times in which *Brol* has

⁶⁰ See *People v. Victory*, 166 Misc. 2d 549, 631 N.Y.S.2d 805 (N.Y.C. Crim. Ct. Kings County 1995); *People v. Ali*, 151 Misc. 2d 742, 573 N.Y.S.2d 575 (N.Y.C. Crim. Ct. N.Y. County 1991); *People v. Sesman*, 137 Misc. 2d 676, 521 N.Y.S.2d 626 (N.Y.C. Crim. Ct. Bronx County 1987).

⁶¹ No. 2004QN014464, 2004 WL 2339812 (N.Y.C. Crim. Ct. Queens County Oct. 4, 2004) (unpublished table decision).

⁶² *Id.* at *1. The court simply cited to *Ward*, *Atkins*, and *Morales*. *Id.*

⁶³ Note, however, that it may be argued that the First Department's decision in *People v. Iovino*, 39 A.D.3d 311, 835 N.Y.S.2d 36 (1st Dep't 2007), suggests that the two-hour limit might still apply to refusals in some cases. Here, the court confirmed an administrative order revoking the petitioner's driver's license. Petitioner argued that his refusal was not valid because it came longer than two hours after his arrest, but the court rejected this contention, finding that the driver's "refusal clearly took place within two hours of his arrest." *Id.* at 312, 835 N.Y.S.2d at 37. The Brief filed by the Attorney General did not argue that a refusal that occurs after two hours is admissible, instead taking the position that the refusal occurred within two hours. Thus, the issue was not truly addressed or decided.

⁶⁴ No. 2005RI001023, 2005 WL 2148893, at *3 (N.Y.C. Crim. Ct. Richmond County Sept. 6, 2005) (unpublished table decision).

⁶⁵ 8 Misc. 3d 360, 364, 793 N.Y.S.2d 754, 757 (N.Y.C. Crim. Ct. Richmond County 2005).

been cited in support of a post-two-hour refusal suppression.⁶⁶ A closer look at *Morris* and *Kenny* is thus warranted.

C. *People v. Morris* and *People v. Kenny*: Brol's Latest Spawn Is Fundamentally Bad Law

In *People v. Morris*,⁶⁷ the central issue was police failure to

⁶⁶ Not one other reported case in twenty-six years ruled a refusal inadmissible based on *Brol*. Nineteen decisions cited *Brol* but addressed cases in which a test result was gathered. Eleven of those cases were decided before *Atkins* in 1995, and therefore either followed *Brol* or, alternatively, did not address the issue. Seven of the remaining eight cases were decided post-*Atkins* and, as a result, did not follow *Brol*. The one remaining post-*Atkins* opinion, *People v. Victory*, briefly mentioned *Brol* but was silent as to its treatment. See 166 Misc. 2d at 555, 631 N.Y.S.2d at 809. Of the nine decisions that involved actual refusals, one predated *Atkins* and thus sided with *Brol* but remanded the case for a factual determination as to the actual time of refusal. *People v. Howard*, N.Y. L.J., May 25, 1989, at 30, col. 1 (Sup. Ct. App. T. 2d Dep't). Two of the remaining eight did not concern refusals occurring beyond two hours from arrest, *People v. Paggi*, No. CR 03554-2004, 2005 WL 1572203, at *3 (Long Beach City Ct. July 1, 2005) (unpublished table decision); *People v. Cruz*, 134 Misc. 2d 115, 116, 509 N.Y.S.2d 1002, 1003 (N.Y.C. Crim. Ct. N.Y. County 1986), and three disagreed with *Brol*, *People v. Ward*, 176 Misc. 2d 398, 401-02, 673 N.Y.S.2d 297, 300 (Sup. Ct. Richmond County 1998); *People v. Cosgrove*, No. 95X052915, slip op. at 5-6 (N.Y.C. Crim. Ct. Bronx County May 6, 1996); *People v. Morales*, 161 Misc. 2d 128, 135-36, 611 N.Y.S.2d 980, 984 (N.Y.C. Crim. Ct. Kings County 1994), while three followed *Brol*. As stated, those three are *Walsh* in 1988, and now *Morris* and *Kenny* in 2005. As previously noted, even *Brol* itself did not render inadmissible the refusal at issue since it ultimately was found to have transpired less than two hours after the defendant's arrest.

