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COURT OF APPEALS

STATE OF NEW YORK

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PEDRO ENDARA-CAICEDO,

Appellant,

-against-

NO. 7

NEW YORK STATE DEPARTMENT OF MOTOR  
VEHICLES, ET AL.,

Respondents.

-----

20 Eagle Street  
Albany, New York  
January 6, 2022

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO

Appearances:

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Ellen S. Kolman  
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Appeal number 7. Matter of  
2 Endara-Caicedo v. the New York State DMV.

3 We'll take a moment to allow counsel to collect  
4 their belongings.

5 Counsel?

6 MS. MEIS: Thank you. Good afternoon. Marika  
7 Meis for Petitioner-Appellant Pedro Endara-Caicedo. I  
8 would like to reserve two minutes for rebuttal, please.

9 CHIEF JUDGE DIFIORE: You may.

10 MS. MEIS: This case involves whether the phrase  
11 "such chemical tests" as used in VTL 1194(2)(c) can have an  
12 entirely different meaning than that phrase as used in  
13 1194(2)(a) and (2)(f).

14 JUDGE GARCIA: Counsel, can I ask you something?  
15 So - - - just so I'm clear, and I really don't completely  
16 understand this. So in a situation like this, and we'll  
17 just use a hypothetical where someone's pulled over and  
18 there's a reason to believe they're intoxicated, they're  
19 going to be arrested, right? And the procedure, as I  
20 understand it, on the administrative side - - - forget the  
21 criminal side - - - is that - - - is the license of that  
22 driver suspended at the time of arrest pending suspension  
23 from a hearing?

24 MS. MEIS: Correct. It's immediately suspended  
25 if - - - upon arrest, and then there is an administrative



1 hearing at the DMV where if the prongs are met and - - -  
2 and followed, then the revocation can happen.

3 JUDGE GARCIA: Okay. Understood. So let's say  
4 now, it's two hours later when they ask for - - - more than  
5 two when they ask for consent and it's refused. If we were  
6 to adopt your rule, and that's not usable, let's call it,  
7 at the administrative hearing, is the license not capable  
8 of being suspended at all, then?

9 MS. MEIS: In the first instance, upon arrest?

10 JUDGE GARCIA: Yeah.

11 MS. MEIS: I think no because - - - well,  
12 perhaps, initially, but when the person would go to the  
13 refusal hearing, they would then prevail, because the  
14 refusal not made within the two hours does not fall in the  
15 statutory scheme - - -

16 JUDGE GARCIA: So even though it's clear - - -

17 MS. MEIS: - - - so they would win.

18 JUDGE GARCIA: - - - clearly over two hours later  
19 - - - let's say it's three, not close, then your position  
20 would be your client's license could still be suspended  
21 pending a hearing where they couldn't use that in evidence?

22 MS. MEIS: I believe so long as there's still a  
23 proper arrest on reasonable grounds, and a person is  
24 arraigned, the license could be suspended until they went  
25 to that hearing. But the cutoff point of two hours is for



1 the refusals, which is tied to the deemed-consent  
2 provision.

3 So that reliability concern that governs both  
4 criminal and administrative proceedings applies equally,  
5 and the statute has to be interpreted the same in both  
6 contexts.

7 JUDGE SINGAS: Hasn't the legislature made it  
8 abundantly clear - - -

9 MS. MEIS: Sorry.

10 JUDGE SINGAS: - - - to treat the criminal and  
11 the administrative proceeding separately?

12 MS. MEIS: They are separate venues, but they  
13 serve the same goal. The very purpose of the deemed-  
14 consent provision was to get people to blow so that they  
15 could secure convictions. And so the legis - - -

16 JUDGE SINGAS: Well, perhaps there was a public  
17 safety argument.

18 MS. MEIS: And - - - well, the legislature set a  
19 bright-line rule of two hours. There's a two-hour period  
20 when you are deemed to have consented to a breath test. If  
21 during that two-hour period you withdraw your consent, that  
22 is exercising the right to refusal. It is a term of art  
23 that has special meaning within the context of this  
24 statute.

