OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

2018 FALL

VINDICATOR

FALL... a time to reflect

- Remembering Chris Reinhart
- Breath Testing Machine Changes
- Fourth Amendment Privacy Interests
- Changes to Ohio's Culpable Mental State Definitions
- Jury Selection for the Muslim or Muslim-Looking Client
- Keeping Your Client's GPS Data from their Cell Phone Private
- Medicaid Fraud in Ohio: A Closer Look
- Case Study: Potential False-Positive Ethanol Readings

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MISSION STATEMENT

• To defend the rights secured by law of persons accused of the commission of a criminal offense;

• To educate and promote research in the field of criminal defense law and the related areas;

• To instruct and train attorneys through lectures, seminars and publications for the purpose of developing and improving their capabilities; to promote the advancement of knowledge of the law as it relates to the protection of the rights of persons accused of criminal conduct;

• To foster, maintain and encourage the integrity, independence and expertise of criminal defense lawyers through the presentation of accredited continuing legal education programs;

• To educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the bill of rights and individual liberties;

• To provide periodic meetings for the exchange of information and research regarding the administration of criminal justice.

BENEFITS OF THE OACDL

LISTSERV - The OACDL listserv is our most popular member benefit. This on-line forum joins over 500 members from around the state. If you have a question, post it on the listserv and usually within minutes you have responses from some of the most experienced legal minds in Ohio.

AMICUS BRIEF - OACDL members provide amicus support for criminal cases.

CLE SEMINARS - The most up-to-date topics presented by nationally-recognized experts are available at incredible savings to OACDL members - including the annual Death Penalty and Superstar Seminars.

STRIKE FORCE - With OACDL, you never stand alone. OACDL members are here to aid.

LOBBYING - The OACDL actively lobbies state government by providing testimony on pending bills and working with other organizations with similar interests.

LEGISLATION - The OACDL monitors pending legislation and government activities that affect the criminal defense profession.

MENTOR AND RESEARCH PROGRAMS - OACDL offers a mentor program for new attorneys and resource telephone access for the assistance of all members.

NETWORKING - Networking functions allow current OACDL members and prospective members to interact. These functions are not only entertaining, but very valuable for old and new members alike.

Letter from the **PRESIDENT**

MICHAEL J. STRENG
President

"All the great things are simple, and many can be expressed in a single word: freedom, justice, honor, duty, mercy, hope." Winston Churchill.

As criminal defense lawyers our role is to seek all of these fundamental ideals.

Freedom. Frequently the liberty of our client is at stake. It is our responsibility to make sure it is not taken without due process and only after proof beyond a reasonable doubt is established.

Justice - To make certain our client is afforded fair treatment.

Honor - To do what is right for our client, toward the court and toward opposing counsel.

Duty - To uphold our responsibility as an advisor and advocate for our client and as an officer of the court.

Mercy - We must show and seek compassion for our client.

Hope - We offer our client hope for the best possible outcome.

By remembering these ideals, each of us raises the bar and improves our individual reputations. When we all remember these ideals, we collectively raise the reputation of the criminal defense bar and demonstrate the value of the criminal defense lawyer in the administration of justice in a manner that reflects this honorable calling.

To the end of achieving these ideals and promoting the highest ethical standards within our profession and membership, I encourage everyone to take a moment and review three items:

1) The Ohio Rules of Professional Conduct
http://www.supremecourt.ohio.gov/LegalResources/Rules/default.asp

2) The Ohio Supreme Court's publication on Do's and Don'ts for Prosecutors and Defense Lawyers.
http://www.supremecourt.ohio.gov/Publications/AttySvcs/conduct.pdf

3) The Ohio Supreme Court's publication on Professional Ideals for Judges and Lawyers.
http://www.supremecourt.ohio.gov/Publications/AttySvcs/proIdeals.pdf

They are helpful reminders of what we need to do to be strong and ethical advocates for our clients as well as increase our reputation individually and as a group.

I believe the OACDL stands for and embodies these ideals and aims to serve and support our members while encouraging the utmost professionalism in the pursuit of these ideals. The mission of the OACDL is to defend the rights of those accused of a criminal offense within the bounds of the law; to educate and develop our member attorneys' skills and knowledge to defend people; to foster, promote and maintain the integrity, independence and expertise of member attorneys; and to educate the public to the role of the criminal defense lawyer in the justice system.

In an effort to achieve this mission, the OACDL has no less than ten seminars already scheduled throughout Ohio for the upcoming year. Our seminars will focus on the latest issues presented by experienced lawyers and experts from Ohio and across the United States. We have increased our focus on helping our members deal with the unique stressors and challenges our vocation places on us and will have a four-part series on "mental

health in our profession" incorporated into these seminars. With many of the seminars, there are receptions where we can gather for fellowship and comradery with our brothers and sisters in the trenches.

In an effort to serve all of our members, the OACDL has created a Senior Committee to assist and educate our members on issues we face as we prepare for, approach and enter into retirement as well as allow for social events and mentoring opportunities. Additionally, the OACDL aspires to keep our membership up to date on pending legislation and public policy that affects our clients and our practices. All of this is in addition to the list serve, the strike force, amicus assistance and many more benefits of membership.

Being a criminal defense lawyer is a noble calling. We not only help individuals by advising and advocating for them when they may feel they have no voice, but we protect the rights of individuals and shape the rule of law though our motions, briefs and arguments within each case. Senator Edward Kennedy stated, "I have believed that America must sail toward the shores of liberty and justice for all. There is no end to that journey, only the next great voyage. We know the future will outlast all of us, but I believe that all of us will live on in the future we make."

I encourage everyone to pursue liberty and justice in each of your client's cases and know you are making a difference.

Letter from the **PRESIDENT-ELECT**

SHAWN R. DOMINY

President-elect

"How can you do what you do?" All criminal defense lawyers are likely asked that question repeatedly throughout their careers. Many people do not understand defense attorneys play an important role in maintaining our democracy. They instead see our role as using "loopholes" to keep guilty criminals from being punished.

The Framers didn't see it that way. They came from England at a time when English law did not permit criminal defendants to have counsel unless a judge permitted a defendant to have a lawyer. As judges regularly refused to permit criminal defendants to have counsel, most defendants were unrepresented.

The Framers reacted to this injustice by creating the Sixth Amendment. That Amendment, along with other Amendments, gave the accused the right to a fair trial. The Framers believed the right to a fair trial was a cornerstone of individual freedom: preventing the government from wrongfully charging a person with a crime and obtaining a conviction through an unfair trial. The Framers wisely recognized a trial could not be fair without the assistance of defense counsel. They also recognized criminal defense lawyers are essential as a check on the power of the government.

Despite the wisdom and intent of the Framers, many people in the United States continue to harbor a negative view of criminal defense lawyers. The public's dim view of defense attorneys is illustrated by a recent article

in the Columbus Dispatch: "Attorney driven by belief that even worst offenders deserve fair trials". Although the article presented the attorney in a positive light, the overall reaction the attorney received from the public was not so positive. While working on a death penalty case, the lawyer received many angry emails, phone calls and letters. She estimated only 20 percent of what she received was supportive. In one letter to the Dispatch titled "Defense attorney helped bad guy live", the writer concluded by saying, "[The defense attorney] is a disgrace to all Ohio taxpayers and Ohio female residents". Many people still don't understand why we do what we do.

Saint Peter said, "Always be prepared to give an answer to everyone who asks you to give the reason for the hope that you have." Putting the religious context aside, Peter gave good advice, which we should heed. We know we are going to be asked why we do what we do. Don't get caught unprepared like Urban Meyer at Big Ten Media Day. Always be prepared to give an answer to everyone who asks you, "why do you do what you do?".

We do what we do for many reasons. The most important of those reasons are supporting the Constitution, protecting individual rights, and preserving our democracy. Vincent Van Gogh said, "Your profession is not what brings home your weekly paycheck. Your profession is what you're put here on earth to do, with such passion and such intensity that it becomes a calling." Our profession is a calling, and the work we do is important.

While what we do is important, it's not always easy. That's why we need an organization like the OACDL. It is filled with like-minded lawyers helping each other on the listserv, teaching each other in CLE seminars, and supporting each other through the Strike Force Committee, the Amicus Committee and the Ethics Committee.

One way the OACDL assists its members, and others, is this magazine. The Vindicator is delivered to nearly 2,000 recipients throughout Ohio. In this issue, there are articles about challenges to statutes defining mens rea, jury selection for Muslim-looking clients, and the recent decision in *Carpenter v. U.S.* We also hear about an insider's experience in the grand jury process, learn details about Medicaid Fraud, and 'get our science on' with articles about forensic science and new breath-testing machines.

Incoming president Michael Streng has a robust vision for improving the OACDL. He stands on the shoulders of recent presidents Ken Bailey and Jon Saia, and more details about his vision for the OACDL are in his Letter From The President. I'm honored to assist Mike Streng in his presidency, serve the members of the OACDL, and do what we do as criminal defense lawyers.

OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Hot Topics in Criminal Law

December 14, 2018
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Columbus, OH

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2018-2018 CLE SEMINAR SCHEDULE

November 14-16, 2018
Advanced Death Penalty Seminar
Sheraton Hotel, Columbus

December 14, 2018
Hot Topics in Criminal Law with Professional Conduct Hours
Ohio Dept. of Transportation Building, Columbus

January 21, 2019
Current Issues in Criminal Law
University of Cincinnati Law School, Cincinnati

March 7-9, 2019
Advanced OVI Seminar and Trial Skills Workshop
Crowne Plaza Hotel, Dublin

April 5, 2019
Juvenile Hot Topics (3 hours)
Zanesville

April 12, 2019
Motions Practice (3 hours)
St. Rita's Hospital, Lima

May 17-18, 2019
Spring Retreat at Myrtle Beach!
Hilton Resorts, Myrtle Beach, South Carolina

The above are the annual seminars sponsored by YOUR association. Other seminars are being scheduled around the state. Brochures will be mailed 6-8 weeks prior to each seminar. All seminar information is posted on our website, www.oacdl.org.
The OACDL Seminars are organized by volunteers of the association. They want to make sure you have the most up-to-date, cutting-edge, informative seminars BY defense attorneys FOR defense attorneys in the state. The OACDL thanks you for your support of our continuing education seminars.

PAST PRESIDENTS OF THE OACDL

1986-88	Jay Milano, Rocky River	2003-04	Charles H. Rittgers, Lebanon
1988-89	John H. Rion, Dayton	2004-05	Paul Skendelas, Columbus
1889-90	Thomas Miller (deceased), Cincinnati	2005-06	R. Daniel Hannon, Batavia
1990-91	Max Kravitz (deceased), Columbus	2006-07	Barry W. Wilford, Columbus
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1992-93	William F. Kluge, Lima	2008-09	Ian N. Friedman, Cleveland
1993-94	Mark R. DeVan, Cleveland	2009-10	Andrew H. Stevenson, Lancaster
1994-95	Samuel B. Weiner, Columbus	2010-11	David Stebbins, Columbus
1995-96	K. Ronald Bailey, Sandusky	2011-12	D. Timothy Huey, Columbus
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2001-02	Jefferson E. Liston, Columbus	2017-18	Kenneth R. Bailey, Sandusky
2002 -03	Clayton G. Napier (deceased), Hamilton		

DIRECTOR'S DIALOGUE

Susan Carr
Executive Director

I want to thank Ken Bailey for his outstanding work as President of this organization last year. He had so much going on in his life (congratulations on the new baby!), and yet was always available. He upgraded the computer we use for seminars, made additions to the Brief and Motions Bank on our website, and was able to procure more partners with OACDL for member benefits. Ken will stay on as our technology chair – so expect more changes to come!

OACDL President Mike Streng has some wonderful plans for the organization during his tenure. Please read his letter, along with President-elect Shawn Dominy's. I think the association is in very good hands for the foreseeable future!

Do you have a Marsy's Law case you think would be the "perfect" case for a challenge? Please email Ian Friedman. Ian has a committee that is working on challenges to the law. Ian can be reached at inf@fanlegal.com. Dues notices will be going out the end of November and are due January 1. You can pay by mail or online at oacdl.org. Just click on the join/renew tab. The renew form is at the bottom of the page. If you would like to renew before we send out the renewal notices, you can save some paperwork! It's hard to believe I am starting my 26th year with OACDL. I want to thank everyone who attended the anniversary party in August – and to all who couldn't attend but sent well wishes. I had so much fun – and it was nice to have my son and his new wife attend, especially since neither of my daughters could be there. Many of you have been around and heard about Kevin since he was a little boy playing basketball. It was fun to introduce him to all of you!

Chris Reinhart 1952 - 2018

One person that was sorely missed at the party was my seminar side-kick and dear friend, Chris Reinhart. As most of you know, Chris passed away this summer. She had been around the OACDL since its inception, and taught me the inside workings of the association. I think her most insightful line was – *have you ever tried to herd cats? Well, this job is the same thing!* She was the editor of our magazine, The Vindicator, for too many years to count! We relied on her to keep us on task, meet deadlines, keep consistency throughout the articles, come up with smart cover pages, and make sure it was all done under budget! She also helped with our two biggest seminars – the March DUI and the November Death Penalty. Those get to be long days at the registration desk, and it was always so nice to have a friend there with me. She is and will continue to be, very much missed. Please take a moment to remember Chris.

Thank you for your friendship and support. I truly appreciate all of you.

Susan

***Christine G. Reinhart**, age 65, passed away Friday, June 22, 2018. She was born August 26, 1952, in Lancaster, Pennsylvania. Chris is survived by her mother, Kazuye Good, and sister, Patricia Kiyono, of Seattle. She was preceded in death by her father, Elmer Good.*

Chris was the Executive Director of the Central Ohio Association of Criminal Defense Lawyers. She will be greatly missed by many lifelong friends who remember her creative, sensitive, and generous spirit.

Chris was involved with the OACDL literally from the first day of its existence when in 1987 she arranged the first meeting in John Rion's office in Dayton attended by the founding members of the association. During the early years she was the publisher of The Vindicator, later to be re-named The OACDL Vindicator because a certain Youngstown Newspaper could not stand the competition. She conceived and executed the plan to feature every Historic County Courthouse on the cover by collaboration with a retired OSU History Professor and photographer. This made the magazine immensely popular throughout the State, every sitting judge in a featured County proudly displaying the magazine in their chambers. This quite literally put OACDL "on the map" throughout the State of Ohio. And she did this all without pay, including editing and proof-reading every article submitted for publication, designing the magazine lay-out, printing and mailing. Chris was similarly involved in the creation of the COACDL, arranging the first meeting of that organization at Paul Scott Sr.'s office in Columbus. She was the first and, until now, the only Executive Director of that Association which holds monthly CLE Meetings at Tony's Restaurant. It was at Tony's where she had her cardiac arrest on May 30th, while setting up for the monthly meeting. You could say that "she died on the job" having devoted thirty years of her life to our profession and our Professional Associations.

We will miss you, Chris.

