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## **Disparity in Police Procedures for Non-English Speaking DWI Suspects: Constitutional Protections for Non-English Speaking Criminal Defendants Falling Second to Governmental Interests**

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**DISPARITY IN POLICE PROCEDURES FOR NON-ENGLISH  
SPEAKING DWI SUSPECTS: CONSTITUTIONAL  
PROTECTIONS FOR NON-ENGLISH SPEAKING CRIMINAL  
DEFENDANTS FALLING SECOND TO GOVERNMENTAL  
INTERESTS**

**SUPREME COURT OF NEW YORK  
NEW YORK COUNTY**

People v. Salazar<sup>1</sup>  
(decided October 10, 2013)

**I. INTRODUCTION**

In *People v. Salazar*, the court found that the New York City Police Department's ("NYPD") driving while intoxicated ("DWI") procedures did not violate the defendant's state or federal constitutional right to due process or equal protection.<sup>2</sup> The NYPD administered a breathalyzer test to the non-English speaking defendant but did not administer a physical coordination test when he was arrested for driving while intoxicated.<sup>3</sup> The defendant challenged the NYPD's procedure as a violation of his equal protection and due process rights.<sup>4</sup> The defendant prevailed in setting aside the guilty verdict at the trial level; however, on appeal by the State, the First Department, Appellate Division reversed.<sup>5</sup> The court evaluated the defendant's equal protection claim under a rational basis analysis,<sup>6</sup> as

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<sup>1</sup> 973 N.Y.S.2d 140 (Sup. Ct. 2013).

<sup>2</sup> *Id.* at 143.

<sup>3</sup> See N.Y. VEH. & TRAF. LAW § 1192(1) (McKinney 2009) ("No person shall operate a motor vehicle while the person's ability to operate such motor vehicle is impaired by . . . alcohol.").

<sup>4</sup> *Salazar*, 973 N.Y.S.2d at 142-43.

<sup>5</sup> *Id.* at 143.

<sup>6</sup> *Id.* at 144 ("To establish an equal protection violation under the rational basis analysis, a claimant must show that the governmental action in question does not bear a rational relationship to a legitimate government purpose.").

opposed to the strict scrutiny analysis utilized by the Bronx County Supreme Court,<sup>7</sup> and found that a rational basis for the policy existed—the impracticability of conducting coordination tests through interpreters.<sup>8</sup> Further, the court concluded, “a DWI suspect does not have a due process right to compel the police to administer a coordination test.”<sup>9</sup> Evaluating the defendant’s due process claim under the *Matthews* balancing test,<sup>10</sup> the court reasoned, because the physical coordination is an “investigative tool used to gather evidence,” the failure of the police to administer said test in order to give the defendant an “opportunity to obtain potentially favorable evidence” did not present a great risk that he would be erroneously deprived of his liberty.<sup>11</sup>

The Appellate Division’s holding displays a step in the wrong direction for courts in providing equal protection of the laws to non-English speaking defendants. The ruling in *Salazar* represents the court’s unwillingness to provide more protection to non-English speaking defendants and disregards those defendants’ constitutional rights. The cost to remedy the disparity in treatment among non-English and English speaking DWI suspects is sufficiently outweighed by the inherent disadvantages faced by non-English speaking DWI suspects as a result of the NYPD’s procedures.

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<sup>7</sup> Strict scrutiny is applied “[w]here governmental action disadvantages a suspect class or burdens a fundamental right.” *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983). Such classification “will be upheld only if the government can establish a compelling justification for the action.” *Id.* However, “[w]here a suspect class or a fundamental right is not implicated, the challenged action need only be rationally related to a legitimate governmental purpose.” *Id.*

<sup>8</sup> *Salazar*, 973 N.Y.S.2d at 144 (setting forth the rational basis for the police the court stated the police have an interest in the reliability of coordination tests and “[t]he evidence supports the conclusion that conducting the test through a Spanish-speaking police officer who was not trained in conducting the test could compromise the reliability of the result.”). Further the court noted “that it is impracticable to conduct coordination tests through interpreters.” *Id.*

<sup>9</sup> *Id.* at 146.

<sup>10</sup> See *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976) (setting forth the three-factor balancing test).

<sup>11</sup> *Salazar*, 973 N.Y.S.2d at 146 (“[U]nlike judicial or extrajudicial proceedings, where it is essential that defendants who do not speak sufficient English be provided qualified interpreters in order to meet due process standards, ‘the investigation of suspected intoxicated driving by the police . . . is not a judicial . . . or even an administrative proceeding.’”). See also *People v. Hayes*, 950 N.E.2d 118, 123 (N.Y. 2011) (noting there is no risk of an erroneous deprivation of defendants’ liberty interest by failing to conduct a physical coordination test).

