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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF:

MONAGHAN,

Appellant,

NO. 101

-against-

SCHROEDER,

Respondent

20 Eagle Street
Albany, New York
November 18, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is
2 Matter of Monaghan v. Schroeder.

3 MR. SILLS: Good afternoon. I'd like to reserve
4 two minutes for rebuttal, please.

5 CHIEF JUDGE WILSON: Yes.

6 MR. SILLS: My name is Eric Sills, and I
7 represent John Monaghan, the petitioner in this action. I
8 think it's fair to say that prior to respondent's response
9 to the petition in this case, no one who practices in the
10 field of DWI law would have ever dreamt that CPLR Section
11 2308(b) could possibly apply to a DMV chemical test refusal
12 hearing. It literally had never come up, ever. It's fair
13 to say that I have immersed myself in this field for close
14 to thirty years. I know all the other relevant people who
15 have done the same.

16 JUDGE CANNATARO: But Counsel, 2308 doesn't apply
17 to DMV enforcement hearings. It applies to subpoenas.
18 It's a ~~-----it's_a~~ mechanism for enforcing a subpoena.

19 MR. SILLS: Correct.

20 JUDGE CANNATARO: So why wouldn't that, you know,
21 any subpoena issue - - - assuming you're talking about
22 subsection B, any - - - any subpoena issued by any attorney
23 in New York could be subject to one of those proceedings.

24 MR. SILLS: Well, the first three words of the
25 Section 2308(b) are, unless otherwise provided, and in this

1 case it is otherwise provided.

2 JUDGE CANNATARO: There's a subpoena enforcement
3 mechanism at the DMV?

4 MR. SILLS: There's - - - no, what's provided is
5 that the only that the CPLR in general does not apply to
6 these hearings. It specifically says that. It
7 specifically says that - - -

8 CHIEF JUDGE WILSON: Well, it doesn't say it
9 doesn't apply, right? It says it doesn't have to be
10 applied, something to that effect?

11 MR. SILLS: It says it's not binding. That's the
12 actual language.

13 CHIEF JUDGE WILSON: Yeah.

14 MR. SILLS: But then - - -

15 CHIEF JUDGE WILSON: Yeah, but it doesn't mean -
16 - - right.

17 MR. SILLS: - - - later down in the section it
18 does say specifically that the provisions of those laws
19 regarding - - - the laws being the CPLR and the CPL,
20 regarding forms of pleading, motion, practice, discovery
21 procedures and other matters are not applicable in
22 accordance with this part. So anyone reading this and
23 anyone who practices and hears DMV judges constantly remind
24 you that they are not bound, you know, that the CPLR
25 doesn't apply, and you can't invoke these rules of the CPL

1 or CPLR, and you're constantly over - - -

2 JUDGE CANNATARO: But doesn't that mean to affect
3 the conduct of proceedings themselves? If ~~if~~
4 ~~if~~ a litigant were to invoke the CPLR in the course of a
5 hearing in front of the DMV to say, you know, you can't
6 admit this or you can't admit that, or that's a good
7 question. That's not a good question. I could understand
8 that. But again, you know, they sort of teach you in New
9 York procedure that you have actions and you have special
10 proceedings. And to me, this is more like a special
11 proceeding to enforce a subpoena, quite separate and apart
12 from what's going on at DMV, other than the fact that the
13 person sought to be produced is going to be a witness in a
14 DMV hearing.

15 MR. SILLS: That said, Your Honor, if in your
16 practice, in, you know, in the real world, practice in
17 front of these judges, if when you subpoena the officer and
18 the officer doesn't show, you win, and everyone you know -
19 - -

20 JUDGE HALLIGAN: Where ~~where~~ can we see - -
21 -

22 JUDGE SINGAS: What's the authority for that?

23 MR. SILLS: I'm sorry?

24 JUDGE SINGAS: What's the authority for that?

25 MR. SILLS: The authority for that was this



1 Matter of Dale Appeals Board decision that is not written,
2 you know, as articulately as one might like, but has always
3 been read to mean what I'm saying, which is, if, you know,
4 Gray v. Adduci said you can't complain if they don't show
5 because you could have subpoenaed them. And so it's always
6 then been taken that if they don't show - - - and ~~and~~
7 keep in mind twice, because for some reason they're allowed
8 to not show the first time and inconvenience - - -

9 JUDGE SINGAS: I know, but all of that seems to
10 be you're relying on practice and what you think people are
11 understand to be the law. But we don't operate like that.
12 Like, we need rules, and we need to look at statutes, and
13 we look at case law, and I'm asking you what your authority
14 is for saying that these cases should be dismissed as
15 opposed to just enforcing the subpoena.

16 MR. SILLS: So let's assume that respondents are
17 correct. And let's assume that the court believes that
18 2308(b) does apply to these hearings. And it's ~~and~~
19 ~~it's~~ been misread for decades, then, you still - - -

20 JUDGE CANNATARO: I'm sorry, what's - - - what's
21 been misread for decades - - -

22 MR. SILLS: That - - -

23 JUDGE CANNATARO: - - - 2308?

24 MR. SILLS: 2308(b) where ~~where~~ DMV has for
25 decades been dismissing these hearings where you subpoena

1 the - - -

2 JUDGE HALLIGAN: But again, what we're struggling
3 with, I think, is how - - - how can we take note of what
4 you're telling us? I think a citation to an administrative
5 decision from 1997, we would expect to see more of a
6 demonstration that that is the settled practice than simply
7 this. And if you're relying on something beyond Dale, if
8 I'm pronouncing it correctly, it would be helpful to know
9 what that is.

10 MR. SILLS: Well, page 156 of the record is a
11 2017 decision that reaches the same conclusion.

12 CHIEF JUDGE WILSON: But those conclusions, if
13 I'm getting it right, are that if you - - - certainly in
14 Dale, if you have failed to subpoena the officer and the
15 officer doesn't show up, you lose. No?

16 MR. SILLS: No, that's not correct, Your Honor.

17 CHIEF JUDGE WILSON: That's what - - - in - - -
18 in Dale, there was not a subpoena, no?

19 MR. SILLS: No. In - - - in Gray v. Adduci - - -

20 CHIEF JUDGE WILSON: Yeah.

21 MR. SILLS: - - - if you show the first time and
22 the officer doesn't, they adjourn. And then you come back,
23 and if the officer doesn't show, they can go forward on the
24 papers.