Breath Testing Machine Changes - A Practitioner's Update

Tim Huey & Blaise Katter

The winds of change are blowing into Ohio, as a multitude of factors are converging and will undoubtedly change the way Ohio does breath-testing. These winds are likely to bring some stormy seas; perhaps for prosecutors, perhaps for defense lawyers, and perhaps for courts – or perhaps all three.

All across the state, the mainstay of breath testing for the past several decades – the BAC DataMaster – is being slowing phased out, at least by the Ohio State Highway Patrol (OSHP). Intoxilyzer 8000 devices (which did not fare well on their initial rollout years ago) are being resurrected from their shallow graves, dusted off, and declared to be wonderful by the OSHP hierarchy.

On top of this, the Ohio Department of Health (ODH) rules relative to breath testing are due to be reviewed and updated next year. This is not news to the folks at the ODH who, long before the Highway Patrol decided to dust off the I-8000s, began drafting new rules – which included approval of new machines.

This article seeks to help practitioners and others who may have to sail these stormy seas be prepared for what may be in store. Caveat: while a higher power may have a design and plan for the weather, that is not so in Ohio -- prior to and after the rollout of the I-8000, there has never appeared to be a particularly well-thought-out plan for the future of breath-testing in Ohio.

In an effort to forecast the weather on the Ohio breath-testing horizon, we will summarize "what we know," grab a crystal ball, and gaze into the (not-so-distant) future.

What we Know Now

We know the Intoxilyzer 8000 is being resurrected – at least in most places – and at least for the near future. Keep reading for more about the when, whys and wherefores of that. We know the DataMasters used in Ohio are getting old. However, contrary to claims by the OSHP, there are no shortage of parts to repair them, but... repairs cost money, time, and effort. And, well, if you look under that pile of dust over there, you will see $6.5 million dollars worth of breath-testing machines and ....

We also know that, no later than May of 2019, the ODH is required to do its five-year review of most of its breath, blood and urine testing "rules" contained in the Ohio Administrative Code. Presumably, this required review should prompt a consideration of what is working, what is not and where we should go. The authors of this article also know the ODH has indeed been working on draft rules, as we have received copies via public record requests.

The correspondence received with the records warns that these are only drafts and could change. Perhaps they can be changed for the better with public input? Let's hope so, because, as discussed below, the draft rules leave way too many holes. The draft rules do call for two new machines to be approved, both of which, many would believe, have to be better than the Intoxilyzer 8000 (but are they really? see more discussion of these machines below).

One problem with the draft rules is they don't call for the utilization of "advances" built into these new devices and may signal a major shift backward and more "hide the ball" mentality. Please read the discussion of this below as it is our hope the defense bar, the judiciary and even prosecutors will come forward and voice the opinion that, going forward, we want Ohio to reject, not embrace, "hide the ball" and "trust me" practices and decision-making related to the breath testing machines and procedures, especially in light of the fact that these machines produce a number which can be used as the sole evidence supporting a conviction of an accused citizen charged with an OVI 'per se' offense. As breath test results are

elevated to such a lofty perch, one would hope that Ohio would strive to promote, not hinder, confidence in those results.

The other problem with the draft rules is that they are "draft" rules. Thus, ODH could change them and leave us with the Intoxilyzer 8000 as the only option for breath tests going forward.

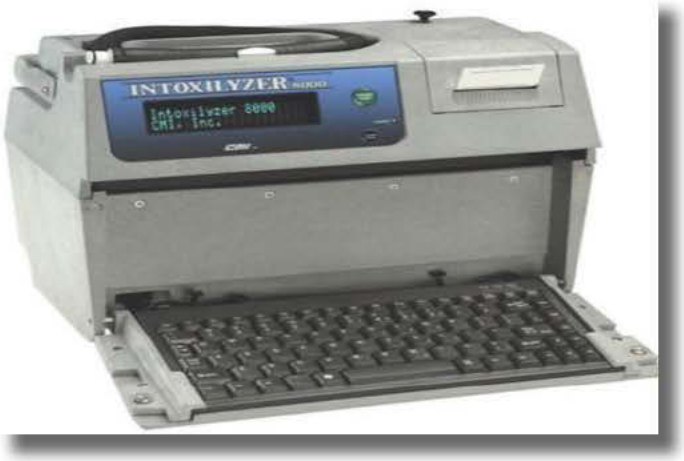
The Resurrection of the Intoxilyzer 8000

Undoubtedly, many of you are beginning to see a local transition away from the BAC DataMaster and back to the Intoxilyzer 8000. Even more of you may be wondering why these machines are returning at all: after all, didn't we mostly chase those machines away years back?

Practically speaking, the transition back to the 8000 in the short-term is the result of politics within the Ohio State Highway Patrol. In April, the patrol ordered a district-by-district conversion back to the 8000 machines, indicating the State will be transitioning away from the DataMaster and citing unavailability of spare parts and repair options. However, just like the 8000, these reasons are mostly smoke-and-mirrors and have little accuracy. The owner and (former) head of National Patent, the manufacturer of the DataMaster, has stated that they have never yet failed to repair a DataMaster Machine, and they have several years' worth of spare parts yet in stock.

Nevertheless, in August, the OSHP accelerated their plans and ordered all* posts to immediately stop using the DataMaster (and to stop using other agencies' DataMasters) and immediately switch to the 8000.
*As the below-referenced article in the Columbus Dispatch cites, however, Franklin County negotiated a special exemption to the requirement. According to the City Attorney, due to the "sophisticated defense bar" in Columbus, switching to the 8000 could grind the Franklin County courts to a standstill. Therefore, Franklin County troopers will continue to use the DataMaster until its official retirement.

In the short-term, therefore, the DataMaster remains an approved machine. Nevertheless, OSHP cases should have switched to exclusively using the 8000 by now. This is presumably just a stopgap measure until the ODH certifies new machines – see below!



On the Horizon - New ODH Rules (and Machines)

In light of the upcoming rule-review deadline in May of 2019, the authors have been reviewing draft rules to 3701-53 via public records requests. Neary a year ago, in September of 2017, the ODH provided us with a draft of their upcoming proposed rules. They have recently provided us with a newer draft which remains essentially the same. These drafts help preview the changes ahead.
New Machines

According to the "draft", the Ohio Department of Health will be adding two new machines to the list of "approved evidential devices." These devices are the Intoxilyzer 9000 and the Intoximeter DMT.
Briefly, the 9000 is a newer version of the 8000 and the Intoximeter DMT is the (previously rejected) Datamaster DMT now being sold by a different company – a company that is much more secretive than the original company, and dealing with them will be much more like dealing with CMI who makes the Intoxilyzer 8000 / 9000. Speaking of which; can you believe the ODH is still willing to dance with them?

New Procedures - I-8000-ish

It appears that the ODH intends to adopt a two-sample testing protocol for both of these machines, with the requirement of a .020 agreement, as adopted for the I-8000. It also appears that the reduced "proficiency test" procedures adopted for the I-8000 will apply to these new machines.

Unlike the I-8000, the ODH will not be responsible for maintaining these new machines. It does not appear the ODH or the Department of Public Safety will be paying for these machines either. Local Senior Operators will be responsible for doing the required annual checks.

Unlike the I-8000, it does not appear the ODH will utilize a COBRA system for the Intoxilyzer 9000. Thus, there will be no data downloaded to the ODH and no online portal. A similar COBRA system is available to the DMT, but it appears the COBRA system will not be utilized for the DMT either.

However, the most recent draft rules allow for the new machines to be "networked by law enforcement agencies if the network system is purchased" from the manufacturer. That seems to give each individual law enforcement agency the discretion to decide whether to buy the networking capabilities.
As noted above, in our public records requests, we are seeking information beyond what has al-

ready been provided. It appears that extracting this information will be like pulling teeth; so stay tuned for more updates!

Improvement? The 1 Million Dollar Questions

It is all well-and-good that new rules may be adopted, which may include some more modern aspects, and all well-and-good that more modern machines will be approved, but what really matters is what is not in the rules.

New machines are not likely to be an improvement if the ODH is able to pull a fast-one and direct the manufactures to eliminate the most important features of these new machines. And that is a real possibility.

Remember: the biggest modification ever related to the BAC Verifier / BAC DataMaster line of machines occurred in the 1990s when it the BAC Verifier was modified and became the BAC DataMaster. This modification allowed for the possibility of downloading data from those devices and allowed for a better idea of how the machine was performing, and so some of the data could be accessed on line (sound familiar?).

But Ohio told the manufacturer early on to disconnect the modem from all Ohio machines and then later said it would be too expensive "fix" this. Thus, due to decisions made by Leonard Porter (remember him?) when Ohio first started buying DataMasters, for three decades Ohio DataMasters have not mastered any data as the data could not be downloaded. The importance of this will become obvious momentarily.

The bottom line is that, at some point way back then, the ODH, with no public notice, told the DataMaster folks "disable that function for all Ohio machines." This was not contained in any rule. There was no public notice and no hearing held. One of the most important decisions about breath-testing in Ohio made in the last thirty years was made in secret. And it was the wrong decision.

This could easily happen again – we will need to be very vigilant as this process goes forward.

Data Preservation and the "Graphic Display" are Very Important Improvements

The two most important features that the DataMaster DMT has that our current DataMasters do not have are 1) Data Preservation capabilities and 2) Graphic Display capabilities. Note both the Intoxilyzer 8000 and 9000 have data preservation capability and graphic display capabilities. Typically, Ohio opted not to have graphic display active on its machines (except two that had this capability by mistake.)

Data Preservation

As we have seen with the Intoxilyzer 8000, and other states are seeing with the 9000 and the DMT, being able to download and preserve data for defense or independent review can be very valuable. The data can show the machine is not working properly or can show that a person did not refuse even when it is claimed he did. It can also help determine whether there was extraneous / mouth alcohol present which falsely elevated the results.

We have recently seen data from another state showing that the DMT rounds up, even though manufacturer claims that is impossible.

Graphic Display

The DMT and Intoxilyzer 9000 are designed to have graphic displays which show some of the data produced by the machine in a graphic format. In particular, this shows the alcohol readings during the entire test and the breath flow / pressure.

This information may be the most critical for practitioners in analyzing the accuracy of any specific test. While we will not unduly lengthen this article to explain the scientific principles behind the alcohol curve [Shameless Plug – detailed information is available in OVI: The Law and Practice by Tim Huey], it is important to note that exculpatory information can be found in the curve. For example, interruptions in breath flow, mouth alcohol, and other indicators that the machine is not properly sampling deep lung air can be deduced from the alcohol curve.

However, the real concern is that this information will be disabled – just like in many other states using these machines.

Conclusion

In terms of the future of Ohio breath testing – these new machines and draft rules are just the tip of the iceberg and maybe the start of a war.

It is time for us to get active and attempt to have an impact on the real decisions that will determine whether Ohio has a fair and open breath testing process in the future – which could stretch 30+ years, as the old decisions relative to the DataMaster have.

About The Authors

Tim Huey is currently the President of the national DUI Defense Lawyers Association and is a former OACDL President. His practice is state-wide, often co-counselling with other OACDL members on OVI, vehicular homicide and assault cases. The Huey Defense Firm can be reached at 614.487.8667.

Blaise Katter is an Associate at the Huey Defense Firm. A rising star in the OACDL, Blaise has given several CLE presentations and has been very active in the organization. Blaise is also the Firm's legislative and appellate guru with a big recent win in State v. Eversole, 2017-Ohio-8436.

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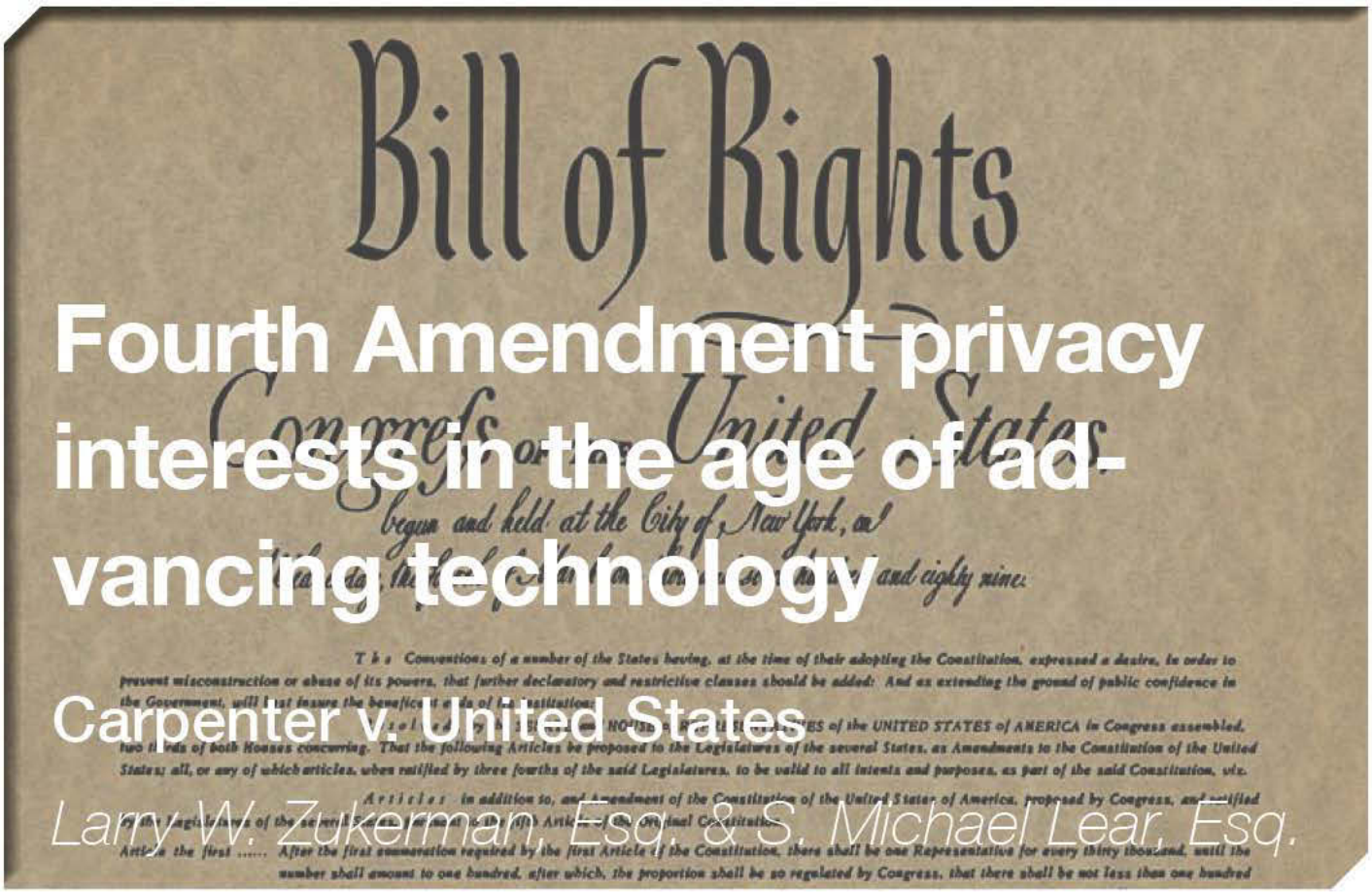


Fourth Amendment privacy interests in the age of advancing technology

Carpenter v. United States

Larry W. Zukerman, Esq. & S. Michael Lear, Esq.

