

LEGISLATIVE PRIORITIES

# New York State Law Enforcement Council

2008



NEW YORK STATE LAW ENFORCEMENT COUNCIL

One Hogan Place  
New York, NY 10013  
212.335.8927  
212.335.3808 f  
[www.nyslec.org](http://www.nyslec.org)

*New York State District  
Attorneys Association*

*Attorney General of the  
State of New York*

*Criminal Justice Coordinator  
of the City of New York*

*New York State Association  
of Chiefs of Police*

*New York State Sheriffs'  
Association*

*Citizens Crime Commission  
of New York City*



## PREFACE

---

The New York State Law Enforcement Council was formed in 1982 as a legislative advocate for New York's law enforcement community. The Council's members represent the leading law enforcement professionals throughout the State, including the Attorney General of the State of New York, the New York State District Attorneys Association, the New York State Association of Chiefs of Police, the New York State Sheriffs' Association, the New York City Criminal Justice Coordinator, and the Citizens Crime Commission of New York City. Since its inception, the Council has been an active voice and participant in improving the quality of justice and in the continuing effort to provide for a safer New York.

### **NYSLEC**

**New York State District Attorneys Association**  
James A. Murphy, III  
*President*

**Attorney General of the State of New York**  
Andrew M. Cuomo

**Criminal Justice Coordinator of the City of New York**  
John Feinblatt

**New York State Association of Chiefs of Police**  
Lloyd Perkins  
*President*  
John Grebert  
*Executive Director*  
John Poklemba  
*Counsel*

**New York State Sheriffs' Association**  
Peter Kehoe  
*Executive Director*  
Christopher O'Brien  
*Deputy Executive Director*

**Citizens Crime Commission of New York City**  
Richard Aborn  
*President*

**Counsel**  
Robert M. Morgenthau  
*District Attorney*  
*New York County*

**Coordinator**  
Leroy Frazer, Jr.  
*Office of the District Attorney*  
*New York County*



## ALLOW ALL DANGEROUS, SUBSTANCE- ABUSING DRIVERS TO BE PROSECUTED FOR INTOXICATED DRIVING

---

In New York, a dangerous loophole makes it legal for impaired and intoxicated persons to drive if the substance they have abused is neither alcohol nor one of the substances listed in the New York Public Health Law definition of “controlled substance.”<sup>1</sup> Even though drivers who, for example, have “huffed”<sup>2</sup> widely-available chemical solvents are as dangerous as those who are drunk on alcohol or high on crack cocaine, they cannot be punished under current drunk-and drugged-driving statutes.<sup>3</sup>

The New York Law Enforcement Council believes that intoxication by any substance, even if otherwise legal to purchase and possess, should be punishable when it objectively impairs a driver’s ability to operate a vehicle as a reasonable and prudent driver. Surprisingly, nowhere in the current Vehicle and

*Intoxication by any substance should be punishable when it objectively impairs a person’s ability to drive safely.*

Traffic Law is “intoxication” or the lesser standard of “impairment” defined. New York should create such definitions to ensure that all dangerous, substance-abusing drivers are subject to prosecution for driving while ability impaired (DWAI) and driving while intoxicated (DWI).

1  
N.Y. PUB. HEALTH LAW  
§ 3306.

2  
According to the  
Merriam-Webster  
Online Dictionary  
(<http://www.merriam-webster.com/>),  
“huffing” refers to the  
inhalation of noxious  
fumes through the  
mouth for the eu-  
phoric effect produced  
by the inhalant.

3  
N.Y. VEH. & TRAF. LAW  
§ 1192.

<sup>4</sup> 625 ILL. COMP. STAT. ANN. §11-501; ME. REV. STAT. ANN. tit. 29-A, § 241I; KY. REV. STAT. ANN. § 189A.010; VA. CODE ANN. § 18.2-266.

<sup>5</sup> The Vaults of Erowid: Big Chart Index, [http://www.erowid.org/general/big\\_chart.shtml](http://www.erowid.org/general/big_chart.shtml) (last visited Apr. 4, 2008).