25 CHIEF JUDGE WILSON: Right.

1 MR. SILLS: And but you don't, like, lose, like,
2 you - - - you can win - - - okay, but - - -

3 CHIEF JUDGE WILSON: Well, the papers presumably
4 have the evidence, right, yeah.

5 MR. SILLS: But you just would have to go on a
6 hearsay - - -

7 CHIEF JUDGE WILSON: Right, but the thing that is
8 not resolved, I think, right, by either Gray or by Dale or
9 anything, is whether you need after having subpoenaed the
10 officer - - - the officers, administratively, to go and
11 enforce that. Now, you say that can't be done, but let's
12 suppose for a moment that you can actually use 2308(b) to
13 subpoena an officer. Then, it seems to me the question
14 that you need to answer is, is that is that violative of
15 due process? In other words, why would it be too much of a
16 burden to have to go get a judicial subpoena to enforce - -
17 - judicial order to enforce a subpoena?

18 MR. SILLS: Because, quite frankly, at these
19 hearings, most of the people who go to these hearings don't
20 have an attorney or their attorney is the public defender
21 who oftentimes, if not most of the time, says this is a
22 civil matter and we don't represent you there. So most of
23 the time you have people who don't have an attorney at all.
24 It happened - - -

25 CHIEF JUDGE WILSON: Well, how would those people

1 know to get the administrative subpoena in the first place?

2 MR. SILLS: They wouldn't. So they're already
3 being burdened, and their right of cross-examination is
4 already being unfairly limited, but that was decided in
5 Gray v. Adduci that that's okay.

6 JUDGE HALLIGAN: You know, there are a number of
7 Appellate Division decisions that I read in which other
8 kinds of determinations, for example, disability retirement
9 benefits or unemployment insurance benefits. There's a
10 hearing, and there is a subpoena, and the Appellate
11 Division says you have to go enforce that yourself. Why
12 would it be different for a driver's license revocation or
13 suspension than for those benefits? Or is it your view
14 that those are wrongly decided too?

15 MR. SILLS: No, it's meaningfully different. As
16 I point out in my brief, if you look at the regulations at
17 issue in each of those cases, those regulations are
18 meaningfully different than 15 NYCRR Section 127.11. Those
19 regulations, at a minimum, apply to subpoenas should be
20 handled in the manner pursuant to the civil practice law
21 and rules, generically.

22 JUDGE HALLIGAN: I think that goes to whether you
23 think that that the enforcement mechanism is applicable.
24 But I'm saying if we conclude it is available, then why
25 would the nature of the interest be different such that a

1 different rule would apply?

2 MR. SILLS: The nature would be different also,
3 because in a typical hearing, the person who's being
4 subpoenaed is a civilian and not a police officer, whereas
5 at a DMV hearing, a refusal hearing, it's almost always a
6 police officer.

7 JUDGE HALLIGAN: So you have to enforce against a
8 civilian, but not a police officer?

9 MR. SILLS: Well, I would say that as an officer
10 of the law, a police officer is obligated to comply with a
11 subpoena. Like, it's kind of outrageous, really, that
12 someone who is - - -

13 CHIEF JUDGE WILSON: That was Chief Judge K's
14 point in dissent, but it was in dissent.

15 MR. SILLS: Correct. And it was a four to three
16 dissent. And it could be decided, you know, either that we
17 should revisit this and go the other way, or it could be
18 decided that this is even an extension of the next step.
19 Like, we're going to shift the goalposts even further,
20 where even though you did what Gray v. Adduci said you
21 should do, and you did try to exercise your rights by
22 subpoenaing the officer, then the officer can just
23 literally blow off the subpoena.

24 And now you have to run to supreme court, which
25 like, you know, no one would quite frankly know how to do

1 who practices in this field. We'd all have to learn it. I
2 mean, it's not that you can't learn new things as you get
3 older, but it's never come up because DMV - - - the reason
4 we know that what I'm saying about how it's always been
5 done is accurate is because there's never been a published
6 decision, ever, where this 2308(b) has ever applied at a
7 DMV hearing, whereas the first time it's ever been up - - -
8 been brought up, it comes all the way to the Court of
9 Appeals.

10 So it's inconceivable that DMV had not been
11 dismissing, as I say, these hearings when - - - when you
12 subpoenaed the officer and they didn't show. And because
13 that's just how it - - - so DMV had always taken the
14 position that I'm taking. It's just that Mr. Demuth, very
15 creatively, because he has a broader knowledge base than
16 criminal defense attorneys, he's the one who must have
17 said, wait a minute. How come they're not applying 2308(b)
18 but - - - because no one ever dreamed of it. No - - - I've
19 never heard an ALJ mention it. The appeals board's never
20 mentioned it. I've read, it's fair to say, every - - -

21 JUDGE RIVERA: Yeah, but then the question again
22 is so not in the imagination of DMV or those who practice
23 before it, but nevertheless, there's no barrier, no
24 obstacle under the statute - - -

25 MR. SILLS: But however, let's say - - -



1 JUDGE RIVERA: - - - to require it.

2 MR SILLS: Let's assume that's correct. And that
3 and that really, everyone's been wrong, including DMV for
4 forty or fifty years, and that we really need to change it.
5 This court has a well-settled doctrine that if there's been
6 a precedent in place, the agency doesn't have to follow it,
7 but they have to explain why they're not following it.
8 Otherwise, it's arbitrary and capricious and requires
9 reversal. So that doctrine, so even if you say - - -

10 JUDGE RIVERA: Well, other than saying it's never
11 happened before, there's not really a record that shows
12 that indeed there has been a specific approach,
13 interpretation, course of action, and they have now
14 deviated from that.