In the modern world, nearly every person has a cell phone. It has evolved from an accessory into a necessity; changed from being a status symbol of only the wealthiest businessmen to the near indispensable tool for almost every citizen regardless of class or status. Now, there are more cell phones than citizens in the United States. It is nearly unheard of for any person to be out of reach of a cell phone and correspondingly, a cell phone tower.

Yet, for all the tools and convenience cell phones provide there is a downside. Modern cell phones work by automatically sending out a signal to nearby cell towers within range. Those towers receive the signal and automatically catalogue and save information in a file called a Cell Site Location Information file ("CSLI"). In other words, the CSLI information, which is saved automatically and effortlessly, tracks the location of your phone—and you—24 hours of the day. As cellular phone technology continues to advance, so too does such tracking information. CSLI tracking is detailed, exhaustive, cheap, automatic, and can now locate individuals with astounding accuracy.

Understandably, that information has been of effective and significant use to law enforcement. Law enforcement routinely gathers CSLI information to discover the location of individuals in relation to past crimes. Under the Stored Communications Act, federal agents could access CSLI information for any individual, as long as they had "reasonable grounds" that the CSLI data would be "relevant and material to an investigation." This standard is much less stringent than the well-known legal standard of "probable cause," and allowed law enforcement almost unfettered warrantless access to CSLI records to track individuals' physical locations. The conflict between law enforcement interests and individual privacy amidst the growing surveillance state are the greater issues that lay in the background of the Supreme Court's decision in *Carpenter v. United States.*

In *Carpenter*, the government charged the defendant with being involved in a string of robberies across the states of Michigan and Ohio. During trial, the government introduced into evidence extensive CSLI data that placed Carpenter's phone close in proximity to the locations of several of the robberies. Additionally, the government commented on the CSLI information during closing argument. All in all, law enforcement used records that tracked his movements for 127 days. All of the CSLI information was obtained without a warrant.

Thus the main question before the Supreme Court was this: should the government be able to access the CSLI records of any citizen, in effect getting detailed time and location data for up to the past five

years, and if so, what level of burden of proof should be required before access is allowed?

The defendant appealed his conviction on the basis that the use of CSLI records infringed upon his Fourth Amendment right of privacy in his movements. His argument was that he had a privacy interest in his physical location, and since the CSLI records detailed so precisely his physical location at any point in time, that the Fourth Amendment protections of privacy interest extended over to the CSLI records.

In response to the defendant's arguments, the government relied on what is known as the third-party doctrine. The third-party doctrine was created through the decisions of two Supreme Court cases: *Miller and Smith*. In *Miller*, the government subpoenaed the bank records of the defendant and used them to secure a conviction. In *Smith*, the defendant was convicted after the government used his dialed phone number records against him in trial. The Supreme Court held that the common principle to be derived from those cases was that business records that are gathered by a third-party do not infringe upon the privacy interests of the individual about whom the records contain information. Inherent in the third-party doctrine logic is the idea that because an individual knows that records are being created and willingly uses the service of the third-party anyway, the individual implicitly consented to the creation and ownership of that record by the third-party and, accordingly, assumed the risk that the information could be conveyed to law enforcement. Thus, the individual has a limited expectation of privacy in such records.

In a distinct move towards modernizing privacy protections provided under the Fourth Amendment, in *Carpenter*, the Supreme Court decided that the CSLI records could not be released without a warrant issued by a judge based upon probable cause, and rejected the third-party doctrine arguments of the government.

First, the majority opinion, authored by Chief Justice Roberts, summarized that Fourth Amendment protections, while customarily limited to property rights, have also been applied to privacy interests ever since the revolutionary decision in Katz , in which the Supreme Court established that "the Fourth Amendment protects people, not places." Roberts re-emphasized the original purposes of the Fourth Amendment, which were to "secure 'the privacies of life' against 'arbitrary power'" and to "'place obstacles in the way of a too permeating police surveillance.'" Additionally, the majority opinion cited to several previous cases as evidence that the Court had in the past extended Fourth Amendment protections to protect the original goal of the Fourth Amendment. The majority relied upon *Kyllo*, which prevented police from using infrared detection technology to look inside people's homes; *Riley*, which recognized that cell phones contain so much storage as to be unique and require a warrant for a search; and Jones, which established that GPS tracking is a possible search under the Fourth Amendment if continued for long enough, as examples showing that the Court has extended Fourth Amendment protections against new technologies.

Against that backdrop of the purpose of the Fourth Amendment and the precedent that the Court had considered the implications of new technology, the majority found that CSLI records are of such a different qualitative nature than other business records that they deserve protection from government access by way of warrant.

In describing the different qualitative nature of CSLI records, the majority focused on several factors. First, the majority pointed out that the retrospective nature and timestamp of the records meant that unlike other business records, CSLI could create a detailed picture of a person's past physical movements and location far in excess of what any other business record could. The majority also was concerned that the automatic nature of CSLI records meant that in effect, all people are under surveillance, whether completely innocent or under government suspicion. The Court was troubled by how easily the government accessed, compiled and maintained these records, in effect allowing the government greater powers of surveillance than ever before at a cheaper investment of resources than ever before. Finally, the majority concluded that the ubiquity and near requirement of a cell phone in today's society removed the implicit consent idea inherent in the third-party doctrine.

Interestingly enough, the majority chose not to dismantle the third-party doctrine in its entirety with its decision. Although the majority opinion rejected the reasoning of the government and created a new category of "qualitatively different" records that retain privacy interests, the court viewed the decision as limiting the reach of the third-party doctrine, not as destroying it. In fact, the majority explicitly declared that the decision in *Carpenter* was a narrow holding, and should not be read as infringing upon "conventional surveillance techniques and tools" or "other business records that might incidentally reveal location information." Additionally, the majority stated that although warrants are now required for access to CSLI records, traditional warrantless exceptions, such as exigent circumstances, could still apply to CSLI searches.

Justice Kennedy penned the main dissent wherein

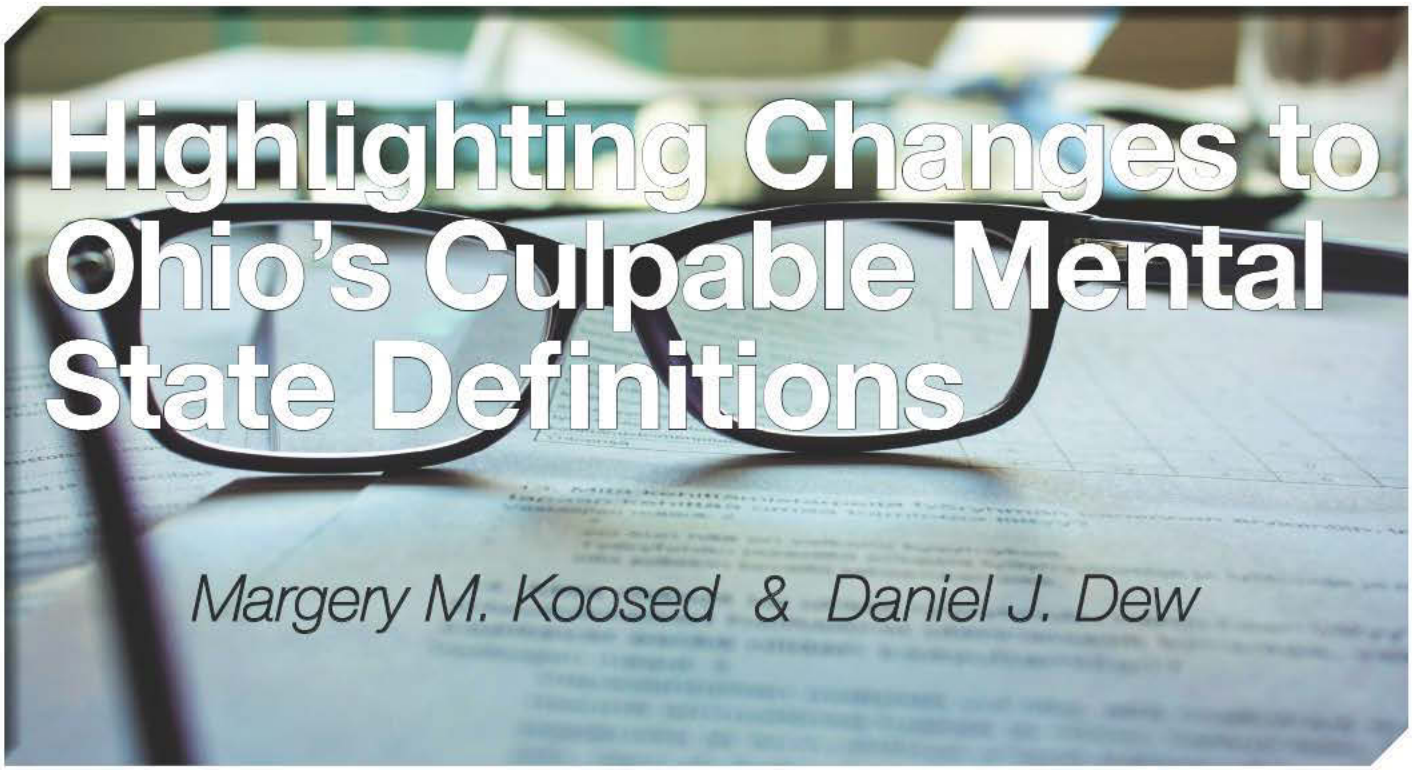
he stated that this was a clear-cut third-party doctrine case. To Justice Kennedy, CSLI records are no different than other records. A third-party cell phone company compiles them, they are stored and sold by the third-party, and the individual customer allows their use by agreeing to keep using the cell phone. The individual never owns the records. If the individual doesn't want to expose himself to the release of his physical location information, he shouldn't use a cell phone. In Kennedy's view, it's just that simple. Although Justice Kennedy's view would provide a clear-cut rule and maintain the third-party doctrine, it simply does not acknowledge the necessity of a cell phone in today's society, or the uniquely detailed nature of CSLI record information.

Justice Gorsuch in his dissent opines that a better approach would have been to remove the third-party doctrine under *Smith and Miller*, and go a step further and decide Fourth Amendment third-party doctrine cases based on property law analogies. In his view, property law relationships, like the traditional bailor-bailee relationship, could establish a workable and predictable jurisprudence while remaining true to the original purpose of the Fourth Amendment. Justice Gorsuch believes that a continued reliance on *Katz* and privacy interest determinations is what led to the mistake of the third-party doctrine in the first place, and continues to lead to ever more complex tests that lead to less predictable and reliable jurisprudence.

The effect of the majority's reluctance to sweep away the third-party doctrine remains to be seen. The repercussions of the ill-defined limits of the nature of the holding in *Carpenter* may pose some problems for lower courts, although the court did provide limited guidance in its discussion of what makes CSLI records so unique and invasive of privacy. Nevertheless, it is likely that lower courts will soon have to struggle in deciding which third-party doctrine business records are so "qualitatively different" as to be more similar to CSLI records, and less like traditional records that incidentally contain physical location information, such as credit card records.

Regardless of the potential new hurdles, the Supreme Court has made an unequivocal statement in *Carpenter*: that it is willing to continue to adjust Fourth Amendment protections in the context of advancing technology.

1. *Carpenter v. United States*, 585 U.S. ___ (2018)
2. *United States v. Miller*, 425 U. S. 435, 96 S.Ct. 1619, 48 L. Ed. 2d 71 (1976).
3. *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979)
4. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)
5. *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001)
6. *Riley v. California*, ___U.S.___, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014)
7. *United States v. Jones*, 565 U.S. 400, 403, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012)



Highlighting Changes to Ohio's Culpable Mental State Definitions

Margery M. Koosed & Daniel J. Dew

Ohio Revised Code sections 2901.21 and 2901.22 define the requirements for criminal liability and culpable mental states under Ohio law. In 2014, the Ohio legislature revised the state's long-standing definitions of acting "knowingly" and "recklessly," and altered when a default intent standard will be applied to crimes that are silent as to intent. Although the new provisions have been in effect since 2015, many defense attorneys may not yet fully appreciate the significance of the code's new requirements.

Changes to "Knowingly"

Since 1974, the Ohio Revised Code (ORC) 2901.22(B) had defined a person's "knowing" act as follows:

> A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

Proving that a defendant acted "knowingly" has always been easier for the prosecution under the ORC than under the Model Penal Code (MPC). Under the MPC section 2.02 (2)(b), a defendant acts knowingly as to a material element "if the element involved the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist," or "if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result." Thus, under the MPC, actual awareness of one's conduct or the circumstances, or awareness that a result is practically certain, is a necessary prerequisite, which makes the MPC standard far more demanding than Ohio's mere probability standard.

On March 22, 2015, Ohio's revised definitions took effect and inched the state's criminal code away from its former probability standard and toward the MPC's actuality or near certainty requirement in one significant context, by adding the following sentence to section 2901.22 (B):

> When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

This new sentence captures the standard law school concept of "willful blindness" and is lifted (with some helpful alterations) from the Model Penal Code 2.02 (7), which reads:

> Requirement of Knowledge Satisfied by Knowledge of High Probability. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

The revised ORC provision requires the prosecution to prove that the defendant "subjectively believed" that there is a high prob-

ability of its existence, "and failed to make inquiry or acted with a conscious purpose to avoid learning the fact." This revision places a heavier burden of proof on the prosecution than even the MPC and should help Ohio's criminal defense attorneys.

Changes to "Recklessly"

The Ohio legislature also amended the code's definition of "recklessly" found at ORC 2901.22 (C), replacing the former standard of "he perversely disregards a known risk" with the revised: "the person disregards a substantial and unjustifiable risk." This revision is another bow to MPC 2.02(2)(c), which uses the same "substantial and unjustifiable risk" measure. The revised ORC 2903.22(C), however, still maintains the "heedless indifference" to this risk that the "person's conduct is likely to cause a certain result or is likely to be of a certain nature" or that "such circumstances are likely to exist" that has appeared in the code since 1974.

Although the MPC 2.02(2)(c) requirement of a "conscious disregard" of the risk may demand more than Ohio's "heedless indifference," and replacing a "known risk" with a "substantial and unjustifiable risk" may allow the prosecution to urge culpability when subjective awareness of the risk may be lacking, the defense may now argue—under the new ORC definitions—both the absence of a substantial degree of risk and the presence of social utility in the purpose of the conduct and circumstances. The MPC's definition of "recklessly" provides more guidance on this: "The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."

"Risk" and "substantial risk," of course, are legal terms of art, defined in the ORC. ORC 2901.01(A)(7) defines "risk" as a "significant possibility, as contrasted with a remote possibility, that a certain result may occur or that circumstances may exist." ORC 2901.01(A)(8) defines "substantial risk" as a "strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist."