A number of states, including Illinois, Kentucky, Maine, and Virginia<sup>4</sup>, have already expanded the scope of their intoxicated driving statutes in this manner. These states’ statutes focus on the *effect* that the substance has on the driver’s competence, rather than whether the substance abused by the driver appears on a specific list. Crafting an intoxicated driving statute in this manner is beneficial because a simple “laundry list” of forbidden substances is destined to fall quickly into incompleteness and obsolescence.

One website popular with teens and young adults gives an idea of the vast universe of substances which can produce a dangerous state in drivers upon ingestion: the website contains user-submitted experiences relating to over 230 legal and illegal psychoactive substances<sup>5</sup>, including salvia divinorum, a Mexican herb which has recently gained popularity for its psychedelic effects and which is legal in New York State.

Furthermore, every corner store sells an extensive number of products and chemicals which, if ingested, will produce a physical and mental state that endangers the driver and those sharing the road with him or her. For example, law enforcement officers in New York have encountered drivers who have gotten high from the chemical agents contained within “Whip-It” cartridges, which are sold for use with whipped cream dispensers. In some cases of inhalant abuse, the physical cause of the intoxicated behavior and dangerous driving may be oxygen deprivation associated with the act of inhaling, rather than a specific active ingredient in the product itself.

.....  
**Disoriented, Oxygen-Deprived Driver Causes Accident but Cannot Be Charged for Drugged Driving:** A mid-morning 911 call in August 2006 alerted police to a disoriented female driver on Sunset Highway in Massapequa Park. The defendant had been driving east slowly in the west-bound lane of the highway; she was even oblivious to a bystander who had run up to the car and was pounding on her window in an effort to get her to stop. The defendant then veered across the highway median and crossed three lanes of traffic before finally coming to a stop.

Witnesses who went to check on the defendant saw her slumped across the seat, drooling, with a large aerosol can of “CleanSafe Dust Remover” in her lap. A police officer responding to the 911 call had already passed another accident scene en route; the victim, who had been run off the road by a car matching the defendant’s car’s license number and description, reported that the defendant had been slumped over her driving wheel before coming to and driving off. Although the defendant failed coordination tests on the scene, breath tests did not reveal alcohol use and urine tests were inconclusive. Prosecutors spoke to a chemist for the manufacturers of CleanSafe about the urine test results; the chemist theorized that the defendant’s state could have been caused by oxygen deprivation from inhaling the product, rather than any active ingredient in the product itself. In any case, none of the active ingredients in CleanSafe is listed in the Public Health Law. A prosecution is pending for Reckless Endangerment in the Second Degree<sup>6</sup> and Reckless Driving<sup>7</sup>, but the defendant cannot be charged for the intoxicated driving itself. *Pending case, Nassau County*

<sup>6</sup> N.Y. PENAL LAW § 120.20.  
<sup>7</sup> N.Y. VEH. & TRAF. LAW § 1212.

A related complication occurs when law enforcement cannot pinpoint the specific chemical or mixture of chemicals that the driver has been using. When police stop drivers who have exhibited clearly dangerous driving behavior, officers look for indicia of recent substance abuse, such as a sweaty and disoriented appearance, slurred speech, strong chemical odors on the breath and clothing, or even falling down and passing out. However, if the driver refuses to allow chemical testing of their blood, breath, and urine, does not admit to having taken substances, and has no contraband in the car, prosecutors have little choice but to dismiss the case, no matter how clearly the signs of substance abuse and dangerous driving appear.

.....  
**This Loophole Has Resulted in the Dismissal of Numerous Cases and DWI or Drugged-Driving Charges**  
.....

**Defendant Refuses Urine Tests and Gets Case Dismissed, Despite Videotaped Evidence of Clearly Impaired Behavior:**

In early 2007, police pulled over a driver in the Bronx after he ran a red light and narrowly missed a collision with a marked police car. Two officers, including a member of the NYPD Highway Patrol with years of experience in interacting with and arresting impaired drivers, observed the driver's disorientation, confusion, and difficulty answering simple questions. Based on their observations, the defendant was arrested for driving while ability impaired. No drugs were found in the vehicle, and the driver refused to take a urine test. However, he did allow the highway patrol officer to administer and videotape breath and coordination tests. While the breath test was negative for alcohol consumption,