15 MR. SILLS: Well, I would say the lack of this
16 ever coming up in a published case is precedent.

17 CHIEF JUDGE WILSON: Well, let's see what Mr.
18 Demuth says about that.

19 MR. SILLS: Okay.

20 MR. DEMUTH: May it please the court. Hello,
21 Your Honors. Owen Demuth, on behalf of the respondents.
22 Your Honors, all the Department is really saying here is
23 that when a motorist subpoenas a police officer at a
24 chemical test refusal hearing, and the officer doesn't
25 appear, the remedy, and he has a remedy right in the

1 statute, is not compulsory dismissal on due process grounds
2 of - - - of the entire hearing, but rather - - -

3 CHIEF JUDGE WILSON: Can we start with the point
4 we were just on, which is what has the practice been?

5 MR. DEMUTH: The practice has been, and I think
6 what that highlights, Your Honor, is the fact that the
7 majority of his claims are not preserved. They're not
8 preserved on - - -

9 CHIEF JUDGE WILSON: I was trying to ask a
10 different question, a factual question. What is the
11 practice of DMV been when someone - - - is his
12 representation correct?

13 MR. DEMUTH: No.

14 CHIEF JUDGE WILSON: Why not?

15 MR. DEMUTH: It's not correct. The field
16 delivery violation claim is simply not correct. And had it
17 been preserved, had it been raised, it could have been
18 raised before the appeals were; it could have been raised in
19 supreme court. Right. But it's not correct. If we had
20 the opportunity to respond in supreme court, we would have
21 put in - - - we would have had the opportunity, as noted in
22 Talero, to make a factual showing and to take legal counter
23 steps to show that there was no violation.

24 JUDGE HALLIGAN: And what would that showing have
25 been? Is it not the established practice? I understand -

1 - -

2 MR. DEMUTH: Yes.

3 JUDGE HALLIGAN: - - - it's outside the record.
4 I'm just asking you to explain to us.

5 MR. DEMUTH: Yes, right, not the established
6 practice, Your Honor, that there was no - - - contrary to
7 counsel's testimony about his experience aside, there was
8 no established practice. There was no - - - there was no
9 agency wide precedent.

10 JUDGE TROUTMAN: Is there any appellate case law
11 applying CPLR 2308 to those hearings?

12 MR. DEMUTH: Not to a chemical test refusal
13 hearing.

14 JUDGE TROUTMAN: Correct.

15 MR. DEMUTH: It's applied in a wide variety of -
16 - - of other - - -

17 JUDGE TROUTMAN: Specifically to - - -

18 MR. DEMUTH: But not specifically to this. But
19 you know, again, that's a policy argument he makes that
20 there's something special about a chemical test refusal
21 hearing that precludes that application.

22 JUDGE TROUTMAN: Aren't these hearings are
23 supposed to be prompt? Would that not be a reason why
24 they've not been applied before?

25 MR. DEMUTH: I'm sorry. Prompt?

1 JUDGE TROUTMAN: The hearings are supposed to be
2 prompt. If you've got a - - - you issue a - - - you go - -
3 - you get the subpoena, you get it served. You're then
4 going to lay on a layer that you've now got to bring
5 another proceeding in supreme court. Doesn't that slow
6 down a process that's supposed to take place expeditiously?

7 MR. DEMUTH: Well, not so much as you might
8 think, Your Honor, because the Department's regs actually
9 speak directly to that. 127.7(e)(3) provides that if the
10 motorist seeks an adjournment for the purposes of getting a
11 subpoena or for any other reason, you know - - -

12 JUDGE TROUTMAN: But you - - - you've sought a
13 subpoena, the officer just chose not to abide by it.

14 MR. DEMUTH: Right.

15 JUDGE TROUTMAN: So why should you have to go to
16 supreme court for enforcement?

17 MR. DEMUTH: Well - - - well, because it's
18 consistent with what this court held in Gray. It's
19 consistent with the CPLR. There's really no reason for
20 precluding application of 2308(b) here. And I don't think
21 - - -

22 JUDGE HALLIGAN: Well, it's - - -

23 MR. DEMUTH: - - - it's - - -

24 JUDGE HALLIGAN: - - - it's an extension of Gray,
25 I think. On another front, has Mr. Monaghan's license been

1 restored, if you know?

2 MR. DEMUTH: My understanding is it is, that the
3 underlying criminal matter has been dismissed. And I think
4 counsel could - - -

5 JUDGE HALLIGAN: I'm sure. I'm sure. Yes, and
6 we can ask, but if that's correct, what's then before us
7 that remains? It looked to me like Mr. Monaghan asked for,
8 you know, declaratory relief and for reinstatement of his
9 license. Is there still a live controversy if his license
10 has been restored?

11 MR. DEMUTH: Well, the suspension, the revocation
12 would still be on his record.

13 JUDGE HALLIGAN: So that's what would be at
14 issue?

15 MR. DEMUTH: I believe that's still - - -

16 JUDGE HALLIGAN: Okay.

17 MR. DEMUTH: - - - you know, would prevent this
18 from being moot.

19 JUDGE HALLIGAN: Thank you.

20 MR. DEMUTH: But Chief Judge Wilson, I think it
21 was you would ask what the practice is, and this is what we
22 would have shown. First, we would have attached to our
23 opposition in supreme court if we had the opportunity,
24 something called an ALJ safety hearing manual that was
25 implemented in 2018, three years before the hearing in this

1 case, which is in 2021. And that was prepared specifically
2 for use by the ALJs in conducting chemical tests refusal
3 hearings. And the manual expressly contemplates that
4 subpoena should be issued under CPLR 2302 and enforcement
5 sought under 2308(b), so it directly counters the claim.
6 Under Talero this is - - -

7 JUDGE SINGAS: Yeah, but what's the argue - - -

8 MR. DEMUTH: - - - something we could have we
9 could have - - - we could have cured.

10 JUDGE SINGAS: Is your position that the practice
11 is that if an officer doesn't show up after the second
12 time, the case is not dismissed. Is that what you're
13 telling us? You think that that's not the practice, or is
14 that the practice?