Ohio's criminal defense attorneys should insist on jury instructions that include the correct, revised definitions, and preserve this issue if courts fail to do so. In a case decided in August 2018, instead of using the new statutory definition of reckless, the 8th District Court of Appeals continued to use the old definition of "reckless." In 2017, the 12th District Court of Appeals erroneously held that the difference between using "risk" and "substantial risk" in jury instructions is "slight" and did not satisfy the plain error standard of review because it was not obvious that the outcome of the case would have changed. But rudimentary canons of statutory interpretation hold that different legal phrases have different legal meanings, thus showing the error of the 12th District Court's ruling. If the legislature had thought that there is little to no difference between "risk" and "substantial risk," it would not have bothered to define both terms differently or amend the code's definition of "reckless."

Changing the Criteria for Strict Liability Findings

Normal rules of statutory interpretation require that courts not read anything into a statute that is not there, but Ohio's default mens rea provision instructs practitioners to read a criminal intent element into every statute that does not have an intent standard and there is no clear intent to create a strict liability offense.

Since 1974, ORC 2901.21(B) has stated:

> When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense.

The revised provision generally retains the same language, but adds:

> The fact that one division of a section plainly indicates a purpose to impose strict liability for an offense defined in that division does not by itself plainly indicate a purpose to impose strict liability for an offense defined in other divisions of the section that do not specify a degree of culpability.

Further guidance for determining strict liability appears as a prologue to what is now section 2901.21(C):

(1) When language defining an element of an offense that is related to knowledge or intent or to which mens rea could fairly be applied neither specifies culpability nor plainly indicates a purpose to impose strict liability, the element of the offense is established only if a person acts recklessly.

(2) Division (C)(1) of this section does not apply to offenses defined in Title XLV.

(3) Division (C)(1) of this section does not relieve the prosecution of the burden of proving the culpable mental state required by any definition incorporated into the offense.

Although ORC 2901.21(B)'s first line did not change much, the legislature notably struck the word "section" and inserted "language." The Ohio Supreme Court has held that the presence of a culpable mental state in one clause and the

absence of a culpable mental state in another clause of the same section demonstrates the legislature's intention to impose strict liability in the clause without a mens rea requirement. By slightly revising the definition in 2015, the Ohio legislature indicated that the plain purpose standard now applies to intra-section provisions as well as inter-section provisions.

If any doubt about the legislature's intent remained, ORC 2901.21(C)(1) makes clear that, regardless of the surrounding provisions, unless the offense explicitly imposes strict liability, the government must prove that the defendant acted "recklessly." And to show that it is serious about criminal intent requirements, the Ohio legislature's mens rea reform included section 2901.20, which voids any new criminal law that does not specify a degree of mental culpability for the offense.

A Plea to Plead

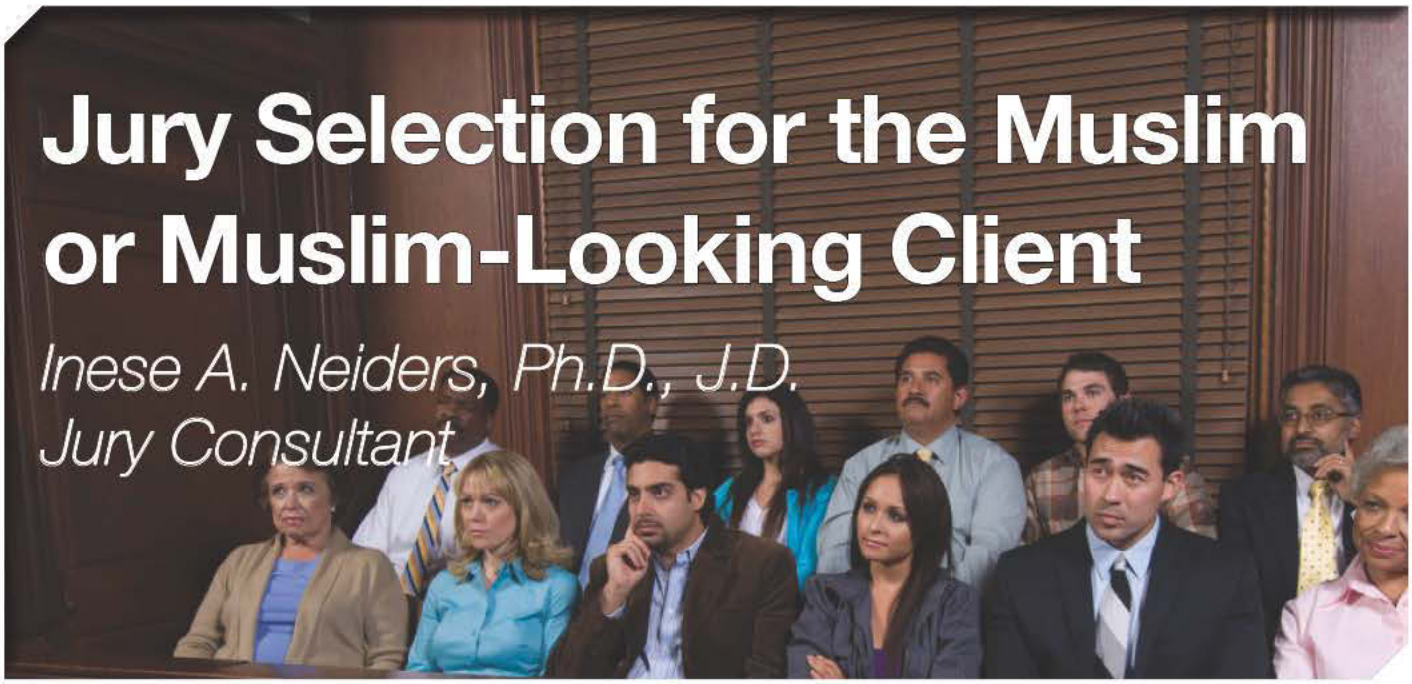
Scouring post-reform cases reveals that Ohio courts have yet to wrestle with the meaning of Ohio's new mens rea statutes. It is the responsibility of the defense bar to force Ohio courts, and ultimately the Ohio Supreme Court, to recognize the greater protections Ohio's law now provides to the accused.

About The Author

Margery M. Koosed is the Aileen McMurray Trusler Professor Emeritus at The University of Akron School of Law.

Daniel J. Dew is a Legal Fellow at The Buckeye Institute's Legal Center.

1. *State v. Austin*, 2018-Ohio-3048, 10 (8th Dist.).
2. *State v. Cunningham*, 2017-Ohio-4363, 93 N.E.3d 25, 34 (12th Dist.).
3. *Keene Corp. v. U.S.*, 508 U.S. 200, 208 (1993), Bailey v. U.S., 516 U.S. 137, 146 (1995), Hamdan v. Rumsfeld, 548 U.S. 557, 578 (2006).
4. *State v. Wac*, 68 Ohio St.2d 84, 86-87, 428 N.E.2d 428 (1981) and State v. Johnson, 128 Ohio St.3d 107, syl. 2, 942 N.E.2d 347 (2010).



Jury Selection for the Muslim or Muslim-Looking Client

Inese A. Neiders, Ph.D., J.D.
Jury Consultant

Several years ago, some thirty Somalis were charged with conspiracy to commit sex trafficking of minors as well as other crimes. In 2012, criminal defense lawyers in Tennessee represented nine of the clients in Federal Court. Six of the clients were found not guilty despite negative attitudes toward Somalis as well as negative attitudes toward their crimes.

Since that time, Muslims and Muslim-looking clients have been demonized to a greater degree. Therefore, lawyers working on these cases need to be more aware of specific biases against these sets of clients.

In reviewing the social science literature, I have found public opinion to be highly negative toward Arab, Middle Eastern, South Asian, and sometimes, African-American Muslims or those of Muslim appearance.

Some of the social science literature addresses hate-crimes which increased after 9-11 and again after the 2016 election. Other articles review arrests of Muslim Americans as well as other minority groups. Some of the literature addresses attitudes of Muslims and how to temper anti-Muslim attitudes. There are many works addressing stereotypes of Muslim Americans as being violent, anti-women, anti-Jewish, etc. To review this substantial set of articles and books, we recommend that you use search engines available at university libraries. We specifically recom-

mend juried academic journals. For this article, we searched for articles published after 9-11.

Being aware of the client's cultural heritage--including the person's beliefs-- can be crucial to understanding the client's behavior in a particular situation. To better understand your client, we recommend social science articles related to the background of your particular client. Not only does understanding the customs and history of your client help you develop rapport, but it also helps you explain mitigating cultural factors. While this type of analysis is often associated with death penalty cases, mitigation is a valuable tool in other cases and many articles and books have been published on the topic.

Unfortunately, many jurors are ignorant of your client's culture and history and are quick to place blame on all Muslims for the problems caused by Arab terrorists. Muslims and other groups are often easily identified by their attire and can easily be stereotyped. Wearing a hijab or turban influences some individuals in a negative way. You will need to educate jurors against stereotypes in jury selection, your opening statement, or other parts of the trial. Muslims are often encouraged to keep a low profile in volatile situations, but it is impossible to keep a low profile during a trial.

Potential areas to address include the beliefts and attitudes of jurors and the behaviors of jurors.

Juror Beliefs and Attitudes:

1. Won't accept the clients status when the client is in the country legally.
2. Believes the travel ban is good.
3. Believes all Muslims should be policed.
4. Believes that Muslim = terrorist.
5. Negatively stereotypes the client because of what a client or client's family members wear.
6. Equates a Muslim or Muslim-looking client with someone who is violent.
7. Believes that the client's culture makes him or her sexist.
8. Believes that the client's group is taking the jobs of others.
9. Is prejudiced in regard to the client social class whether higher or lower.
10. Believes that there are more differences than similarities.
11. Often does not understand or does not want to understand people with accents.
12. Is uncomfortable with people who do not speak English.
13. Believes Americans need to take back the county.
14. Believes Muslims are too rich.
15. Believes Muslims are greedy.
16. Is suspicious of Muslims.
17. Believes Muslims are barbaric.
18. Believes Muslims contribute nothing to western culture or America.

Juror Behaviors:

1. Admits to making negative comments about Muslims.
2. Watches TV news about terrorism.
3. In choosing movies, expresses a preference for movies about terrorists.
4. Belongs to Patriot group or gladly associates with person who does.
5. Has gone to a rally against Muslims.
6. Actively avoids places where Muslims go — e.g. Muslim - owned stores or restaurants.
7. Knows no Muslims.
8. Has had bad experiences with Muslims.
9. Is a Republican rather than Democrat.
10. Does not want Muslims in the neighborhood, workplace or schools.
11. Does not want to marry a Muslim or have a family member marry a Muslim.
12. Listens to "white supremist" bands.

Each lawyer should analyze the specific case and available options. We recommend the use of a juror questionnaire and/or individual sequestered voir dire when possible. Other useful methods include using mock juries or focus groups, shadow juries, juror profile and post-trial analysis. It is also helpful to commission surveys about a specific case or consult existing surveys about similar situation, as found in peer-reviewed, social science articles.

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OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Keeping Your Client's GPS Data from their Cell Phone Private

Kenneth R. Bailey

In the last issue of the Vindicator, I wrote anticipating the Court's holding in ***Carpenter v. United States***. Good news – the Court ruled on the case, and the Court clarified the expectation of privacy covers cell phone GPS location.

1.00 The Court's Holding and Rationale on GPS Location Data.

In June of 2018, the U.S. Supreme Court voted to protect the Accused's privacy rights with respect to their cell phone GPS location. *Carpenter v. United States*, 138 S. Ct. 2206 (2018). The Court's decision overturned the Sixth Circuit's decision.

Carpenter's cell phone's GPS location was stored by the cell phone provider about every fifteen minutes. The cell phone's GPS location data is referenced in case law as Cell-Site Location Information ("CSLI").

The Court's decision helped to identify the difference between a person's expectation of privacy in data turned over to a third party (i.e. a bank), which has been extended to cover the records of dialed phone numbers on a cell phone. *United States v. Miller*, 425 U.S. 435 (no expectation of privacy in financial records held by a bank), and *Smith v. Maryland*, 442 U.S. 735 (no expectation of privacy in records of phone numbers dialed).

The Court's analysis seems to turn upon the fact the CSLI / GPS data exists (1) by operation of just possessing a cell phone, and (2) it requires no affirmative act by the cell phone's owner.

Although the cell phone's GPS data is voluntarily turned over to a third-party, the U.S. Supreme Court recognized an exception to the third-party holder doctrine. Of course, the Court reserved that it may find a further exception due to exigent circumstances.

The ripe areas for future arguments and extension of the Carpenter case will be those which closely align with the two foregoing principles – what else does your phone do without effort? And, what else might occur just by possession of the phone?

2.00 Extending the Court's ruling and battleground.

The most simplistic extension of the Court's holding will be to similar locational data (i.e. CSLI) stored by applications like FindFriends and including some social media applications, such as SnapChat, which allows the sharing of locational data with friends.

The battleground for Defense Lawyers is now data possessed by applications such as SnapChat, which by their advertised design makes photographs and communications very temporary and then expunged (however, without the user's knowledge or intent are actually preserved by the SnapChat company). The SnapChat application also notifies the content's creator if the recipient screenshots the message. (Note: there are applications to circumvent such notification). This application is clearly designed to increase the expectation of privacy in a user.

Instagram has a function similar to SnapChat wherein private messages can be sent between two users. Those messages have a time limitation after which they expire and are no longer available to the recipient, again expressing a greater expectation of privacy in the user.

Another battleground for defense lawyers will be applications such as one called Signal, which is used for sending encrypted text-messages between individuals. The question with encrypted message programs becomes does that entitle the user to a greater expectation of privacy than a traditional text message? I believe it does.

I encourage motions to suppress, motions in limine, and objections when such data is sought to be acquired and/or sought to be introduced as evidence in your current cases, as only time will tell how the foregoing will be resolved, as even in Carpenter, the Court declined to express a rigid rubric but encouraged a thoughtful analysis.

3.00 Client advice.

As for client advice (and advice to attorneys), please continue to advise your clients to turn off location sharing data and reject application's and website's requests for location data.

It seems it's currently best to advise your clients to own and use iPhones, too. Apple continues to be on the forefront of encryption and data protection. The iPad's and iPhone's new iOS 12 has an option for the user to deactivate the data port, if the phone has not been unlocked in the last hour. The data port was how law enforcement would gain access to the phone using a USB device such as a GrayKey box or Cellebrite.