## II. FACTUAL BACKGROUND

Shortly before eleven o'clock on the night of June 26, 2007, Officer Iglesias observed a car parked partially on the sidewalk, facing oncoming traffic.<sup>12</sup> Upon approaching the car, the officer saw the defendant slouched over the steering wheel in the driver's seat.<sup>13</sup> The officer knocked on the window; when the door opened, the officer smelled a strong odor of alcohol coming from the vehicle and observed an open bottle of beer in the car and the keys in the ignition with the motor running.<sup>14</sup> The officer testified that the defendant was unable to exit the car on his own and needed the officer's assistance to do so.<sup>15</sup> The officer proceeded to ask the defendant some questions, at which point the defendant responded in Spanish.<sup>16</sup> Based on the officer's observations and the defendant's response, the officer placed him under arrest.<sup>17</sup>

Officer Padilla responded to the scene to take the defendant to the 45th Precinct for a breathalyzer test.<sup>18</sup> At the precinct, Officer King, the breathalyzer operator, proceeded to tell the defendant why he was under arrest and asked the defendant if he wanted to take the breathalyzer test.<sup>19</sup> The defendant responded to the officer in Spanish, at which point Officer King realized there was a "language barrier."<sup>20</sup> Officer King read the information regarding the breathalyzer test in English and then played a tape which repeated the information in Spanish.<sup>21</sup> The defendant agreed to take the breathalyzer test, and the results indicated that the defendant's blood alcohol content was

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<sup>12</sup> *Salazar*, 973 N.Y.S.2d at 142.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (noting that the officer further "testified that the defendant was unsteady on his feet, had bloodshot eyes, and appeared to be intoxicated.").

<sup>16</sup> *Id.* (noting the officer asked the defendant in Spanish if he was drunk and the defendant replied "Yes I am drunk. That's why I parked over here.").

<sup>17</sup> *Salazar*, 973 N.Y.S.2d at 142.

<sup>18</sup> *Id.* (noting that Officer "Padilla also testified that the defendant was unsteady on his feet, needed help to walk to the police van, and had bloodshot eyes with dilated pupils, and that his breath smelled strongly of alcohol."). See also N.Y. VEH. & TRAF. LAW § 35:22 (McKinney 2009).

<sup>19</sup> *Salazar*, 973 N.Y.S.2d at 142; see also 35 CARMODY-WAIT 2d § 194:59 ("A breath testing device is a scientifically reliable instrument which . . . is capable of producing an accurate measurement of a motorist's blood alcohol content.").

<sup>20</sup> *Salazar*, 973 N.Y.S.2d at 142.

<sup>21</sup> *Id.* (stating that Officer Padilla assisted Officer King in explaining to the defendant in Spanish that the procedures required the test).

.21, almost three times the legal limit.<sup>22</sup> Officer King, who was specially trained to administer the physical coordination test,<sup>23</sup> and did so frequently, testified that he did not give the physical coordination test to the defendant because “[the defendant] did not speak English.”<sup>24</sup>

A jury found the defendant, Raul Salazar, guilty of driving while intoxicated.<sup>25</sup> Following his conviction, Salazar moved to set aside the verdict<sup>26</sup> on the ground that the NYPD procedure of administering both breathalyzers and physical coordination tests to English speaking DWI suspects, while offering only the breathalyzer test to non-English speakers, violated both the Equal Protection and Due Process Clause guaranteed by both federal<sup>27</sup> and state<sup>28</sup> constitutions.<sup>29</sup> The Bronx County Supreme Court, following its prior decision,<sup>30</sup> granted the defendant’s motion, set aside the verdict, and dis-

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<sup>22</sup> *Id.* See also N.Y. VEH. & TRAF. LAW § 1192(2) (“Driving while intoxicated; per se. No person shall operate a motor vehicle while such person has .08 of one per centum or more by weight of alcohol in the person’s blood as shown by chemical analysis of such person’s . . . breath . . .”).

<sup>23</sup> See N.Y. VEH. & TRAF. LAW § 16:6 (McKinney 2009) (“When a driver is stopped by the police there are several screening devices the police use in order to determine whether to arrest the driver for an intoxication related offense. Some involve blowing into a field sobriety instrument . . . [o]thers require the driver to perform some physical act.”)