15 MR. DEMUTH: It's not the practice. And to the
16 extent that it might have been, there might have been ALJs
17 doing that before the manual took effect in 2018, my
18 understanding is that there were some dismissals, but it
19 wasn't - - -

20 JUDGE SINGAS: It wasn't a routine?

21 MR. DEMUTH: - - - any formal rule. It was - -
22 -

23 JUDGE SINGAS: No, I get that it wasn't pursuant
24 to any rule. I'm just saying, like, what was the practice
25 and what did people understand that practice to be when

1 they came before an ALJ in this type of hearing, that if
2 the cop didn't show up on the second time, that this case
3 would get dismissed?

4 MR. DEMUTH: Well, no, actually, the Department's
5 regs are directly counter to that. And these were
6 regulations that were in effect at the time. That's
7 127.9(c), which we do cite in our brief. That provides - -
8 - and I think this directly counters the field delivery
9 violation. It says if there's a first nonappearance by the
10 police officer, then there must be an adjournment. If
11 there's a second one - - -

12 JUDGE CANNATARO: An adjournment to get a
13 subpoena? I'm sorry, go ahead.

14 MR. DEMUTH: Or just - - - just an adjournment in
15 general to, you know, it certainly - - - he has the
16 opportunity to do it at that point or just because just to,
17 you know, see if the officers will show up again.

18 JUDGE CANNATARO: And what happens, I mean, I
19 know you're talking about - - - we keep asking about custom
20 and practice, and you keep talking about regs, but let's
21 stick with regs.

22 MR. DEMUTH: Well, I'm trying to explain what we
23 would have put in about the custom and practice. And the
24 first one would have been the manual and - - - which is - -
25 - which is a rule which does apply to all the ALJs and that

1 was in effect - - -

2 JUDGE CANNATARO: I'm just not sure I understand
3 the connection between the manual and custom and practice.
4 If your adversary gets up and says the custom and practice
5 is if the officer doesn't show up after they've been
6 subpoenaed, the hearing is dismissed. That - - - that's
7 the practice that that - - - you know, is most striking in
8 his presentation. I don't think a manual answers that
9 question.

10 MR. DEMUTH: I believe it does. Well, at least
11 again outside the record, this whole case is just awash in
12 extra record materials, which is unfortunate.

13 JUDGE SINGAS: But I don't think that that's his
14 position. His position is that the first time you get an
15 adjournment, but the second time it was customary that this
16 case would be dismissed. And all I want to know is that -
17 - - is that your experience? Is that true, or is that not
18 true?

19 MR. DEMUTH: No, my experience again, what I have
20 learned in my - - - my understanding of what DMV has done
21 is since 2018, that has certainly not been the practice.

22 JUDGE TROUTMAN: Before that?

23 MR. DEMUTH: Before that, there were ALJs not
24 pursuant to any field delivery precedent or rule, but there
25 were - - -

1 JUDGE TROUTMAN: And he explained that he'd been
2 - - - he's been practicing for a number of years. So both
3 things can be true. You're saying 2018, even if it did
4 happen before, it changed?

5 MR. DEMUTH: It did.

6 JUDGE TROUTMAN: That there were no longer
7 dismissals - - -

8 MR. DEMUTH: And to an extent, it happened
9 before. I think it's important he's making a field
10 delivery claim. There has to be - - -

11 JUDGE TROUTMAN: What do you say about due
12 process? I subpoenaed somebody - - - this isn't one where
13 he never even tried to subpoena the witness.

14 MR. DEMUTH: Right.

15 JUDGE TROUTMAN: And quite frankly, one would
16 normally expect a law enforcement officer to appear when
17 they're duly served with a subpoena.

18 MR. DEMUTH: Right.

19
20 JUDGE TROUTMAN: What about his due process
21 rights?

22 MR. DEMUTH: Well, we're saying that before you
23 can really state that there is a process. You know, it's
24 not just the subpoena issuance statute, but it's also
25 provided by the enforcement statute. And all we're saying

1 is that - - - before he can say - - -

2 JUDGE TROUTMAN: It's all on the petitioner; the
3 petitioner has got to do all of that.

4 MR. DEMUTH: Right.

5 JUDGE TROUTMAN: So there's no responsibility on
6 the - - -

7 MR. DEMUTH: Well - - -

8 JUDGE TROUTMAN: - - - on the on the part of
9 anyone else - - -

10 MR. DEMUTH: Yes. A couple points - - -

11 JUDGE TROUTMAN: - - - even though - - - even
12 though the administrative judge can take away your license,
13 they just got to keep pushing the rock up the hill, even if
14 it keeps falling back. They've all these extra things?

15 MR. DEMUTH: Well, I don't know if it's an extra
16 thing. It's just one additional step beyond what was
17 announced in Gray.

18 JUDGE TROUTMAN: A subpoena normally you - - -

19 MR. DEMUTH: The ALJ has no power to - - -

20 JUDGE TROUTMAN: What about the fact that when
21 you have a subpoena that's doing the - - - in normal
22 trials, normal civil practice, criminal practice, you
23 subpoena someone. There is an expectation. Now, in
24 criminal case, of course, the judge is already there and
25 can issue a warrant. But you're saying in these

1 proceedings, even after you do the subpoena, if even though
2 the officer hasn't shown up twice, even though unlike in
3 some of the other instances where there was no subpoena,
4 there was actually a subpoena. They still don't show up
5 after the second time. It's still incumbent on the
6 motorists to now go to another forum; that is what you're
7 saying is - - -

8 MR. DEMUTH: We're saying that is the plain
9 meaning of 2308(b), and it was incorporated by the
10 Department's regulation - - -

11 JUDGE TROUTMAN: And not violative of - - -

12 MR. DEMUTH: - - - and part of that - - -

13 JUDGE TROUTMAN: And not violative of due process
14 to do it that way?

15 MR. DEMUTH: It's - - - it's not pro - - - it's
16 not violative. It balances, I believe, just by saying you
17 need - - -

18 JUDGE RIVERA: The license is reinstated - - -

19 MR. DEMUTH: - - - to go this additional step.

20 JUDGE RIVERA: The license is reinstated once the
21 officer doesn't show up the first time?

22 MR. DEMUTH: No, the first time, it's just an
23 adjournment. There's a mandatory - - -

24 JUDGE RIVERA: Okay. So the license is still not
25 reinstated at that point. Is it ever reinstated out - - -

1 MR. DEMUTH: If - - - if - - -

2 JUDGE RIVERA: - - - at all during this period?

3 MR. DEMUTH: If - - - I - - - I think, I was
4 trying to mention this before, the regs do provide that if
5 they seek an adjournment to either get a subpoena or
6 enforce it, the ALJ has an opportunity. It's a
7 discretionary exercise, but the ALJ has the opportunity to
8 reinstate the license while he goes to supreme court - - -

9 JUDGE RIVERA: Is that what happened here?

10 MR. DEMUTH: - - - to get the subpoena or issue
11 it in the fir - - -

12 JUDGE RIVERA: Is that what happened here? Was
13 it reinstated when he went to get the subpoenas?

14 MR. DEMUTH: No, he - - - so he sought the
15 subpoenas after the first adjournment, and he never asked
16 for an adjournment in order to enforce.