⁶⁷ 8 Misc. 3d 360, 793 N.Y.S.2d 754 (N.Y.C. Crim. Ct. Richmond County 2005). *Morris*, ironically, was a DMV administrative law judge. Stopped as he approached a toll booth on the Staten Island side of the Verrazano Narrows Bridge, he refused to submit to both field sobriety and alco-sensor tests. The police officer thereafter arrested *Morris* without warning him that refusal to take the test would result in the loss of his driver's license (a fact which, given the defendant's occupation, he most certainly already knew). After a two-hour delay during which the arresting officer counted toll money, *Morris* was brought to the local precinct; police first informed the defendant that more than two hours had passed since the arrest, and then again requested that he submit to a chemical test. *Morris* replied in the negative, and the officer responded that his license would consequently be suspended. *Morris* then asked: "There would be no penalty after two hours?"; the officer answered, "[t]hat is correct, there will be a criminal penalty." *Morris* then again refused the test. *Id.* at 361-63, 793 N.Y.S.2d at 755-56 (internal quotation marks omitted).

The *Morris* court clearly viewed the defendant as the victim of sloppy and irresponsible police work, emphasizing the needless two-hour delay and the ambiguous warning. See *id.* at 365, 793 N.Y.S.2d at 758 ("[W]e deal with a refusal after the two hour period has tolled based upon police error and folly. Clearly, VTL § 1194 was not meant to protect incompetent police officers who dally in their effort to bring a defendant to the police station."). Viewed in this light, *Morris*'s legal analysis is somewhat result-oriented, rejecting precedent and statutory authority in

give the defendant sufficient warnings as to the consequences of his chemical test refusal. As such, the government never even argued the two-hour issue. Perhaps on this account, *Morris* is at times unclear and confusing. For instance, one thrust of its analysis is that breath tests gathered after two hours are scientifically unreliable and legally inadmissible. These propositions are both incorrect. A breath test is a reliable indicator of a person's blood alcohol content ("BAC") at the time of the test,⁶⁸ and post-two-hour results are uniformly admissible—that is, with the exception of those cases involving deemed consent.⁶⁹

order to reach a specific outcome the court perceived as just.

An inclination on the court's part to punish the state for perceived police misconduct was also present in *People v. Kenny*, 2005 WL 2148893. In explaining the case's facts, the opinion noted that one officer, speaking into a video camera in the police station's Intoxicated Drivers Testing Unit room, glanced at his wrist watch and stated the time as 8:45 p.m. *Id.* at *2. Given that the defendant was arrested earlier that evening at 6:54 p.m., *id.* at *1, a test result or refusal occurring at 8:45 p.m. would withstand application of the two-hour admissibility rule. Yet at a later hearing, the court found that the actual time of the refusal, as indicated by a contemporaneously filled out police form, was 9:45 p.m., more than two hours after the time of arrest. *Id.* at *2. Although never explicitly stated, the facts clearly suggest that the court felt the officer lied into the camera about the time of the refusal in order to satisfy what he believed to be a two-hour restraint. One also draws this inference from the tone of a nearby footnote: "It is interesting to note that the People did not ask the court to view the video tape after introducing it into evidence. However, the court, *sua sponte*, viewed the tape." *Id.* at *2 n.3.

⁶⁸ See *People v. Donaldson*, 36 A.D.2d 37, 40, 319 N.Y.S.2d 172, 176 (4th Dep't 1971) (affirming a drunk-driving conviction that relied on the admissibility of a Breathalyzer test, and declaring that "we think the time has come when [we] may recognize the general reliability of the Breathalyzer as a device for measuring the concentration of alcohol in the blood, and that it is not necessary to require expert testimony as to the nature, function or scientific principles underlying it . . ."); see also *People v. Alvarez*, 70 N.Y.2d 375, 380, 515 N.E.2d 898, 900, 521 N.Y.S.2d 212, 214 (1987) (stating that the court "recently . . . reaffirmed [its] long-standing conclusion that 'the scientific reliability of [B]reathalyzers in general is no longer open to question'" (quoting *People v. Mertz*, 68 N.Y.2d 136, 148, 497 N.E.2d 657, 663, 506 N.Y.S.2d 290, 296 (1986))); *People v. Gower*, 42 N.Y.2d 117, 121, 366 N.E.2d 69, 71, 397 N.Y.S.2d 368, 370 (1977) (declaring that, with respect to Breathalyzers, "reliability has been demonstrated and the results of such testing where properly performed are universally accepted").

