

**TESTIMONY OF CHIEF ASSISTANT DISTRICT ATTORNEY
KAREN FRIEDMAN AGNIFILO
BEFORE THE NEW YORK CITY COUNCIL COMMITTEE ON TRANSPORTATION
AND THE COMMITTEE ON PUBLIC SAFETY**

**“Oversight - Preventing Traffic Fatalities: Examining the Vision Zero Working Group’s
Report”**

February 24, 2014

Good morning Chairwoman Gibson and Chairman Rodriguez and members of the Committees on Public Safety and Transportation. I am Chief Assistant District Attorney Karen Friedman-Agnifilo and I am presenting testimony on behalf of New York County District Attorney Cyrus R. Vance, Jr. Thank you, on behalf of District Attorney Vance, for holding today’s hearing and affording me the opportunity to testify about preventing traffic fatalities.

As you all know, New York County has already experienced more than its share of vehicle-related tragedy this year. The story of young Cooper Stock is one of several heart wrenching examples. Nine-year-old Cooper was crossing the street with his dad, Dr. Robert Stock, on January 10. A cab driver, turning left from 97th Street onto West End Avenue, struck both of them in the crosswalk, killing Cooper. The NYPD’s Collision Investigation Squad and specially trained Assistant District Attorneys from my office continue to investigate this incident.

The Manhattan DA’s Office investigates all fatal and critical injury crashes that the NYPD’s Collision Investigation Squad goes out on and even some that they do not. This was a policy put forth by DA Vance in 2010 when he took office. Despite the fact that we investigate these cases, it can be difficult for people to understand why a crash that seriously injures or kills is not always a crime. The reality is that often these cases do not meet the complicated legal requirements for criminal charges.

Let me try to explain some of the legal framework that prosecutors are bound by when charging vehicular-crash cases. For example, we are often asked why a driver involved in a fatal collision is not guilty of criminally negligent homicide or vehicular manslaughter.

To prove criminally negligent homicide, an ADA must show that the defendant has “engaged in some blameworthy conduct creating or contributing to a *substantial and unjustifiable* risk of death.”ⁱ In other words, crashing without some sort of additional culpable conduct – really, outrageous conduct – does not establish the requisite state of mind for criminal negligence. This precedent was established in a case where, on a foggy night, a driver failed to see the vehicle stopped in the lane ahead and fatally struck the vehicle and state trooper standing beside it – a scenario the Court of Appeals determined did not constitute criminally negligent homicide.ⁱⁱ The Court held that an unexplained failure to perceive without more, is not a crime. And, to be guilty of vehicular manslaughter, in addition to other elements, the driver must be intoxicated or impaired by drugs.

In another case, a driver mistakenly drove the wrong way onto a parkway exit ramp and, upon realizing his mistake, chose to make a U-turn across three lanes of traffic rather than backing up the ramp or turning around on the grassy shoulder of the highway. This decision led to the death of an oncoming motorcyclist when he crashed into the turning car. The court held that the defendant’s decision did not rise to a level of moral blameworthiness required to sustain a charge of criminally negligent homicide.ⁱⁱⁱ

Typically the courts have held that one traffic infraction, such as speeding, failure to yield, or even driving the wrong way on the highway, does not in and of itself establish criminal negligence absent an additional aggravating factor. The courts have generally held that an additional affirmative act by the driver must occur to transform speeding into dangerous speeding, however, some acts themselves are so egregious as to constitute, not criminal negligence, but the lesser crime of criminal recklessness – for example, our office successfully prosecuted a case in which the driver was clocked on radar driving in excess 100 MPH on the

Henry Hudson Parkway thereby placing the lives of the other drivers on the roadway and their passengers at risk.

Some states – including Illinois, Washington, and Florida – allow for a vehicular homicide charge in cases of reckless driving. This is not the case in New York.