17 CHIEF JUDGE WILSON: So when we think about the
18 benefit to the state of having the extra requirement of
19 enforcing the subpoena and the relative burden on the
20 motorist to go get the subpoena, how do those things - - -
21 for a due process analysis, how do we compare those things?

22 MR. DEMUTH: Right. Well, I think it's a - - -

23 CHIEF JUDGE WILSON: What does the state get out
24 of it? I guess is what I'm asking. I can imagine what the
25 burden is.

1 MR. DEMUTH: Well, I think it's a reasonable
 2 balance, and - - - and I think it's important - - - yes,
 3 yes, Gray didn't talk about what happens if the subpoenas
 4 actually issued but not complied with. But the CPLR is - -
 5 - that's why people do this every single day in supreme
 6 court actions administrative to - - - to enforce subpoenas
 7 - - -

8 CHIEF JUDGE WILSON: And that goes to - - -

9 MR. DEMUTH: This is not that - - - that
 10 burdensome a step.

11 CHIEF JUDGE WILSON: - - - that goes - - - that
 12 goes to the burden. I'm asking particularly because I can
 13 imagine what the burden is.

14 MR. DEMUTH: Right.

15 CHIEF JUDGE WILSON: I've had to go enforce
 16 subpoenas sometimes myself. What's the benefit to the
 17 state, as you would articulate it, in having that extra
 18 requirement that you go out and get your subpoena enforced?

19 MR. DEMUTH: Well, it's a benefit not only to the
 20 state, because I think it's a nice balance between the
 21 liberty interests the driver has and maintaining his
 22 driver's license. But also, as you said, in Endara-
 23 Caicedo, the interest in letting these proceedings be
 24 completed, so we prevent the grisly toll that drunk drivers
 25 take on the road.



1 So I think that's a nice middle ground saying,
2 okay, look, you - - - you issued the subpoena, but now
3 we're just saying you need to - - - it's a - - - you know,
4 a fairly pro forma application. All they do is they go to
5 supreme court. There's - - - they're not seeking contempt.

6 JUDGE HALLIGAN: Does - - -

7 MR. DEMUTH: They're not seeking the sheriff to
8 get involved.

9 JUDGE HALLIGAN: But does the - - -

10 MR. DEMUTH: They're just asking - - -

11 JUDGE CANNATARO: But hold on, can I - - - I'm
12 sorry. Can I - - - just a point of order on that last
13 thing you said. The remedies under CPLR 2308(b), you know,
14 unlike (a) it doesn't call it a contempt of court, but the
15 remedies are largely the same. They include costs to the
16 successful litigant. They include a fine to the
17 noncompliant subpoenaed individual. And they even include
18 the possibility of the court issuing a warrant to have a
19 sheriff bring the person before the body that they're
20 sought for. Is that really what DMV wants?

21 MR. DEMUTH: No.

22 JUDGE CANNATARO: Do they want judges issuing
23 warrants?

24 MR. DEMUTH: No, no. And that's the - - - I'm
25 glad you pointed that out, Judge Cannataro, because that is

1 the difference between a judicial subpoena and - - - and
2 2308(b), a nonjudicial subpoena, because the first thing
3 you do for - - -

4 JUDGE CANNATARO: No, but the warrant requirement
5 is in 20 - - - the warrant option is in 2380(b).

6 MR. DEMUTH: It only happens if the - - - all
7 we're saying that the only additional step the motorists
8 have to take here is to get that order compelling
9 compliance. That - - - I think that's attached to a \$50
10 cost order, but there's nothing else. If you - - - if a
11 judge issues a subpoena and it's disobeyed, you can go and
12 get everything. You can get contempt, you can get fines,
13 you can get the sheriff involved. That's not here.

14 JUDGE CANNATARO: Yeah - - -

15 MR. DEMUTH: All it would be would be an order
16 compelling - - -

17 JUDGE CANNATARO: No, but what I'm saying is
18 2308(b) includes the same remedies. I could envision a
19 judge - - - look, I was a trial court judge. I know when
20 you enforce subpoenas. Usually the first order is you must
21 comply with this subpoena. But I'm saying under this
22 statute as written, a judge could conceivably, if they
23 thought it was justified, not just write an order that says
24 comply with the subpoena, they could have - - - they can
25 issue a warrant to the sheriff to bring the person before

1 the body that seeks them. And that seems like a very sort
2 of extreme thing to do to a state trooper. And I'm just
3 confirming that DMV is open to that possibility.

4 MR. DEMUTH: No, I don't read the - - - the first
5 step of actually getting that order compelling compliance,
6 I don't see - - - I - - - from what I read about in the
7 practice commentary is that does not permit the judge to
8 actually go that far when you when you've just made - - -
9 asked for the order compelling compliance. Yes, if - - -
10 if there's noncompliance, all that's on the table.

11 But I'd like to make clear that we - - - all
12 we're saying is, you know, we just would like the motorist
13 to complete the process available to them by going that
14 additional step. If there was still - - - if for some
15 reason this police officer still did not show up, we - - -
16 we would want the hearing closed unless there was some
17 extraordinary circumstances, majority of those cases, that
18 would be the end of the matter.

19 JUDGE HALLIGAN: Does the answer to the due
20 process question, in your view, get resolved as a bright
21 line rule? In other words, yes, the requirement to enforce
22 the subpoena violates due process; no, it doesn't, or is it
23 something that should be decided on a case-by-case basis
24 depending on what opportunity there is to cross examine? I
25 ask because there are some Appellate Division cases which



1 suggest you look on a case-by-case basis. What else is in
2 the record and so forth?

