

THE GRAND JURY OF THE SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

REPORT OF THE GRAND JURY
OF THE SUPREME COURT
STATE OF NEW YORK
FIRST JUDICIAL DISTRICT
ISSUED PURSUANT TO
CRIMINAL PROCEDURE LAW
SECTION 190.85 SUBDIVISION (1)(c)

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DISTRICT ATTORNEY
NEW YORK COUNTY

After considering the evidence before it and receiving legal instructions from the District Attorney of New York County, this Grand Jury hereby submits a report, pursuant to Criminal Procedural Law § 190.85(1)(c), “[p]roposing recommendations for legislative, executive or administrative action in the public interest based upon stated findings.”

INTRODUCTION

Vehicular violence is an epidemic in New York City. Drivers who disregard traffic rules and regulations have left victims of all ages dead and severely injured in their wake. The actions of these dangerous drivers that are most likely to maim or kill are speeding, failing to yield the right of way (mostly left-hand turns), disobeying traffic signals and signs, and driving while distracted.

In examining vehicular violence, we have come to understand that prosecutors have the arduous task of deciding which crashes arising from a violation of a traffic regulation should be charged in a criminal complaint or submitted to a Grand Jury for consideration in an indictment. The prosecution must ultimately not only prove all elements of the applicable crimes, described below, by proof beyond a reasonable doubt (well above the standard of proof in a civil action), but must fairly evaluate the facts of each case in exercising prosecutorial discretion. Prosecutors must distinguish between those vehicular crashes that justify ascribing criminal liability to a

driver, and those that should be addressed through civil litigation or regulatory enforcement. Although reasonable minds may differ on each of those decisions, this Grand Jury has learned and appreciates that the collisions that did not ultimately result in criminal charges were given due consideration by prosecutors assigned to investigate the matters.

At the same time, we recognize that it is difficult for the loved ones of deceased victims, and for surviving victims with severe injuries, to understand or accept that the actions of some careless drivers are not prosecuted. Even in situations where drivers have been convicted, it is understandable that victims and their families sometimes do not regard the punishment meted out under current law as commensurate with the level of harm inflicted on the victims.

As the evidence presented to us demonstrates, there is no single solution for combating vehicular violence. Criminal prosecution of dangerous drivers is but one component in any plan to reduce, and eventually, eradicate vehicular violence. Increased safety is dependent on the cooperative efforts of many City and State agencies. Street design can modify driver behavior; technology can monitor driver behavior. And, of course, education of dangerous drivers and the overall community can be effective in preventing crashes. The current increase in bicyclists' fatalities, for example, underscores the need for street re-design through the construction of protected bike lanes and the clearing of corridors and intersections to reduce fatalities and injuries.

In response, this Grand Jury takes the affirmative action to issue a Grand Jury Report (“Report”). This Report focuses on investigating, prosecuting, sanctioning, and preventing vehicular strikes by dangerous drivers, including professional drivers of 26-ton vehicles and drivers engaged in public and private transportation, who ignore traffic regulations and cause serious physical injury or death to pedestrians and bicyclists. Although our recommendations were borne out of an investigation presented to this Grand Jury, the recommendations are applicable to the other four counties of New York City, as well as to all counties in the State of New York.¹

This Grand Jury formulated its Recommendations: (a) after having voted charges against several individuals who operated vehicles in a manner that resulted in the death or serious physical injury of a pedestrian or a bicyclist; (b) in consideration of the convictions of several dangerous drivers who received what some consider inappropriately light sentences (while within the confines of the existing law); (c) upon the testimony of the families of victims killed by

¹ On April 30, 2019, this Grand Jury was impaneled by the Honorable Neil E. Ross upon application of the New York County District Attorney Cyrus R. Vance, Jr., and extended on May 16, 2019, to a term ending on October 24, 2019.

vehicular violence; and (d) the testimony of advocates, experts in the field, and government witnesses.

We reviewed videos of crashes that resulted in death or serious physical injury, as well as received testimony from law enforcement, including precinct officers, members of the Highway Division's Collision Investigation Squad ("CIS") of the Transportation Bureau of the New York City Police Department ("NYPD"), the Office of the Sheriff ("Sheriff's Office") of the New York City Department of Finance ("Department of Finance"), and from members of the New York County District Attorney's Office ("DANY"). We learned about the role of Vision Zero Task Force, the New York City Taxi & Limousine Commission ("TLC"), the New York City Department of Transportation ("DOT"), the New York City Department of Citywide Administrative Services ("DCAS"), and the New York City Business Integrity Commission ("BIC").

We considered the safety needs of all segments of our society, especially the most vulnerable. To that end, we emphasize a concern for people with disabilities. According to the American Community Survey of the United States Census, 20% of New York City residents have a physical disability. It is important that their interests and specific needs are included in any conversation or recommendation to control vehicular violence. Any corrective action on their behalf inures to the benefit of the community as a whole. Crosswalks that are not blocked by motor vehicles are safe for all pedestrians;

well-maintained curb cuts provide access for parents pushing strollers and travelers pulling luggage, as well as for individuals using wheelchairs and other devices that assist mobility. Consequently, certain ideas in our recommendations arise from a concern to ensure the social inclusion of people with disabilities. For example, we highlight the need for greater collection of data about how people with disabilities are affected by collisions, how improved street design increases accessibility, and how a broader curriculum in our schools and general education can enlighten the public about the rights and needs of people with disabilities.

Also among the most vulnerable are our youth, those under 17 years old (the youngest death was a four-month old infant), and our senior citizens (the oldest death was an almost 99-year old person). Traffic collisions pose the highest safety threat to New York City children. While senior citizens comprise 13% of the New York City population, 50% of all pedestrian fatalities in New York City are senior citizens.

We are confident that our recommendations will provide law enforcement and prosecutors' offices with additional tools to bring dangerous drivers to justice and to prevent future crashes. Therefore, this representative body of Manhattan citizens implores the elected officials of the City of New York and the State of New York to consider the following reforms and to take the appropriate actions to implement them:

1. Strengthen offenses applicable to vehicular collisions resulting in death or serious physical injury;
2. Toughen and expand sanctions imposed on reckless drivers;
3. Improve the development and admissibility of evidence;
4. Strengthen the voice of vehicular violence victims; and
5. Remove dangerous drivers from New York City and State roadways through education, street design, and increased government oversight.

VEHICULAR VIOLENCE

Vision Zero

New York City commenced recording statistics of vehicular deaths and serious physical injuries in 1910. At times, the numbers of these tragedies were staggering. By 2013, fatalities in the City of New York climbed to 299 for that year.

To battle the rising tide of deadly crashes, Mayor Bill de Blasio launched Vision Zero in 2014. New York City became the first American city to adopt

this program, which has been used in Sweden since the mid-1990s.² Vision Zero's goal is the reduction of traffic fatalities and severe injuries to zero. Part of its focus is to redesign streets to stop hazardous driving. Redesign strategies include: narrowing streets, creating protected bike lanes, implementing automated enforcement, "daylighting" corners (prohibit parking within 20 feet of the intersection), and constructing pedestrian "refuge" islands in the middle of multi-lane roads. The City also lowered the speed limit to 25 miles per hour in an effort to lessen the degree of injury upon impact. Other parts of the program focus on public education and heightened enforcement.

The Vision Zero Task Force convenes bimonthly meetings to inform the member agencies of project updates, to exchange ideas, to share best practices, and to consider new policies. City Hall representatives are joined by members from the NYPD, DOT, TLC, DCAS, the New York City Department of Sanitation, BIC, the Sheriff's Office, the New York City Department of Health and Mental Hygiene, the Metropolitan Transportation Authority, and an Assistant District Attorney as liaison on behalf of the five New York City District Attorneys' Offices.

² Vision Zero grew out of a grassroots advocacy effort that started in mid-2000. In response, in 2007, Mayor Michael Bloomberg's administration took the first steps toward implementing various safety measures.

In the last four years, there has been a consistent decrease in fatalities and serious injuries. Last year, there were 202 fatalities. Among those deaths, 115 were pedestrians and 10 were bicyclists; the others were either drivers or passengers in cars or on motorcycles.

The rate of its success is commendable. Over the last 20 to 25 years, Sweden's Vision Zero reduced fatalities by 50%; in the past five years, New York City's Vision Zero achieved a 30% to 35% reduction in fatalities.³ Yet, for those who are injured or killed, and for their families and loved ones, the pace of this endeavor is too slow. Even with the successes of Vision Zero, the tragedies continued to occur. Here is a representative sample of some of those incidents:

- In the late afternoon on January 15, 2016, a male senior citizen on his way to pick up his nephews was struck by a motorcycle. He succumbed to his injuries.
- Shortly after midnight on November 14, 2017, a man returning home after completing his work shift was killed by a car making an illegal left-hand turn.

³ There is slight reversal of this trend in New York City in 2019. As of mid-June, 19 more traffic fatalities occurred as compared to the same period in 2018.

