**SUGGESTED DRAFT**

The Honorable Andrew M. Cuomo Governor of New York State NYS State Capitol Building Albany, NY 12224

 Re: S4747/A5266

Dear Governor Cuomo:

The District Attorneys Association of the State of New York (DAASNY) writes to suggest a chapter amendment to the above-referenced hit and run legislation or to oppose the bill as drafted. The bill sponsors, Senator Rich Funke and Assemblyman Fred Thiele support this amendment and advise it was their intent to address the rise in hit and run incidents and the fact that more offenders are leaving crashes that have resulted in injury or death to avoid punishment for other serious infractions, like driving while intoxicated or driving with a suspended license. As currently drafted, the bill does not accomplish the goal of removing the incentive for drivers to flee. It is drafted so narrowly that it will rarely, if ever, be applicable and it requires that the prosecution prove the C felony of Manslaughter 2° in order to also prove this new C felony, of Aggravated Leaving the Scene of an Incident Without Reporting, negating any benefit to charging the new C felony. For these reasons, we urge a chapter amendment that would more simply and effectively raise the penalty for fatal leaving the scene charges from a D to a C felony.

Currently, driving while intoxicated (DWI) drivers may be encouraged to flee the scene of serious injury or fatal crashes because the potential penalties for leaving the scene are frequently much less than those for DWI assaults and homicides. This is the same situation that existed in 2005 when the legislature recognized that fatal leaving the scene penalties must not be lower than penalties for Vehicular Manslaughter because it created an incentive to flee.[[1]](#footnote-1) Fatal leaving the scene charges were elevated to a D felony that year.

The next year, in 2006, extensive DWI reforms were passed into law[[2]](#footnote-2) that raised the penalties for some DWI assaults and homicides. The reforms included (among many other changes) the creation of Aggravated DWI for drivers with blood alcohol concentrations (BACs) of .18% or higher, the creation of a “combined influence” offense for drivers using drugs and alcohol or multiple drugs and the complete overhaul of Vehicular Manslaughter 1°, making it a C felony to cause someone’s death while driving with a BAC of .18% or higher. Since then New York has continued to address the scourge of drunk driving by enacting additional tough legislation, including Leandra’s law in 2009, requiring interlock devices for all DWI convictions in 2010 and Aggravated Vehicular Homicide in 2007. These efforts have been recognized by the National Highway Traffic Safety Administration (NHTSA) which regards New York as a leader in the fight to end drunk driving. But ten years later, leaving the scene of a fatal crash remains a D felony. Increasing the sanctions for DWI offenses, without also increasing the sanctions for leaving the scene of serious injury and fatal crashes, has re-created the same anomaly that existed in 2005.

S4747/A5266 fails to correct this anomaly in spite of the goals stated by the bill’s sponsors. First, it only provides for a C felony under the rare circumstances when a driver:

1. Leaves the scene, violating VTL 600(2)(a),

2. AND causes the death or serious injury of more than one person,

3. AND the death or injury is caused by the driver’s reckless driving under VTL 1212,

4. AND the driver is suspended or revoked due to impaired or intoxicated driving

 under VTL 1192 or due to a prior leaving the scene,

5. OR the driver has a prior leaving the scene or impaired/intoxicated driving

 violation in the last 10 years..

Second, the proposed bill requires as an element of the new C felony leaving the scene that the people prove that the defendant committed another C felony – Manslaughter in the second degree. The proposed bill seeks to penalize drivers who leave the scene after having “*recklessly caused the death of more than one other person and/or serious physical injury to more than one other person…”.* Manslaughter 2° currently provides for a C felony when a single death is recklessly caused and it does not require the additional element of leaving the scene. This creates an inadvertent redundancy and provides no real benefit to victims or to the criminal justice system. It would actually be harmful if S4747/A5266 were signed into law without amendment, because it would occupy the C felony position in the leaving the scene statutory scheme instead of allowing for a straightforward, fatal leaving the scene to be elevated to a C felony, as needed.

There are several recent cases that illustrate the need for the suggested chapter amendment. In Nassau County, a 13 year old special needs victim, Bryanna Soplin, was crossing Hempstead Turnpike. A retired police officer had been drinking at a bar further west on the same road. He struck and killed Bryanna and immediately fled the scene. He surrendered 42 hours later – enough time to metabolize between .63% and .84% BAC. (DWI per se is established at a .08% BAC). The driver initially claimed that he thought he struck a construction cone. He ultimately pled guilty and admitted that he had reason to know that he had struck a person. The Soplins will never know whether the driver was intoxicated or if his BAC was above a .18% because he left a child to die in the street and prevented a complete investigation. The D felony for leaving the scene was the highest possible charge under the circumstances. In another case, a driver alleged to be coming from a strip club/bar struck and killed Sherman Richardson on a highway. He immediately fled and took the next available exit. Later that day the vehicle was found engulfed in flames. The driver remains at large. Law enforcement will not be able to use forensic evidence to determine whether the driver was intoxicated or impaired by drugs. The victim’s widow, Jawana Richardson, will never know with certainty why her husband died that day. Unfortunately she will know that if the driver is apprehended, he can only be charged with a D felony for leaving the scene while the person who set the car on fire can inequitably be charged with a C felony for arson. And finally, the extremely narrow scope of the proposed statute can be illustrated through one of the terrible, recent cases in Suffolk County. It is alleged that a DWI driver crashed into the back of the Ostane family’s car on the Southern State Parkway. The driver was picked up by a friend and left the scene of the crash. Mrs. Ostane helplessly watched her husband and young children burn to death inside the car. She was the only survivor. The current form of S4747/A5266 is so narrow that it does not apply to this unspeakable tragedy.

The families of hit and run victims have sought the change represented by the suggested chapter amendment for many years without success and would welcome your leadership on this issue. If the amendment is not possible, it is DAASNY’s position that it is preferable that the bill is vetoed.

 Respectfully,

 Hit-and-run incidents are on the rise, as more offenders are leaving accidents that have resulted in injury or death to avoid punishment for other serious infractions, like driving while intoxicated or driving with a suspended license. A driver would be guilty of the new crime if he or she engaged in reckless driving which caused the death of more than one other person and/or serious physical injury to more than one other person, and he or she either committed the crime either while knowing or having reason to know that his or her license is suspended or revoked; driving while intoxicated (DWI) or while ability impaired (DWAI); or having a prior conviction for leaving the scene of an accident or for DWI/DWAI. Aggravated Leaving the Scene of an Incident without Reporting would be a Class C felony.

 The crime is particularly egregious since a severely injured person's chance of survival is greatly diminished when medical care is delayed. We are very pleased that both Houses have come together in passing this important measure as it can certainly be agreed that a stricter deterrent is necessary to reduce the incidence of drivers fleeing the scene of serious accidents. As such, we would urge your favorable executive action on A.5266/S.4747.

1. Justification Section; Sponsor’s Memo; Bill S4584/A 3327-A, Chapter 49; Signed into law May 24, 2005: “…This bill will bring the penalties for leaving the scene of an accident resulting in serious personal injury or death more in parity with those for vehicular assault and vehicular manslaughter. Under current law, for example, an intoxicated driver causing an accident, resulting in death of another person, who stays at the scene faces a more serious charge - second degree vehicular manslaughter, a class D felony - than if the person left the scene and sobered up - a class E felony. The bill obviates the problems with current law which, in essence, rewards an intoxicated driver for fleeing the scene. [↑](#footnote-ref-1)
2. S8232/A11859/A11963 was signed into law on September 13, 2006, Chapter 732. [↑](#footnote-ref-2)