25 JUDGE SINGAS: In criminal cases.



1 MS. MEIS: In both cases. When you do that,  
2 then, the consequence is - - - is that your license is  
3 revoked.

4 JUDGE SINGAS: But under 1192 - - - 1194(2)(c),  
5 sorry, there are specific and limited considerations, none  
6 of which talk about a two-hour rule.

7 MS. MEIS: All of which say "such chemical  
8 tests", the exact same phrase that is in provision (2)(a)  
9 which limits the statute to two hours, and that is in  
10 (2)(f) which limits the statute to two hours as this court  
11 held in Odum. There cannot be a refusal after two hours  
12 under this statutory scheme. It doesn't mean that the  
13 person cannot still be prosecuted under the impaired  
14 provision or the common law provision, and if a prosecution  
15 were sustained - - -

16 CHIEF JUDGE DIFIORE: So what's the purpose of  
17 the two-hour rule in the context of a license revocation  
18 hearing if your license is - - - you're deemed to consent  
19 as a condition of your license? What would the purpose of  
20 that rule be?

21 MS. MEIS: You're deemed to consent as a  
22 condition of your license, but only during that two-hour  
23 period because the legislature in enacting in a deemed  
24 consent statute recognized that, at the time, they thought  
25 that drivers had a right to refuse the test. So whether or



1 not that's constitutionally valid today, at the time the  
2 statute was drafted, they balanced the concerns with trying  
3 to curb drunk driving, while also taking into account the  
4 important rights of motorists.

5 A one-year license revocation based on declining  
6 a test that you are not required to take, and a test that  
7 might indeed be unreliable and be a false positive should  
8 not result in a severe sanction of a one-year revocation  
9 and a 500-dollar penalty, and that was a bright-line rule  
10 that the legislature drew and that should be  
11 honored by this Court.

12 The plain language of the statute, and the rules  
13 of statutory construction, as well as its history all show  
14 that both provisions equally apply this two-hour  
15 limitation.

16 JUDGE RIVERA: So counsel, just to be - - - I'm  
17 over here on the screen. Hello. Happy New Year.

18 MS. MEIS: Hi.

19 JUDGE RIVERA: Just - - - yes, hi. Just to  
20 clarify your position. The position is that to the extent  
21 that what the statute does in the administrative context is  
22 allow for revocation regardless of any eventual  
23 determination of guilt in the criminal context, that there  
24 is where this rule cannot apply, right, because the  
25 understanding was always about the constitutionality of the



1 rule, but of course, that a license could be revoked  
2 pursuant to - - - to the statutes otherwise if indeed the  
3 criminal case is successful.

4 MS. MEIS: Correct.

5 JUDGE RIVERA: I just want to clarify where you  
6 are. You're not saying that the license can never be  
7 revoked?

8 MS. MEIS: Absolutely not, Your Honor.

9 JUDGE RIVERA: Your point is it can't be revoked  
10 because an individual in that two hour - - - excuse me - -  
11 - post the two-hour window chooses not to take the test - -  
12 -

13 MS. MEIS: Absolutely.

14 JUDGE RIVERA: - - - at the punishment the  
15 legislature intended?

16 MS. MEIS: Exactly.

17 JUDGE RIVERA: But post the two-hour window, you  
18 know, if they are otherwise established to have violated  
19 the statute subjecting them to revocation, well, so be it,  
20 but not - - - I just wanted to clarify your position  
21 because I wasn't so sure based on something you said a  
22 minute ago.

23 MS. MEIS: Outside of two hours, if - - - a  
24 person can still be prosecuted criminally, they just can't  
25 be prosecuted under the per se sub (2) division, which



1 requires a breath test.

