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CONTENTS

Justice Delayed is Justice Denied: Due Process Violations in SCRAM Cases 1
Case Law & Litigation Tips 6

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Justice Delayed is Justice Denied: Due Process Violations in SCRAM Cases

Patrick T. Barone, J.D., Michael P. Hlastala, Ph.D.

Over the last twenty years societal and political pressures have turned the cause of eliminating drunk driving into the Nation's new prohibition. During this time the courts have struggled with ways to reliably monitor a drunken driving offender's pre-conviction and post-conviction use of alcohol. For this purpose, the courts are now employing a newer product known by the trade-name "SCRAM", an acronym meaning "secure continuous remote alcohol monitor".

The SCRAM device, manufactured by AMS, is a bracelet worn on the offender's ankle. AMS claims that it monitors the use of alcohol as it migrates through the offender's skin. The scientific underpinnings of SCRAM are discussed in more detail below.

While in place the bracelet takes alcohol readings once per hour. If alcohol is detected, the readings are taken twice per hour. The readings are then reported via a modem and the internet to a remote server located outside AMS' home office. The information is then plotted into a graph, which is reviewed by AMS to determine if a possible drinking episode can be "confirmed".

Before an event is confirmed as a consumption event, the manufacturer will submit any positive test results for alcohol to an internal review process. AMS contends that they impose strict, well-defined, and very conservative guidelines for this confirmation process. In addition, for any event to be a "confirmed event", it has to hold up to review by an internal, highly trained committee, and all parties must concur before the event is confirmed. One may conjecture that this arduous confirmation process is necessary in part because of distortions in the typical alcohol metabolism curve. These distortions complicate the interpretation of TAC (transdermal alco-

hol content) curves. This problem is discussed in more detail below.

Once a drinking episode is confirmed the manufacturer will report this confirmation back to the local monitoring agency, which is usually the court where the offender's case is pending. The court will then employ its own follow-up procedures that depend on the status of the case. If the offender is on bond, he or she may face a bond revocation hearing, while if the allegation of alcohol use occurs post-conviction, the offender may be facing a possible show cause hearing that could result in a revocation of probation.

Upon an adverse finding in court for either violation there is always the persistent and very real possibility that significant punitive sanctions will be imposed by the court. Depending on the circumstances, these sanctions might include a potentially lengthy incarceration. Consequently, in these instances certain due process protections ought to apply to the offender, including the essential due process rights of timely notice and the opportunity to be heard. However, in practice, these rights are difficult to protect because the "confirmation" process is not immediate, and then even after the drinking episode is ostensibly "confirmed" by AMS there is an additional delay, which is often as much as several weeks, between the time of the suspected drinking episode and the time the offender is notified of this allegation.

Due to these delays, the ability to collect a potentially exculpatory independent breath or blood test has long since passed by the time the offender receives notice of the allegation. Thus, the offender will find him or herself in the unenviable position of having to prove a negative, that is, that he or she was not drinking, and must do so without any ability to produce convincing evidence to support the denial.

Any attempt to prove the negative will be further frustrated by the lack of information available to the defense relative to the inner workings of the device. This lack of information is based in part on the proprietary nature of the device that understandably, the manufacturer wishes to keep confidential. These two factors, however, coalesce to create significant Constitutional problems for the accused. To fully comprehend these problems it is important for practitioners to first have a comprehensive understanding of what is known

about the science that underlies the SCRAM bracelet.

The Science of Transdermal Alcohol Monitoring

The SCRAM device works by measuring the gas alcohol concentration over the skin. Alcohol is delivered to the skin via blood flow. Alcohol then diffuses through the perfused tissue layer, the epidermis and the *stratum corneum* and then into the gas above the skin¹. The *stratum corneum* is made up of densely packed cells and represents the major barrier to alcohol diffusion. Thus the diffusion process is a "diffusion-limited" (depends on the resistance to diffusion) system which varies considerably depending on the physiological (or pathological) properties of the skin.

In addition to passive diffusion, detectable perspiration contributes a conductive component to the process. In the case of perspiration, alcohol dissolved in sweat contained in the sweat glands is carried to the surface by the convective liquid movement to the surface. Under normal circumstances, perspiration represents only a small component of the transdermal skin flux. However, under conditions of exercise (increase in body heat) or hyperthermia, the increase in sweat production to help in body cooling will enhance the rate of transdermal alcohol exchange.

The diffusive alcohol exchange occurs due to a net movement from a region with high concentration to a region with a lower concentration. When the blood alcohol concentration (BAC) is higher than that at the surface of the skin, there is a net alcohol flux from the blood to the gas above the skin. During the alcohol absorption phase, when the BAC is increasing, alcohol diffuses from the blood toward the skin surface.