⁶⁹ See *People v. Atkins*, 85 N.Y.2d 1007, 1008–09, 654 N.E.2d 1213, 1214, 630 N.Y.S.2d 965, 966 (1995) (validating post-two-hour chemical test results obtained through express consent); *People v. Finnegan*, 85 N.Y.2d 53, 59, 647 N.E.2d 758, 761, 623 N.Y.S.2d 546, 549 (1995) (upholding the admissibility of post-two-hour results obtained through private tests); *People v. McGrath*, 135 A.D.2d 60, 61, 524 N.Y.S.2d 214, 215 (2d Dep't 1988) (declaring that post-two-hour chemical tests performed pursuant to court orders are valid at trial), *aff'd*, 73 N.Y.2d 826, 534 N.E.2d 318, 537 N.Y.S.2d 480 (1988).

Regarding the issue of scientific reliability, *Morris* cites to a statement made by a New York Assemblyman *sixty-five years ago* asserting that a breath test must be administered within two hours for its results to be probative. Since then science has cured polio, smallpox, and cholera, and is working on cancer; the understanding of breath testing for alcohol has likewise improved. Unquestionably, a breath test is presently a scientifically reliable indicator of a person's BAC at the time of the test. Equally obvious is that some delay always exists between driving and testing, during which BAC usually decreases⁷⁰—an inference flowing from the fact that human beings “sober up” when they stop drinking alcohol.⁷¹ Not surprisingly, results of chemical tests administered as long as seven hours or more after vehicular operation have been found admissible at trial.⁷² There is simply no magical moment at

⁷⁰ Typically, a breath test result higher than the legal limit would be used on its own at trial, while a prosecutor may decide to add expert testimony when using a breath test administered so long after vehicular operation that BAC, as measured, has fallen below the legal limit.

⁷¹ See generally *People v. Cruz*, 48 N.Y.2d 419, 427–28, 399 N.E.2d 513, 517, 423 N.Y.S.2d 625, 629 (1979) (discussing the definition of intoxication and noting that a layman should be able to determine the indicia of intoxication). Common sense dictates that a defendant with a BAC of .12 five hours after his arrest—taking into account an officer's observation of intoxication at the time of operation, in addition to the near certainty that the defendant was not drinking alcohol while in police custody—was clearly well above .08 BAC at the time of driving.

⁷² See *People v. O'Connor*, 290 A.D.2d 519, 520, 738 N.Y.S.2d 55, 56 (2d Dep't 2002) (upholding the admission of retrograde extrapolation testimony concerning blood that was withdrawn from the defendant roughly seven hours after a car accident); *People v. Stiffler*, 237 A.D.2d 753, 753–54, 655 N.Y.S.2d 139, 139–40 (3d Dep't 1997) (affirming admission of Breathalyzer test results obtained more than six hours after the defendant's operation of a vehicle as basis for application of retrograde extrapolation); see also *People v. Dombrowski-Bove*, 300 A.D.2d 1122, 1123, 753 N.Y.S.2d 259, 260 (4th Dep't 2002) (holding as properly admitted the opinion testimony of a pharmacologist who made a reverse extrapolation of the defendant's BAC at the time of the incident); *People v. Cross*, 273 A.D.2d 702, 703, 711 N.Y.S.2d 533, 534 (3d Dep't 2000) (“[P]roper foundation was laid for [the prosecution expert's] testimony in the area of retrograde extrapolation of alcohol in the blood.”); *People v. MacDonald*, 227 A.D.2d 672, 674–75, 641 N.Y.S.2d 749, 751 (2d Dep't 1996) (holding that a forensic toxicologist could opine as to the defendant's BAC at the time of the accident despite the defendant's contention that such reverse extrapolation testimony was improper, “since a proper foundation was laid by the [government], the doctor qualified as an expert in his field, and his testimony was properly submitted to the jury for them to accept or reject”), *aff'd*, 89 N.Y.2d 908, 675 N.E.2d 1219, 653 N.Y.S.2d 267 (1996). In *People v. Mertz*, ironically, it was the defense's argument that retrograde extrapolation testimony should have been admitted which required reversal of the conviction. 68 N.Y.2d 136, 141–42, 497 N.E.2d 657, 659, 506 N.Y.S.2d 290, 292 (1986).