3 MR. DEMUTH: Yeah, and a lot of this will be on a
4 - - - because of the discretion given to the ALJs. They -
5 - - they have - - -

6 JUDGE HALLIGAN: I'm not asking for a bright line
7 rule one way or the other that enforcement - - - requiring
8 enforcement does or doesn't violate due process.

9 MR. DEMUTH: Yeah, I guess to the extent that I'm
10 seeking a bright line rule, it's not a particularly novel
11 one. It would just be, you know, consistent with the way
12 the Appellate Divisions have already read 2308(b) and
13 different administrative contexts that, you know, if
14 there's noncompliance, you know, you must - - - the process
15 available and the process you need to complete is to go
16 that additional step and get an order, not compulsory
17 dismissal.

18 And I think that's consistent with Gray. It's
19 consistent with CPLR. I mean, that's exactly what that
20 statute is there for. And the Department's regulations do
21 incorporate that contrary to petitioner's argument. This
22 is something that we could have interpreted in supreme
23 court and which would have been entitled to deference. And
24 there's three reasons why. The first is the ALJ has no
25 power to issue or enforce its own subpoenas. That's not in

1 dispute. Petitioner has never disputed that. The ALJ - -
2 - this - - - some agencies do. The Department here in a
3 refusal hearing does not.

4 The second is that 2308(b) states that it applies
5 quote, "unless otherwise provided", in the Appellate
6 Division cases have interpreted that to mean that unless
7 the agency has been given a specific grant of power in
8 either its enabling statute or the regulations, then 2308
9 applies. And in this case there was no specific grant of
10 power, so we default to 2308.

11 And just reading 127.11(a), which is what
12 petitioner relies on for the regulatory argument, I think
13 the most natural reading of that, the most reasonable
14 reading, is that it just excludes application of the - - -
15 of the CPLR as far as it contemplates, you don't need to do
16 formal litigation devices that would happen in a plenary
17 action, such as discovery or motion practice or bills of
18 particulars. They're not applicable to hearings. That's
19 the language.

20 But I think, Judge Cannataro, you touched on it
21 before. That wouldn't necessarily apply to a special
22 proceeding. That doesn't speak to a subpoena enforcement,
23 which - - - which the CPLR provides is done separately in a
24 different venue in supreme court. So I think those
25 regulations and the CPLR itself work in harmony with each

1 other, and they provide - - - and I think it's just - - -
2 as far as the due process argument goes, it's just - - -
3 it's a reasonable balance.

4 You know, we're going - - - we are extending
5 Gray. We're going - - - because Gray didn't have the
6 opportunity to talk about enforcement. But I just think
7 that all we're saying is that he - - - he's not entitled to
8 dismiss the whole thing. He can't - - - he can proceed
9 without. He doesn't have to seek enforcement. He can
10 certainly proceed. And - - - and many times - - - one
11 thing that's important to point out the majority - - -
12 there are about 6,000 of these refusal hearings held every
13 year.

14 The vast majority of them, subpoenas are never
15 issued. And that's for - - - that's by design. That's
16 because the petitioner's attorney makes a tactical decision
17 not to do it, because they hope the officer won't show up.
18 And that gives them the opportunity to try to poke holes in
19 the refusal report. And oftentimes they get dismissed
20 because of that, because sometimes there's boxes that
21 aren't checked out or they're illegible.

22 So - - - so out of the 6000 cases, my
23 understanding, again, something we could have put in a
24 factual showing in the record is that subpoenas are sought
25 in less - - - eight percent or less of these cases. So I



1 think that's kind of important to point out.

2 JUDGE TROUTMAN: So the troopers should easily be
3 able to show up.

4 MR. DEMUTH: I'm sorry?

5 JUDGE TROUTMAN: If they aren't issued that
6 often, it seems odd that the troopers aren't showing up.

7 MR. DEMUTH: Well, you know, that - - - that was
8 actually something that Gray considered. That was - - -
9 that was before the Gray court that, you know, shouldn't -
10 - - shouldn't that be part of the due process claim, the
11 fact that, you know, there - - - there's not - - - and of
12 course, it wasn't enforcement, but it was just - - - there
13 was a non, you know.

14 JUDGE TROUTMAN: It's just an odd argument you're
15 making. You're saying most times they don't want the
16 trooper there, but when they subpoena the trooper and the
17 trooper doesn't come, they - - - that's of no matter
18 either. That just seems odd.

19 MR. DEMUTH: I don't - - - I don't know what I'm
20 saying. I'm just saying that there's an additional process
21 available in the very same article where the issuance
22 statute applies. And that's all we're asking. Before you
23 can state a due process claim and - - - and make a demand
24 that the entire thing be dismissed out right, that you go
25 that additional step. I think that's a reasonable balance

1 between the liberty interest and - - - and the interests
2 that - - - that you stated in Endara-Caicedo.

3 CHIEF JUDGE WILSON: Thank you.

4 MR. DEMUTH: Thank you.

5 MR. SILLS: I would like to clear up a couple of
6 things that I think would be inaccurate before I get into
7 arguments. One would be the license is not restored.
8 Okay. Mr. Monaghan won his DWI case, so he didn't get
9 revoked for that. He was revoked for this. It is still an
10 outstanding revocation.

11 JUDGE HALLIGAN: So he doesn't have a license
12 yet?

13 MR. SILLS: He does not have a license. And long
14 story short, because of his driving record, he will not
15 have a license for a very long time if this case stands,
16 like, a very long time. So he doesn't have his license.

17 JUDGE HALLIGAN: And if it doesn't, he would - -
18 -

19 MR. SILLS: I'm sorry?

20 JUDGE HALLIGAN: If it does not stand, would he
21 have his license restored in - - - in the near term, or are
22 there other obstacles to that given his driving?

23 MR. SILLS: I don't think there's any other
24 obstacle that I'm aware of, but - - - but he doesn't have
25 it back, number one.