the coordination tests revealed numerous signs of impairment, which were captured on videotape. Not only did the defendant fail to complete any of the coordination tests successfully, but the video also showed him struggling to blow into the breath instrument appropriately and to maintain his balance. As the night wore on and the effects of the unknown drug or substance wore off, the driver's mental condition improved. Although the police had clear evidence on videotape of the defendant's inability to drive and react in a reasonable and prudent manner, they could not identify the specific substance that had impaired his judgment. After the Court of Appeals returned its decision in *People v. Litto* clarifying that "intoxication" only applied to alcohol, prosecutors were forced to dismiss the case. *Dismissed case, Bronx County*

.....  
**All Charges Dropped For Nassau Defendant High on Paint Thinner Fumes:**

In May 2006, a police officer responding to a 911 report of intoxicated person driving north in North Bellmore, Long Island found the defendant sitting in a parking lot. He was in the driver's seat of his car with the engine running and a tubesock-clad arm pressed to his mouth and nose. The car and defendant both smelled strongly of paint thinner, and an open can of paint thinner was plainly visible. When the defendant stepped out of the car, he was falling over, extremely incoherent, and unable to follow simple instructions or pass a set of standardized field sobriety tests. Although his blood alcohol content was, at .02%, well under the legal limit of .08%, a urine test came back positive for isopropyl alcohol and acetone, two common ingredients in paint thinner. However, because neither isopropyl alcohol nor acetone is listed as a controlled

substance in the Public Health Law, the drugged driving charges could not be sustained. And because the arresting officer had not personally observed the defendant's poor driving, neither Reckless Driving nor Reckless Endangerment in the Second Degree (for recklessly risking serious physical injury to another person) could be charged. Prosecutors had no choice but to drop all charges against the defendant.

*Dismissed case, Nassau County*  
.....

The inability to charge DWI and DWAI in these situations also has implications for cases in which chemically-altered drivers kill or seriously injure others. The parallel crimes of vehicular manslaughter and vehicular assault can be charged against a driver who kills or injures another person while driving while intoxicated or impaired in violation of the Vehicle and Traffic Law. However, because these charges require the driver to be guilty of DWI or DWAI, they cannot be charged when a driver kills or injures another while high on a substance other than alcohol or a listed drug or while high on an unidentified substance.

.....

**One Dead, Five Injured by Driver High on Inhalants, but Highest State Court Rejects Charge of Driving While Intoxicated:** Driving along a four-lane road in Brooklyn one night in January 2004, nineteen-year-old Vincent Litto lifted a can of Dust-Off cleaning product to his mouth and sprayed. The chemical propellant in the canned-air duster produced a rapid high and slowed down his bodily functions; in less than a minute, Mr. Litto had lost control of his vehicle and veered into oncoming traffic. The collision killed one person and injured five, including Mr. Litto himself.

Since his voluntary ingestion of chemicals had clearly placed him in a dangerous physical and mental state whereby he was incapable of driving safely, prosecutors charged him with fourteen crimes, including operating a motor vehicle while in an intoxicated condition<sup>8</sup>.

However, in June 2007 the Court of Appeals ruled that he could not be charged with this crime, reasoning that the legislature had intended the statute to apply only to intoxication caused by alcohol, not drugs or other substances. Nor could Mr. Litto be charged under New York's existing drugged-driving statute<sup>9</sup> because that statute only applies to drivers who have taken one of the controlled substances listed in New York's Public Health Law; Dust-Off, a widely-available household cleaning product, is not on that list. Prosecutors also had to drop a count of Vehicular Manslaughter in the Second Degree<sup>10</sup> because that charge required the defendant to be intoxicated in violation of the Vehicle and Traffic Law. *People v. Litto, Kings County*

.....

Creating definitions of "intoxication" and "impairment" which focus on the *effects* of the substance upon the user rather than the names of those substances will allow law enforcement to prosecute drivers when the specific substances impairing their judgment cannot be identified or are not listed in the Public Health Law.

8  
N.Y. VEH. & TRAF. LAW  
§ 1192(3).

9  
N.Y. VEH. & TRAF. LAW  
§ 1192(4).

10  
N.Y. PENAL LAW §  
125.12.