- In the morning of June 12, 2017, a bicyclist, traveling in a designated bicycle lane on a single lane roadway, was struck and run over by a passing bus, killing him.

As we learned, there is more we can and should do.

NYPD

A uniformed police officer from the precinct in which a vehicular crash occurs is usually the first NYPD officer to respond. He or she fills out a motor vehicle incident report, vouchers any property recovered at the crash scene, and/or vouchers the victim's property at the hospital. When a crash involves a fatality, or a person is likely to die or is critically injured, the NYPD Highway District of the Transportation Bureau is notified and specialists are dispatched. A CIS detective, who is trained in pedestrian crashes, and who can download and interpret event data recorders (black boxes), is assigned. The CIS detective is also responsible for making the necessary death notifications and notifying the appropriate district attorney's office. A member of the Collision Technical Group ("CTG") is dispatched to document the crash scene and take any measurements that may later aid in any collision reconstruction.

Often, and particularly if there is no evidence that the driver is intoxicated or impaired by drugs and/or alcohol, the driver is not arrested at the scene, and may not even be given a ticket or a summons. Nevertheless, the

investigation of crashes that result in death or critical physical injury continues, and may result in charges later filed against the driver. All other incidents, such as those that result in lesser physical injury, are handled by precinct police.

Alternatively, the police can issue a traffic ticket for which there is a civil penalty. For example, a civil traffic infraction pursuant to New York City Administrative Code § 19-190(a) carries a fine not to exceed \$100, or the alternative civil penalty under § 19-190(b) with a maximum civil fine of \$250, returnable to the Environmental Control Board. Contested matters are determined by the hearing division of the Office of Administrative Trials and Hearings.

New York County District Attorney's Office

In response to the devastation and needless loss caused by dangerous drivers, New York County District Attorney Cyrus R. Vance, Jr. made combating vehicular violence one of his top priorities. Shortly after taking office in 2010, District Attorney Vance implemented a new office policy to investigate *all* vehicular crashes that resulted in a fatality or critical injury, and established the Vehicular Crimes Unit (“VCU”) to supervise and assist all DANY Assistant District Attorneys in the investigation and prosecution of vehicular violence. These crimes include incidents of hit and run, unlicensed drivers, impaired or intoxicated drivers, and sober drivers who violate traffic

regulations. District Attorney Vance also developed extensive specialized training for the Assistant District Attorneys assigned to these cases.

DANY investigates an average of 60 crashes a year that involve fatalities or critical injuries. This number includes sober as well as intoxicated and impaired drivers. The vast majority of the victims are pedestrians. It also includes car-on-car crashes and bicyclist fatalities. A homicide-trained Assistant District Attorney is assigned to investigate these collisions. The Grand Jury learned that it is DANY policy that in every crash involving a fatality or critical injury that does not result in criminal charges, the Assistant District Attorney handling the investigation must explain the decision to decline prosecution. That determination is then reviewed by the Chief of VCU and a member of DANY's executive staff.

Some Fatalities

In addition to the evidence supporting several crashes that were presented for Grand Jury vote, to understand vehicular violence better, we heard evidence about other crash investigations, only some of which resulted in the filing of charges. All of them are heartbreaking. All of them were preventable.

Ordinary days, in which people went about their day-to-day activities or enjoyed time with friends and family, turned into last days. Among those tragedies we learned about are the following:

- During a fall afternoon, on October 8, 2013, a 12-year old boy was playing soccer in a park a few blocks from his home. His ball bounced into the two-lane roadway. As the light was about to change to red, a driver stopped and motioned to the boy to get the ball in the street; however, another driver attempted to make the light before it changed, and mowed the boy down with his van. The boy died a few hours later.
- On a rainy, foggy Friday night, on January 10, 2014, a nine-year old boy held his father's hand in the crosswalk in front of their apartment building. They were returning home from dinner. A taxi cab driver making a left-hand turn failed to slow down and look for pedestrians, and plowed into them. The father survived, but his young son died at the scene.
- On a spring night, on April 10, 2014, a 22-year old woman was returning home with one of her sisters after dinner. As they crossed the street, a taxi traveling northbound hit the woman and threw her into oncoming traffic; she was then struck by a second

taxi traveling southbound. The woman died shortly after being transported to the hospital. Both taxi cab drivers were at the end of their shifts.

We implore our elected leaders and those appointed to supervise the relevant agencies to consider the following Recommendations carefully and to act upon them with a sense of urgency. Several Recommendations are not new to our lawmakers, having been considered at one time or another, but were never advanced out of committee or brought before the entire New York State Legislature. It is now time to act.

RECOMMENDATIONS

RECOMMENDATION ONE

STRENGTHEN OFFENSES APPLICABLE TO VEHICULAR COLLISIONS RESULTING IN DEATH OR SERIOUS PHYSICAL INJURY

We are troubled by the scarcity and weakness of the prosecutorial tools available to punish and deter the conduct of purportedly sober drivers who disregard traffic regulations and cause the death or serious physical injury of pedestrians and bicyclists. One offense, “Right of Way,” pursuant to New York City Administrative Code § 19-190(b), was specifically enacted in response to the public outcry to tragic deaths, particularly the death of a young child whose life ended crossing a Brooklyn street holding her grandmother’s hand. The statute, which went into effect in August 2014, criminalizes the actions of a driver, who, failing to exercise due care, causes “physical injury,” as defined in Penal Law § 10.00(9), to a pedestrian or bicyclist who has the right of way.

Although the statute is a well-intentioned step toward deterring these calamities, it is limited in scope and modest in punishment. First, because this statute was enacted by the New York City Council, this misdemeanor offense extends only to collisions that occur in one of the five boroughs of New York City. Second, there is no distinction in its application to lawless conduct that causes physical injury, *or* serious physical injury, *or* death. Third, the offense is

limited to collisions in which a driver fails to yield the right of way to pedestrians in the crosswalk, or bicyclists with the right of way, and does not extend to situations where the harm is caused by speeding, texting while driving, or other dangerous conduct.⁴ Fourth, this offense fails to reference death or the gravity of the injury in its nomenclature. In fact, in those cases in which a plea of guilty is entered, the defendant need only admit to causing physical injury, and no more. Fifth, the maximum sanctions for this misdemeanor are a criminal fine of \$250 and/or imprisonment of no more than 30 days.

A second offense, frequently a companion charge, is the traffic infraction of Failure to Use Due Care, pursuant to Vehicle & Traffic Law § 1146(c). This statute applies to drivers who cause “serious physical injury,” as defined by Penal Law § 10.00(10), to a pedestrian or bicyclist, while failing to exercise due care. The New York State Legislature strengthened this statute after a three-year old and a four-year old were killed by a delivery van that jumped a curb in Chinatown. As a result, such misconduct, which is a violation

⁴ Over the years, there have been disputes about when a victim is legally within the crosswalk, and when the signal is in favor of the victim. These issues further complicate and limit the reach of this statute, resulting in several fatalities falling outside of the statute.

and not a crime,⁵ is punishable by one or more of the following: a maximum fine of \$750, no more than 15 days in jail, or mandatory participation in “a motor vehicle accident prevention course.” About the same time, the New York State Legislature also amended subdivision (a) of Vehicle & Traffic Law § 1146 in response to the death of a three-year old child hit by a motorist driving backwards to find a parking space. The statute now mandates suspension of the driver’s license or registration for a period of up to six months.

The Grand Jury learned from a description of numerous crashes that the sentences imposed upon drivers convicted of both of the above-described offenses were mild. One defendant was sentenced to a one-year conditional discharge and six-month license suspension for causing serious physical injury. Other defendants, who caused fatalities, were sentenced to 10 days of intermittent custodial confinement or 30 days in jail.

Purportedly sober drivers who cause the death or the serious physical injury of another person can also be charged with Reckless Driving, in violation of Vehicle & Traffic Law § 1212. This unclassified misdemeanor offense punishes a driver who “*unreasonably* interferes with the free and proper use of the public highway, or *unreasonably* endangers users of the public highway (emphasis added).”

⁵ This offense elevates to a class B misdemeanor if the driver has been previously convicted of a violation under subdivision (a) or (c) of § 1146 within the preceding five years.

The consequences of a conviction of this offense include one or a combination of the following: a fine not to exceed \$300 and/or up to 30 days in jail for the first offense. Vehicle & Traffic Law § 1801. If the defendant is convicted of this offense twice within an 18-month period, the jail exposure increases to 90 days; if the defendant is convicted of this offense three times within 18-months, the jail term increases to 180 days.