During the elimination (burn-off) phase, the opposite occurs as alcohol diffuses from the gas above the skin toward the blood. Because the exchange is diffusion-limited in both directions, the shape of the transdermal alcohol concentration (TAC as denoted by AMS) curve is distorted relative to the shape of the BAC curve. The TAC curve is generally flatter (decreased peak height) and the rates of increase and decrease of TAC are reduced relative to the same values for the BAC curve (Anderson & Hlastala). This curve distortion complicates the interpretation of TAC curves.

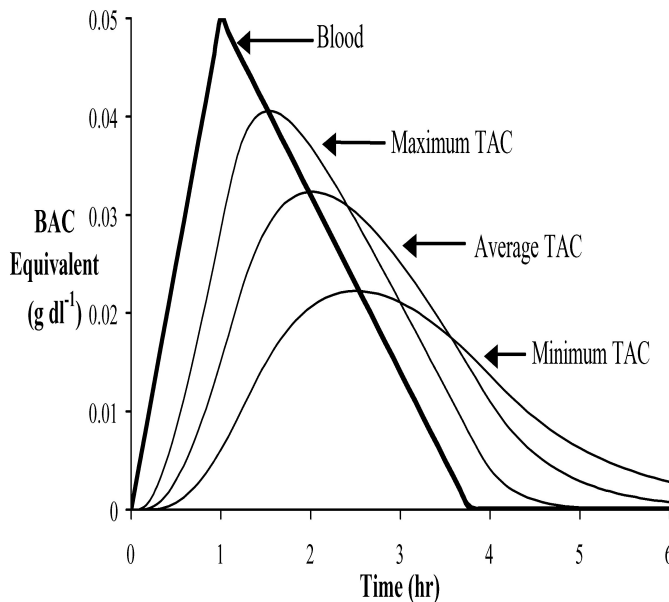


Figure 1 illustrates the distortion of the TAC curve relative to a hypothetical BAC curve given the inter-individual variation in skin diffusion properties.

Generally, the process of authenticating an alleged drinking episode requires two important assumptions. First, that the height of the TAC curve is directly related to the BAC curve and is determined by adjusting with a fixed correction factor. The practice of converting TAC curve by a constant multiplier assumes that the shape of the TAC curve is identical in form to the BAC curve. This assumption is flawed because the shapes are quite different (as shown in Figure 1). If the subject has an average TAC curve, then correction by a constant factor would be appropriate. However, if the subject has a near maximum TAC curve, then the peak BAC would be overestimated using an average correction factor. Similarly, if the subject has a near minimum TAC curve, then the peak BAC would be underestimated using the average correction factor.

Second, that the rate of TAC decline is equal (or at least similar) to the rate of BAC decline (burn-off rate). Under normal circumstances neither of these assumptions can be true due to the variations in skin diffusion properties among the normal population, thus leading to false positives (apparent readings of supradermal gas alcohol concentration above 0.02 gm/dl when the BAC is actually lower than 0.02 gm/dl). The impact of

errors in these assumptions have not yet been adequately evaluated. Because of the normal physiological variation in skin diffusion properties, the SCRAM device can yield either false positives or false negatives.

The method used by AMS to determine whether an alleged drinking event is a “Confirmed Drinking Event” is subjective at best. A data string showing the alleged event is reviewed by employees of AMS. The criteria used for determining whether the data truly indicates a drinking event is unclear and not specifically defined. This determination ostensibly relates to the examination of the TAC rate of decline with the assumption that this rate directly correlates with the BAC burn-off rate. However, the ability to make this determination depends critically on the assumption that diffusion properties of the specific subject’s ankle skin are the same as an average ankle.

If AMS were to develop a set of specific criteria for judging an alleged drinking event, it would make the determination “objective” rather than “subjective,” legitimizing the interpretation and minimizing the possibility of false-positive determinations of drinking events. Such an approach would also speed up notification to the subject when a positive drinking event is identified so that he or she can obtain exculpatory data.

Another concern relates to the resolution of determination of the “burn-off” rate of the TAC curve. The data points are obtained every 30 minutes (rather than continuously). In the presence of measurement or random noise, it becomes difficult to accurately measure the rate of decline of the TAC curve. A systematic analysis of the effects of measurement noise (error) has not yet been published.

How the Typical SCRAM Case Causes Science and Law to Collide

Aside from the apparent reliability problems discussed above, the very processes involved in the monitoring and confirmation of a drinking episode by the manufacturer requires a significant delay between the “confirmation” of a drinking episode and the actual notification of this “confirmation” to the offender. This systematic problem with SCRAM is exacerbated by the physiological delay in the expression of the alcohol through the skin. Scientific literature has shown

that this delay might be as much as 120 minutes², while the manufacturer claims that this delay might be as much as 180 minutes³.

