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MEMORANDUM

August 13, 2010

TO: All Judges
Exercising Criminal Jurisdiction

FROM: John W. McConnell
Paul McDonnell

SUBJECT: Child Passenger Protection Act -- Leandra's Law

As you are aware, late last year the Governor signed into law the Child Passenger Protection Act, also known as "Leandra's Law" (L 2009, ch 496; attached). A principal purpose of the law is to protect children in motor vehicles by increasing criminal penalties for people who are convicted of driving while intoxicated (DWI) with a child under sixteen in the car. The child safety provisions of the act went into effect on December 18, 2009.

Leandra's Law also dramatically expands the use of ignition interlock devices in New York. The law requires that any driver convicted of misdemeanor or felony DWI offenses under VTL §1192(2), (2-a) or (3), install and maintain an ignition interlock device on any motor vehicle the driver owns or operates, regardless of whether a child was in the vehicle at the time of the offense. To carry out this directive, courts must sentence defendants convicted of one of these offenses to a period of probation or a conditional discharge in addition to any jail or prison term, and must include the condition that defendants install and maintain vehicle ignition interlock devices. The law also requires interlock devices as a condition of probation or conditional discharge in sentencing for several penal law offenses.

The provisions relating to the mandatory imposition of a sentence of probation or conditional discharge and the installation of ignition interlock devices becomes effective on Sunday, August 15, 2010. The remainder of this memorandum outlines the "child-in-vehicle" provisions and the interlock device provisions of Leandra's Law, and describes several new operational practices to assist courts in complying with this law.

I. Child-in-Vehicle Provisions

A. Vehicle and Traffic Law

1. Aggravated DWI - with a child. A new subdivision (b) of Vehicle and Traffic Law § 1192(2-a) provides that it is a class E felony offense for a person to operate a motor vehicle in violation of VTL § 1192(2), (3), (4) or (4-a) with a passenger who is fifteen years of age or younger. Thus, first time offenders who commit the misdemeanor offense of driving while intoxicated by alcohol or impaired by drugs or a combination of drugs and alcohol will now face a class E felony charge if a child under the age of sixteen is in the motor vehicle.

The existing offense of aggravated DWI - per se, where a person operates a vehicle with a blood alcohol content of .18 or greater, has been relocated within a new subdivision (a) of VTL § 1192(2-a). It is not enhanced under Leandra's Law, remaining a class A misdemeanor for a first offense (VTL § 1193(1)(b)).

2. Sentence ranges. A person convicted of aggravated DWI - with a child, is subject to the same sentence ranges as a person convicted of other class E felony offenses. Thus, the court may impose a non-jail term of conditional discharge or probation, or may impose a jail term up to one year, including a "split" sentence, or may impose an indeterminate prison term up to 1 1/3 years to 4 years. However, an unconditional discharge is not permitted (VTL § 1193(7)(e)). As with other VTL § 1192 offenses, a sentence of probation or conditional discharge must include a fine (VTL §1193(7)(e)), although the fine ranges vary with the offense and whether it the defendant's first offense or the defendant is a repeat offender. The fine ranges are set forth in VTL § 1193(1).

3. License revocation. A first offense carries a mandatory revocation of one year. Where the defendant has been convicted within the prior ten years of VTL § 1192(2), (2-a), (3), (4) or (4-a), the mandatory revocation is eighteen months (VTL § 1193(2)).

4. Plea restrictions. Any plea of guilty entered by a defendant charged with aggravated DWI - with a child, must include at least a plea of guilty to VTL § 1192(2), (2-a) or (3) unless "the district attorney, upon reviewing the available evidence, determines that the charge of [aggravated DWI] is not warranted" (VTL § 1192(10)(d)). Significantly, this prevents a first offender charged with aggravated DWI from pleading to driving while ability impaired under VTL § 1192(1) without the district attorney's representation that the higher charge is "not warranted." Even where the district attorney make such a representation, the court is nonetheless required to "set forth upon the record the basis for such disposition" (*Id.*).

5. Mandatory screening. At arraignment, or at the court's discretion at any time prior to sentence, the court must order a defendant charged with aggravated DWI - with a child, to submit to screening for alcohol or substance abuse and dependency. If the screening indicates that the defendant is abusing or dependent on alcohol or drugs, the court must further order the defendant to undergo a formal alcohol or substance abuse and dependency assessment (VTL § 1198-a(2)).