Two other offenses that may apply to vehicular violence are Reckless Endangerment in the Second and First Degrees, a class A misdemeanor, and a class D felony, pursuant to Penal Law §§ 120.20 and 120.25, respectively. For these charges the prosecution must establish a different culpable state of mind. The misdemeanor crime requires proof beyond a reasonable doubt that the defendant was “aware of and consciously disregard[ed] a substantial and unjustified risk that such result [would] occur or that such circumstance exist[ed].” *See* Penal Law § 15.05(3). Furthermore, the risk must be of such a nature and degree that to disregard it “constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.” *Id.* The felony crime requires additional proof beyond a reasonable doubt of circumstances evidencing depraved indifference to harm a life.

The misdemeanor level of the crime of Reckless Endangerment carries a sentence of up to one-year incarceration and a maximum criminal fine of \$1,000; the felony level of the crime of Reckless Endangerment carries a

sentence of up to seven years incarceration and a maximum criminal fine of \$5,000. In addition, a driver who flees the scene of a crash, leaving a dead or seriously injured victim at the scene, may be charged with a felony pursuant to one of the two provisions of Leaving Scene of an Incident Without Reporting, in violation of Vehicle & Traffic Law §§ 600(2)(a) and (c).⁶

The above-described offenses are inadequate to curb the type of vehicular traffic violence under investigation by this Grand Jury. The public is not served by a patchwork of laws in reaction to horrific crashes. Instead, we recommend that the New York State Legislature enact new crimes addressing this conduct, and strengthens certain existing Vehicle & Traffic Law offenses.

In making our decisions, we are sensitive to the fact that some crashes that result in fatalities or serious physical injuries do not fall within the ambit of criminal behavior. Some crashes are the result of severe weather, poor lighting conditions, or distracted pedestrians or bicyclists who dart unexpectedly in front of vehicles. While taking these factors into account, the proposed new offenses and suggested revisions to the existing laws are designed to elevate the gravity of the crashes caused by dangerous driving.

⁶ Most other offenses applicable to vehicular crashes involving death or serious physical injury require evidence that the driver was impaired or under the influence of alcohol and/or drugs. *See, e.g.*, Operating a Vehicle Under the Influence of Drugs or Alcohol, in violation of § 1192 of the Vehicle & Travel Law; Vehicular Assault in the Second and First Degrees, in violation of Penal Law §§ 120.03 and 120.04, respectively; Aggravated Vehicular Assault, in violation of Penal Law § 120.04-a; Vehicular Manslaughter in the Second and First Degrees,

1. Enact a New Penal Law Article
Titled “Vehicular Violence”

We propose that the New York State Legislature enact a new Article 126 in the Penal Law, entitled “Vehicular Violence,” underscoring the severity of this conduct by criminalizing dangerous driving. The first provision in the article would define “vehicular violence,” followed by four new crimes.

In particular, we recommend the enactment of a new Penal Law class A misdemeanor called “Death by Vehicle” that would apply to incidents in which a driver, violating specified moving traffic regulations, causes the death of another individual.⁷ We also propose the creation of a parallel Penal Law class B misdemeanor, designated “Serious Physical Injury by Vehicle.” These crimes would be applicable to crashes that occur in all 62 counties of New York State.

Under the new statute, the prohibited conduct would apply to a wider array of traffic violations, especially speeding, disobedience of traffic signals and signs, failure to yield the right of way, and texting or using a cell phone while driving.

in violation of Penal Law §§ 125.12 and 125.13, respectively, and Aggravated Vehicular Homicide, in violation of Penal Law § 125.14.

⁷ Several states have enacted statutes of this type. See e.g., North Carolina General Statutes Annotated § 20-141.4(a2), *Misdemeanor Death by Vehicle*; Arizona Revised Statutes Annotated § 28-672A, *Causing Serious Physical Injury or Death by a Moving Violation*; Michigan Compiled Laws Annotated § 257.601d, *Moving Violation Causing Death or Serious Impairment of Body Function*; *Penalites*; Hawaii Revised Statutes Annotated § 707-704, *Negligent Homicide in the Third*

“Death by Vehicle” would be upgraded to a class E felony, and “Serious Physical Injury by Vehicle” would be upgraded to a class A misdemeanor, where there is evidence of one or more aggravating factors. Such factors may include circumstances where: (a) the driver is operating the vehicle, knowing that his or her license is suspended or revoked, based upon either a refusal to submit to a mandatory chemical test pursuant to section 1194 of the Vehicle & Traffic Law, or a conviction for a violation of any of the provisions of section 1192 of the Vehicle & Traffic Law; (b) the driver has been previously convicted of a violation of any provisions of section 1192 of the Vehicle & Traffic Law within the preceding ten years; (c) the driver was speeding 20 or more miles per hour above the legal speed limit; (d) the driver is violating more than one of the specified moving violations; or (e) the driver caused the death of more than one person (for the crime of aggravated death by vehicle) or caused serious physical injury to more than one person (for the crime of aggravated serious physical injury by vehicle).

The new offenses do not dispense with the utility of the offenses in Vehicle & Traffic Law § 1146. Such low-level offenses may be appropriate in certain scenarios. However, portions of the statute merit revision. For example, the language in section 1146(a) directing a driver to provide “*warning by sounding*

Degree; Kansas Statute Annotated § 21-5406, *Vehicular Homicide*; and California Penal Code § 192, *Manslaughter*.

the horn when necessary,” and to avoid colliding with *“domesticated sheep, cattle, and goats, which are under the supervision and control of a pedestrian”* should be omitted, or if necessary in rural districts, dealt with in a separate provision. In addition, the phrasing of subdivision (a) should be consistent with that of subdivision (c) in that it should define the breach of duty.

2. Expand the Scope of the
Misdemeanor Crime of Reckless Driving

The New York State Legislature should also amend the crime of Reckless Driving to expand the scope of its proscribed conduct. We received testimony that drivers cannot effectively operate a motor vehicle while using portable mobile devices. In fact, texting while driving is akin to someone driving with .08 of one per centum blood alcohol level, *per se* intoxication. A driver’s inattentiveness and distraction put others at risk.

We recommend the inclusion of a new subsection defining reckless driving as the operation of a motor vehicle while manually manipulating a portable electronic device, such as a cell phone, tablet, or other communication device. In addition, we encourage the New York State Legislature define the term “unreasonably” as used in the statute.

3. Raise the Classification of
Felony Hit-and-Run Offenses

The testimony also highlighted an incongruity in the treatment between impaired or intoxicated drivers who cause the death or serious physical injury of another while operating a motor vehicle but remain at the scene of the crash, and purportedly sober drivers who cause the death or serious physical injury of another while operating a motor vehicle but flee the scene of the crash. We recommend that the New York State Legislature raise the felony classification of the offenses of Leaving Scene of an Incident Without Reporting, resulting in serious physical injury or death of an individual, in violation of §§ 600(2)(c)(i) and (ii) of the Vehicle & Traffic Law, from class E and D felonies, respectively, to the next level of class D and C felonies, respectively. Such amendments would mirror the current felony classification of the crimes of Vehicular Assault in the First Degree, in violation of Penal Law § 120.04, a class D felony, and Vehicular Manslaughter in the First Degree, in violation of Penal Law § 125.13, a class C felony, that apply to impaired and intoxicated drivers.

Drivers who flee from a crash site delay and/or prevent law enforcement from gathering vital evidence in a timely manner, especially potential forensic evidence of the driver's intoxication or impairment obtained through chemical testing of the driver, and observations of the driver's physical condition at the time of the crash. Fleeing enables an intoxicated driver time to

metabolize any alcohol, reducing his or her blood alcohol content, and, thereby, elude a more serious charge and a potentially harsher sentence.

Put another way, current criminal penalties are more severe for an intoxicated driver who stays at the scene of a crash and is convicted of Vehicular Manslaughter in the First Degree, a class C felony, with a maximum sentence of 15 years in state prison, than they are for a driver (who may be impaired or intoxicated) who hits and runs from the scene, and is convicted of the lower class D felony, which carries a much lower maximum sentence of up to seven years in state prison. Similarly, an intoxicated driver who stays at the scene of a crash and is convicted of Vehicular Assault in the First Degree, a class D felony, with the maximum sentence of up to seven years in state prison, is treated more severely than a driver (who may be impaired or intoxicated) who hits and runs from the scene, and is convicted of a class E felony, which carries a maximum sentence of up to four years in state prison. Surely, the New York State Legislature could not have intended that a driver who runs away would benefit from this cowardly act.

The current law creates a perverse incentive to flee. In one case described to us, the driver fleeing the scene of a crash was sentenced to a 90-day term of imprisonment and ordered to pay a \$2,000 criminal fine; in another case, the driver was sentenced to a six-month jail term, five years of probation, and ordered to pay a \$2,000 criminal fine. In the latter case, there was evidence

that the driver was in possession of marijuana, but law enforcement could not administer a chemical test at the scene and, therefore, could not corroborate whether the driver was impaired. Revising the statute to increase the felony classification of leaving the scene crimes would remove the incentive for a driver to abscond, would reflect the severity of the crime associated with a hit-and-run incident, and would ensure the application of the appropriate charge to the driver's conduct.