A third source of delay may be termed “judicial” delay, which is the delay that occurs between the notification of a Confirmed Event by the manufacturer and the subsequent notice to the offender by the monitoring agency. These delays create an almost certain violation of the offender’s constitutional rights because they effectively preclude the offender from any opportunity to seek and obtain potentially exculpatory evidence in the form of an independent test. Independent testing is particularly crucial where, as here, recent scientific research suggests that the data and processes used to “confirm” drinking are respectively both unreliable and subjective⁴.

A review of the applicable case law suggests that while this specific issue has not been addressed at the Federal level, Federal courts have resolved the more general right to obtain exculpatory evidence in favor of the accused⁵. On the other hand, the right to independent testing, or at least to be protected from active interference with this right, is protected by many state courts. For example, in Michigan, once a drunk driving accused has submitted to the chemical test of the police officer’s choosing, he or she has the right to collect an independent test. If this right is interfered with it may result in a dismissal of the drunken driving case⁶. Many other state appellate courts have rendered analogous rulings⁷.

Under federal law, the United States Supreme Court and the Circuit Courts have provided ample and consistent legal authority for the proposition that an accused is entitled to obtain exculpatory evidence⁸. This right has been explained as follows: “[d]efendants have a due process right to obtain evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or punishment⁹.”

Additionally, the Sixth Circuit Court of Appeals similarly stated that, pursuant to *Brady*, a prosecutor is required to turn over evidence that is “favorable to the accused and ‘material’ to guilt or innocence.” Plus, when evidence is not turned over, it results in a Constitutional violation¹⁰. Along this line, the United States Supreme Court has held that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material

either to guilt or to punishment¹¹.

In the context of transdermal blood alcohol monitoring, the wearer of a SCRAM bracelet should be entitled to obtain an independent breath test or blood test, or both, if AMS indicates that an alcohol incident has occurred. For this type of protection to be meaningful, the SCRAM bracelet must have an audible alert signal that advises the wearer that a claimed “violation” has been detected. Then, an immediate blood draw could either refute the monitoring device’s accuracy or quantify (through GC-MS analysis) what chemical has led to the alert being recorded.

The reason for this is, of course, that the wearer of the SCRAM bracelet would otherwise be subjected *exclusively* to AMS’s alcohol analysis, which, as stated, is currently based on undisclosed *proprietary* evaluation methods, as well as technology that is inherently inferior to breath testing or a blood alcohol screen. Previous scientific research has shown that unlike traditional forms of breath and blood testing, SCRAM readings are not intended as an accurate or reliable quantitative measurement¹².

Nevertheless, judges and related court personnel may argue that there is no due process right to obtain exculpatory evidence relative to SCRAM bracelet situations because the case law that addresses exculpatory evidence pertains to the adjudication of guilt or innocence, as to a charged offense, whereas, typically, an individual who is required to wear a SCRAM bracelet has already been convicted of an alcohol-related crime, or he or she is simply being monitored for alcohol consumption while awaiting trial or disposition. However, an argument of this nature would actually be at odds with *Brady* and its progeny because often the penalty for consuming alcohol while in a home-monitoring program—where members of AMS would be the sole determiner of whether an alcohol event actually occurred—is incarceration. Therefore, regardless of how judges and court personnel may wish to characterize the matter, the fact remains that an individual may lose his or her liberty based on AMS’s determination—unless the collection of independent evidence is permitted in order to potentially exculpate the accused.

Furthermore, whether existing evidence is suppressed, relative to the discussion in *Agurs*, or whether the accused is prohibited from going out

and obtaining exculpatory evidence, the result is the same – namely, an individual may end up incarcerated for allegedly consuming alcohol while wearing a SCRAM bracelet, when in fact there may have been no alcohol consumption whatsoever.

Consequently, if courts are going to employ the apparently inferior science of transdermal blood alcohol monitoring in connection with pre-conviction and post-conviction procedures, then those procedures must be safeguarded with more reliable technology in order to avoid the specter of an innocent person losing his or her liberty based only on a dubious and non-disclosed analysis from AMS. Indeed, the *Agurs* decision by the United States Supreme Court substantiates this conclusion. While addressing the issue of competing evidence, relative to exonerating an accused, the Court stated the following: “If, for example, one of only two eyewitnesses to a crime had told the prosecutor that the defendant was definitely not its perpetrator and if this statement was not disclosed to the defense, no court would hesitate to reverse a conviction resting on the testimony of the other eyewitness¹³.”

The same is true with a statement from AMS that an individual has consumed alcohol—a court should not hesitate to permit the accused an opportunity to obtain exculpatory evidence, in the form of a more reliable breath test or blood test, in order to prevent an innocent person from being wrongfully incarcerated or subjected to other unwarranted penalties. Thus, if anything, the SCRAM bracelet should be used as merely a preliminary screening device—so long as the wearer is notified of AMS’s determination that an alcohol incident has allegedly occurred, within sufficient time for exculpatory evidence to be obtained.