<sup>24</sup> *Salazar*, 973 N.Y.S.2d at 142 (noting that “although Officer Padilla assisted him with the breathalyzer test, he did not want Padilla to translate the coordination test instructions since ‘part of the test is following directions . . . [and] [he] wouldn’t know if the officer truly and accurately described what I was saying’ or whether Padilla was ‘using his own words or translating exactly what [he] said.’”). Furthermore, Officer King stated that the Police Department does not have a tape in Spanish of the instructions to the physical coordination test. *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> N.Y. CRIM. PROC. LAW § 330.30 (1) (McKinney 1970) provides, in pertinent part:

At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon . . . [a]ny ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law by an appellate court.

<sup>27</sup> U.S. CONST. amend. XIV, § 1, states, in pertinent part: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

<sup>28</sup> N.Y. CONST. art. I, § 11, states, in pertinent part: “No person shall be denied the equal protection of the laws of this state or any subdivision thereof.”; N.Y. CONST. art. I, § 6, states, in pertinent part: “No person shall be deprived of life, liberty or property without due process of law.”

<sup>29</sup> *Salazar*, 973 N.Y.S.2d at 142-43.

<sup>30</sup> See *People v. Molina*, 887 N.Y.S.2d 784, 798 (Sup. Ct. 2009) (setting aside the verdict convicting a Spanish speaking defendant of driving while impaired by alcohol on grounds that the procedure employed by the police department, administering only a breathalyzer test

missed all charges, finding that the procedure employed by the NYPD violated the defendant's equal protection and due process rights.<sup>31</sup> The State appealed to the Appellate Division, which ultimately rejected the rationale followed by the Bronx County Supreme Court, reversed the order, and reinstated the defendant's conviction, finding no violation of the defendant's equal protection or due process rights.<sup>32</sup>

### III. THE COURT'S ANALYSIS IN *PEOPLE V. SALAZAR*

#### A. Equal Protection Claim

Section 1 of the Fourteenth Amendment to the United States Constitution provides, “[n]o State shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws.”<sup>33</sup> This clause protects against “intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.”<sup>34</sup>

The New York Constitution provides its citizens with an equivalent constitutional safeguard as provided in the Fourteenth Amendment of the United States Constitution.<sup>35</sup> Article 1, § 11 of the New York State Constitution provides that “[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof.”<sup>36</sup> Further, New York Civil Rights Law § 40(2), expands the safeguards of Article 1, § 11 stating “[n]o person shall, because of race, creed, color, national origin . . . be subjected to any discrimination in his civil rights . . . by the state or any agency or subdivision of

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to a Spanish speaking individual while requiring a breathalyzer and a physical coordination test of English speaking individuals, violated the defendant's due process and equal protection rights thus requiring reversal of the judgment).

<sup>31</sup> *Salazar*, 973 N.Y.S.2d at 143 (“the procedure employed by the police department created a ‘classification predicated upon a person’s Hispanic origin and their inability to speak and/or understand the English language and therefore discriminates against primarily Spanish speaking individuals of Hispanic origin’ and thus, violated the equal protection clause under either a strict or rational basis analysis.” Further the court found a due process violation whereas the “procedures utilized deprived [the] defendant of his liberty interest in that this deprivation could be eliminated by additional or substitute procedures.”).

<sup>32</sup> *Id.*

<sup>33</sup> U.S. CONST. amend. XIV, § 1.

<sup>34</sup> *Vill. of Willowbrook v. Grace Olech*, 528 U.S. 562, 564 (2000).

<sup>35</sup> *See Hernandez v. Robles*, 855 N.E.2d 1, 18 (N.Y. 2006).

<sup>36</sup> N.Y. CONST. art. I, § 11.

the state.”<sup>37</sup>

Claimed violations of the Equal Protection Clause are assessed under either a “strict scrutiny” or “rational basis” analysis. Strict scrutiny is appropriate when a suspect class is disadvantaged or where a fundamental right is burdened by governmental action.<sup>38</sup> Rational basis scrutiny, the lowest standard, is applicable where neither a suspect class nor a fundamental right is implicated, and thus, the action need only be rationally related to a legitimate governmental purpose.<sup>39</sup>