6. Responsibility of Law Enforcement Officers; Mandatory Reporting to Child Protective Services. VTL § 1192(12)(b) has been amended to require a law enforcement officer to note in the descriptive section of a simplified traffic information the remark "C.I.V." (Child in Vehicle) whenever a driver is charged with a violation of VTL § 1192(2), (2-a), (3), (4) or (4-a) and a child under the age of sixteen was present in the motor vehicle. More significantly, where the driver is a parent, guardian or custodian of a child in the vehicle, the law enforcement officer must also "report or cause a report to be made" to Child Protective Services pursuant to Article 6 of the Social Services Law.

7. Interlock Device. A court must sentence a defendant convicted of VTL § 1192(2-a) to a period of probation or a conditional discharge, a condition of which must be the installation of an ignition interlock device in any motor vehicle owned or operated by a defendant. As more fully described below, this is in addition to any other sentence, including jail or state prison, that the court imposes, and runs consecutively to any term of imprisonment.

B. Penal Law

Leandra's Law amends four penal law provisions by adding a new aggravating element to offenses where a defendant drives while intoxicated and causes injury or death to a child under the age of sixteen present in the motor vehicle. The new amendments are as follows:

1. Vehicular assault in the first degree (PL § 120.04(6)). Vehicular assault in the second degree is elevated to the class D felony offense of vehicular assault in the first degree where it is established that the person "commits such crime while operating a motor vehicle while a child who is fifteen years of age or less is a passenger in such motor vehicle and causes serious physical injury to such child."

2. Aggravated vehicular assault (PL § 120.04-a(6)). Vehicular assault in the second degree is elevated to the class C felony offense of aggravated vehicular assault where it is established that, while engaged in reckless driving, the person "commits such crime while operating a motor vehicle while a child who is fifteen years of age or less is a passenger in such motor vehicle and causes serious physical injury to such child."

3. Vehicular manslaughter in the first degree (PL § 125.13(6)). Vehicular manslaughter in the second degree is elevated to the class C felony offense of vehicular manslaughter in the first degree where it is established that the person "commits such crime while operating a motor vehicle while a child who is fifteen years of age or less is a passenger in such motor vehicle and causes death to such child."

4. Aggravated vehicular homicide (PL § 125.14(7)). Vehicular manslaughter in the second degree is elevated to the class B felony offense of aggravated vehicular homicide where it is established that, while engaged in reckless driving, the person "commits such crime while operating a motor vehicle while a child who is fifteen years of age or less is a passenger in such motor vehicle and causes death to such child."

II. Ignition Interlock Device Provisions

A. VTL §§ 1192(2), (2-a) or (3)

Leandra's Law requires a court to impose a sentence of probation or a conditional discharge as part of every conviction for driving while intoxicated under VTL § 1192(2), (2-a) or (3), regardless of whether jail or prison time is imposed (PL § 60.21).[1] The court must also include as a condition of probation or conditional discharge that the defendant install and maintain a functioning ignition interlock device on any motor vehicle he or she owns or operates.[2] This period of probation or conditional discharge shall run consecutively to any period of imprisonment the court may impose and "commences when the defendant is released from imprisonment."[3] As a result, even state prison terms for felony DWI charges require a sentence of probation or conditional discharge consecutive to the prison term, as well as a condition that the defendant install an ignition interlock device on any cars the defendant owns or operates.[4] The new law also amends the Executive Law to provide that the Board of Parole must require as a condition of any parole or conditional release for defendants convicted of "a felony as defined in [VTL § 1193(1)(c)]" that the defendant install and maintain an ignition interlock device in accordance on any motor vehicle he or she owns or operates (*see* Executive Law § 259-c(15-a)). Accordingly, a defendant released on parole or conditional release after being sentenced to a state prison term under VTL § 1192 (2), (2-a) or (3) will be concurrently supervised by both the Department of Probation and Correctional Alternatives (DPCA) and the Division of Parole.