On the new iPhone, the steps for deactivating the USB access are as follows:

1. Go to "Settings";
2. Go to "Touch ID & Passcode"; then
3. Turn the selector switch off for "USB Accessories".

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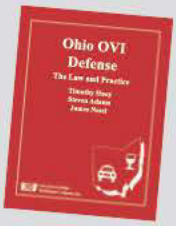

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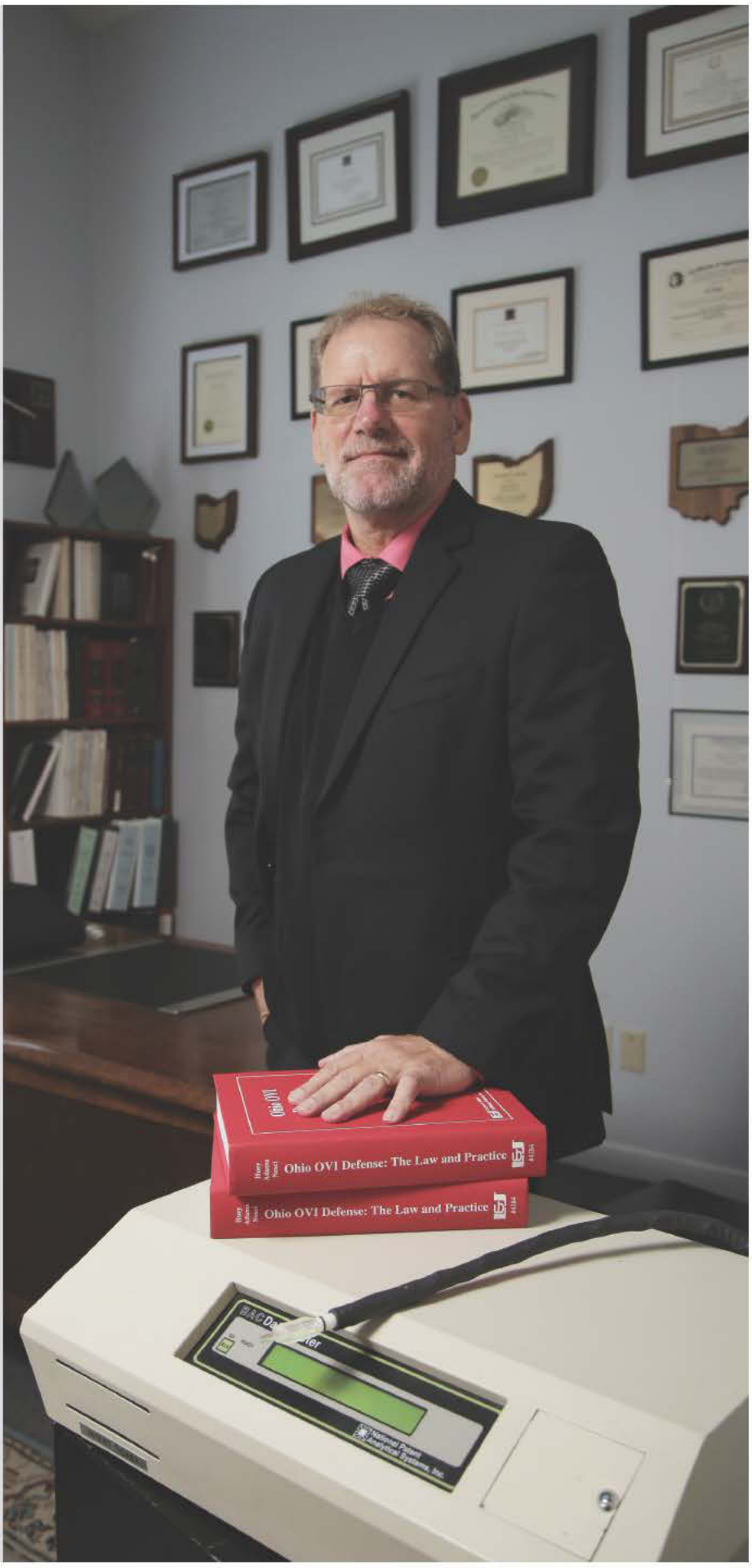
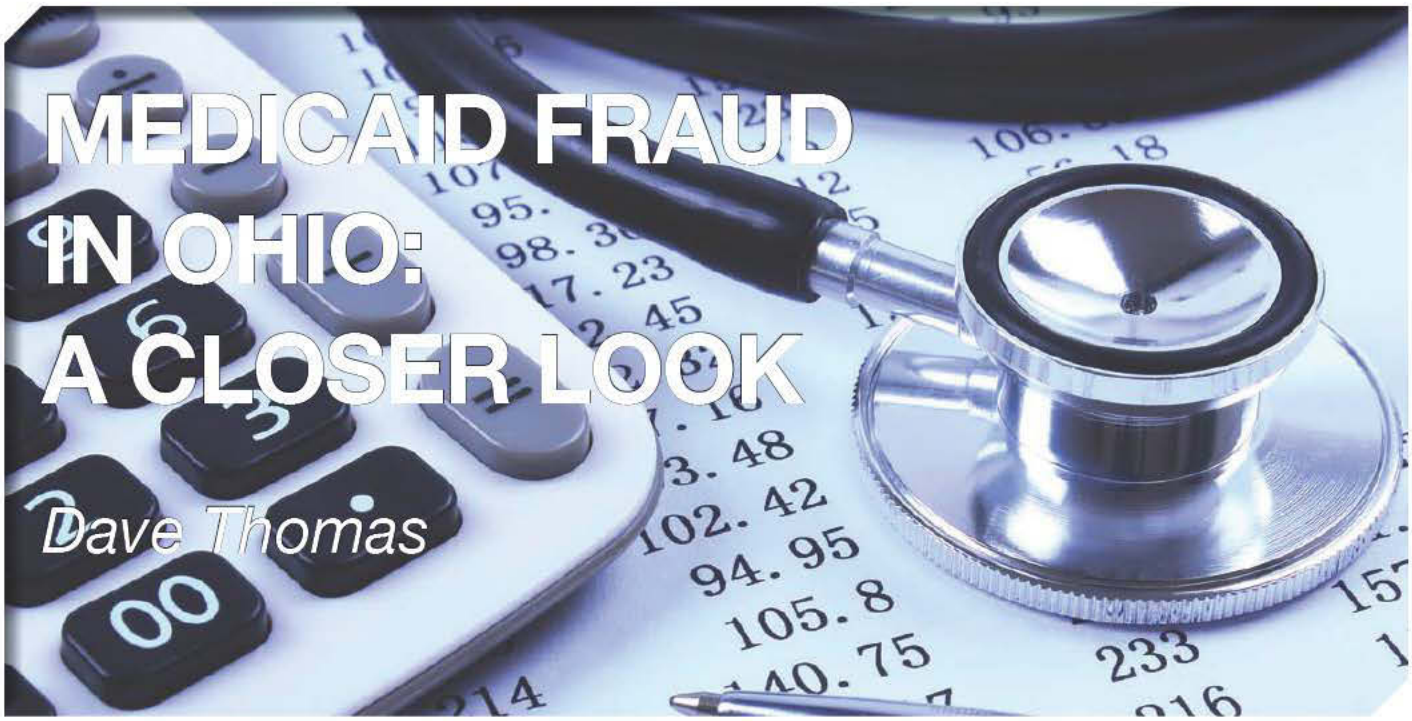




MEDICAID FRAUD IN OHIO: A CLOSER LOOK

Dave Thomas

Medicaid is a joint state and federal health care program that assists low-income families and individuals in paying for doctor visits, hospital stays, long-term medical expenses, custodial care costs, and more. In essence, it is public insurance for the poor and medically fragile. In Ohio, Medicaid is a $23 billion program in which 130,000 providers deliver services to more than 2.9 million Medicaid recipients.

While the overwhelming majority of participants conduct themselves legally, any program of this size and complexity inevitably brings real and perceived fraud and abuse. Furthermore, Medicaid fraud investigations target individuals and entities of all income levels from the largest companies to the poorest persons. Accordingly, all criminal defense lawyers should have a working knowledge of Ohio's Medicaid fraud system enforcement system.

What is Medicaid Fraud?

Revised Code Section 2913.40 codifies the offense of Medicaid Fraud: "No person shall knowingly make or cause to be made a false or misleading statement or representation for use in obtaining reimbursement from the Medicaid program." If the value of the property, services, or funds obtained exceeds $1,000, Medicaid Fraud is a felony of the fifth degree. In addition, fraud-related conduct often implicates other violations of 2913, such as theft and unauthorized use of property.

Examples of Medicaid fraud include billing for products and services that were not provided; billing for a different and more expensive product or service ("upcoding"); billing twice for the same product or service ("double billing"); and billing for services that were not medically necessary. Fraud schemes may also include conduct intended to facilitate the fraud, such as tampering with billing records or kickbacks to those who help submit fraudulent claims.

Who is Prosecuted?

Anyone who interacts with the Medicaid program may be prosecuted for fraud. This includes physicians, nurses, and home health aides, but also medical equipment suppliers, medical transport drivers, and even patients. Importantly, the amount of the fraud is virtually irrelevant. Defendants in these cases range from large companies to individual home health aides earning close to minimum wage. Furthermore, the largest number of Medicaid fraud investigations focus on companies and individuals who provide home health services and nursing home care.

The investigations are aggressive. Adjusted for population, Ohio leads the nation in indictments and convictions for fraud related to the Medicaid program. For fiscal year 2017, 121 people and entities were charged with fraud by way of indictment, complaint, or information around Ohio. During that same period, there were 123 fraud convictions. By way of comparison, California (four times Ohio's population) had 144 convictions, Texas (nearly three times Ohio's population) had 128 convictions, and New York (nearly twice Ohio's population) had 70 convictions.

The Attorney General's Medicaid Fraud Control Unit

The Social Security Act requires each state to operate a Medicaid Fraud Control Unit (MFCU) that investigates and prosecutes Medicaid provider fraud and patient abuse or neglect. Revised Code

Section 109.85 gives the Ohio Attorney General's Office special jurisdiction to investigate and prosecute Medicaid fraud and nursing home abuse, including the authority to empanel a special grand jury for that purpose.

The Attorney General's Office exercises that authority aggressively. According to Section Chief Keesha Mitchell, Ohio's MFCU has doubled in size since 2010. Today, six fraud teams consisting of two Assistant Attorneys General and six Special Agents interview witnesses, issue grand jury subpoenas, and bring indictments against health care providers and patients around Ohio.

It is also important to understand how the MFCU and its teams exercises their prosecutorial discretion. First, because the Ohio Department of Medicaid is based in Columbus, the special grand jury and nearly all indictments are in Franklin County. This exercise of discretion is convenient for the Attorney General's Office, but often creates a substantial hardship for defendants (and their lawyers) who are located outside central Ohio. Second, the MFCU has made a policy decision not to create a pre-trial diversion program as authorized by R.C. 2935.36. As a result, first-time offenders – including those facing fourth and fifth degree felony charges - face the difficult choice of a risky jury trial or the substantial consequences of a felony and/or fraud-related conviction.

Direct and Collateral Consequences of a Medicaid Fraud Conviction

Those consequences are severe. All criminal defense lawyers know the life-altering effect of a felony or fraud-related conviction. They are exacerbated in the health care environment. First, licensed professionals who are convicted of any criminal offense related to that profession face a potential suspension or revocation of the ability to practice. Second, ALL persons who are convicted of a felony or ANY criminal offense related to the delivery of health care items or services are automatically prohibited from working in any federally-funded health care program for at least five years. This applies regardless of the offense of conviction (e.g. petty theft) and remains effective even if the conviction is later sealed by the trial court. Furthermore, the exclusion applies to all jobs in health care: from chief executive to aide.

As a practical matter, this means that any conviction flowing from a Medicaid Fraud indictment will make it virtually impossible for the defendant to work in health care for at least five years. After the expiration of five years, the excluded individual must apply for reinstatement to the U.S. Department of Health and Human Services Office of Inspector General.

Medicaid Fraud Triage

Given the size of the MFCU, the lack of a pre-trial diversion program, and the severe consequences of a conviction, it is critical that defense counsel be active at the earliest stage possible. Most individuals and companies become aware of a Medicaid fraud investigation when they are visited by a Special Agent or served with a grand jury subpoena duces tecum for billing records or patient charts. The subpoena is always signed by an Assistant Attorney General who supervises the Special Agent. This creates an opportunity for defense counsel to begin a dialogue with the Attorney General's Office. Section Chief Mitchell and her staff are open to meetings with lawyers and individualized proposals, especially if there is a question regarding the amount of fraud or the "knowingly" element under R.C. 2913.40(B). At this meeting, defense counsel may present investigation, analysis, or other information that mitigates or exculpates a client. These pre-indictment discussions are the best (and sometimes only) time to prevent an indictment.

Conclusion

As this country's health care system continues to expand and develop, health care fraud enforcement will expand and develop along with it. For example, one of the MFCU's newest area of scrutiny is drug treatment programs that have proliferated with the opiate crisis. These investigations will intersect with many of our practices, and it is critical for criminal defense lawyers to have a working knowledge of Ohio's Medicaid fraud enforcement system.

About The Author

Dave Thomas is a partner and member of the corporate compliance and white collar criminal defense practice at Taft Stettinius and Hollister LLP. He represents companies, public officials, health care providers, and other professionals who are the subject of state and federal investigations and prosecutions involving the United States Department of Justice and the Ohio Attorney General's Office, as well as county prosecutors throughout the state. He also assists clients in responding to subpoenas from Government regulators, including federal agencies like the U.S. Department of Health and Human Services and Drug Enforcement Administration and state agencies such as the Ohio Auditor's Office, Ohio Ethics Commission, and Ohio Inspector General. He is also the Litigation practice group leader for Taft Columbus.

1. Ohio MFCU 2017 Annual Report, https://www.ohioattorneygeneral.gov/getattachment/bc04f0c2-0b1a-4142-bf4c-f404641331c0/2017-Health-Care-Fraud-Annual-Report.aspx.
2. MFCU Statistical Sate for FY 2017, https://oig.hhs.gov/fraud/Medicaid-fraud-control-units-mfcu/expenditures_statistics/fy2017-statistical-chart.pdf

Case Study: Potential False - Positive Ethanol Reading by a SCRAM Device

Jan Semenoff

Case Study #1

I was recently sent some SCRAM data for a quick review and comment. I ended up generating a complete letter of opinion for the attorney involved. The case revolves around a SCRAM report that indicated a positive alcohol reading. However, the subject of the report was sleeping under a brand new, out-of-the-bag (and static laden) blanket that had just been sprayed with Static Guard™ prior to sleeping. The question, of course, concerned the possibility that the Static Guard™ spray may have caused a false-positive reading on the SCRAM device. Is this a true case of alcohol consumption, or a false-positive due to the sprayed chemical? What does the reported data tell us?

SCRAM is an acronym for Secure Continuous Remote Alcohol Monitor, a product of Alcohol Monitoring Systems, Inc. of Littleton, Colorado. A SCRAM device is a transdermal alcohol sensor that continuously monitors a test subject for alcohol consumption. The sensor is slightly smaller than a small deck of cards, and is worn on the subject's ankle, secured by a tamper proof strap. Instead of a BAC reading, the device reports a Transdermal Alcohol Concentration, or TAC.

I need to point out that this article does NOT identify the failure of SCRAM devices overall, nor does it indicate faulty or malfunctioning devices. It DOES identify a potential false-positive reading that is more a failure of the interpretation of the data presented, and probably an inappropriate application of the readings obtained. I've written before about sub-standard acts, practices or conditions leading to substandard results. This is one of those cases, where the substandard condition (the application of Static Guard™) may have created a substandard (and therefore unreliable) reading. As for Case Study #2, the cause is unknown.