Summary

The measured changes advanced in Recommendation One would enable law enforcement and prosecutors to charge dangerous drivers more appropriately, and to take important steps in reducing the death toll and the severity of injuries caused by vehicular violence.

RECOMMENDATION TWO

TOUGHEN AND EXPAND SANCTIONS IMPOSED ON RECKLESS DRIVERS

Some individuals may not take solace in the proposed new crimes set forth in Recommendation One, perhaps feeling they are not severe enough to restore justice or to deter drivers from causing avoidable deaths or severe injuries to pedestrians and bicyclists as the result of violating traffic regulations. We believe those proposed new offenses and other revisions in Recommendation One, coupled with our suggestions to strengthen the sanctions, as set forth below, will be a significant step toward correcting driver behavior and holding those who violate the law accountable.

Some crashes may warrant incarceration, and in those instances, our proposals offer new options. The appropriate penalty in most crashes, however, is a loss of driving privileges, either on a temporary or permanent basis. Still other crashes call for additional alternative sanctions that can be structured through court-ordered conditions and/or service to the public.

1. Amend the Predicate Felony Statute

Some vehicular crashes, even those involving sober drivers, may warrant significant incarceration. By creating a new Penal Law felony crime, and elevating the felony classification of certain existing crimes in the Vehicle &

Traffic Law (applicable to the types of crashes investigated by this Grand Jury), we have provided for a range of custodial sentences that can be considered in those instances. We further recommend expanding the coverage of Penal Law § 70.06(1)(a), which provides the term of imprisonment for a second felony offender, to include “all felonies defined in the Vehicle & Traffic Law.” *See e.g.*, Vehicle & Traffic Law § 511(3) (Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree); § 600 (Leaving Scene of an Incident Without Reporting), and § 1193.1(c) (Driving While Intoxicated). As it currently exists, the predicate felony offender statute increases the severity of punishment applicable to a defendant convicted of a Penal Law felony, other than a class A felony, who has a prior judgment of conviction for any felony in New York, or a conviction in a foreign jurisdiction, which would constitute a felony in New York. However, the statute excludes all Vehicle & Traffic Law felonies from qualifying as a second felony offense.⁸

Thus, a defendant previously convicted of the felony level offense of Driving While Intoxicated, pursuant to Vehicle & Traffic Law §§ 1192 and 1193.1(c), who is later convicted of that same crime, falls outside of the parameters of the second felony offender section. Similarly, a defendant convicted of the felony of Aggravated Unlicensed Operation of A Motor Vehicle in the First Degree, pursuant to Vehicle & Traffic Law § 511 (3)(a),

⁸ A Vehicle & Traffic Law felony can qualify as the first felony offense.

who is subsequently convicted of a felony level of Leaving Scene of an Incident Without Reporting, pursuant to §§ 600(2)(c)(i) or (ii) of the Vehicle & Traffic Law, is not subject to enhanced punishment. These are just some of the possible scenarios. In fact, we learned of an instance in which a driver, repeatedly convicted of Vehicle & Traffic Law felonies, eluded the increased sanctions of the predicate felony statute. This recommended amendment to Penal Law § 70.06(1)(a) would help deter recidivism in vehicular violence.

2. Provide for Alternatives to Incarceration
for Vehicle & Traffic Law Offenses

On the other hand, not all vehicular offenses should involve a sentence of incarceration. We learned that Penal Law § 65.05 authorizes the sentencing of a defendant to a conditional discharge as an alternative to incarceration and/or fines. The conditions “deemed reasonably necessary to ensure that the defendant will lead a law abiding life,” set out by statute, include community service, or conditions “reasonably related to his or her rehabilitation.” Penal Law § 65.10(h) and (l).

However, such sentence alternatives are sparingly imposed upon defendants convicted solely of Vehicle & Traffic Law offenses. Various provisions of the Vehicle & Traffic Law seem to restrict the imposition of such sanctions, unless expressly authorized. For example, Penal Law § 65.10(e-1)

authorizes a sentencing court to require a driver to participate in a “motor vehicle accident prevention course” when the driver has been convicted of a traffic infraction, in violation of Article 26 of the Vehicle and Traffic Law, that results in “serious physical injury or death.” This authority is cross-referenced in § 1146(c) of the Vehicle & Traffic Law, as is the sentencing court’s express ability to “impos[e] any other disposition, including a period of community service” under subdivision § 1146(e) of the Vehicle & Traffic Law. Thus, some courts only impose conditions if there is express statutory authority.

Moreover, other sections of the Vehicle & Traffic Law have been construed to exclude these alternative sentences. For example, Vehicle & Traffic Law §§ 511(2)(b) and 511(3)(b), Aggravated Unlicensed Operation of a Motor Vehicle in the Second and First Degrees, respectively, expressly provide that the sentence “*must be*: (i) a fine [of a specified amount] and (ii) a term of imprisonment as provided in the penal law, or (iii) where appropriate, a term of imprisonment is not required by the penal law, a sentence of probation as provided in subdivision six of this section, or (iv) a term of imprisonment as a condition of a sentence of probation (emphasis added).” There is no provision authorizing of a conditional discharge as a sentencing option.

Unsafe and dangerous driving is precisely the type of conduct that may be eradicated by directing a defendant to satisfy certain conditions, including completing remedial driving courses and/or watching videos designed to

sensitize drivers to the impact of careless driving on victims and their families and friends. Community service may be an opportunity for a defendant to perform relevant public activities, which may also bring some semblance of closure and justice to victims and their loved ones. For example, at the Red Hook Community Justice Center, drivers participate in lengthy group discussions evaluating their driving conduct, listen to victims share their experience, and give lectures about the perils of reckless driving. We were told that such activities reduced recidivism.

We heard from advocates for victims of vehicular crashes who caution against wholesale increased incarceration or the imposition of higher fines, since these sentences may unjustly affect certain segments of the population. These advocates agree that community service alternatives may be a more productive option.

We urge the New York State Legislature to amend Penal Law § 65.10 and the relevant sections of the Vehicle & Traffic Law to authorize a sentencing court to impose a sentence of a conditional discharge, and to order community service and other rehabilitative acts as permissible conditions for a defendant convicted of any offense contained in the Vehicle & Traffic Law.

3. Increase Sanctions on a Driver's License

The Grand Jury also learned through testimony that a motorist does not face mandatory revocation or mandatory suspension for all convictions arising from a traffic crash that causes the death or serious physical injury of another individual. Vehicle & Traffic Law § 510(1) authorizes the DMV commissioner, the commissioner's designees, and judges presiding in civil and criminal proceedings the power to suspend or revoke driver's licenses.

There are 30 separate provisions delineating the specific circumstances in which a driver's license *must* be revoked or suspended, as set out in Vehicle & Traffic Law §§ 510(2)(a) and 510(2)(b). None of these provisions include conviction of the misdemeanor crimes of Vehicle & Traffic Law § 1212, Reckless Driving, or New York City Administrative Code § 19-190, Right of Way. There are another 11 separate provisions in which a sentencing court *may* revoke or suspend an individual's driver's license, contained in Vehicle & Traffic Law § 510(3). None of the provisions apply to a defendant convicted of New York City Administrative Code § 19-190. There may be some other misdemeanor convictions that fall outside of the statute.

We strongly recommend adding new provisions to Vehicle & Traffic Law §§ 510(2) and 510(3) to expand the discretionary authority of the designated persons to revoke or suspend the driver's license of an individual convicted of any offense involving the operation of a motor vehicle that causes

the death or serious physical injury of another person, regardless of whether or not that death or severe injury is an element of the offense charged against the defendant.

In addition, we urge the New York State Legislature to lengthen the mandatory suspension time periods set forth in Vehicle & Traffic Law § 510(2), and correct the inequities in the statute. In particular, Vehicle & Traffic Law § 510(2)(b)(xv) mandates a 75-day suspension of a defendant's driver's license who is convicted of a violation of any provision of Article 26 of the Vehicle & Traffic Law, where the driver's conduct caused the death of another person. Inexplicably, 75 days is a shorter time period than the six-month mandatory suspension of a driver's license of a driver who caused serious physical injury as a first-time offender of section 1146 of the Vehicle & Traffic Law, a traffic infraction, and the one-year suspension for a driver's license of a driver who was convicted of that same offense within the previous five years. *See* Vehicle & Traffic Law § 510(2)(b)(xiv). It is also shorter than the six-month mandatory suspension for refusing to take a breath test, even when no other person or vehicle was involved in the collision. The statute should be revised to permit sentencing judges and other authorized persons flexibility in setting the period of the mandatory suspension from a range of 75 days to one year.

According to the testimony, including from family members of deceased crash victims, the suspension or revocation of the driver's license may have

more impact in modifying driver behavior and preventing future crashes than custodial confinement or the imposition of higher pecuniary sanctions. The length of a suspension period should be longer; the level of scrutiny for reinstating a revoked license should be raised. Furthermore, the decision to suspend or revoke a driver's license should not be so delayed, or the proceedings so protracted, to allow a dangerous driver to continue operating a motor vehicle without interruption.