B. Penal Law Offenses (PL §§ 120.03, 120.04, 120.04-a, 125.12, 125.13 and 125.14)

Ignition interlock devices are also required where the court sentences a defendant to a period of probation or conditional discharge for any penal law offense of which an essential element is an

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[1] The interlock provisions do not apply to convictions for driving while impaired by drugs (VTL § 1192(4)), or driving while impaired by a combination of drugs and alcohol (VTL § 1192(4-a)). Moreover, VTL § 1192(2), (2-a)(a) and (3) exclusively involve driving while intoxicated by alcohol. Thus, the only instance where an ignition interlock device is mandated for driving while impaired by drugs or a combination of drugs and alcohol is when VTL § 1192(4) or (4-a) is an element of a conviction under VTL § 1192(2-a)(b), aggravated DWI – with a child.

[2] The definition of motor vehicle does not include all-terrain vehicles (see VTL §§ 125(d), 2281), boats (see Navigation Law § 49(a)) or snowmobiles (see VTL § 125(c)). It does, however, include motorcycles (VTL § 123). Unfortunately, none of the interlock providers qualified in New York will install an interlock device on a motorcycle; thus, a defendant who owns a motorcycle will be unable to operate it while a condition requiring installation of an interlock is in place (*see* VTL § 1198(9)).

[3] Leandra's Law therefore carves out an exception to the mechanics of a "split sentence," where a defendant serves a period of probation, the first part of which is concurrently satisfied by a local jail sentence (PL § 60.01(2)(d); *see also People v Zephrin*, 14 NY3d 296 [2010]). Under PL § 60.21, any period of probation must now be added to the end of any jail term imposed for a conviction of VTL § 1192 (2), (2-a) or (3).

[4] The statute does not specify the duration of the term of probation or conditional discharge that is to be added to the period of imprisonment. Instead, it provides that the court "shall sentence such person to a period of probation or conditional discharge in accordance with the provisions of section 65.00 of [the Penal Law]." Although a sentence to a period of probation or conditional discharge following a state prison term or a jail term longer than six months may itself be at odds with various provisions of PL Article 65, the legislature presumably intended courts to adopt the periods of probation set forth in PL § 65.00 (3) and the conditional discharge periods as set forth in PL § 65.05 (3).

alcohol-related violation of any provision of VTL § 1192. Six Penal Law offenses fall within the statute,[5] and they are treated differently than convictions under the Vehicle and Traffic Law. For instance, while the court must impose an interlock condition as part of any sentence of probation or conditional discharge for these Penal Law offenses, it may not include probation or conditional discharge in a sentence to a term of imprisonment (except where the court imposes a traditional split sentence as provided in PL § 60.01(c)). Instead, for defendants subjected to a state prison term, Leandra's Law amended the Executive Law to direct the Board of Parole to include the ignition interlock requirement as a condition of the defendant's parole or conditional release (*see* Executive Law § 259-c (15-a)). There is no provision, however, that authorizes a court to mandate installation of an interlock device where it sentences a defendant solely to a jail term of one year or less.

[5] The six penal law crimes that potentially fall within this category are: vehicular assault in the first and second degrees (PL §§ 120.03 and 120.04); aggravated vehicular assault (PL § 120.04-a); vehicular manslaughter in the first and second degrees (PL §§ 125.12 and 125.13); and aggravated vehicular homicide (PL § 125.14).

*C. **Duration of the interlock condition***

VTL Offenses

When imposing a sentence of probation or conditional discharge for a conviction under VTL § 1192 (2), (2-a) or (3), the court must order the defendant to use ignition interlock devices for at least six months (VTL §§ 1193 (1)(b)(ii) and (1)(c)(iii)). However, where a defendant is convicted of VTL § 1192 (2) or (3) and has previously been convicted of one or more of those offenses within the preceding five years, the court must order such devices for the entire period of license revocation, which may be up to eighteen months (see VTL§ 1193 (1-a)(c)). Of course, the court is also authorized to maintain the condition for the entire period of probation or conditional discharge.

Penal Law Offenses

Leandra's Law does not set forth any minimum period of an interlock condition imposed for a violation of one of the six penal law sections that have as an essential element a violation of VTL § 1192(2), (2-a) or (3). The law only requires that where the defendant is sentenced to a term of probation or conditional discharge, the court must order an interlock as a condition. Thus, any subsequent termination of the interlock condition must be made under CPL 410.20, which allows the court to "modify or enlarge the conditions of a sentence of probation or of conditional discharge at any time prior to the expiration or termination of the period of the sentence."