Evidence of Alcohol Elimination Provided by the SCRAM Device

Let's start by looking at the raw data. In this case, the SCRAM report provides the following Transdermal Alcohol Concentration (TAC) data:

Time	TAC	Elimination Rate	
1:05	0.260	*First Positive Reading*	
1:35	0.217		
2:06	0.179	0.081g/h	*End 1st hour*
2:36	0.143	0.074g/h	
3:07	0.105	0.075g/h	*End 2nd hour*
3:37	0.089	0.054g/h	
4:08	0.068	0.037g/h	*End 3rd hour*
4:38	0.054	0.034g/h	
5:09	0.046	0.022g/h	*End 4th hour*
5:40	0.039	0.015g/h	
6:10	0.035	0.011g/h	*End 5th hour*
6:41	0.026	0.013g/h	
7:11	0.014	0.021g/h	*End 6th hour*
7:42	0.013	0.013g/h	
8:12	0.008	0.006g/h	*End 7th hour*
8:43	0.005	0.008g/h	

Chart 1 – Reported SCRAM Data

It is perhaps easier to visualize the reported elimination graphically:

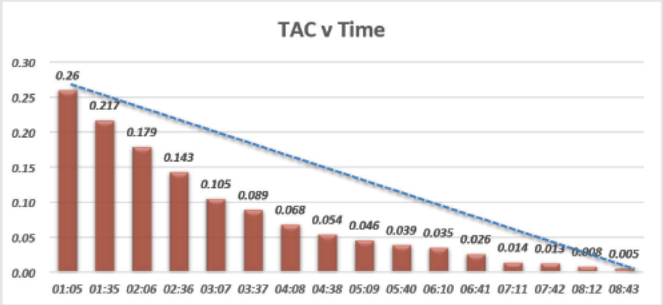


Figure 1 - Elimination of Ethanol as Indicated by the SCRAM Device in this matter. In contrast, linear elimination using a Zero Order Kinetic is indicated in the dashed blue line.

The SCRAM report in this case also incorrectly indicates that the elimination rate of the subject was measured at 0.030 grams per hour. While this is true on average, overall (taking the highest reading, subtracting the lowest reading, and dividing by the total time), it is NOT demonstrative of the elimination data, specifically from one hour to the next. In actuality, reporting the elimination rate in this manner is highly misleading.

Let's go back and look at Chart 1. You may notice that in the first hour, the reported elimination rate is 0.081 grams per hour, and 0.075 grams per hour again in the second hour. This is higher (double the upper end of 0.040 per hour among chronic alcoholics) than reported in any historical or current toxicological reports, as previously discussed. Then, in the third hour the elimination rate drops to 0.037 grams per hour, 0.022 grams per hour in the fourth, and 0.011 grams per hour in the fifth. This is clearly NOT a metabolic elimination rate. It is not linear and does not follow a Zero Order Kinetic. Again, the true Zero Order elimination is shown in a dashed blue line in the graph above for comparison.

The Absorption of Ethanol

My first point of concern is that the initial SCRAM reading immediately indicates a BAC of 0.260 grams, with no previously reported ascending rise in BAC levels. There was no positive reading 30 minutes prior, during the last SCRAM sample. Think about that for a moment. Apparently, the subject went from 0.0 - 0.260 grams BAC in less than 30 minutes. Given that the average adult human receives an equivalent BAC dose of 0.020 grams per Standard Drink , the subject would have had to immediately consume 13 Standard Drinks (equivalent to about 20 ounces of hard liquor) and have them completely and fully absorbed in just 30 minutes. From a physiological perspective of the absorption and distribution of alcohol, this is highly unlikely. It has been reported that full ethanol absorption takes between 9-192 minutes among healthy adults (Dubowski, 1985). Additionally, high bolus consumptions of alcohol have a tendency towards delayed absorption rates.

The Elimination of Ethanol

In order to understand the data presented in this case, and indeed in any other case, it is important that you understand the concepts of ADME (Absorption, Distribution, Metabolism and Elimination) of ethanol in the human body.

Alcohol can be eliminated without the body metabolizing or converting it into a by-product, or waste metabolite. Anywhere from 1-5% of the ethanol is eliminated in this fashion, unchanged. Ethanol is absorbed, and quickly eliminated before being metabolized in the body in two main ways. About 2-5% of the total ethanol consumed is exhaled unchanged in your breath or eliminated unchanged in your urine. A negligible amount, approximately 1%, is excreted unchanged through your skin. In short, you sweat out about 1% of what you've consumed.

It is the unchanged ethanol in the breath that is read by a breath alcohol testing device, or in this case, sweated out through the skin into a transdermal alcohol detection device. Devices such as the Intoxilyzer AlcoBlow™ and various handheld police flashlights with so-called "sniffer' technology can read the alcohol emanating from a person through their skin. The SCRAM device operates in the same manner.

At its heart, a SCRAM device is simply a fuel cell device that determines the presence and concentration of ethanol. It reads the alcohol emanating from the skin of the test subject and is calibrated to believe that the amount of alcohol eliminated unchanged through the skin is about 1% of the total Blood Alcohol Concentration (BAC). It basically multiplies the alcohol detected by 100 times to report a BAC level. The reported level is referred to as a Transdermal Alcohol Concentration (TAC).

Clearance Rates – Metabolic Elimination Rates in the Human Body

Metabolic elimination rates or clearance rates of ethanol are dependent upon the type and amount of ADH enzyme (Alcohol Dehydrogenase Enzyme) found in the specific person. In a healthy person, the rate of clearance of alcohol from the blood by the liver is roughly 0.013 – 0.022 grams per hour, with a median rate of about 0.017 – 0.018 grams per hour. People who are on low-protein diets, or who are malnourished, are reported to have lower rates of elimination. Others, especially those chronically exposed to alcohol, have higher clearance rates. High-level, long-term alcoholics have a clearance rate of about 0.036 – 0.040 grams per hour (Jones, 1996), but this is considered an extreme.

Kinetic Models

There are a number of different models to express the kinetics, or movement, of alcohol, drugs or poisons through the human system:

In *First Order Kinetics*, the elimination rate of the drug or poison is directly proportional to the concentration of the substance in the first place. In short, if a test subject has a high concentration of a drug or poison in their system, and it is metabolized using a first order kinetic model, then they will rapidly start to process and eliminate the drug or poison. As the concentration of that drug or poison is reduced, the elimination rate will also begin to decline. Think of this as in taking half of the drug away in the first hour, half of the remaining drug away in the second hour, half of that remaining drug away in the third hour, and so forth. I would graph the elimination of the drug or poison this way in a First Order Kinetic elimination model, as shown in red in Figure 1.

In *Zero Order Kinetics*, the elimination rate is constant. If a test subject reduces the drug or alcohol by X amount per hour, then each and every hour, X amount is metabolized and eliminated. The elimination is linear, as shown in blue in Figure 1:

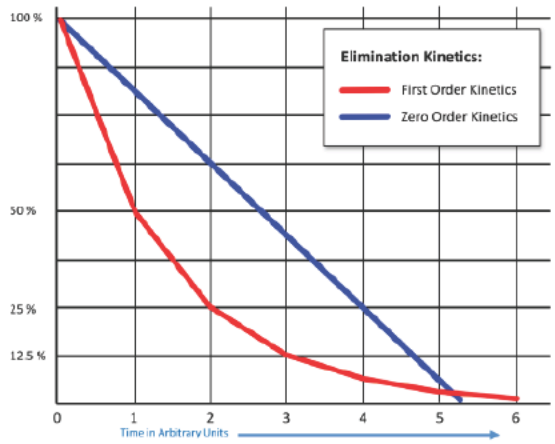


Figure 2 - Zero and First Order Elimination Kinetics

Ethanol most closely follows a Zero Order Kinetic in humans (shown in blue, above). Regardless of the level of ethanol consumed by the subject, their elimination rate will be the same, hour after hour. A test subject doesn't sober up faster because they've had more to drink. The elimination rate is constant, maybe just tapering off and tailing a bit at the very end. Jones (2010) noted that the alcohol elimination followed Zero Order Kinetics until the subject had a BAC of about 0.020 grams, at which time it eliminated following a First Order Kinetic model.

Varying Elimination Rates – Widmark's ß

In the traditional Widmark Formula , the elimination rate of ethanol is denoted as ß, sometimes referred to as a Beta-slope. Different people have different types and levels of ADH, therefore, have different elimination rates of ethanol. It has been repeatedly established that the average elimination rate is, for the most part, the equivalent of somewhere between 0.006 – 0.028 grams/100 mL per hour (Dubowski, 1985). Jones reported a range of 0.010 – 0.048 grams/100 mL per hour (Neuteboom & Jones, 1990), and a range of 0.009 – 0.029 grams/100 mL per hour (for 95% of the sample of 1200 subjects, with a median and mean of 0.019 grams/100 mL per hour [Jones 2010]). Jones reported a range of 0.009 – 0.036 grams/100 mL per hour, again with a mean ß of 0.019 grams/100 mL per hour (Jones, 1993). Many toxicologists use an average of 0.017 grams/100mL per hour, and others widen this range from 0.010 – 0.020 grams/100mL per hour for computations.

So, the elimination rate value has been reported from 0.06 – 0.048 grams/100mL per hour in different individuals by a number of researchers. It is important to remember that without testing an individual subject, we just don't know what their specific elimination rate will be.

The most important thing to keep in mind is that the elimination of alcohol by metabolic means is primarily linear and does not change in rate during the event in question. As previously discussed, if a subject metabolizes ethanol at X rate at the beginning of a consumption episode, they will metabolize ethanol at X rate at the end of the episode. This is in sharp contrast to the elimination rates that was reported by the SCRAM device's data in this case. Look again at Chart 1.

The Evaporation Rate of Ethanol

The obvious question, therefore, is, "What is being indicated by the data obtained?"

Ordinary evaporation of volatile substances follow a complex logarithmic mathematical model, referred to in both thermal physics and chemistry as a Boltzmann Constant. When demonstrated graphically, it shows the following pattern:

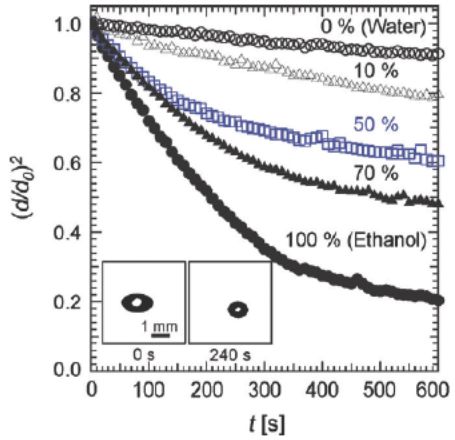


Figure 3 - Evaporation Rates of Ethanol by Concentration

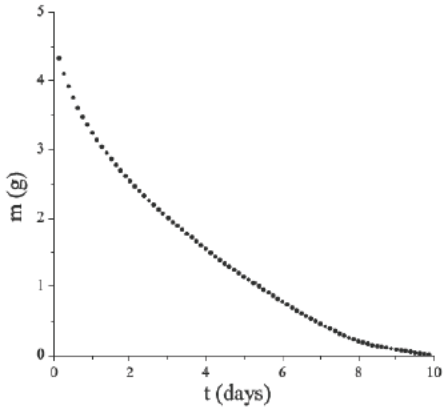


Figure 4 - The Evaporation Rate of 98% Ethanol

Note that in Figure 3, the higher concentrations of ethanol have a steeper arc (100%, black at bottom) than the 10% ethanol solution (Gray dashed, second from top). Figure 4 shows the logarithmic elimination pattern of 98% pure ethanol. Both support that, graphically, ethanol elimination is NOT linear. Also, the time of the elimination can be measured in seconds, minutes, hours or in days. The logarithmic pattern is the same regardless of the duration of the study.

The Chemical Components of Static Guard ™

The Material Safety Data Sheet for Static Guard™ indicates the following chemical composition:

Chemical Name	CAS Number	Weight %	Trade Secret
Alcohol (Denatured ethanol)	64-17-5	60-100	*
Isobutane	75-28-5	3-7	*
Propane	74-98-6	1-5	*
Quaternary Compounds	61789-80-8	1-5	*
Fragrance	N/A	0.1-1	*

*The exact percentage (concentration) of composition has been withheld as a trade secret

Denatured alcohol is simply ethanol that has a bittering compound added to it (typically Bitrex™) that makes it taste extremely bitter and unpalatable to consume orally. The chemical nature of the ethanol itself is not otherwise altered. The propane and isobutane are used as a propellant in the compressed gas canister and are also volatile. Therefore, the formula is primarily ethanol, with a little surfactant soap (the quaternary compounds) and volatile fragrance.

Based on the chemical composition published by the manufacturer, we can conclude that the chemical composition is between 60-100% ethanol. The concentration of the ethanol itself is not listed. Most denatured ethanol used for industrial purposes is between 70 -100% Alcohol by Volume Concentration. We would therefore expect the evaporation rate to follow somewhere in the 70-100% range indicated in Figure 3.

The elimination rate reported in the first few hours is ridiculously high when compared to known human metabolism and tapers off over time in a non-linear fashion. This data clearly follows the pattern of alcohol evaporation rather than alcohol metabolism and is more likely than not a false-positive contamination rather than an indication of alcohol consumption.

I think it is always important that forensic investigators rely upon as complete a picture as possible in order to arrive at a logical conclusion. This case involves the data set from the device used, including the usage logs, and in comparison, to the known science of both evaporation and metabolism. I would respectfully suggest that the data supplied by the SCRAM device supports the normal evaporation of ethanol outside the body and does not support a reasonable assertion that the metabolism of ethanol internally was correctly identified and reported by the device.

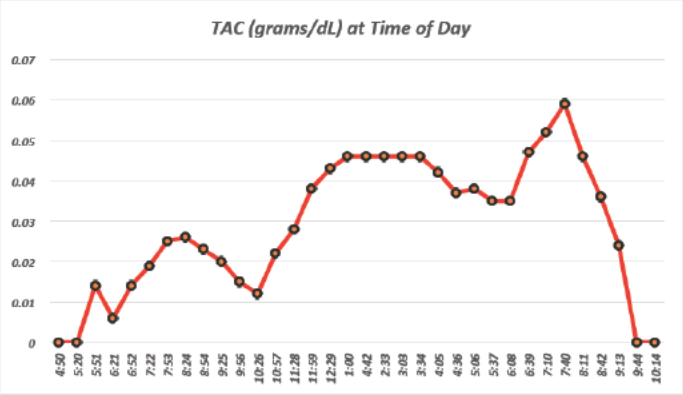
Case Study #2

Very quickly, I want to look at a second case study, on another SCRAM device that was sent to me while I was preparing this article. The test subject's SCRAM device reported the following Transdermal Alcohol Concentrations (TAC):

Time of Day	TAC	Comment
4:50PM	0.00	
5:20	0.00	
5:51	0.014	First positive test
6:21	0.006	
6:52	0.014	
7:22	0.019	
7:53	0.025	
8:24	0.026	
8:54	0.023	
9:25	0.020	
9:56	0.015	
10:26	0.012	
10:57	0.022	
11:28	0.028	
11:59	0.038	Midnight
12:29AM	0.043	
1:00	0.046	
4:42	0.046	
2:33	0.046	
3:03	0.046	
3:34	0.046	
4:05	0.042	
4:36	0.037	
5:06	0.038	
5:37	0.035	
6:08	0.035	

6:39	0.047	
7:10	0.052	
7:40	0.059	Peak TAC reading
8:11	0.046	
8:42	0.036	1 hr elimination @ 0.023g/hr
9:13	0.024	1 hr elimination @ 0.022g/hr
9:44	0.00	2 hr elimination @ 0.036g/hr
10:14	0.00	

Again, it might be easier to graph the data:



When I first looked at the data, I thought it might demonstrate an evening, well, actually an all-nighter, it seems, of concurrent consumption and elimination, resulting in the wildly fluctuating readings. The elimination rate is impossible to determine with data like this – the test subject needs to be fully absorbed to start to calculate elimination rates, and this can't be done during concurrent alcohol consumption. But, we see a key peak at 7:40 the following morning. Perhaps the end of consumption occurred at about 6AM, followed by an absorption rise to 7:40AM, then an elimination to 9:44AM?