In determining which standard was appropriate, the court noted that “[i]t has long been the rule that ‘language, by itself, does not identify members of a suspect class’ ”;<sup>40</sup> therefore, strict scrutiny analysis is not triggered unless a defendant can demonstrate that, either in his particular case or in general, the policy intentionally discriminated against Hispanic ethnicity.<sup>41</sup> Absent this showing, a rational basis analysis was appropriate to evaluate the defendant’s equal protection claim.<sup>42</sup> In analyzing the defendant’s claims, the court found that the practice at issue did not disadvantage a suspect class; therefore, the strict scrutiny analysis, requiring the government to establish a compelling justification for the practice, was not implicated.<sup>43</sup> The court reasoned that “[a]lthough Hispanics as an ethnic group, constitute a suspect class under equal protection analysis, the practice at issue here is facially neutral as to ethnicity.”<sup>44</sup> The police department policy regarding when to administer a physical coordination test was based on a suspect’s ability to speak and understand English, not based upon a suspect’s race or national origin.<sup>45</sup> The

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<sup>37</sup> N.Y. CIV. RIGHTS LAW § 40-c(2) (McKinney 2003).

<sup>38</sup> See *Heller v. Doe*, 509 U.S. 312, 319 (1993); see also *Soberal-Perez*, 717 F.2d at 41 (noting that strict scrutiny requires the government to show a compelling state interest).

<sup>39</sup> See *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976).

<sup>40</sup> *Salazar*, 973 N.Y.S.2d at 144.

<sup>41</sup> *Id.* (stating that “ ‘[s]uch a claim requires that a [defendant] show an intent to discriminate against the suspect class.’ ”). To establish intentional discrimination, the defendant must show that “ ‘the decision maker . . . selected or reaffirmed a particular course of action at least in part ‘because of’ not merely in ‘spite of’ its adverse effects upon an identifiable group.’ ” *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* (stating that the trial court’s determination cannot stand). See also *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 299 (1978); *San Antonio Indep. Sch. Dist. V. Rodriguez*, 411 U.S. 1, 16-17 (1973).

<sup>44</sup> *Salazar*, 973 N.Y.S.2d at 143-44.

<sup>45</sup> *Id.* at 144.

court found nothing in the record to indicate that the police chose not to administer a physical coordination test on the “basis of anti-Hispanic animus.”<sup>46</sup> In fact, the evidence revealed that “non-English-speaking suspects [we]re not offered the option of taking a physical coordination test, in order to avoid confusion and complications due to a language barrier.”<sup>47</sup> Therefore, intentional discrimination based on ethnicity was not established, and the defendant’s claim was evaluated under the rational basis analysis.<sup>48</sup>

In order to find a violation of the Equal Protection Clause under a rational basis analysis, the plaintiff “must show that the governmental action,” here, the NYPD’s policy regarding the administration of sobriety tests, “does not bear a rational relationship to a legitimate government purpose.”<sup>49</sup> However, the court found that the NYPD’s interest in the reliability of coordination tests indicated a rational basis for the policy.<sup>50</sup> The court further reasoned that unlike a judicial or administrative proceeding, where the failure to provide an interpreter was likely in violation of equal protection or due process, physical coordination tests are merely an investigative tool, which does not give rise to the defendant’s right to have an interpreter present in order to administer the test.<sup>51</sup> Requiring the police department to have qualified interpreters to administer investigative procedures, such as the physical coordination test, would “impose unrealistic and substantial financial and administrative burdens” on the police department.<sup>52</sup> The avoidance of those obligations constitutes a rational basis for the NYPD’s procedure of not administering coordination tests to non-English speaking suspects.<sup>53</sup> Additionally, to support its refusal to demand the police department to implement a policy re-

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.* (quoting *People v. Perez*, 898 N.Y.S.2d 402 (2010), and *People v. Burnet*, 882 N.Y.S.2d 835 (Sup. Ct. 2009) (addressing the same issue and accepting this rationale)).

<sup>48</sup> *Salazar*, 973 N.Y.S.2d at 144.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* (noting that evidence supports the finding that “conducting the test through a Spanish-speaking police officer who was not trained in conducting the test could compromise the reliability of the result.”); see also *Perez*, 898 N.Y.S.2d at 407 (stating that it is impractical to conduct coordination tests through interpreters).

<sup>51</sup> *Salazar*, 973 N.Y.S.2d at 144-45 (“[A] defendant’s right to an interpreter is available only at or after the time that adversary judicial proceedings have been initiated against the defendant.”) (internal quotation marks omitted).

<sup>52</sup> *Id.* at 145 (“[T]he time it would take an interpreter to get to a testing site would serve to degrade evidence, as the passage of time impacts sobriety.”).