2 If they're still prosecuted and they did not  
3 blow, they can still be convicted and their license can  
4 still be suspended. The punishment envisioned in the  
5 revocation proceeding in 1194(2)(c) only applies where a  
6 person has exercised their right of refusal and withdrawn  
7 their deemed consent and that period is undeniably a two-  
8 hour period.

9 JUDGE WILSON: Can I see if - - - if you have the  
10 same statutory development understanding that I do?

11 So in 1941, the ability to take a test, all  
12 right, chemical test for alcohol, came in - - -

13 MS. MEIS: Correct. Governed by two hours.

14 JUDGE WILSON: - - - and it had a two-hour rule,  
15 right?

16 MS. MEIS: Yes.

17 JUDGE WILSON: And there was no license  
18 suspension, revocation, or anything like that?

19 MS. MEIS: Correct. There was nothing.

20 JUDGE WILSON: Okay. In 1953, the legislature  
21 added the deemed consent in conjunction with license  
22 suspension.

23 MS. MEIS: Correct, but the refu - - -

24 JUDGE WILSON: And so - - -

25 MS. MEIS: - - - the - - - the revocation was a





1 punishment for withdrawing your consent.

2 JUDGE WILSON: Right. So from 1954, let's say -  
3 - -

4 MS. MEIS: '53, I think, yes.

5 JUDGE WILSON: Well, right, but moving ahead a  
6 year, so we have no worry about when the statute became  
7 effective, I mean, I could look that up, but let's not.  
8 Let's move to 1954. If you were stopped, a test - - - and  
9 you refused a test six hours after your arrest, your  
10 license could still be revoked?

11 MS. MEIS: No.

12 JUDGE WILSON: Why not?

13 MS. MEIS: Because the provision was always read  
14 to be bound by the same two-hour rule. Even though that  
15 was in a different statutory provision, they were read  
16 together.

17 JUDGE WILSON: But there's no such chemical-test  
18 language there.

19 MS. MEIS: But DMV itself read it that way for  
20 fifty-some-odd years until their policy changed in the 2012  
21 memo. Everyone understood that the refusal was a term of  
22 art only in context of the deemed-consent provision and  
23 that it only occurred when you withdrew the deemed consent  
24 during that two-hour period.

25 JUDGE WILSON: Okay. So you're saying from the



1 period from 1953 to 1970, I think; is that right?

2 MS. MEIS: Until - - - no, until 2012, when the  
3 DMV changed their policy.

4 JUDGE WILSON: No, I didn't finish my question.

5 MS. MEIS: I'm sorry.

6 JUDGE WILSON: In 1970, there's been a  
7 recodification, yes?

8 MS. MEIS: Correct.

9 JUDGE WILSON: Okay. So let's take the period  
10 from '53 to '70. At that point, the argument you're making  
11 is not based on the statutory text; it's based on  
12 everybody's understanding.

13 MS. MEIS: Yes, it's based on - - -

14 JUDGE WILSON: And you're not pointing to the  
15 same "such chemical test" language, because that didn't  
16 exist then.

17 MS. MEIS: Correct.

18 JUDGE WILSON: Okay.

19 MS. MEIS: The "such chemical test" language came  
20 in the final moving of all these parts of the statute that  
21 had always historically been read and understood together  
22 by DMV and by courts. They put them all in one place, and  
23 that's why it was deemed an inconsequential change because  
24 it was the same historical reading of the statute as it had  
25 been read, even though in disparate parts. And this is the



1 continued reading that we're urging today, and it's the  
2 reading that makes sense based on the statute and the  
3 construction of.

4 CHIEF JUDGE DIFIORE: Thank you, Counsel.  
5 Counsel?

6 MR. LEVITZ: Thank you, Your Honors. May it  
7 please the Court, Philip Levitz for the respondents.

8 The Vehicle and Traffic Law requires the DMV to  
9 revoke the driving privileges of a dr - - - drunk driving  
10 suspect who refuses a chemical test irrespective of the  
11 time of refusal. Endara-Caicedo's request to read a two-  
12 hour limitation into the license revocation requirement  
13 fails for two fundamental reasons.