Looking at the data, the first hour in this final elimination has a rate of 0.023 grams per hour, and 0.022 grams per hour (on a half-hour increment). Then, the last hour shows an increased elimination rate of 0.036 grams per hour. So again, clearly this cannot be an indication of the body's metabolism of alcohol.

The real problem? The test subject, completely unaware that the SCRAM device was collecting positive data, provided a breath sample into an ignition interlock device which registered 0.00 grams and started the car. The widely fluctuating readings of the SCRAM device are an indication of false-positive readings from an unknown source. Both devices cannot be correct.

Final Thoughts

It is NOT the intention of this article to pick apart or identify any short-comings with the SCRAM device, but rather, to illustrate the necessity of logically examining the reported data to determine what events were actually transpiring. But, to do this, you need to be able to put the data into context. Knowing about the sprayed Static Guard ™, or the zero reading on the ignition interlock puts the data into the proper perspective.

References

Dubowski, K.M. Absorption, Distribution and Elimination of Alcohol: Highway Safety Aspects, 10 J. Stud. Alcohol Suppl. (1985).

Hasegawa, K., Abe, Y. & Goda, A., Microlayered Flow Structure Around an Acoustically Levitated Droplet Under a Phase-Change Process. npj Microgravity. 2. 16004. 10.1038/npjmgrav.2016.4. (2016).

Jones, A.W. and Andersson, L., Influence of Age, Gender and Blood-Alcohol Concentration on Disappearance Rate of Alcohol from Blood in Drinking Drivers, Journal of Forensic Science 1996; 41(6), pages 922-926.

Jones, A.W., Evidence-Based Survey of the Elimination Rates of Ethanol from Blood with Applications in Forensic Casework, Forensic Science International 200 (2010) 1-20.

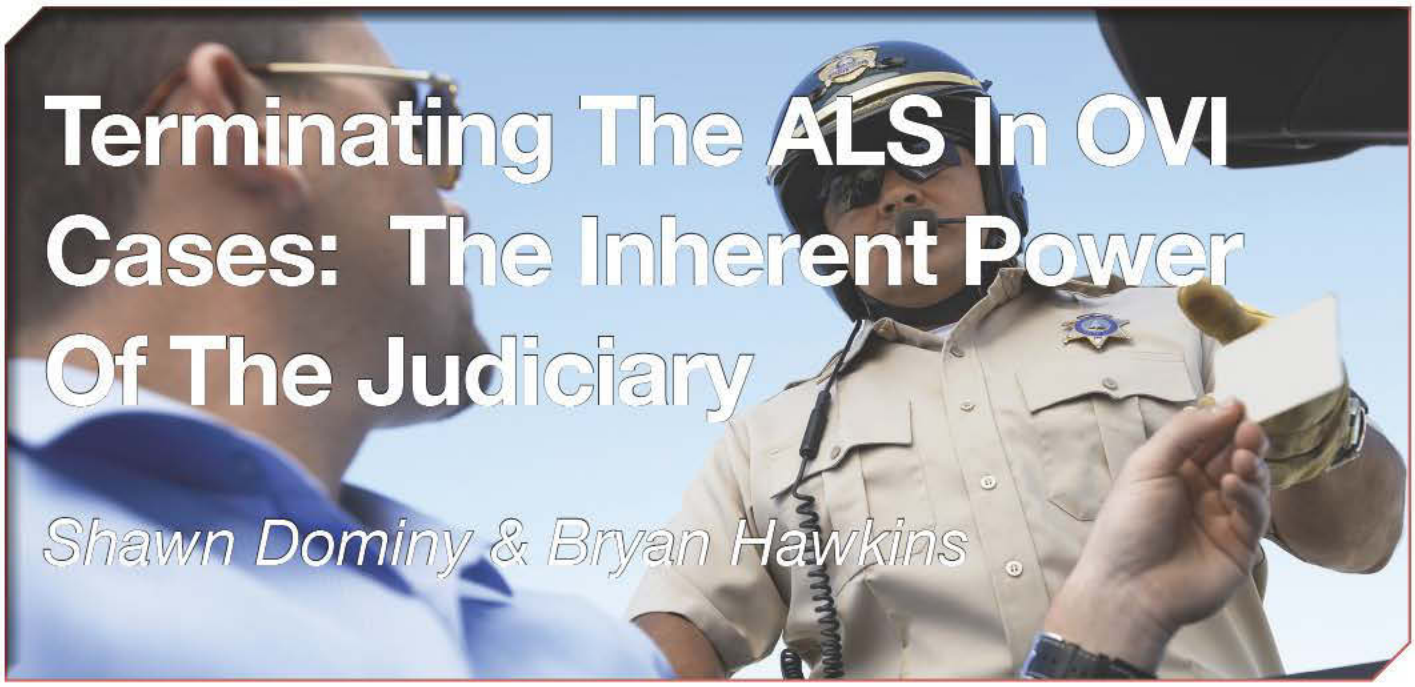
Jones, A.W., Disappearance Rate of Ethanol from the Blood of Human Subjects: Implications in Forensic Toxicology, Journal of Forensic Sciences, JFSCA, Vol. 38, No. 1, January, 1993, pages 104-118.

Jones, A.W., Biochemical and Physiological Research on the Disposition and Fate of Ethanol in the Body, Garriott's Medicolegal Aspects of Alcohol, 5th Edition, Chapter 3, pages 47-156.

Neuteboom, W. and Jones, A.W., Disappearance Rate of Alcohol from the Blood of Drunk Drivers Calculated from Two Consecutive Samples; What Do the Results Really Mean?, Forensic Science International, 45 (1990), 107-115.

Tyukodi, B, et al, The Boltzmann Constant from a Snifter, European Journal of Physics, 33 (2012) 455-465.

1. Neuteboom & Jones reported an outlier elimination rate of 0.064 grams/100 mL per hour. This is the highest known and reported value.
2. A Standard Drink is typically considered to be 12 ounces of beer at 5% Alcohol by Volume (ABV), 5 ounces of wine at 12% ABV, and 1.5 ounces of spirit liquor at 40% ABV.
3. The Widmark Formula is used to determine the concentration of ethanol in a human being at a specific point in time and is used by Toxicologists or Forensic Criminalists to determine a BAC at a time of concern.
4. Volatile in the chemical sense refers to any substance that evaporates at room temperature. Ethanol is considered a volatile chemical.



Terminating The ALS In OVI Cases: The Inherent Power Of The Judiciary

Shawn Dominy & Bryan Hawkins

All people have inconsistencies, to varying degrees, in their behaviors. Judges are not exceptions. At times, they decisively run the courtroom, make decisions, and decide how the law will be enforced. At other times, they seem to doubt their own power to interpret the law. On multiple occasions, we have heard judges say they do not have the authority to terminate an Administrative License Suspension (ALS) because the Ohio General Assembly did not give them that authority. This article addresses Ohio's statutory scheme for the ALS from a Constitutional perspective and a statutory perspective. The clear view from both perspectives reveals judges have the power and duty to terminate an ALS when law enforcement fails to comply with procedures mandated by the ALS statutes.

Ohio's Statutory Scheme For The ALS

An ALS is an administrative license suspension imposed by a law enforcement officer on behalf of the Ohio Bureau of Motor Vehicles. An ALS is imposed in two circumstances: (1) when a person arrested for OVI submits a blood, breath or urine sample and the results of a chemical test show a prohibited concentration of alcohol or drugs in that sample; or (2) when a person arrested for OVI refuses a blood, breath or urine chemical test.

The statutory framework for the ALS includes a method for appealing the suspension. The appeal is limited to four bases:

1. Whether the arresting officer had reasonable grounds to believe the arrested person violated R.C. 4511.19 (OVI) or R.C. 4511.194 (Physical Control)

2. Whether the arresting officer requested the arrested person to submit to a chemical test

3. Whether the arresting officer informed the arrested person of the consequences of refusing a chemical test

4. Whether the arrested person refused to submit to the chemical test OR whether the chemical test results show a prohibited concentration of alcohol or certain drugs in the sample of the arrested person's blood/breath/urine

The statutory scheme for the ALS also imposes requirements for law enforcement officers. The duties of an officer imposing an ALS include:

- *The officer must advise the arrestee regarding the consequences of refusing a chemical test, and the advisement must be given by reading a form (BMV Form 2255) aloud and providing the written form to the arrestee*
- *The officer must have one or more persons witness the officer's reading of the form and must have the witness(es) sign the form*
- *The officer must notify the arrestee the initial court appearance will be held within five days*
- *The officer must inform the arrestee the ALS may be appealed*
- *The officer must send to the Ohio BMV, within 48 hours after the arrest, a sworn report (BMV Form 2255) which contains certain information*
- *The officer must give the sworn report to the arrestee, or give the arrestee an unsworn report, so long as the BMV sends the sworn report to the arrestee within 14 days*
- *The officer must send to the court where the arrestee is to appear, within 48 hours after the arrest, a sworn report which contains certain information*

The Problem With Ohio's Statutory Scheme For The ALS

Most of the statutory requirements for an officer imposing an ALS are not mentioned in the statute describing the ALS appeal. That statute limits the appeal to the four listed bases. So what is the recourse when an officer fails to comply with the law? For example, what happens if an officer does not have a witness when reading the form? What is the impact of an officer's ALS report being unsworn? What is the result if an officer fails to send the sworn report to the court or the BMV within 48 hours?

Some lawyers and judges believe there is no recourse. Officers can fail to comply with legislative mandates, and there is no remedy for the driver whose license was suspended. When the Constitutional and statutory perspectives of the ALS are more closely examined, it's clear the remedy for an officer's lack of compliance with the law is termination of the ALS.

Constitutional Perspective: The ALS Is Constitutional Only If Officers Follow Reliable Procedures

Remember that clause in the Bill of Rights which discusses taking life, liberty or property? It says the government cannot do so without due process of law. The Ohio Constitution provides the same protections in the "Due Course Of Law" clause of Article I, Section 16. A driver license is 'property'. By suspending a driver's license administratively, the executive branch of government deprives the driver of property. Therefore, the driver has the right to due process of law regarding the driver license suspension.

The ALS is one of the few scenarios in which the government takes property before a judicial determination regarding whether seizure is permissible. Instead, the ALS involves a post-deprivation hearing. To determine whether a post-deprivation hearing affords due process in the context of a driver license suspension, courts use the three-part test from *Matthews v. Eldridge*:

> (1) the private interest which will be affected by the official action; (2) the risk of an erroneous deprivation of such interest and the probable value of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

In 1996, the *Matthews* test was applied to the Ohio ALS procedure in *State v. Hochhausler*. In concluding the ALS is not unconstitutional, the Ohio Supreme Court commented:

Further, when prompt post-deprivation review is available to correct administrative error, no more is generally required "than that the pre-deprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible government official warrants them to be."

Part of what keeps the ALS from being an unconstitutional taking of property are the reliable procedures for imposing it. Those procedures are found in R.C. 4511.192: the bullet points above describing the duties of a law enforcement officer imposing an ALS. If an officer fails to comply with those statutorily mandated procedures, the ALS deprives a driver of due process of law and should be terminated.

Statutory Perspective: If Officers Do Not Comply With Statutory Procedures, The ALS Is Void

R.C. 4511.192 provides the "sworn report" (the BMV 2255) "completed under this section" shall be admitted and considered as prima-facie proof of the information and statements it contains in any appeal of the ALS . If the report is not sworn or is not completed in compliance with R.C. 4511.192 (the statutorily mandated procedures weren't followed), the report is void and cannot serve as prima facie proof. When there is not prima facie proof supporting the validity of the ALS, the licensee is relieved of his or her burden to appeal the ALS, and the ALS must be terminated . As the Tenth District Court of Appeals explained:

A licensee is required to meet his or her burden of proof under R.C. 4511.191(H) only when the registrar has presented prima facie proof that the arresting officer complied with the procedures mandated under R.C. 4511.191(D)(1)(c) ; such prima facie proof supports the ALS, absent a licensee's carrying his or her burden of proving the ALS is invalid for one of the reasons specified in R.C. 4511.191(H). The registrar may establish such prima facie proof either through the arresting officer's sworn report properly admitted under R.C. 4511.191(D)(3), or through the officer's testimony at the ALS hearing. Because appellee failed to make the necessary prima facie showing supporting the validity of the ALS, not only was appellant relieved of his burden of proving by a preponderance of the evidence that one of the four conditions listed in R.C. 4511.191(H)(1)(a)-(d) had not been met, but the municipal court should have terminated the ALS .

An officer's compliance with statutorily mandated procedures is a condition precedent to an ALS being imposed. If an officer fails to comply with the procedures in R.C. 4511.192, the ALS should be terminated, and there is no need for the court to address the ALS appeal.

Other Ohio appellate courts have reached conclusions consistent with the Tenth District's holding in *Triguba*. In *State v. Frame* and *Toledo v. Ferguson*, the appellate courts concluded the officer's failure to send the sworn report to the

court within 48 hours terminates the ALS. In *State v. Cook* and *State v. Harding*, the officers' failure to state 'reasonable grounds' in the sworn report resulted in termination of the ALS. *State v. Nichols* resulted in an ALS being terminated when the arresting officer completed the report incorrectly. The failure to hold the defendant's initial appearance within five days of the arrest led to ALS termination in *State v. Gibson* and *State v. Brown*. There are conflicting appellate decisions on this issue, so it's one the Ohio Supreme Court should decide.

In each of the cited cases, the ALS was terminated because officers failed to comply with the procedures mandated in the statutory framework. With the exception of the cases regarding 'reasonable grounds', none of the statutory procedures violated were included in the four statutory bases for ALS appeals. If officers violate the statute, the remedy is termination of the ALS.

The Ohio Bureau of Motor Vehicles (BMV) apparently agrees the ALS should be terminated for reasons other than those enumerated in the ALS appeal statute. The BMV provides Ohio courts with an ALS Court Disposition form (BMV Form 2261). Courts complete the form to notify the BMV when there is a change in the status of the ALS. On that form, the listed reasons for terminating the ALS include:

- "BMV Form 2255 was not filed with the court or was not sent within 48 hours of the offense"
- "BMV Form 2255 was completed improperly"
- "Initial Hearing on ALS was not held within 5 days"

None of those reasons are listed in the appeal statute, but the BMV recognizes they are justifications for terminating the ALS.

