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# Right to Counsel Applied in Drunken Driving Case

Joel Stashenko, New York Law Journal

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ALBANY - A woman's right to counsel was violated when Nassau County officers failed to inform her that her lawyer had called police headquarters with orders not to question or test her for drunken driving, the state Court of Appeals ruled Tuesday.

In [People v. Washington](#), 65, the 4-3 court upheld the suppression of blood-alcohol test results to Jonai Washington about 90 minutes after police said she struck and killed a pedestrian in Hempstead early in the morning of Aug. 30, 2010.

The court said attorney Anthony Mayol of Forest Hills called Nassau County police headquarters at her family's request at 3:29 a.m., identified himself as Washington's attorney and cautioned officers, "You have to stop all questioning and we're not consenting to any form of testing whatsoever."

The call ended at 3:39 a.m. At precisely the same time, police said they administered a blood-alcohol test to Washington with her written consent, though they conceded she didn't know that Mayol had reached out to authorities before agreeing to the test.

She later sought to have the test results suppressed, arguing that she might not have consented had she known she had an attorney.

The court said its 1968 precedent in [People v. Gursej](#), 22 NY2d 224, recognized a limited right of the accused to seek legal help in alcohol-related driving cases though not an absolute one, because the accuracy of tests for alcohol is time sensitive.

*Gursej* remains relevant to situations like *Washington*, Judge Victoria Graffeo ([See Profile](#)) wrote for the majority.

"In our view, the statutory right to legal consultation applies when an attorney contacts the police before a chemical test for alcohol is performed, and the police must alert the subject to the presence of counsel, whether the contact is made in person or telephonically," she wrote.

Graffeo added, "Since the police officers here made no effort to advise defendant about the

lawyer's communication, and the People did not demonstrate that a notification of this nature would have been unreasonable under the circumstances, we hold that the chemical test was administered in violation of the statutorily-based *Gursey* right to counsel."

Chief Judge Jonathan Lippman ([See Profile](#)) and Judges Eugene Pigott Jr. ([See Profile](#)) and Jenny Rivera ([See Profile](#)) joined the majority ruling.

The decision affirmed lower court rulings, by Nassau County Supreme Court Justice George Peck and an Appellate Division, Second Department panel, affirming the suppression of the Washington's blood alcohol test results (NYLJ, April 18, 2013).

In dissent, Judge Susan Phillips Read ([See Profile](#)) wrote there is no statutory right in New York for suspected drunken drivers to be able to consult with counsel before agreeing to take a chemical breath test.

She said the majority's ruling takes the limited privilege for suspected drunken drivers to ask to consult with a lawyer before agreeing to chemical testing under *Gursey* and expands it to cover situations where a motorist has not asked for counsel or resisted testing.

"The majority seemingly reasons that it should make no difference whether the motorist asks to speak to the lawyer or vice versa before the test is performed," Read wrote. "As a practical matter, though, the majority's enlargement of the *Gursey* privilege invites debate and thus uncertainty, especially when the attorney telephones rather than physically appears at the police station."

Judges Robert Smith ([See Profile](#)) and Sheila Abdus-Salaam ([See Profile](#)) joined in Read's dissent.

Pedestrian Plutarco Caceres of Uniondale was killed when struck by Washington's car. While Washington failed a field sobriety test and was arrested for drunken driving at the scene of the accident. Washington has been challenging the admissibility of the blood alcohol test since her indictment for second-degree manslaughter, second-degree vehicular manslaughter and driving while intoxicated.

Assistant Nassau County District Attorney Yael Levy argued for the prosecution.

Frederick Brewington of Hempstead represented Washington.

Brewington said the court made a "very important" decision that will have an "enormous impact on suspects who have had access to their attorneys blocked."

"The police are not at liberty to serve as filters as to when lawyers speak to their clients," he said.

Brewington said prosecutors filed [an affidavit](#) stating that they would not go forward with the case against Washington if the blood alcohol test results were not available to them.

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