I am telling you all of this so that you understand the parameters that our Vehicular Crimes team must follow when assessing the criminal liability of the driver in a vehicular crash, bicycle strike or pedestrian strike. In each investigation, we are bound by statutory and case law in our charging practices.

When it comes to misdemeanor vehicular crimes – crimes such as driving with a suspended or revoked license, or driving while intoxicated, we have seen an uptick in cases. Between 2009 and 2013, the Manhattan DA’s Office saw a 12.5 percent increase in misdemeanor cases of operating a vehicle with a suspended or revoked license or without a license (VTL §511). We screened 7,272 in 2009 and 8,183 in 2013. As for DWI cases, in 2009 we screened 2,161 misdemeanor cases (VTL §1192), compared to 2,556 DWI cases in 2013, an increase of more than 18 percent.

One thing is for sure: these are stubborn crimes with potentially lethal consequences. In response to these critical public safety matters, District Attorney Vance expanded the Vehicular Crimes Unit shortly after assuming leadership of the Office. He added significant legal and investigative staff, trained Assistant District Attorneys, and forged stronger relationships with the NYPD’s Collision Investigation Squad.

Our Office has conducted city-wide crash investigation and reconstruction trainings, training nearly 100 Assistant District Attorneys from the five boroughs and surrounding counties. As a result of this week-long training, more than 60 Assistant District Attorneys at the Manhattan DA’s office have been trained in crash investigation and reconstruction. Participants have learned how to investigate and evaluate vehicular collisions, pedestrian strikes, and bicycle

strikes so that our prosecutors are expert in both the science involved and the applicable criminal law.

The Co-Chiefs of the Vehicular Crimes Unit, Jill Hoexter and John Wolfstaetter, also travel the state to provide specialized training.

It is also important to note our close relationship with the NYPD in connection with the investigation of vehicular incidents. Until recently, the NYPD Collision Investigation Squad responded only to crash scenes where a person died or was likely to die. They did not routinely respond to crash scenes where other serious physical injury occurred, such as the loss of a limb. Recently, the NYPD revised its protocol to respond to all crashes involving death or “critical” injury as determined by a Paramedic or EMT at the scene – a change we applaud.

While this change has resulted in our office being called to more crash scenes, this “critical injury” standard being applied by the NYPD, is not the legal standard and actually excludes incidents where we might be able to bring a criminal case. In addition to death, one of the necessary elements to bring criminal charges is *serious physical injury*, which is a legal term of art. Serious physical injury means physical injury to a person which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.^{iv} If the Collision Investigation Squad had the capacity to respond to all cases that would potentially result in either serious physical injury or death, District Attorneys would be called to more crash scenes, allowing prosecutors to make appropriate charging decisions.

Our investigations of crashes, pedestrian strikes and bicyclist strikes are always thorough and sometimes lengthy and, unless there is obvious intoxication or impairment by drugs, there is most likely not an immediate arrest. We review the driver’s cell phone and SMS text message records, surveillance video recordings, and when available, download information from the vehicle’s event data recorder to determine speed, throttle position, evidence of braking, and other variables. These are labor intensive cases but the investigation is critical in determining whether or not criminal charges are warranted.

And we have had many successes:

- In November 2013, Steve Drappel was convicted after trial of Vehicular Manslaughter and other charges for driving a tour bus while intoxicated and killing a pedestrian in midtown. He was sentenced to 1-to-4 years in prison.
- In October of last year, Argelis Alcantara was convicted after trial of Vehicular Manslaughter and other charges for fatally striking a pedestrian in Washington Heights. He was sentenced to serve 2-to-6 years in prison.
- And in September, Joseph Darlington was convicted by a jury of Aggravated Vehicular Assault and other charges for a 2012 crash on the Lower East Side that left two pedestrians critically injured. He was sentenced to serve 2-to-6 years in prison

These cases are just a few examples of our successful vehicular crime prosecutions. But as DA Vance says often, a crime prevented – in this case we could say, “a crash prevented” – is far better than one prosecuted.