Summary

More severe but creative sanctions are needed to promote general deterrence, to reform the behavior of individual drivers, to prevent recidivism, to promote safe driving, and to bring justice to victims and their loved ones.

RECOMMENDATION THREE

IMPROVE THE DEVELOPMENT AND THE ADMISSIBILITY OF EVIDENCE

The six proposals in this recommendation would assist the prosecution in gathering relevant evidence for charging, and in permitting the admissibility of evidence necessary for convicting dangerous drivers who cause the death or serious physical injury of pedestrians and bicyclists.

Three proposals pertain to crashes in which the driver may be intoxicated or impaired. Although the focus of our investigation largely concerns sober, albeit dangerous, drivers, there are instances in which the sobriety and the alertness of a driver are questionable.⁹ This Report provides an opportunity to express our views on ways to develop evidence to resolve this issue. The other three proposals are procedural changes that would assist in the prosecution of vehicular crimes, either in gathering the necessary evidence or in the presentation of evidence in court.

1. Broaden the Application of Vehicle & Traffic Law §§ 1192.4 and 1192.4-a

The term “drugs” in Vehicle & Traffic Law § 1192 is restricted to the seven schedules of controlled substances specifically designated in Public

⁹ This Report does not address all issues that pertain to intoxicated or impaired drivers.

Health Law § 3306, as referenced in Vehicle & Traffic Law § 114-a. New York is one of the remaining five states in the nation that still correlates impairment to a schedule of drugs.

We recommend that the New York State Legislature amend Vehicle & Traffic Law §§ 1192.4 (Driving While Ability Impaired by Drugs) and 1192.4-a (Driving While Ability Impaired by the Combined Influence of Drugs or of Alcohol and any Drug or Drugs) to specify that impairment may occur from “*any substance.*” This change is warranted for several reasons *inter alia*: (a) any future legalization of marijuana will take this substance off the list; (b) “inhalants” such as “dust off” and “glue” are not included in the list; (c) new designer and synthetic drugs involving the slightest alteration in the chemical compound, especially those manufactured in foreign countries, would be excluded from the list; and (d) any new drugs would be excluded until the New York State Legislature adds them to the schedule. However, a driver’s consumption of these substances may result in impaired driving.

Moreover, the New York State Legislature should add a new subsection to the Vehicle & Traffic Law, to be numbered 1192.4-b, defining “intoxication” and “impairment” as the voluntary consumption of any substance which affects the mental or physical abilities of a reasonable and prudent driver.

2. Mandate Oral Fluid Testing at the Crash Scene

Immediately after a crash that results in death or serious physical injury, an officer from the Intoxicated Driver Testing Unit, trained and certified in recognizing signs of driver impairment, conducts various tests. The driver is instructed to perform three standard field sobriety tests designed to reveal indicia of impairment: the horizontal gaze nystagmus test, the walk and turn test, and the one-legged stand test. The driver is also required to take a breath test that reveals the driver's blood alcohol content. If the driver declines, he or she is warned that a refusal can result in the immediate suspension or subsequent revocation of his or her driver's license (whether or not he or she is ultimately found guilty of the charge for which he or she is arrested), and, that such refusal can be introduced as evidence against the driver in a criminal proceeding. If the driver continues to refuse, the officer may apply for a search warrant to obtain a blood sample from the driver to perform a chemical test.

Often, drivers exhibiting signs of impairment during the field sobriety test have a low or negative blood alcohol content. Technology now affords law enforcement a tool for determining whether the driver is impaired by a drug. Through the use of a portable machine, such as the Dräger Drug Test 5000, law enforcement officers trained in drug recognition techniques can administer a non-intrusive saliva swab test. As demonstrated to us in the Grand Jury, a sufficient amount of oral fluid is extracted in about 60 seconds by inserting a

small device into a driver's mouth. Within approximately eight minutes, a printout reveals the presence of any drug that falls within one of the seven schedules listed in section 3306 of the Public Health Law. Although the test may reveal the presence of a category of drug in a person's system, it does not collect DNA from the driver. Under current law, if the driver refuses to provide an oral fluid sample, the officer has no other recourse because the law does not require the driver to submit an oral fluid sample for chemical testing.

We recommend that the New York State Legislature amend subdivision 1194.1(b) of the Vehicle & Traffic Law to require drivers to submit to an "oral fluid" test at every crash scene. This revision places the saliva swab test for the detection of drugs, including marijuana, on par with roadside breath tests for the detection of alcohol. In addition, a refusal to provide an oral fluid sample would be a permissible ground for law enforcement to seek a court order to compel the driver to do so. Moreover, the amendment should clarify that a refusal to provide an oral fluid sample will result in the same adverse consequences to the driver as the refusal to take a breath test. Mandatory testing of oral fluids would provide critical evidence as to whether a driver is impaired, and possibly criminally culpable.

Oral fluid test results obtained at the crash scene have proven to be accurate. In New York City, commencing in 2015, and for several years thereafter, when a driver consented, two oral fluid samples were collected from

a driver – one used for screening at the scene, and another sent to an accredited out-of-state laboratory. In all instances, the test results at the scene were identical to the test results produced in the laboratory.

Therefore, we also recommend that the New York State Legislature provide additional funding to the New York State Police Forensic Investigation Center's laboratory in Albany, New York: (a) to purchase additional equipment and hire additional personnel to perform both a second screening test and a confirmatory test to identify a specific drug in the driver's system, and (b) to obtain the requisite New York State accreditation for conducting such tests.

3. Repeal the Two-Hour Rule

Vehicle & Traffic Law § 1194(2)(a)(1) permits the administration of a mandatory chemical test within two hours of a driver's arrest for a Vehicle & Traffic Law § 1192 offense. We learned that this time period is impractical. The statute does not specify when a driver is under arrest for purposes of the commencement of the two hours, and the case law is not uniform in resolving the issue. In some instances, courts have found that the two hours commenced upon formal arrest; in other instances, courts have found that the two hours commenced earlier when the driver was placed into custody. Moreover, two hours is not enough time for law enforcement to properly complete the tests. Before administering any chemical tests, a collision

technician at the scene must allow for a 20-minute observation period where the driver abstains from smoking, drinking, or ingesting any foods that could compromise the test results. The officer must advise the driver that he or she has been arrested, and ask for the driver's consent to the chemical tests. If the answer is no, the officer reads a second set of warnings, informing the driver of the consequences of his or her refusal, and then prepares a refusal form. Only then can the chemical tests commence. This process may be further delayed if there are several drivers detained at the testing site, each awaiting his or her turn. Thus, 120 minutes can easily expire.

And yet, the courts have strictly adhered to the two-hour rule when it comes to refusals. Astonishingly, if the refusal is communicated two hours and one minute after the driver's arrest, that refusal cannot be elicited as evidence at trial against the driver.

We urge the New York State Legislature to amend Vehicle & Traffic Law § 1194(2)(a)(1) to eliminate the "two hour" limitation for conducting chemical tests and to add language that permits chemical tests to be taken at any time. In addition, the statute should expressly provide that a driver's refusal to submit to chemical tests may be used against the driver in any criminal proceeding, no matter when the refusal is communicated. In vehicular crash investigations, the passage of time inures to the benefit of the driver. Alcohol metabolizes in the body, reducing the blood alcohol content level. On

the other hand, the repeal of the two-hour rule enables law enforcement to gather fleeting evidence critical to establishing whether or not the driver was impaired.

4. Broaden Mandatory Fingerprinting

Fingerprinting is a necessary law enforcement tool that identifies persons who are charged with or convicted of offenses. With certain exceptions, police officers are required to take the fingerprints of an individual arrested or arraigned for, *inter alia*: (a) any felony; (b) any misdemeanor defined in the New York Penal Law; or (c) any misdemeanor defined outside the New York Penal Law that is equivalent to a felony, if such person had a previous judgment of conviction for a crime if the driver has been convicted of that offense within the previous 10 years. *See* Criminal Procedure Law § 160.10(1)(a), (b) and (c).¹⁰ Some applicable misdemeanors are found in the various provisions of Operating a Motor Vehicle While Under the Influence of Alcohol or Drugs, Drugs, pursuant to Vehicle & Traffic Law §§ 1192.2, 1192.3, 1192.4 and 1192.4-a. However, fingerprinting is not mandatory for all other Vehicle & Traffic Law misdemeanors, including those specifically addressed by this

¹⁰ Criminal Procedure Law § 160.10(2) authorizes an arresting officer to take fingerprints when it is not mandatory if he or she is unable to ascertain the arrestee's identity, reasonably suspects that the identification given is not accurate, or the arrestee is wanted for the commission of some other offense.