Courts Have The Power And The Duty To Fashion Remedies

Despite precedent and acquiescence of the BMV, many judges maintain they do not have the power to terminate an ALS. Those judges insist the legislature only gave them the authority to reverse the ALS if the driver proves one of the four prongs of the ALS appeal.

We sometimes lose sight of the forest for the trees. There are three independent branches of government with a separation of powers. The authority of the judiciary to interpret law and fashion remedies is not dependent on the legislature to grant said authority. As Justice Marshall said in *Marbury v. Madison*, "It is emphatically the province and duty of the judicial department to say what the law is." Ohio law says officers "shall" perform certain duties when imposing an ALS. If the officers fail to perform those legislatively mandated duties, it is the province of the court to determine the remedy. The remedy is termination of the ALS.

It is our hope that lawyers and judges will read this article and embrace its conclusions. We encourage criminal defense attorneys to contest the ALS, not only by filing a standard ALS appeal, but also by filing a separate motion to terminate the ALS. We urge trial judges to exercise their inherent judicial power to terminate Administrative License Suspensions when officers fail to comply with legislative mandates. Finally, we anticipate the Ohio Supreme Court will ultimately address this issue and bring uniformity, certainty, and justice to Ohio ALS law.

ABOUT THE AUTHORS

Shawn Dominy is a criminal defense lawyer with a practice focused on O.V.I. defense. He is the President-Elect of the O.A.C.D.L. and co-chair of the O.V.I. Seminar Committee. He is also a member of the National College for DUI Defense and a founding member of the DUI Defense Lawyers Association. Shawn authored the book 'I Was Charged With DUI/OVI – Now What?!' (iUniverse Publishing) and authored a chapter in the book Defending D.U.I. Vehicular Homicide Cases (Aspatore Publishing).

Bryan Hawkins is a criminal defense lawyer in the Dominy Law Firm. He previously worked in the office of the Franklin County Public Defender Office and has represented literally thousands of clients in O.V.I. and criminal matters. He is an active member of the O.A.C.D.L., serving on the Publications Committee and the O.V.I. Seminar Committee. Bryan writes on OVI topics in the blog: www.columbusoviattorneyblog.com and lectures on OVI subjects at continuing education seminars.

1. R.C. 4511.191
2. R.C. 4511.197
3. R.C. 4511.192
4. State v. Hand, 149 Ohio St.3d 94 (2016).
5. Bell v. Burson, 402 U.S. 535, 539 (1971)
6. Dixon v. Love, 431 U.S. 105, 112 (1977); Maumee v. Gabriel, 35 Ohio St.3d 60 (1988).
7. Matthews v. Eldridge, 424 U.S. 319 (1976) Id. at 335
8. State v. Hochhausler, 76 Ohio St.3d 455
9. Hochhausler at 465, quoting Mackey v. Montrym, 443 U.S. 1 (1979)
10. R.C. 4511.192(F)
11. Triguba v. Registrar, BMV, 10th Dist. No. 95APG11-1416, 1996 WL 362053 (June 27, 1996)
12. The ALS appeal parameters at that time in R.C. 4511.191(H) are now found in R.C. 4511.197
13. The procedures mandated at that time by R.C. 4511.191(D)(1)(c) are now found in R.C. 4511.192
14. Triguba, at p. 2
15. State v. Frame, 5th Dist. No. CA-881, 1999 WL 333249 (May 24, 1999)
16. Toledo v. Ferguson, 6th Dist. No. L-16-1118, 2017-Ohio-1394
17. State v. Cook, 5th Dist. No. WD-04-005, 2005-Ohio-1677
18. State v. Harding, 7th Dist. No. 13-MA-131, 2014-Ohio-884 (March 6, 2014)
18. State v. Nichols, 5th Dist. Nos. 01-CA-7, 01-CA-8, 2001 WL 1744687 (November 6, 2001)
19. State v. Gibson, 144 Ohio Misc. 2d 18, 2007-Ohio-6069 (M.C.)
20. State v. Brown, 3rd Dist. No. 9-16-37, 2017-Ohio-678
21. Marbury v. Madison, 5 U.S. 137, 177

OHIO DEPARTMENT OF PUBLIC SAFETY
BUREAU OF MOTOR VEHICLES

ALS COURT DISPOSITION / PRE-TRIAL SUSPENSION NOTIFICATION

SUBJECT NAME		SOCIAL SECURITY NUMBER	DATE OF BIRTH
ADDRESS		CITY	
RE: COURT CASE NUMBER	DATE OF HEARING	DATE OF OFFENSE	DRIVER LICENSE NUMBER

This matter came for hearing on the date indicated above in reference to the suspension action in accordance with the provisions of Section 4511.197 of the Ohio Revised Code (R.C.).

☐ The appellant's appeal was granted upon the court's determination of one or more of the following conditions:
- ☐ The arresting law enforcement officer did not have reasonable ground to believe that an OVI violation or a violation of R.C. 4511.194 (Physical Control) was committed before the test.
- ☐ The officer did not request the appellant to submit to the chemical test.
- ☐ The officer did not inform the appellant of the consequences of a refusal or of submitting to the test.
- ☐ The appellant did not refuse the test. (Refusal Case)
- ☐ The test results did not indicate a prohibited concentration of alcohol. (Positive Test Case)
- ☐ The officer did not place appellant under suspension.
- ☐ BMV Form 2255 was not filed with the court or was not sent within 48 hours of the offense.
- ☐ BMV Form 2255 was completed improperly.
- ☐ Test not administered within 3 hour time limit.
- ☐ Initial hearing on ALS not held within 5 days.
- ☐ ALS terminated per plea agreement, ALS reinstatement fee not to be collected.

☐ Judicial Pre-Trial suspension imposed ☐ Limited Privileges from _____ until _____.
☐ Interlock required.

☐ Pre-Trial Suspension Terminated
☐ Stay of Administrative License Suspension issued.
☐ The appeal is withdrawn by the defendant.
☐ The appellant's appeal is denied for failure to show error.
☐ Stay of ALS rescinded. ALS re-imposed. Suspension from _____ until _____.
☐ Note: Limited driving privileges granted if applicable.
☐ Suspension is terminated
- ☐ Plea of guilty or no contest to OVI after refusal. R.C. 4511.191(C).
- ☐ ALS terminated upon OVI conviction, do not collect ALS reinstatement fee. *State v. Gustavson.*
- ☐ Found not guilty of OVI, R.C. 4511.19, or municipal OVI, after a positive test result. R.C. 4511.197(D).

CLERK	COURT
CITY	4 DIGIT COURT CODE

SIGNATURE OF PROSECUTING ATTORNEY	SIGNATURE OF JUDGE
X	X

Please mail this form to: Ohio Bureau of Motor Vehicles
P.O. Box 16784
Columbus, Ohio 43216-6784

BMV 2261 8/15 [760-1001]

Yes, You Can (And I Did) Indict a Ham Sandwich!

Jon J. Saia

It is truly amazing that everyone who gets pulled over for not using a turn signal at least 100 feet from an intersection has drugs in their car.

In 31 years of practice and representing thousands of traffic offenders, I have never represented anyone charged solely with a failure to use a turn signal at least 100 feet from an intersection. After serving two weeks of Grand Jury Duty, I now know why.

Apparently, everyone who commits this traffic violation is also guilty of a drug offense. The traffic offense is never filed; it is needed solely to serve as the basis for the traffic stop in the felony.

I have to admit, it was rather refreshing to hear one officer testify truthfully about his traffic stop. He saw a car, knew the owner was a drug dealer, and ran the plates. He found an active warrant for the owner, identified the owner as the driver, then stopped and arrested the driver. That testimony seemed more genuine than stopping a car for not using a turn signal at least 100 feet from an intersection.

Doing my civic duty and serving on the Grand Jury presented quite a dilemma for me. In addition to being a criminal defense lawyer for 31 years, I am currently the Immediate Past President of the Ohio Association of Criminal Defense Lawyers and President of the Central Ohio Criminal Defense Lawyers Association.

The experience turned out to be quite enlightening.

The volume of cases in Franklin County is overwhelming. The Franklin County Prosecuting Attorney's Office does a great job in reviewing the cases, streamlining cases, and requesting an indictment on only what the prosecutor believes to be the strongest charges.

After the first couple days, the Grand Jury became educated enough to begin asking questions about additional charges. Much to my surprise, the response was the Grand Jury could do whatever it wanted, but the additional charges would not be requested. The reasons were various but generally emphasized "we believe we have a much stronger case on the more serious charges."

For the most part, the process was very efficient. I would estimate that, in a two week period, we heard in excess of 250 cases.

I learned that there are a lot of drugs and guns on the streets.

Drugs: My opinion that 90% or more of criminal behavior is drug-related was confirmed by my grand jury service. As a young lawyer, I would hear statistics from judges that 50-60% of crimes were drug related. I surmised that the basis of such statistics from judges is that they only know what they are told and did not know the whole story.

The "whole story" is that most of the cases we heard were drug "related." Murders, robberies, burglaries, felonious assault, and thefts all had some relationship to the use or sale of drugs or involved drug money.

Guns: there are a lot of guns. I would wager that there are thousands of guns in the streams, rivers, and woods of Franklin County. I was amazed at not only the number of guns but the discarded guns.

In the end, I found my service to be a rewarding experience. In addition to serving my civic duty, it was an educational experience which will help me be a better trial attorney.

One question I will never again leave out of Voir Dire is "Has anyone ever served on a Grand Jury?" After hearing daily only one version of the facts, grand jurors can become quite numb that there is another version out there.

Several cases were presented where my thought process was different than other grand jurors. I knew there was no way the events transpired the way we were told, and there were huge pieces missing. When I raised my concerns, I was usually met with some strange looks.

I also realized that, in general, the individuals I served with did not like two versions of facts. No matter how minute those inconsistencies were.

If you ever have a chance to serve on Grand Jury, I would suggest doing so. It is a rewarding experience which will teach you a lot about the community where you live. You may not like it, but you will learn about it.

AMICUS REPORT

Russell Bensing

Susan Gwynne isn't a sympathetic figure. Over a ten-year period, she worked (or posed) as a nurse in various nursing homes and assisted living facilities, stealing money and personal items from residents to feed her cocaine habit. She eventually pled out to seventeen counts of burglary, all second-degree felonies, plus fourteen counts of theft and fifteen of receiving stolen property.

A Delaware County judge gave her 65 years in prison.

The 5th District found this "shocking," and modified the sentence to 15 years, noting that Gwynne, age 55, had no prior criminal record, and that no physical harm was caused or even threatened: none of the residents were in their rooms when Gwynne committed the thefts.

The State appealed, the Supreme Court took it in, and that's one of several cases the OACDL Amicus Committee has pending there.

The State argues in Gwynne that a court of appeals cannot review the trial court's determination of the seriousness and recidivism factors in RC 2929.12. But RC 2953.08(G)(2) allows an appellate court to reverse or modify a sentence if it is "clearly and convincingly" unsupported by the record. (While the statute seems to apply that only to consecutive sentences, the Supreme Court extended that to non-consecutive sentences in *State v. Marcum*, 146 Ohio St.3d 516 (2016).) We argue that determination of whether the sentence is unsupported requires analysis of whether the sentence comports with the principles and purposes of sentencing contained in RC 2929.11, and review of the 2929.12 factors is essential to that.

As any Ohio criminal lawyer knows, appellate review of sentencing law in Ohio is a mess, with numerous decisions describing the trial court's discretion in sentencing as "unfettered," and appellate courts routinely upholding decades-long sentences. Gwynne promises to be one of the most significant sentencing decisions to come down in a while, and the sheer absurdity of the sentence lends hope that, despite the rightward tilt of the court since the last election, the court will make sentencing appeals easier for defendants.

There are several other cases that we're working on. One is *State v. L.G.*, which involves a question of whether a 13-year-old boy had to be advised of his Miranda rights before being questioned by the school safety director about a bomb threat, with several police officers standing around the boy. The 10th District found this constituted a custodial interrogation; the State begs to differ. The concern here is that after last year's decision in State v. Polk, 150 Ohio St.3d 29 (OACDL participated in that one as well), where the court upheld the search of a student's schoolbag, recent events make it more likely that the court will err on the side of giving school security officials greater power.

Two other cases in which OACDL will be participating involve Fourth Amendment issues. One is *State v. Dibble*, in which the State is claiming that the 10th District erred in suppressing a search, and argues that the courts can consider sworn testimony given at the time of the approval of the warrant in determining whether the good-faith exception to the warrant requirement applies. The court has also accepted *State v. Hawkins*, which presents the issue of whether a difference between the color of the vehicle and the color listed on its registration is sufficient to create reasonable suspicion for a traffic stop.

Hawkins is a conflict case. The other three lend support for my answer when people ask me what's the best way to get a case into the Supreme Court: have the State appeal.

The Amicus committee is also monitoring developments regarding Marsy's law, the victim's rights amendment passed in 2016 by a narrow 83-17 margin. The Supreme Court's Rules committee has just come out with proposed changes to accommodate passage of the amendment. The major change in the Rules of Evidence is a modification to Rule 615, which provides for separation of witnesses; the change would prohibit exclusion of the victim from the trial. Given the broad definition of "victim" in the proposed statutory language adopting the rule – a family member who has been "harmed" by the defendant's conduct could be included – the modification poses the possibility of a virtual cheering section for the victim during the trial.

There are numerous proposed changes to the Rules of Criminal Procedure as well. CrimR 12 would provide that the victim can file pretrial motions. CrimR 16 would be changed to allow the victim to object to pretrial disclosure. CrimR 11 would allow the victim to "raise any objection to the terms of the plea agreement" before the judge accepts it. And there's a new CrimR 37, which requires the prosecutor to inform the victim of every court proceeding.

How this will shake out is unclear. What kind of motions would a victim file? Who knows? Can the judge reject a plea bargain because the victim objects to it? Would the change to the discovery rules permit the victim to tell the prosecutor she doesn't want him to turn her statement over to the defense? Does it actually give the victim veto power over the prosecutor's duties of discovery under Rule 16?

Not completely, of course. The duty to disclose exculpatory evidence is required under the United States Constitution, and that trumps anything the good citizens of Ohio put in theirs. The problem is that Marsy's law is a constitutional amendment, and so any conflict between what Marsy's Law provides and what is specified by the Ohio statutes or rules is going to be resolved in favor of the former. Minimizing some of the more harmful effects of Marsy's Law will depend on arguing that it implicates certain rights protected by the U.S. Constitution or SCOTUS decisions. For example, the victim's ability to scuttle a plea bargain might conflict with Supreme Court decisions on plea-bargaining.

In any event, perhaps the best way of attacking the law is at the trial and intermediate appellate court levels; the Ohio Supreme Court will probably prefer to let the issue percolate at those levels for a while before becoming involved. If you have an issue with Marsy's Law in one of your cases, please contact the Amicus Committee. We can be reached by email at rbensing@ameritech.net.

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