14 First, it's inconsistent with the language,  
15 structure, and history of the statute. And second, the  
16 two-hour rule is a rule of evidence for criminal trials  
17 with no application to administrative license revocation as  
18 Your Honors were suggesting.

19 JUDGE GARCIA: Counsel, I'm sorry to interrupt  
20 you there, but do you agree with your colleague's  
21 assessment of how this was applied before the merger of the  
22 statutes?

23 MR. LEVITZ: Of how it was applied?

24 JUDGE GARCIA: Yeah, that this changed in 2012,  
25 essentially?



1 MR. LEVITZ: Well, it is - - - it is true the DMV  
2 issued an opinion in 2012 after - - - for the first time  
3 doing a formal examination of the statute and concluding  
4 that the statute required the reading that we're presenting  
5 today. Let me explain the basis for that reading.

6 So --

7 JUDGE GARCIA: Yeah, but before that, how did you  
8 read it?

9 MR. LEVITZ: There was a period of time when we  
10 read the statute - - - well, when a two-hour rule was  
11 applied as a practical matter. That is what DMV did before  
12 2012. But again, that was before any formal examination of  
13 the statute, and it was based on, really, a different  
14 situation, different practical background than we have now  
15 because way back when, there was a concern that, you know,  
16 after two hours, you might not get the best evidence.  
17 That's the reason that the two-hour rule was created in the  
18 first place.

19 Later, as this court recognized in the Atkins  
20 case, in understanding that you could get relevant evidence  
21 after two hours, the - - - the DMV also recognized that you  
22 could get good evidence after two hours, and if you could  
23 use the evidence after two hours in a criminal case,  
24 certainly, it shouldn't be a bar to its relevance in - - -  
25 in the - - - the rule that you need to revoke for license -



1 - - I'm sorry, for test refusal.

2 So again, let me - - -

3 JUDGE WILSON: Those are - - -

4 MR. LEVITZ: - - - get into the history of that.

5 JUDGE WILSON: Those are pretty good policy  
6 reasons, but can you deal with exactly where counsel  
7 started - - -

8 MR. LEVITZ: Right.

9 JUDGE WILSON: - - - which is the statutory  
10 language - - -

11 MR. LEVITZ: Absolutely. And that's exactly  
12 where I wanted to go.

13 JUDGE WILSON: - - - which uses "such chemical  
14 test" over and over and over?

15 MR. LEVITZ: Right.

16 JUDGE WILSON: What is the best argument you can  
17 give us for why "such chemical test" means something  
18 different in different sections?

19 MR. LEVITZ: Right. Well, the history is  
20 actually absolutely clear, and then Your Honor, Judge  
21 Wilson, you were getting at it. Let me explain.

22 The Vehicle and Traffic Law expressly provides,  
23 in subsection (c), 1194(2)(c), that the determination of  
24 whether a driver's license will be revoked for test refusal  
25 shall be limited to four issues, none of which includes a



1 two-hour limitation and none of which is disputed here. So  
2 the language of the statute requires revocation in this  
3 case. And so let me talk about the history.

4 Endara-Caicedo contends that the phrase "such  
5 chemical test" in the license revocation provision,  
6 subsection (c), incorporates the two-hour limitation from a  
7 separate deemed-consent provision of the statute.

8 But as, Judge Wilson, you were getting at, the  
9 two-hour limitation was not even in the same statutory  
10 section when the license revocation provision was enacted  
11 with that "such chemical test" language. That "such  
12 chemical test" language has never changed in the license  
13 revocation provision. It's always been there from the  
14 beginning, and when the statute was enacted, there was no  
15 two-hour rule in that section. So as you were getting at,  
16 there's simply no way to read into that section, a two-hour  
17 limitation that wasn't there.

18 When the legislature later consolidated the two-  
19 hour rule and the license revocation provision in the same  
20 statutory section, it gave no indication that it now  
21 intended to apply the two-hour limitation for the separate  
22 administrative license revocation requirement.