Given all of the roadblocks we face, prosecutors have to be forward thinking in our approach to both prosecution and prevention. Recognizing that we all have an investment in the goals of Vision Zero, it’s important that we focus on ways in which we can contribute to preventative measures.

According to statistics from DCJS and NYPD, between 2008 and 2012, 54% of all collision fatalities in New York City involved a pedestrian.^v And, while the number of people killed in motor vehicle collisions has actually remained fairly steady City-wide, *pedestrian* fatalities in the City climbed 23.5% last year, from 136 in 2012 to 168 in 2013, according to the NYPD.^{vi}

So what can we do? Is there anything that we, as prosecutors, can do that is consistent with both the goals of Vision Zero and sound public policy?

Install More Speed Cameras

According to the Vision Zero report, “speeding cars are the primary cause of traffic fatalities.”

As you know, DA Vance strongly supported and lobbied Albany to pass the current pilot program allowing for the installation of speed cameras near city schools. This program should be on the table for significant expansion. Cameras have a deterrent effect on speeding and District Attorney Vance has been a long-standing proponent of speed cameras to augment existing police resources. Cameras do not replace or reduce the number of police officers, as some have argued – rather, cameras are an inexpensive and efficient way to add to our safety.

Look at the numbers: In 2013, NYPD wrote 83,202 summonses for speeding.^{vii} There are limited officers available for enforcement, and if technology can supplement those efforts, then it should be implemented.

Provide Resources for More Police Investigations

We applaud Commissioner Bratton’s decision to increase staffing in the Highway Patrol and the Collision Investigation Squad. One of the key elements to affect traffic enforcement is a visible presence of uniformed members of the Highway Patrol on our highways and streets. While we were pleased that last August the NYPD began to investigate every collision that results in death or “*critical*” injury, that is not how the statute reads. We would like to see the Collision Investigation Squad respond to all crash scenes where a death or “*serious physical injury*” occurs because *serious physical injury* is one of the statutory elements necessary to support criminal vehicular charges. As I said earlier, we investigate every crash that the Collision Investigation Squad responds to in Manhattan. A thorough investigation of all of these crashes is

essential for us to make an independent decision of whether criminal charges are warranted based on the evidence and the law.

NYPD needs the resources so that they can have a higher visible traffic-enforcement presence. Drivers, bicyclists, and pedestrians must see, on a daily basis, that enforcement and investigation is a priority in this city.

Eliminate the 180 Day Requirement (CPL 30.30 Speedy Trial) for Vehicular Charges

Prosecutors agree that defendants have a right to a speedy trial. Homicides, which are labor-intensive investigations and complicated cases to prosecute, have long been an exception to the speedy trial requirement. Yet homicides caused by automobiles are the only homicides in New York that are still subject to speedy trial requirements. As a point of fact, cases sometimes cannot be brought because we cannot complete a proper investigation in the statutory time frame.

Vehicular homicides should be held to the same standard as all homicides. A thorough investigation prevents improper charging of some, while also giving prosecutors the time needed to develop an appropriate criminal case where supported by the evidence.

That said, we are very proud of the significant improvement we have made in reducing dismissals in DWI cases because of statutory time limits. Speedy trial dismissals in DWI cases in our office decreased an impressive 93% from 2009 to 2013.

Blood Draw

At the scene of a crash, the only time blood can be drawn to determine intoxication is when there is a death or serious physical injury *and* there is probable cause to show that the driver was intoxicated or under the influence of drugs. Only in those limited circumstances can prosecutors obtain a search warrant from a judge to compel a blood draw.

Getting a search warrant in the middle of the night means waking up a judge, driving to the judge's home, driving to the hospital, and waiting for the medical professional to see the defendant and take the blood. That process can easily take 4-8 hours. Alcohol and drugs are continuously metabolized by the human body from the moment they enter the blood stream. During the time that it takes to obtain and execute a search warrant, the levels of alcohol or drugs in the blood are rapidly dissipating which can seriously impede the chances of obtaining the needed evidence to prove an individual's blood alcohol or drug level.