Report, *e.g.* Vehicle & Traffic Law § 1146 (Failure to Exercise Due Care), § 1212 (Reckless Driving) and § 511(1)(a) and (2)(a) (Aggravated Unlicensed Operation of a Motor Vehicle in the Third and Second Degrees), or for the misdemeanor offense under New York City Administrative Code § 19-190.

We recommend that the New York State Legislature amend Criminal Procedure Law § 160.10(1)(b) to include all Vehicle & Traffic Law misdemeanors and other offenses, such as § 19-190 of the New York City Administrative Code as mandatory printable offenses when a death or serious physical injury occurs. We learned that, in many instances, persons charged with a misdemeanor of the sort discussed in this Report often have several open arrests for Vehicle & Traffic Law misdemeanors. If the driver is fingerprinted, the prosecution will have notice of those pending offenses.

Fingerprinting would also reveal whether the defendant has prior misdemeanor convictions resulting from unlawful driving conduct. This may subject the driver to enhanced penalties. This information would assist the prosecution in determining the appropriate offenses to charge, whether a defendant's prior misdemeanor convictions require an enhanced charge, and the appropriate resolution of any pending charges. For example, if the driver was convicted of the misdemeanor of Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree, pursuant to Vehicle & Traffic Law § 511(1)(a), and commits that same crime within the next 18 months, the driver

can face the more serious felony charge of Aggravated Unlicensed Operation of a Motor Vehicle in the Second degree, pursuant to Vehicle & Traffic Law § 511(2)(a)(i). Requiring the fingerprinting of such misdemeanors alerts the prosecution to prior convictions necessary to charge the higher crime, and informs the sentencing judge of unlawful acts that may bear on the sentence.¹¹ In addition, this information would assist the prosecution in formulating the terms of a plea offer and sentence recommendation, including how to handle the open case, and would give the defense counsel crucial information to represent the defendant effectively.¹²

5. Exempt Vehicular Homicides from Statutory Speedy Trial Limitations

Subject to specific exceptions, pursuant to Criminal Procedure Law § 30.30(1)(a), where the top charge is a felony, a defendant is statutorily guaranteed a trial within six months of his or her arrest. However, Criminal Procedure Law § 30.30(3)(a) excludes certain homicide crimes from the speedy trial time constraint because they are labor intensive and complicated to investigate.

¹¹ Whenever fingerprinting is mandatory, a police officer is also authorized to photograph and obtain the palm prints of an arrestee for investigative purposes. *See* Criminal Procedure Law § 160.10(3).

¹² If any open Vehicle & Traffic Law misdemeanors are resolved with a plea of guilty to a traffic infraction, the record, including the driver's fingerprints, is sealed.

We recommend that the New York State Legislature expand Penal Law § 30.30(3)(a)'s exemption to include Vehicular Manslaughter in the Second Degree, a class D felony, Vehicular Manslaughter in the First Degree, a class C felony, and Aggravated Vehicular Homicide, a class B felony, Penal Law § 125.12, § 125.13, and § 125.14, respectively. These homicides are no less complex, labor intensive, and/or time-consuming than other homicides, and, in some instances, may be more vulnerable to the 180-day time constraint.

As the testimony illustrates, such investigations often rely on the development of several forms of forensic evidence, including crash reconstruction. Many vehicles are equipped with an Event Data Recorder (“EDR”) or black box. This electronic sensor may record certain technical information about a vehicle’s performance for a few seconds immediately prior to and during a crash such as the speed, throttle position, braking patterns, and other variables. However, the force of a car striking a pedestrian or bicyclist may not be sufficient to trigger the recording.

Law enforcement needs to scour for videos mounted in public areas, found on motor vehicle dashboards, or recorded by neighbors and passersby on cellphones. Sometimes there are no videos, making the prospect of prosecution even more difficult.

Witnesses must be located, especially those who may have left the scene before CIS has arrived, or who may have seen the crash from an upstairs

window, or in a passing car. The prosecution may need to apply for search warrants to collect bodily fluids for chemical testing or data from cellphones and other electronic devices, and records from telephone and internet service providers. Even after obtaining this evidence, significant time is required to analyze the fruits of these searches fully. Careful examination of evidence may also result in a reduction of charges or an exoneration of the allegations against the driver.

6. Permit Remote Testimony for Offenses
Under Vehicle & Traffic Law § 511

Prosecution of unlicensed drivers, pursuant to Vehicle & Traffic Law §§ 511(1)(a), (2), and (3)(a) (Aggravated Unlicensed Operation of a Motor Vehicle in the Third, Second, and First Degrees, respectively), is a valuable tool for removing dangerous drivers from the roadways. Persons who flout the law in this manner often fail to comply with traffic rules. We heard about crashes in which drivers, who caused the death of an individual, pleaded guilty to the felony Aggravated Unlicensed Operation of a Motor Vehicle in the First Degree, pursuant to Vehicle & Traffic Law § 511(3).

One common element in the prosecution of these offenses is establishing that the defendant was notified, or had reason to know that his or her driving privileges were revoked, suspended, or otherwise withdrawn. This

element requires testimonial explanation of the notification procedures of the New York State Department of Motor Vehicles. All such notifications are generated by the DMV.

Courts have not allowed the admission of this evidence in the form of an affidavit from a DMV employee, holding that it would violate a defendant's constitutional right to confront the witness. *See, e.g., People v Pacer*, 6 N.Y.3d 504 (2006). Moreover, the case law requires the testimony of an employee who is knowledgeable about the notification process. *See, e.g., People v Francis*, 114 A.D.3d 699 (2nd Dept. 2014). In all instances, the witness must have "personal knowledge" of the notification procedures at the Albany DMV. For Manhattan prosecutions, an Albany witness must travel 150 miles, spending approximately three hours either by car or by train and subway, to testify briefly about the notification procedure. Often, the witness's appearance is hampered by inclement weather, staff shortages, or court part availability. Failure to establish the notification element would likely result in the conviction of only a traffic infraction under Vehicle & Traffic Law § 509(1).

This Grand Jury recommends the enactment of legislation permitting an appropriate witness to testify remotely about the notification process. Remote testimony is a more practical alternative and serves a public policy and fiscal interest by reducing any strain on the Albany office personnel, and avoiding the expenditure of travel costs, which is ultimately borne by the taxpayers. This

procedure would not violate the Confrontation Clause.¹³ Additionally, the appropriate witness does not: (a) identify the defendant; (b) testify to statements made by the defendant; or (c) render any opinion. The witness' direct testimony would be completed in less than 10 minutes, and involve mostly foundational questions. Even with rigorous cross-examination, the witness' testimony would be concluded in approximately 30 minutes.

Modern technology would afford a defendant a full opportunity to confront the witness who testifies to notification, under oath, and observe his or her demeanor. Equipping a courtroom for remote testimony is cost effective and straightforward. Since many courtrooms are already equipped with video capabilities, all that is needed is broadband internet access to enable video-conferencing. Most New York State agencies have access to video-conferencing. Therefore, the Grand Jury recommends that the New York State Legislature provide statutory authority for remote testimony of a suitable witness testifying to the DMV's notification procedure in all prosecutions under section 511 of the Vehicle & Traffic Law.

¹³ See, e.g., *People v. Wrotten*, 14 N.Y.3d 33 (2009) (no confrontation clause violation where trial court permitted 84-year old prosecution witness, who was too ill to travel, to testify by live two-way video feed); and *People v. Giurdanella*, 144 A.D.3d 479 (1st Dept. 2016) (no confrontation clause violation where the victim testified by live, two-way video when the Egyptian government unexpectedly barred him, at the last minute, from travelling to New York for trial). See also *Harrell v. State*, 709 So.2d 1364 (1998) (the highest Florida court

Summary

The proposals in this Recommendation are essential to amass the evidence needed to bring to justice those drivers who threaten the safety of pedestrians and bicyclists.

upheld a conviction where two robbery victims testified, through an interpreter, by satellite transmission).

RECOMMENDATION FOUR
STRENGTHEN THE VOICE OF
VEHICULAR VIOLENCE VICTIMS

From the moment of the collision, victims and family members of the deceased experience a range of emotions – sorrow and grief, anger and rage, panic and distress, and for some, resignation and despair. They often have little information about the various proceedings that may adjudicate the fault of the driver, and are confused about whether they may participate, if at all, at any of them.

1. Amend DMV Regulations

In addition to the criminal investigation, there are several regulatory proceedings that may affect the status of a driver's license to operate a motor vehicle. Most notably, DMV may conduct a safety hearing within 12 months of the death of a victim of a vehicular crash to determine whether the driver committed any moving violations which caused, contributed to, or exacerbated the crash, and, whether the driver's license should be suspended or revoked. The precinct police officer who responded to the crash presents the details, such as notes, police reports, and records documenting any skid mark measurements, road conditions, and witness statements. The DMV determination must be supported by a preponderance of the evidence, which

may include hearsay. However, DMV may forego the hearing if the police officer fails to appear. The NYPD typically notifies the victim's estate approximately two weeks before the safety hearing date. However, the estate is not a party to the proceeding. A loved one of the deceased has no right to be heard unless he or she is a witness to the crash. Any participation by the family of a victim is at the discretion of the individual hearing judge.