which the scientifically probative nature of this kind of evidence abruptly disappears. As shown by the lack of corresponding time limits for consent, warrant-based, and personal testing pursuant to *Atkins*, *McGrath*, and *Finnegan*, respectively, admissibility is not dictated by the clock, but rather by the standard governing the admission of any and all trial evidence: relevance. Still, if the facts warrant it, New York caselaw has long permitted a defendant to challenge the natural inference that a person—still drunk after driving—was drunk when driving. Yet regardless of such potential defenses, BACs determined several hours after cessation of drinking—as noted above—are frequently admitted as “probative, competent or relevant, i.e., scientifically acceptable.”⁷³

Legal admissibility has also been established. *Atkins*, *Finnigan*, and *McGrath* are all controlling on this issue, and yet *Morris* ignored these precedents in concluding that “VTL § 1192 is both evidentiary and procedural.”⁷⁴ *Morris*’s analysis is thus fatally flawed. As to lower court decisions, the opinion referenced *Ward* but ignored the numerous others allowing post-two-hour refusal admissibility. It cited to *Victory* repeatedly, yet that court in fact found itself bound by *Atkins* to admit breath test results gathered after two hours.⁷⁵ The fact is that the Court of Appeals in *Atkins* stated in clear and unequivocal terms:

The Defendant’s contention that the two-hour limitation in section 1194(2)(a) was intended by the Legislature to be an absolute rule of relevance, proscribing admission of the results

⁷³ *People v. Victory*, 166 Misc. 2d 549, 556, 631 N.Y.S.2d 805, 810 (N.Y.C. Crim. Ct. Kings County 1995); see also *supra* note 72 and accompanying text (listing caselaw).

⁷⁴ *People v. Morris*, 8 Misc. 3d 360, 366, 793 N.Y.S.2d 754, 758 (N.Y.C. Crim. Ct. Richmond County 2005). Astonishingly, while predominantly ignoring the appellate decisions most on point, *Morris* mentioned *People v. Mills*, 124 A.D.2d 600, 507 N.Y.S.2d 743 (2d Dep’t 1986), distinguishing it on the basis that *Mills* actually concerned a blood test that was gathered within two hours, rather than a breath test refusal. See *id.* at 365, 793 N.Y.S.2d at 758 (“*Mills* stands for the proposition that the requirement that the blood sample must be obtained within two hours after arrest, unless an express manifestation of consent has been given.”). This seems oddly appropriate given that the refusal in *Brol* actually occurred within two hours. Ultimately, the salient point is that because *Mills* validated the admissibility of post-two-hour blood test results obtained via express consent, the *Brol* analytical model—afforded absolute deference by the *Morris* court—should dictate that similar breath test refusals likewise be found admissible.

⁷⁵ *Victory*, 166 Misc. 2d at 565, 631 N.Y.S.2d at 815.

of any chemical test administered after that period regardless of the nature of the driver's consent, is unpersuasive. This argument is completely undermined by the lack of a corresponding time limit for court-ordered chemical testing under section 1194(3) or the additional test which the driver must be permitted to have administered by a physician of his or her choosing under section 1194(4)(b).⁷⁶

Morris entirely overlooked or disregarded this reasoning. As noted above, the court instead cited to sixty-five-year-old legislative history. And, in the end, the bulk of *Morris's* language and ideas is traceable back through *Victory* to the *Atkins's* dissent. Thus, the position taken in *Morris* had already been definitively rejected by the New York Court of Appeals.

The other disturbing thread running through *Morris* is the court's inference of "gamesmanship" on the part of the police in delaying the chemical test. Such an accusation is not only unsupported by the facts of the case, but is also largely nonsensical. While test results and refusals remain admissible beyond two hours after arrest, delays usually allow a drunk driver's body to destroy or diminish evidence of intoxication. As time passes, the body metabolizes more and more alcohol; typically, the longer it takes to conduct a test, the lower a defendant's BAC will be. Delays therefore normally benefit a defendant and, consequently, that delay should lead to suppression on account of its supposed prejudicial effect is unconvincing.