D. The cost of the ignition interlock device

The projected cost of an ignition interlock device ranges from $75 to $115 per month and installation and removal fees range from $40 to $100. The total cost for a six month period will therefore be approximately $500 to $800, which is to be paid by the person subject to the condition (VTL § 1198(5)(a)). However, the statute also provides that where "the court determines such person is financially unable to afford such cost," the court may impose a payment plan or waive the cost altogether. To assist the court in determining whether to waive part or all of the costs, or help approve a payment plan, DPCA has designed a financial disclosure form that the defendant must complete in connection with the application. DPCA regulations provide that three copies of the form must be submitted to the court prior to sentencing, and that the court should retain one copy and provide the other copies to the prosecutor and defense counsel. (9 NYCRR 358.8). The financial disclosure form may be found on both the DPCA and UCS websites. Where the court grants the application to waive any part or all of the costs, the ignition interlock manufacturers must bear the cost.

E. Monitoring the Interlock Conditions of Probation or Conditional Discharge

Leandra's Law requires DPCA to promulgate regulations to govern "the monitoring of compliance by persons ordered to install and maintain ignition interlock devices" and to establish standards for monitoring by departments of probation and other agencies (VTL § 1193(1)(g)). After a lengthy development process, DPCA issued these rules as Part 358 of Title 9 NYCRR. A copy of the rules may be found on the websites of both DPCA and the Unified Court System. In brief, the rules call for the City of New York, and each county outside the City of New York, to establish plans to provide for monitoring defendants sentenced to probation or a conditional discharge with an interlock condition. Every plan must designate the probation department as monitor for all interlock

cases made as a condition of a sentence of probation, but may designate an alternate agency to monitor interlock conditions imposed pursuant to a sentence of a conditional discharge (9 NYCRR 358.4(c)).

DPCA regulations provide for three different classes of interlock devices, and direct that the monitoring agency, not the court, determine the appropriate class of device for each defendant. Class I devices have reporting capabilities, store data for later downloading, are programmable and possess anti-tampering features. Class II devices have all of the features of a Class I device plus photographic identification procedures. Class III devices contain all the features of a Class II device, but also provide significantly more sophisticated features such as GPS tracking, real-time data reporting and infra-red or other low-light camera capability. Not surprisingly, class III devices are typically more expensive than Class I or Class II devices.

The regulations divide New York State into four regions and require manufacturers in each region to ensure that defendants need travel no more than fifty miles to have an interlock device installed. Currently, seven ignition interlock manufacturers have been approved to provide ignition interlock device in New York, and each region will be serviced by at least four different companies. Under the regulations, defendants may choose the manufacturer and model of device within their designated Class (9 NYCRR 358.4(d)(1)).

A defendant must install interlocks within ten business days after the interlock condition takes effect, and must submit proof of compliance to the court or monitor within three business days of installation (9 NYCRR 358.7(c)(1)). Defendants sentenced to probation who live outside the county of the sentencing court will have their probation supervision transferred to the county where the defendant resides (CPL 410.80). Defendants sentenced to a conditional discharge who live outside the county of the sentencing court will be monitored by the monitoring agency of the defendant's county of residence, but the original sentencing court will retain jurisdiction over the case. Any violations of the conditional discharge will be directed to the original sentencing court (9 NYCRR 358.7(b)(2)). Out of state residents convicted in New York are subject to the provisions of Leandra's Law, and the rules governing the interstate compact for adult offender supervision under Executive Law § 259-mm control. Where a defendant is not subject to the compact, the monitor will cooperate with a qualified manufacturer to allow for regular reporting to the monitor, and the sentencing court will retain jurisdiction of the case (9 NYCRR 358.7 (b)(4)).

It is a now a class A misdemeanor for any defendant to operate a motor vehicle in violation of an interlock condition (VTL § 1198(9)(d)).

Effective Dates

Signed by Governor Paterson on November 18, 2009, Leandra's Law became effective on December 18, 2009; provisions requiring ignition interlock devices only become effective on August 15, 2010; the act does not apply to any offenses "committed before the date of the enactment." Thus, although the interlock provisions become effective on Sunday, August 15, 2010, those provisions apply to sentencing for any offense committed on or after November 18, 2009.

Any questions regarding the issues raised in this memorandum may be referred to Paul McDonnell in Counsel's Office at (212) 428-2150. For operational questions, please contact Trial Court Operations.

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