It seems intuitive that if the driver kills someone or causes serious physical injury, there should be a mandatory blood draw from that driver. Waiting to establish probable cause and get a warrant wastes valuable time and allows the blood alcohol and drug content to diminish. We need your help to persuade Albany to bring New York up to the level of many other states regarding mandatory blood draws for drivers who kill or cause serious physical injury.

Include Representatives of the District Attorney's Offices at TrafficStat

Like CompStat, the NYPD conducts a weekly TrafficStat meeting focusing on a different borough each week. TrafficStat is the perfect opportunity to learn what is happening in a particular borough. All of the training sergeants from that borough are present. Previously, representatives from the five District Attorney's Offices were not included in these meetings. Moving forward, including a representative from the District Attorney's offices will allow prosecutors to point out issues that we are seeing in the investigation and prosecution of cases in our respective boroughs. For instance, unlike the NYPD Highway Patrol, most precincts in Manhattan do not regularly calibrate their preliminary breath testing instruments. As a result, we cannot seek to introduce the readings from these instruments at trial. Implementing procedures to make sure that these instruments are calibrated on a regular basis in each precinct would strengthen our criminal prosecutions.

Plan and Implement a Comprehensive Approach to Vision Zero

Some roads are less safe than others. Much like other crime “hot zones” we can, and should, target these high-risk areas for immediate remediation. The Manhattan DA’s Office has had measurable success in reducing violent crime through our Intelligence-driven prosecution approach and we are ready to apply our data-driven model to vehicular crime.

But, if we are serious about achieving the goals of Vision Zero, everybody needs to be at the table to create sound policy. Include the District Attorneys on the Task Force that is working on Vision Zero. Currently, not a single member from any one of the five District Attorney’s Offices has been invited to attend. We are the only law enforcement agency that is missing from the discussion.

At the same time, send representatives from Vision Zero to the partnerships that already exist in this area. The five District Attorney’s Offices have quarterly meetings at the NYC Department of Transportation Offices. Representatives from Vision Zero are welcome to attend. Currently, representatives of the Highway Patrol, the Collision Investigation Squad, training officers from the Intoxicated Drivers Testing Unit and the NYPD laboratory all meet and discuss intoxicated and drug driver issues at these quarterly meetings.

Vision Zero notes that we have successfully driven down crime and, as a result, have had a profound public health impact. In particular, the report stresses that traffic related deaths are on par with or exceed gun homicides. The DAs have had a large role to play in reducing gun crime in New York – our office alone has indicted 13 violent gangs since 2010 and taken more than 550 guns off of Manhattan streets. The link between public safety and public health is inextricable and it is clear that both law enforcement and public health experts need to be at the table as the city moves forward.

Thank you for the opportunity to testify today and to be a part of the ongoing conversation about traffic safety in New York City.

ⁱ See *People v. Cabrera*, 10 N.Y.3d 370, 375 (2008); *People v. Boutin*, 75 N.Y.2d 692, 696 (1990).

ⁱⁱ *Cabrera*, 10 N.Y.3d at 376; *Boutin*, 75N.Y.2d at 692.

ⁱⁱⁱ Cf. *People v. McGranham*, 913 N.E.2d 936 (2009).

^{iv} Penal Law Section 10.00(10)

^v Bill Sanderson, *'Epidemic' of Fatal Crashes: Narrow Legal Standard Means Drivers are Rarely Charged*, The Wall Street Journal (Feb. 10, 2013), <http://online.wsj.com/news/articles/SB10001424052702303465004579322441555410428>.

^{vi} *Id.*

^{vii} City of New York Police Department, Traffic Reports: City Wide Moving Summonses, www.nyc.gov/html/nypd/html/traffic_reports/traffic_summons_reports.shtml.