Kenny largely followed *Morris*, only adding the contention that post-two-hour test results are inadmissible due to New York State Department of Health Regulations.⁷⁷ This assertion is unpersuasive in light of its absence from the New York jurisprudence addressing the matter. *Kenny's* rationale in applying the health regulations was that "[t]he applicable Health Rules and Regulation mandated in connection with the two-hour rule have been held to have 'definite authority' in this area, by both the Third and Fourth Departments of the Appellate Division."⁷⁸ Of the cases on which *Kenny* relied, *People v. Hampe*

⁷⁶ *People v. Atkins*, 85 N.Y.2d 1007, 1009, 654 N.E.2d 1213, 1214, 630 N.Y.S.2d 965, 966 (1995) (citations omitted).

⁷⁷ No. 2005RI001023, 2005 WL 2148893, at *2 (N.Y.C. Crim. Ct. Richmond County Sept. 6, 2005).

⁷⁸ *Id.* at *3 (citing *People v. Hampe*, 181 A.D.2d 238, 240–41, 585 N.Y.S.2d 861, 862–63 (3d Dep't 1992); *People v. Boyst*, 177 A.D.2d 962, 962, 577 N.Y.S.2d 1007,

involved judicial acceptance of the BAC Verifier breath testing instrument on account of its approval by the New York State Department of Health,⁷⁹ *People v. McDonough* concerned the Health Department’s definition of the method for blood alcohol measurement,⁸⁰ and *People v. Boyst* addressed police failure to add an anticoagulant to a defendant’s blood sample, referencing Health Department rules to show that the sample would remain admissible.⁸¹ These cases have absolutely nothing to do with the “two-hour rule.” In fact, *McDonough* even rejected the defendant’s proffered interpretation of the Health Department definition as conflicting with the VTL, implying that the latter should guide.⁸² *McDonough* thus recognized that the VTL—as construed by the Court of Appeals—takes precedence over discrepant Health Department regulations. This certainly helps explain why no other opinions share this facet of *Kenny*’s reasoning.

Kenny ultimately acknowledged the admissibility of breath tests administered after two hours if a subject gives express consent.⁸³ Yet the opinion then adopted an entirely new foundation for its claim of refusal inadmissibility, reasoning that the defendant was not given appropriate warnings of the changed circumstances accompanying the expiration of two hours from arrest, despite previously conceding that nothing in fact changed after two hours.⁸⁴ The reality is that a drunk-driver normally has two choices: blow or don’t blow. If a defendant consents to blow into the testing instrument, the test result is admissible (if the result is relevant at trial) regardless of the timing of the request. Alternatively, if he refuses, then that fact is also

1007 (4th Dep’t 1991); *People v. McDonough*, 132 A.D.2d 997, 997, 518 N.Y.S.2d 524, 525 (4th Dep’t 1987).

⁷⁹ 181 A.D.2d 238, 241, 585 N.Y.S.2d 861, 863 (3d Dep’t 1992).

⁸⁰ 132 A.D.2d 997, 997, 518 N.Y.S.2d 524, 525 (4th Dep’t 1987).

⁸¹ 177 A.D.2d 962, 962–63, 577 N.Y.S.2d 1007, 1007 (4th Dep’t 1991).

⁸² 132 A.D.2d at 997, 518 N.Y.S.2d at 525.

⁸³ 2005 WL 2148893, at *4.

⁸⁴ *Id.* at *4–5.

admissible in spite of when it occurs.⁸⁵ The warnings thus remain the same.⁸⁶

The *Kenny* court justified its requirement for new warnings as intended to alert defendants that they are “no longer subject to the ‘implied consent’ provision of VTL [section]1194.”⁸⁷ This view of implied consent is overly broad and patently incorrect. Most significantly, it ignores the basic distinction drawn by the VTL between “the conscious driver and the unconscious or incapacitated driver.”⁸⁸ The two-hour implied consent cap protects those defendants *incapable* of consenting to chemical tests, not those capable yet simply unwilling to do so. It is only the unconscious or incapacitated driver who is unable to make decisions, and who warrants protection from the state’s otherwise unchecked power in this context. *Kenny*’s warning requirement is thus predicated on a misconception of implied consent.