When there are no criminal charges filed or no criminal conviction is obtained, the DMV safety hearing is often the only means for the family of the deceased to experience a modicum of justice. Therefore, the DMV Commissioner should consider modifying the agency's regulations to permit the estate of a deceased victim an opportunity to submit additional evidence, whether it is testimonial, physical, forensic, or documentary, for consideration by the hearing judge in evaluating the driver's operation of the vehicle and in determining fault. The Commissioner should further consider amending the regulations to permit the family and friends of the deceased to submit written impact statements for consideration by the hearing judge in determining the penalty.

2. Create a Liaison Position to
Assist Vehicular Violence Victims

We applaud the assistance provided by DANY’s Witness Aid Services Unit (“WASU”) to witnesses and victims of vehicular violence. Counselors and licensed social workers provide various services, including conducting individual or group support sessions; completing forms to obtain reimbursement for medical expenses or funding for funeral services; or composing “victim impact statements” for submission at the sentencing of a convicted defendant. Although WASU is limited to those situations in which a driver has been charged with a misdemeanor or a felony, DANY will assist victims and/or their families to find community-based organizations or not-for-profit organizations that can provide similar support.

We support DANY’s proposal to create the position of a “vehicular crime specialist” to assist individuals injured by motor vehicles and the family of deceased victims to navigate the criminal justice system and connect with the appropriate agencies. Adding this individual to WASU’s existing group of specialists (*e.g.*, for crimes involving child abuse and human trafficking), would ease the burden and uncertainty borne by the victims and their loved ones. As the first point of contact with a victim, a vehicular crime specialist, possessing the requisite expertise to understand the roles of the various agencies, support

groups and not-for-profits, can help victims and their families address financial, medical, and social service needs arising from vehicular violence.

To expand on this concept, this Grand Jury also encourages the organizers of Vision Zero to appoint a liaison between the various City and State agencies and victims and the families of deceased victims. The liaison would ensure that they are informed about the dates and the parameters of any relevant proceedings, and help them navigate among medical providers, insurance companies, law enforcement, and other professionals.

Summary

Amidst their trauma, the victims of vehicular violence and their loved ones should be given a more effective voice in addressing their concerns and expressing the true impact of a dangerous driver's conduct. To that end, they should be provided guidance and access to the appropriate resources.

RECOMMENDATION FIVE

REMOVE DANGEROUS DRIVERS FROM NEW YORK STATE AND CITY ROADWAYS

The prevention of vehicular crashes is preferable to sanctioning the drivers who cause fatalities or injuries. The suggestions in this Recommendation seek removal of dangerous drivers from our streets. We are heartened by the collaborative efforts between State and City agencies in furtherance of this goal, under the banner of Vision Zero. In this Recommendation, we highlight other areas that merit the attention of State and City elected officials and appointed leaders of State and City agencies.

One way to remove dangerous drivers is through stricter enforcement and government oversight. Our first four proposals are designed to monitor dangerous drivers better. The remaining two proposals seek to prevent crashes from the outset through data analysis and education.

1. Reduce the Per Se Blood
Alcohol Content for Intoxication

One means of lowering the number of dangerous drivers is to reduce the legal level of blood alcohol content. Under New York State law, a person is considered *per se* legally intoxicated when his or her blood alcohol content reaches .08 of one per centum. Depending on an individual's body mass, the .08 level can be reached with the consumption of 12 ounces of beer, or a 5

ounce glass of wine, or 1½ ounces of hard liquor. According to the testimony, signs of impairment that may affect driving, such as delay in reaction time, slurred speech, and a reduction in motor skills, can manifest when an individual's blood alcohol content reaches .05 of one per centum. Therefore, we recommend that the New York State Legislature amend Vehicle & Traffic Law § 1192.2 to reduce the *per se* intoxication limit of an individual's blood alcohol content from .08 of one per centum to .05 of one per centum.¹⁴

In over 100 countries, the blood alcohol content limit is .05 of one per centum, and in some countries it is even lower at .02 of one per centum. As recently as December 30, 2018, Utah became the first state to lower its blood alcohol content to .05 of one per centum, and several states have proposed legislation for a similar reduction. Moreover, several national organizations support the .05 of one per centum limit, including the National Safety Transportation Board, the American Medical Association, the National Academies of Sciences, Engineering and Medicine, the World Health Organization, and the Association for the Advancement of Automotive Medicine.

In addition, we recommend the amendment of Vehicle & Traffic Law §§ 1192.5 and 1192.6 to reduce the *per se* intoxication limit for commercial drivers

¹⁴ Accordingly, the evidentiary presumptions in Vehicle & Traffic Law § 1195.2(a), (b) and (c) need to be adjusted to reflect the lower *per se* intoxication limit.

to .02 of one per centum. These are drivers of vehicles of up to 26 tons, such as fuel oil delivery trucks, sanitation trucks, and tractor trailers. The *per se* limit should be similarly reduced to .02 of one per centum for all drivers engaged in the transportation of individuals, whether they are in the public sector or for-hire. The .02 of one per centum limit is not without application in the law. It is the limit for all drivers under 21 years of age. *See* Vehicle & Traffic Law § 1192-a. According to the testimony, lowering the blood alcohol content level would significantly reduce fatalities from vehicular crashes.¹⁵

2. Broaden the Business Integrity Commission's Regulatory Authority

BIC, created to combat systemic corruption in the private trade waste industry, licenses and regulates companies that collect garbage and recyclables from commercial businesses, and construction and demolition sites. Currently, BIC has limited authority to promulgate rules and regulations to improve safety in that industry. In particular, the agency lacks the authority to take administrative action against individual drivers who demonstrate patterns of unsafe driving in the operation of large 26-ton vehicles. Over the last decade, 41 persons, mostly pedestrians and bicyclists, were struck and killed by drivers

¹⁵ As a corollary, the New York State Legislature should consider lowering the current limit of .18 of one per centum blood alcohol level for Aggravated Driving While Intoxicated,

of private trade waste vehicles. Nine of those crashes occurred between 2016 and 2018; at least one occurred this year.

We ask the City Council to support BIC’s legislative initiative that seeks to expand its authority to oversee safety matters in the trade waste industry, including the ability to deny applications, or to suspend or revoke licenses and registrations of trade waste companies based on traffic safety concerns. Companies that employ dangerous drivers should not be permitted to conduct business in New York City. BIC should also be permitted to discipline trade waste truck drivers who engage in reckless driving by issuing administrative violations, imposing fines, and even suspending or revoking drivers’ operating licenses.

3. Expand Automated Camera Enforcement

When drivers of motor vehicles enter an intersection and are unable to travel all the way through they “block the box” of the crosswalks and bike lanes. This makes crossing more dangerous for pedestrians requiring them to navigate around cars that obstruct free passage in the crosswalks. It is especially difficult for persons with physical disabilities who travel with a walker or in a 36-inch wide wheelchair. These individuals may find themselves

pursuant to Vehicle & Traffic Law § 1192.2-a, to be consistent with any new amendments proposed in this Report.

trapped on the sidewalk, on a meridian, or in the middle of the street. It is also dangerous for bicyclists who must share the roadways with motor cars and large vehicles.

We ask the New York State Legislature to provide red light cameras to capture violators who “block the box,” an approach implemented in other American cities. Automated enforcement would ensure open intersections for pedestrians and bicyclists to cross the streets safely.¹⁶

4. Improve Oversight of Medically Impaired Drivers

To Americans, driving is synonymous with liberty and independence. It is critical to maintaining employment, pursuing business, and engaging in social functions, and other daily living activities. But that privilege, and the retention of an issued license, must be balanced with the public safety of the community. Medically impaired drivers pose a threat to themselves and others. These individuals may have a disorder or condition that interferes with their physical coordination, judgment, attention, or other skills necessary to operate a motor vehicle safely. Such conditions may be the collateral effects of a chronic condition, an uncontrolled seizure disorder, or a progressive condition which gradually deteriorates a person’s abilities over time, such as dementia.

¹⁶ The additional red light cameras would also capture drivers who speed through the traffic signals.

Information pertaining to a driver's ability to operate a vehicle safely can be reported to the DMV. In New York State, there are three forms for reporting medically impaired drivers. The DS-6 form may be used by doctors. New York State encourages, but does not require, physicians to report individuals whose driving ability may be adversely affected.¹⁷ Law enforcement is trained to detect conditions and to ask questions if it appears that an individual is having physical or mental difficulties while driving a vehicle. The relevant information may be reported on a DS-5. In addition, any concerned citizen or family member may report a driver who appears to be unable to drive safely using a DS-7 form. Of the three forms, the DS-5 is given the greatest weight by the DMV.