23 It's a fundamental canon of statutory  
24 interpretation that such legislative silence does not imply  
25 an intention to significantly alter the mandatory



1 revocation scheme that had always existed in the statute.  
2 And it's the burden of a party contending that legislative  
3 action changed settled law - - - here, Endara-Caicedo - - -  
4 to show the legislature intended such a change. Well,  
5 Endara-Caicedo has offered absolutely no evidence to meet  
6 that burden.

7 So second, it would make no sense to read a two-  
8 hour limitation into the administrative license revocation  
9 requirement. The two-hour rule is an evidentiary rule  
10 intended to ensure that the chemical test evidence  
11 introduced at criminal trial - - - sorry, in criminal  
12 trials was collected recently enough to be probative.

13 JUDGE WILSON: Let me stop you just for a second.

14 They problem with saying that it makes no sense  
15 is the department did that for a few decades.

16 MR. LEVITZ: Again, it was before they examined  
17 the statute, and it was at a different time when, as I was  
18 talking about, there actually were - - - the whole reason  
19 for the two-hour rule in the criminal context where it  
20 started and where it should be limited - - - you know, and  
21 actually has always been limited in the statute, is a  
22 concern about whether you'd get probative evidence after  
23 two hours. Okay, that was a concern, but technology has  
24 changed over time. It's a concern that simply doesn't  
25 apply today because technology has improved and you can - -



1 - you can get good evidence after two hours.

2 Now, that rule still exists in the statute as - -  
3 - as sort of a bright-line rule for criminal cases that  
4 unless you consent to use of the evidence after two hours,  
5 it's not going to be admissible. But if you consent, what  
6 this court held in Atkins, is absolutely, you can use it  
7 because it could still be probative.

8 In any event, again once DMV examined the  
9 statute, and this is exactly the conclusion it - - - it  
10 came to in the modern context. And as a majority of this  
11 court recognized in Odum, the two-hour rule has no  
12 application to administrative license revocation, which is  
13 a required administrative penalty for chemical test refusal  
14 whether or not the driver is ultimately criminally  
15 convicted of drunk driving.

16 Let me also talk a little bit about, again, how  
17 to understand this con - - - this statute in the context of  
18 a legislative intent and the public policy at issue here.

19 Your Honors were talking about the public safety  
20 context in which this administrative scheme was - - - was  
21 created. That's really important here. Applying the two-  
22 hour rule to the administrative license revocation  
23 requirement would contravene public policy and legislative  
24 intent. The legislature and the court of appeals, this  
25 court, repeatedly have made clear that administrative





1 revocation of driving privileges was intended to be an  
2 automatic penalty for drunk driving suspects who thwart an  
3 investigation of drunk driving by refusing chemical tests.

4 It's undisputed here that the license revocation  
5 requirement was designed to enable the authorities to deal  
6 effectively with the scourge of drunken drivers,  
7 encouraging drunk - - - this is language from - - - from  
8 this court in the Craft case and the Washington case - - -  
9 encouraging drunk driving suspects to consent to chemical  
10 tests and revoking their driving privileges if they refuse.

11 Giving drunk drivers a free pass for refusing the  
12 test based on the mere happenstance that they refuse more  
13 than two hours after their arrest would directly contravene  
14 the legislature's critical public safety goals. And giving  
15 drunk drivers that free pass is especially problematic  
16 because refusal after two hours now cannot be used against  
17 the driver in the driver's criminal case under this court's  
18 decision in Odum. Thus, without the administrative  
19 sanction, the driver might escape all consequences for the  
20 test refusal and for driving drunk.

21 CHIEF JUDGE DIFIORE: Thank you, Counsel.

22 MR. LEVITZ: Thank you, Your Honors.

23 CHIEF JUDGE DIFIORE: Counsel, your rebuttal?

24 MS. MEIS: Thank you. Whether or not the phrase  
25 "such chemical test" existed in the statute in the 1970s,



1 my adversary has admitted, and it's clear, that DMV  
2 interpreted this statute to limit refusals to two hours  
3 from inception until its policy change in 2012.