1 Judge Singas, I believe you mentioned something
2 that - - - about if they don't show the second time, do you
3 win? That is not accurate. What happens is if it's - - -
4 the second time is where the subpoena comes into play. So
5 on the second time, if you haven't subpoenaed the officer,
6 the - - - the ALJ is just going to go forward on the report
7 of refusal. And if you wanted the officer there, you would
8 have had to subpoena the officer or you forfeit that. That
9 would be a Gray v. Adduci issue, but you don't - - - you
10 don't automatically win. Like, typically, it would go
11 forward anyway.

12 In terms of are you reinstated while this all
13 goes on, if the officer doesn't - - - currently - - - it
14 used to be before COVID, they would schedule these hearings
15 for an in-person hearing that typically took place within
16 about a week or so, and you initially get a fifteen-day
17 suspension by law that automatically terminates if you
18 haven't had the hearing. Well, these days you never have
19 the hearing because they do it virtually and they schedule
20 them several months out.

21 So everybody after fifteen days gets their
22 license back. If you go to the hearing the first time and
23 - - - and the officer doesn't show because they didn't show
24 you, you still get to keep the license, whereas if you have
25 the situation here and you now had to request an

1 adjournment in order to subpoena - - - in order to enforce
2 the subpoena, according to DMV's regulations, 127.7, the -
3 - - it's very likely you're going to get suspended now for
4 exercising the right to try and enforce the subpoena where
5 the officer didn't even show after being subpoenaed.

6 Now, you would lose your license in all
7 likelihood, and extend any revocation because you don't get
8 any credit for time served.

9 JUDGE RIVERA: Just to be clear, what - - - was
10 the license reinstated here given the first adjournment?

11 MR. SILLS: Well, the license would have been
12 reinstated after the fifteen days initially, and then it
13 wouldn't have been suspended when the officer didn't show,
14 and then it went forward with the hearing the next time,
15 so.

16 JUDGE RIVERA: So there was a period of time when
17 the license was reinstated?

18 MR. SILLS: Correct, approximately four months, I
19 believe.

20 JUDGE RIVERA: Okay. Thank you.

21 MR. SILLS: So another issue is in Goldberg - - -
22 Goldberg v. Kelly.

23 JUDGE HALLIGAN: Wait, the - - - the license was
24 reinstated while the subpoena question was being sorted
25 out?

1 MR. SILLS: Well, there really wasn't a subpoena
2 question. The subpoena - - -

3 JUDGE HALLIGAN: Was the license reinstated?

4 MR. SILLS: Yes.

5 JUDGE HALLIGAN: Okay.

6 MR. SILLS: There's a fifteen-day suspension by
7 law when you get arraigned on a - - - on a refusal case,
8 and it's as a matter of law that terminates after fifteen
9 days.

10 JUDGE HALLIGAN: Between that time and the time
11 of the - - - the time of the second hearing, it was
12 reinstated?

13 MR. SILLS: Yes.

14 JUDGE HALLIGAN: And if a second adjournment had
15 been sought at that point to enforce the subpoena, it would
16 have remained reinstated in that pendency?

17 MR. SILLS: Then, it would fall under rule 127.7,
18 and the presumption is that it's - - - if you request the
19 adjournment as the motorist, you're likely to lose the
20 license. It would be - - -

21 JUDGE CANNATARO: But it's discretionary in part?

22 MR. SILLS: It is discretionary, but you very
23 well could get suspended for exercising your right to have
24 to make the officer come by a further process than - - -
25 than we've already talked about.

1 Now, in Goldberg v. Kelly, the Supreme Court
2 talked about the importance of the right to cross-examine,
3 even in administrative proceedings, and said that the court
4 has been zealous to protect the right from erosion.

5 CHIEF JUDGE WILSON: Yeah, but the question here
6 really is whether you need to get a subpoena to protect
7 that right. It's not that you don't have the right. It's
8 a question of whether you need to get a - - - sorry, get
9 and enforce a subpoena.

10 MR. SILLS: But - - - but realistically, as Mr.
11 Demuth stated, there's 6,000 approximately hearings. Only
12 eight percent of them involve subpoenas to begin with.
13 Keep in mind - - -

14 CHIEF JUDGE WILSON: Right, so we don't even need
15 to worry about those cases in a sense.

16 MR. SILLS: But there's two reasons for that.
17 One would be a lot of times the officers actually do show
18 up and they don't need to be subpoenaed.

19 CHIEF JUDGE WILSON: Okay.

20 MR. SILLS: And the other thing would be almost
21 nobody has the resources to do the subpoena process to
22 begin with. So it's already - - -

23 CHIEF JUDGE WILSON: But that's not an issue in
24 this case unless we're going to undo Gray.

25 MR. SILLS: No. What I'm saying is, though, in

1 terms of due process, it's - - - it's already a huge burden
2 on process to make someone do the subpoena, and most people
3 don't exercise that procedure to begin with. And to - - -
4 to make it even harder, at some point, you're eroding the
5 right to cross-examine at all, because really, nobody's
6 going to go through this procedure. They're just going to
7 say, fine, we'll take our chances on the paperwork, and the
8 officers are going to tell each other don't show.

9 CHIEF JUDGE WILSON: It's a little hard to - - -
10 it's a little hard to say there's a denial of due process
11 because somebody doesn't know to ask for something. Right?
12 You could ask the ALJ to issue the subpoena, no? And your
13 point is that they don't know to do it?

14 MR. SILLS: No, you have to do it. They - - -
15 you can't ask them it's - - -

16 CHIEF JUDGE WILSON: Where do you go do it?

17 MR. SILLS: Your lawyer has to do it.

18 JUDGE CANNATARO: These are attorney subpoenas,
19 right?

20 MR. SILLS: They're attorney subpoenas.

21 CHIEF JUDGE WILSON: So you need to get an
22 attorney?

23 MR. SILLS: You'd have to get an attorney. Your
24 attorney would have to do it. You - - - you know, if it's
25 - - - quite frankly, a public defender is never going to do

1 it. And so - - - so it would have to be someone that
2 you're paying to do it.