However, reporting of medically impaired drivers raises many issues, not the least of which are patient privacy, doctor-patient confidentiality, and physician liability issues, that may require extensive legislative changes. The testimony makes clear that more data are needed to understand the circumstances for restricting or revoking licenses and to arrive at fair and appropriate solutions for the afflicted drivers. For example, it is important to understand the factors that determine a "seizure-free interval," or the likelihood

¹⁷ Some states require physicians to report certain cognitive or physical conditions. *See, e.g.*, California Health & Safety Code § 103900 (requires physicians to report disorders by lapses of consciousness, as well as Alzheimer's disease and related disorders); and Nevada Revised Statute § 629.047 (requires physicians to report persons diagnosed with certain medical conditions, including epilepsy).

a driver will suffer an episodic seizure. Alternatively, mobility options for affected drivers must be considered, especially in geographic areas where there is limited public transportation so that they are not disenfranchised. These are complicated issues that generate myriad questions and require a delicate balancing of competing interests.

This Grand Jury recommends that State and City officials convene a “commission” to study, evaluate, and review issues concerning medically impaired drivers. As part of its work, the commission should obtain testimony from individuals with all perspectives, including drivers who would be affected by any restrictions on a driver’s license. The commission should consider all available approaches including requiring refresher defensive driving courses, subsequent written driving tests, and/or practical driving tests relating specifically to city driving to maintain a driver’s license. The findings of the commission would help inform our lawmakers to enact the appropriate legislation.

5. Encourage the Collection and Analysis of More Data

Information is most valuable when it is analyzed to identify the source of problems and to find productive solutions. There are numerous, yet disparate, databases containing key information relevant to the issue of vehicular violence. This data can and should be analyzed to detect patterns and to

highlight areas requiring attention. Such predictive analytics could be used to identify patterns of dangerous driving, by individual, location, or time of day, and to help law enforcement, government agencies and elected officials focus their limited resources in the most productive ways to make our streets safer for everyone.

We applaud the creative use of data by the New York City Sheriff's Office. In 2018, the Sheriff's Office cross-matched data from red light and speed cameras with data relating to tickets issued to drivers by the TLC, and identified 42 individuals who had unpaid tickets, totaling approximately \$1.3 million. These drivers, who registered their vehicles in Pennsylvania, were operating their vehicles as unlicensed taxicabs in New York City. In addition to identifying substantial unrecouped New York City revenue, scores of vehicles, operated by dangerous drivers ticketed repeatedly for running red lights and speeding, were removed from the streets of New York City. Equally admirable is BIC's recent hire of a data analyst to develop a safety profile for all BIC licensees and registrants. By using available data to find red flags of dangerous driving behavior, BIC can concentrate its resources on the most problematic companies to prevent crashes. More agencies should consider this approach.

Despite these successes, the testimony brought to light several deficiencies in the use of relevant data. For instance, the Sheriff's Office

license plate reader data cannot be readily cross-matched with license plate reader data generated by the NYPD and the New York State Triborough Bridge and Tunnel Authority. Nor can all out-of-state vehicle registrations be electronically imported into the New York City Parking Violations Bureau database.

Therefore, we recommend that State and City officials, and heads of various regulatory agencies assign personnel to expand data collection and share analyses in order to detect hazardous driving behavior and conditions. Our policymakers should enter into memoranda of understanding with out-of-state departments of motor vehicles and the DMV to share data with City agencies, and with each other. They should also support efforts to cross-match relevant currently siloed databases, such as the various license plate reader databases.

The Grand Jury also learned that relevant information is lacking in some critical areas. Notably, there is a paucity of data on the number and the circumstances of non-fatal pedestrian injuries of people with disabilities, and almost no data on their fatalities. State and City officials should direct the relevant agencies to conduct a comprehensive study of pedestrians with physical disabilities who are injured or killed in traffic collisions. Such information would assist engineers in improving street designs for better

accessibility and greater safety. The data may also identify the most dangerous locations where pedestrian refuges or median crossings are needed.

The increase in bicycle fatalities this year also highlights the need for more effective use of data to identify additional crash-prone intersections that require day-lighting, to expand the protected bike lane networks, and other relevant street designs. It is also important to collect data regarding the negative effects, if any, of bicyclists traveling on streets that have not yet been re-designed for their safety. Data are also lacking on whether, and to what extent, bicyclists disobey traffic laws and regulations.

Pedestrians and bicyclists who collide with large vehicles are most vulnerable to fatalities. We learned that the Sheriff's Office is conducting investigations of bus companies with significant unpaid summons that are involved in traffic fatalities. The Sheriff's Office is also expanding its efforts to investigate trucking companies with significant outstanding violations, especially with respect to safety equipment. Law enforcement's proactive use of existing data in monitoring these two industries would greatly reduce serious injuries and fatalities of pedestrians and bicyclists.

We recognize the advancements by DOT in implementing the "leading pedestrian intervals," which create safer crossings for most pedestrians. However, this positive step may not be sufficient for individuals who are physically challenged. Additional data are needed to determine whether to

lengthen the crossing time for people with mobility limitations, whether to adjust audio notifications for sight-impaired citizens, and whether to acquire “smart” traffic lights or other technology that can detect pedestrians in the crosswalks.

Last, but not least, more data are needed to determine the frequency of collisions caused by motorists texting while driving. DOT estimates that 10% of the incidents of dangerous driving is caused by motorists distracted by texting and/or holding cellphones while driving. Currently, such data are combined with data relating to other forms of impaired driving. If texting is to be meaningfully addressed, that data must be isolated and studied alone.

6. Incentivize a Safe Driving Culture Through Education

Innovative education is crucial to modify driver behavior and to create a driving culture attentive to safety. This Grand Jury urges State and City officials to broaden their education outreach.

As a prime illustration, TLC and DOT, together with Families For Safe Streets, an advocacy group within Transportation Alternatives, produced a video entitled *Drive Like Your Family Lives Here* to expound the consequences of the irresponsible driving. This 15-minute composite of stories from five families who suffered losses of loved ones has had a profound effect on fleet

drivers who have seen the video as part of their required training, reminding them of the importance of safe driving.

With respect to bicyclists, TLC organizes events where TLC licensees ride Citi Bikes alongside bicycling advocates to get the bicyclists' point of view navigating New York City streets. TLC also hosts discussions between for-hire drivers and bicycling advocates where for-hire drivers can explain the pressures they face, and the parties can work together to find ways to share the road safely. In addition, BIC plans to instruct school children about how to be safe around waste collection trucks by arranging for them to see and climb into the vehicle to appreciate its size and to understand the driver's difficulty in seeing them from the high cab.

Accordingly, we encourage the appropriate State and City agencies to undertake the following tasks in an effort to shift the driving attitude in our society:

- provide simulation experiences to acquaint pedestrians and motorists with bicyclists' perception of the streets;
- extend educational programs for impaired drivers or drivers who have received multiple tickets to all dangerous drivers;

- produce video messages to sensitize motorists and bicyclists to the plight of people with disabilities as they traverse New York City streets;
- reform written and practical driving tests to focus on the nuances of New York City driving;
- revise defensive driver education curriculum; and
- expand the DMV's Official Driver Handbook instructions on sharing the road with bicyclists and pedestrians.

Summary

Prevention is the preferable course of action. The components of this Recommendation will create a culture of safety that would reduce vehicular violence that plagues pedestrians and bicyclists.

CONCLUSION

We hope that this Report lessens the pain, suffering, helplessness, and outrage of those affected by the deaths or serious physical injury of pedestrians and bicyclists caused by vehicular violence. We also hope we have provided an understanding of the constraints under which law enforcement and prosecutors currently function.

The solution for reducing, and hopefully eliminating, dangerous vehicular crashes, does not lie entirely, or even predominantly, with an increase in efforts by law enforcement. A multi-faceted approach is necessary: vigorous *enforcement*, smart *engineering* in street design, enhanced *education* outreach, and broader *engagement* between the appropriate City and State agencies and the entire community. Thus, our Recommendations seek not only more effective tools for the investigation, prosecution, and sanctioning of such unlawful conduct, but demand more creativity in preventing vehicular violence before tragedy strikes.

WE THE GRAND JURY OF THE SUPREME COURT, STATE OF
NEW YORK, FIRST JUDICIAL DISTRICT, PURSUANT TO THE
PROVISIONS OF CRIMINAL PROCEDURE LAW SECTION 190.85(1)(c),
BASED UPON OUR STATED FINDINGS, SUBMIT THIS REPORT
RECOMMENDING LEGISLATIVE, EXECUTIVE AND
ADMINISTRATIVE ACTION IN THE PUBLIC INTEREST.

The Grand Jury would like to thank the courageous survivors and loved ones who told us their stories and helped us form the basis for the recommendations in this Report.