4 What is important is to look at the 2012 memo  
5 because the rationale DMV used was looking at lower court  
6 cases that were holding after Atkins that refusals would be  
7 admissible after two hours in criminal proceedings. They  
8 reasoned that if a blow could be admissible after two  
9 hours, as Atkins held, so too should a refusal. Those  
10 cases are now explicitly overruled by Odum. Odum held that  
11 after two hours a refusal cannot be admissible in criminal  
12 proceedings, and therefore, DMV got it wrong, and this  
13 court has made that clear in Odum and in the statutory  
14 construction.

15 JUDGE GARCIA: Counsel - - - Counsel, I'm sorry,  
16 over here.

17 MS. MEIS: Yes?

18 JUDGE GARCIA: One of the things that I'm  
19 struggling with, and maybe some others from the questions,  
20 Odum is clear and it was a criminal case and there are  
21 certain requirements in criminal prosecutions and levels of  
22 proof and protections that are different. And what I  
23 struggle with is this is an administrative proceeding, and  
24 granted, a very serious one, but not a criminal proceeding  
25 where because of one-minute difference the quantum of proof

1 in an administrative proceeding goes from a hundred to  
2 zero. And because you're asked to take this test at two  
3 minute - - - two hours and one minute, someone who was  
4 arrested and meets the other criteria under the  
5 administrative provisions now gets their license back.

6 MS. MEIS: Well - - -

7 JUDGE GARCIA: And you know, we don't have to go  
8 through the cases that we've had and the cases below that  
9 address the serious nature of this problem.

10 MS. MEIS: Well, the concerns in the  
11 administrative context are equally serious. The right to  
12 drive is something the legislature values.

13 JUDGE GARCIA: But you can't - - - I think you're  
14 on weak ground if you're arguing the concerns and having  
15 your license revoked is the same as a criminal proceeding.  
16 So what else is there?

17 MS. MEIS: Well, as well, Judge, if the - - - if  
18 the DMV's position is urged, then police will actually be  
19 disincentivized from timely gathering this evidence.

20 Under Atkins and other cases, all the police need  
21 do is request the test be taken. If they obtain that  
22 refusal within two hours or the consent within two hours,  
23 it doesn't matter whether the test was ultimately given at  
24 two hours and one minute or not.

25 And so there is - - -



1 JUDGE GARCIA: So should there be a good-faith  
2 reading in there? I mean, if there was not - - - there's  
3 no way in good faith to get this done, should they examine  
4 that?

5 MS. MEIS: I think the occasions where that would  
6 occur are extremely rare. There are Spanish-speaking  
7 videos available at most places where DWI proceedings are  
8 taken - - - are - - - are held where they could easily  
9 obtain the consent or the refusal within the time period of  
10 two hours. And having a bright-line rule that's  
11 enforceable for motorists for administrative law judges,  
12 for police, is important, and it's a balance that the  
13 legislator - - - legislature struck.

14 If they wish to change it, they can easily amend  
15 the statute, but the statutes as written - - - as written  
16 is limited, and the two-hour standard applies both in  
17 criminal and administrative proceedings. Thank - - -

18 JUDGE SINGAS: But that's not what the  
19 legislature said. You can't read the legislative history  
20 and support the conclusions that you want to support.

21 MS. MEIS: I think you can based on the plain  
22 language, based on the use of "such chemical test", based  
23 on its consistent interpretation for two - - - until 2012  
24 as limiting it to two hours, and reading the statute  
25 cohesively and comprehensively, as the rules require.



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CHIEF JUDGE DIFIORE: Thank you, Counsel.  
(Court is adjourned)



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

I, Ellen S. Kolman, certify that the foregoing transcript of proceedings in the Court of Appeals of Endara-Caicedo v. NYSDMV, No. 7 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Ellen S. Kolman*

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