3 JUDGE SINGAS: Yeah, but - - -

4 MR. SILLS: Very few people are going to do - - -
5 do this.

6 JUDGE SINGAS: But all those arguments are the
7 same for the issuance of the subpoena and the enforcement
8 of the subpoena. All those things you just mentioned are
9 the same. But we've already decided that on the issuance
10 of the subpoena.

11 MR. SILLS: But you haven't decided whether at
12 some point enough is enough, and it's a violation of due
13 process to make people continuously push stones uphill as -
14 - - as the - - -

15 JUDGE SINGAS: But it's hard for us to find a due
16 process violation if the process wasn't followed, you
17 didn't engage in the process.

18 MR. SILLS: I'm sorry?

19 JUDGE SINGAS: There's a process that exists.
20 You ask for the subpoena, you ask that the subpoena get
21 enforced. We have rules and regulations about that. And
22 now you're saying there's a due process violation, but you
23 didn't ask for the second half of that.

24 MR. SILLS: I think it's fair to say that even if
25 in the future that's going to be the process, it never was

1 the process, and - - - and to hold someone to like you
2 should have known, being aware of how it works in practice
3 and the wording of - - - of section - - -

4 JUDGE TROUTMAN: Has there been an appellate case
5 that even after you've subpoenaed the officer, and they
6 failed to show, that required the petitioner to then go to
7 supreme court to get enforcement?

8 MR. SILLS: No, Your Honor, and I believe the
9 reason is there would never have been a case at all because
10 you always won, like DMV always dismissed those, and all of
11 a sudden they've changed procedure and changed their
12 precedent.

13 JUDGE RIVERA: What - - - what about this 2018
14 manual, I think he called it? What about that?

15 MR. SILLS: I've never heard of it, and I've
16 never heard an ALJ mention it. And we've been talking
17 about some things outside the record. I had tried to
18 include something in my reply brief that ended up getting
19 stricken. But even after Monaghan, I had a case where we
20 subpoenaed an officer and the officer didn't show, and so I
21 said, Your Honor, I - - - I would request an adjournment to
22 seek enforcement. Denied. And I'm like, but that's the
23 procedure. Denied. Well, what - - -

24 JUDGE RIVERA: That might have been the nice due
25 process claim right there.

1 MR. SILLS: But then - - - but then long story
2 short, I brought it to - - -

3 JUDGE RIVERA: Well, let's keep it really short.
4 Let me ask you this. What - - - I thought you had a very
5 interesting point that obviously doesn't seem to be
6 preserved otherwise in this argument that, yes, after
7 fifteen days, there hasn't been a hearing, so now the
8 license is reinstated. But oh, if you actually - - - if -
9 - - if this court agrees with them that, yes, you have to
10 seek enforcement, you're going to be penalized for that
11 because the ALJ might very well require that your license
12 be suspended during that period. It strikes me that that's
13 perhaps - - -

14 MR. SILLS: So - - -

15 JUDGE RIVERA: - - - a very strong argument about
16 due process, but I don't recall that preserved anywhere
17 before us.

18 MR. SILLS: Well, whether it was - - - because I
19 guess sometimes until the - - - the one side makes an
20 argument, and you're responding to it as opposed to
21 preserving it on the front end. But finally, Your Honors,
22 everything else aside, we have the substantial evidence
23 question, and here, I think it's kind of outrageous that
24 the arresting officer swore in his report of refusal that
25 he read - - - that he did not read the refusal warnings.

1 And then he swore in his bill of particulars that he did
2 read the refusal warnings. And - - - and that in the first
3 document he said it was another trooper who did it. In the
4 other document he said he did it. Everything is sworn.

5 JUDGE TROUTMAN: Doesn't that really go to the
6 value that cross-examination would have provided for?

7 MR. SILLS: If they had complied with the
8 subpoena.

9 JUDGE CANNATARO: Well, what if - - - what if the
10 what if the hearing officer just didn't think they needed
11 to get to that? What if the - - - so your - - - your
12 client denies being given a warning at all?

13 MR. SILLS: Correct.

14 JUDGE CANNATARO: What if the hearing officer
15 didn't find that testimony credible? Then, the - - - the
16 apparent dispute between who gave the warning is
17 immaterial.

18 MR. SILLS: Well, you're assuming - - - we're all
19 assuming - - -

20 JUDGE CANNATARO: We don't know. I - - - I get
21 that.

22 MR. SILLS: - - - that the warning was read at
23 all, or that it was read correctly. I - - - I mean, I can
24 tell you - - -

25 JUDGE CANNATARO: No, I'm not assuming that, but

1 what I'm saying is the hearing officer did not credit your
2 client's testimony that he wasn't given a warning. In the
3 - - - in the hearing officer's mind, that was - - - that
4 was done.

5 MR. SILLS: But he - - - but the real question
6 is, how could he credit that the warning was read when the
7 officer swore that he read the warning and that he didn't
8 read the warning at the same time?

9 JUDGE CANNATARO: You're saying he couldn't - - -
10 the hearing officer could not disbelieve your client's
11 claim that he was not given a warning?

12 MR. SILLS: Regardless of my client's claim, the
13 report of refusal swears that trooper - - -

14 JUDGE TROUTMAN: Why couldn't they just - - -
15 couldn't the hearing officer just thought a mistake was
16 made?

17 MR. SILLS: When - - - when someone swears they
18 both did something and that they didn't do it, it's kind of
19 like swearing I was - - - I was there and I wasn't there at
20 the same time. I would say it presents you with choices of
21 scenarios which renders it incredible as a matter of law,
22 and therefore you can't credit it because, like, how would
23 the court decide were they really read, who - - - who read
24 the warnings? I - - - I find unanimously that these
25 warnings were not only read but read properly by trooper

1 who? Like, I don't know how you could make a finding here
2 that - - - that there was substantial evidence that the
3 warnings were read.

4 CHIEF JUDGE WILSON: Thank you.

5 MR. SILLS: Which is a whole separate dispositive
6 issue, I believe. Thank you.

7 CHIEF JUDGE WILSON: Thank you.

8 (Court is adjourned)

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C E R T I F I C A T I O N

I, Christy Wright, certify that the foregoing transcript of proceedings in the Court of Appeals of Monaghan v. Schroeder, No. 101 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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