Ultimately, at least seven opinions—published in either judicial reporters or in the *New York Law Journal*—have repudiated *Walsh* or *Brol*, none of which resulted in appellate review.⁸⁹ Numerous courts have presumably allowed the introduction of post-two-hour refusals since *Morales*, yet done so in unpublished opinions; likewise, none have resulted in a reported appellate decision. Indeed, Judge Camacho, in Queens County, found a refusal gathered after two hours to be admissible in *People v. Hurtado*,⁹⁰ decided after *Morris* in 2005. Judge

⁸⁵ Refusal evidence admissibility is derived from the concept of consciousness of guilt. The guilty mind is betrayed whenever asked to blow. *See* *People v. MacDonald*, 89 N.Y.2d 908, 910, 675 N.E.2d 1219, 1220, 653 N.Y.S.2d 267, 268 (1996); *People v. Ferrara*, 158 Misc. 2d 671, 674, 602 N.Y.S.2d 86, 89 (N.Y.C. Crim. Ct. Richmond County 1993).

⁸⁶ The NYPD “Intoxicated Driver Examination Instruction Sheet,” Form PD 244-154A (1-02)-RMU-Pent, bears out this fact, i.e., that there is only one set of warnings administered by police to suspected drunk-drivers.

⁸⁷ 2005 WL 2148893, at *4.

⁸⁸ *People v. Morales*, 161 Misc. 2d 128, 132, 611 N.Y.S.2d 980, 982 (N.Y.C. Crim. Ct. Kings County 1994) (internal quotation marks omitted); *cf.* *People v. Kates*, 53 N.Y.2d 591, 596–57, 428 N.E.2d 852, 854–55, 444 N.Y.S.2d 446, 448–49 (1981).

⁸⁹ *See* *People v. Ward*, 176 Misc. 2d 398, 403, 673 N.Y.S.2d 297, 301 (Sup. Ct. Richmond County 1998); *People v. Capraella*, 165 Misc. 2d 639, 642, 629 N.Y.S.2d 965, 969 (N.Y.C. Crim. Ct. Queens County 1995); *Morales*, 161 Misc. 2d at 133, 611 N.Y.S.2d at 983; *People v. Cambria*, N.Y. L.J., Aug. 29, 1994, at 28, col. 5 (N.Y.C. Crim. Ct. Bronx County); *People v. Frazier*, N.Y. L.J., July 9, 1993, at 24, col. 1 (N.Y.C. Crim. Ct. Bronx County); *People v. Flora*, N.Y. L.J., June 23, 1992, at 22, col. 6 (N.Y.C. Crim. Ct. N.Y. County); *People v. Dillin*, N.Y. L.J., Oct. 5, 1990, at 23, col. 3 (N.Y.C. Crim. Ct. N.Y. County).

⁹⁰ No. 2004QN032270 (N.Y.C. Crim. Ct. Queens County Apr. 5, 2005).

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Camacho cited *Torres*, *Ward*, *Coludro*, and *Morales*, making it clear that a post-two-hour refusal is admissible at trial.⁹¹ Even more recently, both *Morris* and *Kenny* were expressly rejected in *People v. Burns*,⁹² in which the court noted that “[i]ndeed, the two-hour rule has been narrowed to apply only in cases where the defendant is incapable of consent.”⁹³

CONCLUSION

In *People v. Zawacki*,⁹⁴ the Fourth Department—the very court that spurred the original controversy with *Brol*—recognized “the [New York] Court of Appeals [as holding] the two-hour limit . . . inapplicable to chemical tests administered pursuant to [a] defendant’s actual consent.”⁹⁵ The controversy has long since come full circle, the validity of chemical test analysis performed beyond two hours from arrest indisputably clear. And while the Court of Appeals has not squarely faced the issue of refusal evidence admissibility after two hours, statutory construction, controlling caselaw, and the paucity of rational counterarguments overwhelmingly support its validity.

⁹¹ *Id.*

⁹² No. NA 18328/05, 2006 WL 2660913, at *4–5 (Dist. Ct. Nassau County Sept. 5, 2006).

⁹³ *Id.* at *4 (citing to *Ward*, *Morales*, and *Torres*).

⁹⁴ 244 A.D.2d 954, 665 N.Y.S.2d 172 (4th Dep’t 1997).

⁹⁵ *Id.* at 955, 665 N.Y.S.2d at 173.