<sup>53</sup> *Id.*



quiring interpreters of various languages to administer physical coordination tests, the court expressed its position of being deferential to the judgment of public officials stating, “[s]uch policy making is not a function of the court.”<sup>54</sup>

### B. Due Process Claim

Section 1 of the Fourteenth Amendment of the United States Constitution guarantees all citizens the right not to be deprived of life, liberty, or property without due process of law.<sup>55</sup> New York State guarantees to all citizens the same protection in Article 1, § 6 of the New York State Constitution.<sup>56</sup>

The United States Supreme Court has stated that a due process claim is determined on a case-by-case inquiry analyzed according to the three-factor test set forth in *Mathews v. Eldridge*.<sup>57</sup> The three-part test examines,

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>58</sup>

The due process claim framed by the defendant asserted that it is “unconstitutional to deprive *any* [DWI] suspect of [a physical coordination] test.”<sup>59</sup> The defendant claimed that the officer’s failure to administer the physical coordination test deprived him of due process because such a test may have provided evidence favorable to his defense.<sup>60</sup> The court responded to the defendant’s assertion and differentiated the situation in the present case to situations where “the police failed to disclose or preserve evidence.”<sup>61</sup> The court pointed out

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<sup>54</sup> *Id.*

<sup>55</sup> U.S. CONST. amend. XIV, § 1.

<sup>56</sup> N.Y. CONST. art. I, § 6.

<sup>57</sup> 424 U.S. 319, 334-35 (1976).

<sup>58</sup> *Id.* at 335.

<sup>59</sup> *Salazar*, 973 N.Y.S.2d at 145.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 146. *See* *People v. Kelly*, 467 N.E.2d 498 (N.Y. 1984); *see also Hayes*, 950

the error in the defendant's argument in equating the word "obtain" with "preserve" and stated "[i]t is well settled law of this state 'that the police have no affirmative duty to gather or help gather evidence for an accused.'"<sup>62</sup>

Further, the court applied the *Mathews* three-part test and found that a "DWI suspect does not have a due process right to compel the police to administer a coordination test."<sup>63</sup> Although a significant liberty interest of a defendant is at stake in a criminal case, the court noted that, in this case, the defendant failed to show that the procedure employed by the police department presented a "great risk that he w[ould] be erroneously deprived of his liberty."<sup>64</sup> Further, the "probable value of substitute procedural safeguards, i.e., to require the [NYPD] to have trained interpreters in numerous languages available around the clock on short notice, would result in enormous fiscal and administrative burdens on the police department."<sup>65</sup> The court stated that these burdens were legitimate concerns for the government; thus, a non-English speaking DWI suspect did not have a due process right to compel a police officer to administer a physical coordination test.<sup>66</sup> Additionally, the court acknowledged that although it is well established that in order to satisfy due process, a non-English speaking defendant must be provided an interpreter at judicial proceedings,<sup>67</sup> but this right did not extend to the investigative stages of a trial.<sup>68</sup>

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N.E.2d at 122 (noting "[t]here is a difference between preserving evidence already within the possession of the prosecution and the entirely distinct obligation of affirmatively obtaining evidence for the benefit of a criminal defendant").

<sup>62</sup> *Salazar*, 973 N.Y.S.2d at 146. See also *Hayes*, 950 N.E.2d at 122-23 (noting that the defendant does not have the right to have police perform certain investigative procedures simply because they may yield results favorable to the defendant).

<sup>63</sup> *Salazar*, 973 N.Y.S.2d at 146.

<sup>64</sup> *Id.* at 146-47 ("Defendant has made no showing and has failed to cite any precedent to support his proposition that he has a right to a pre-arrest translator or that failure to provide non-English speakers with a physical coordination test violates either equal protection or due process.").

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 147.

<sup>67</sup> See *People v. Ramos*, 258 N.E.2d 197, 198 (N.Y. 1970). See also *People v. Rodriguez*, 633 N.Y.S.2d 680, 681 (App. Div. 3d Dep't 1995) ("It is a well-established precept of due process that non-English speaking defendants in criminal actions are entitled to an interpreter . . ."). See also *Yellen v. Baez*, 676 N.Y.S.2d, 724, 725 (Civ. Ct. 1997) ("It is a fundamental axiom of our system of jurisprudence that due process of law includes the right to have an adequate interpretation of the proceedings.").

<sup>68</sup> *Salazar*, 973 N.Y.S.2d at 146 (quoting *Perez*, 898 N.Y.S.2d at 408 (" '[T]he investigation of suspected intoxicated driving by the police, in the field or at the intoxicated driver

#### IV. FUTURE IMPLICATIONS OF *PEOPLE V. SALAZAR*

On its face, NYPD's procedure of not administering a physical coordination test to non-English speaking defendants and routinely administering such a test to English speaking suspects appears to be discriminatory toward non-English speaking defendants. This is a clear case of the NYPD discriminating against non-English speaking suspects, specifically Hispanics, which should trigger strict scrutiny. The demographics of New York City, especially Bronx County, indicates an overwhelming Hispanic population,<sup>69</sup> which displays the need for greater equal protection of the laws to be afforded to Hispanics.

The NYPD's physical coordination test procedure disadvantages such criminal defendants at a critical stage of a DWI case;<sup>70</sup> evidence of the physical coordination test is unavailable to a non-English speaking defendant, while that same type of evidence is available to an English speaking defendant.<sup>71</sup> Evidence revealed during the physical coordination test may be crucial to a criminal defendant's case, and thus, the unfair disadvantage placed on non-English speaking DWI suspects cannot withstand the constitutional claims raised in *Salazar*.

It is difficult to accept the argument that the administration of physical coordination tests to non-English speaking defendants presents too great an obstacle when breathalyzer tests are routinely administered to non-English speaking defendants. Clearly, explaining

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testing facility, is not a judicial, quasi-judicial, or even an administrative proceeding.' ”)).

<sup>69</sup> See New York City Dep't of City Planning, *Population: American Community Survey*, <http://www.nyc.gov/html/dcp/html/census/popacs.shtml> (click the “2012” link in the “Hispanic Origin” section of the table to open up the report) (last visited May 2, 2014).

<sup>70</sup> See N.Y. VEH. & TRAF. LAW § 1194(2)(a)(1) (noting a DWI case has unique circumstances; relevant evidence is collected within two hours of an arrest).

<sup>71</sup> See *California v. Trombetta*, 467 U.S. 479, 485 (1984). The Court stated that:

Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed “what might loosely be called the area of constitutionally guaranteed access to evidence.” Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system.

*Id.*

the procedures and consequences of a breathalyzer test to a non-English speaking defendant cannot be any less confusing or burdensome than explaining the simple instructions required in administering a physical coordination test. Therefore, the court's willingness to forgo physical coordination tests with non-English speaking defendants because of a language barrier is not plausible because the same language barrier exists in administering a breathalyzer test, yet the NYPD administers the latter without objection.

In order to protect non-English speaking suspects and remedy the disparity in treatment regarding the procedures afforded to English and non-English speaking DWI suspects, reasonable efforts should be made to ensure those non-English speaking defendants' rights are protected. The court did not take into account other means of providing non-English speaking defendants with an opportunity to perform physical coordination tests other than requiring the NYPD to have trained interpreters available. The court overlooked the obvious possibility of creating videotaped procedures for the most commonly spoken languages that would explain the simple instructions of a physical coordination test, similar to the videotaped procedures already shown to non-English speaking defendants prior to administering the breathalyzer test.

## V. CONCLUSION

The Appellate Division's holding in *Salazar* evidences the court favoring governmental interests, which prejudice defendants, over the constitutional rights of non-English speaking defendants.<sup>72</sup> The failure of the NYPD to administer a physical coordination test to non-English speaking suspects, when English speaking suspects are routinely administered such tests, is clearly discriminatory and in violation of the equal protection and due process clause. The NYPD's claim that a procedure that forgoes administering such a test to non-English speaking defendants eliminates confusion and complications due to a "language barrier" has no merit when the same confusion and complications due to a "language barrier" are present while administering a breathalyzer test. If the NYPD is able to administer a breathalyzer test by playing a tape that repeats the information in the appropriate language, without confusion and complications due to a

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<sup>72</sup> *Salazar*, 973 N.Y.S.2d 140.

“language barrier,” then clearly the NYPD can adopt similar means to administer a physical coordination test.

The court’s holding in *Salazar* deprives non-English speaking criminal defendants of the procedures and protections afforded to English speaking defendants. The implications of this holding will cause courts to deny equal protection of the laws to non-English speaking defendants because of alleged complications as a result of a “language barrier.”<sup>73</sup> In evaluating such constitutional claims, the overriding factor should be to ensure that justice is served. Considering the unique circumstances in a DWI case, the use of a translator or videotape to administer a physical coordination test to non-English speaking defendants during the critical investigative stage will ensure a fair trial by providing evidence that will assist both the prosecution and the defense.

*Daniela Giordano\**

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<sup>73</sup> *Id.*

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