Presently, however, AMS’s current technology and reporting protocol does not permit timely notification. Accordingly, the use of SCRAM technology, in its current form, is likely to violate an innocent user’s due process rights. As a result, it appears that SCRAM bracelets should not be used for any purpose resulting in any form of penalty until appropriate notification procedures can be implemented. At best, a “positive” SCRAM reading should be merely a “presumptive” violation, and be required to be “confirmed” by an immediate forensic test.

Possible Solutions to SCRAM’s Due Process Problems

In states where SCRAM is being utilized, courts often recommend it as an alternative to incarceration. Consequently, the SCRAM bracelet is often viewed by defense counsel as a pragmatic way to keep his or her client out of jail. While problems with the underlying science are discussed above, and there are many, it can nevertheless be said that the SCRAM bracelet probably works reasonably well at detecting an actual drinking event most of the time.

Thus, because of the possible benefits to the client it may not be necessary to advocate against the use of the SCRAM bracelet altogether. However, it is abundantly clear that the device should never be used for evidentiary purposes to “prove” the use of alcohol. Instead, the device should only be used to require that the wearer appear within a prescribed time for a more accurate alcohol test which would preferably be a blood test. Such a change would relegate the SCRAM bracelet to the position it ought to occupy, that of a simple screening test, or in other words, to the position of the roadside preliminary breath test. This conclusion is further compelling because the technology for both devices is identical, i.e., both use fuel cells to detect the presence of alcohol. They are both “presumptive” testing methods, not “confirmatory”.

Provided the manufacturer can change their procedures and technology so that an offender can assuredly obtain “real time” notification of the alleged “confirmed” alcohol event, the wearer will be reasonably well protected by the ability to obtain an independent test. However, without such immediate notice there is no way to adequately protect the wearer’s Constitutional rights. With such notice and audible alert capabilities, the SCRAM bracelet can become a powerful tool in the court’s quest to monitor probationers on house arrest and effectively stop the offender’s use of alcohol.

1. Joseph C. Anderson and Michael P. Hlastala. *The kinetics of transdermal alcohol exchange*, *J Appl Physiol* 100: 649-655, 2006.
2. Robert M. Swift, Christopher S. Martin, Larry Swette, Anthony LaConti & Nancy

- Kackley, *Studies on a Wearable, Electronic, Transdermal Alcohol Sensor*, 17 *Alcoholism: Clinical and Experimental Research* 4 at 721- 725 (1992).
3. Testimony of Jeffery Hawthorn as provided in Evidentiary Hearing at 86, *People vs. Glaza*, Oakland County Dist. Ct., (Dec. 15, 2004) (04-003877).
 4. Anderson and Hlastala, *supra*.
 5. The linchpin of this proposition is the case *Brady v. Maryland*, 373 U.S. 83; 83 S.Ct. 1194; 10 L. Ed. 215 (1963).
 6. *See*, e.g., *People v Underwood*, 153 Mich App 598; 396 N.W.2d 443 (1986), (*Accord*, *People v. Anstey*, No. 255416, 2005 WL 292237 (Mich.App. Feb. 8, 2005)).
 7. *See Commonwealth v. O'Brien*, 434 Mass. 615, 750 N.E.2d 1000 (2001). (No requirement exists that the police assist a defendant charged with driving while intoxicated (DWI) in obtaining an independent medical examination, but they may not *prevent or hinder* the defendant's reasonable and timely attempt to obtain such an examination, and *State v. Minkoff*, 308 Mont. 248, 42 P.3d 223 (2002) (Upholding a similar rule of "non-impedance" of a person's independent test rights. *See also State v. Dull*, 176 Ga. App. 152, 335 S.E.2d 605 (1985). (Holding that a failure to inform defendant of right to additional, independent chemical test, not failure to obtain and show waiver affirmatively, rendered results of chemical test administered at arresting officer's request inadmissible).
 8. *See Brady v. Maryland*.
 9. *People v. Stanaway*, 446 Mich 643, 666; 521 N.W.2d 557, 569 (1994).
 10. *United States v. Frost*, 125 F. 3d. 346, 382 (6th Cir. 1997).
 11. *See United States v. Agurs*, 427 U.S. 97; 96 S.Ct. 2392, 2398 n.10; 49 L.Ed.2d 342 (1976).
 12. Daniel J. Brown, 7 (10) *The Pharmacokinetics of Alcohol Excretion in Human Perspiration*, 7 *Methods and Findings Experimental Clinical Pharmacology* 539 (1985).
 13. *United States v. Agurs* at 2402, n.21.

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Case Law at a Glance & Litigation Tips

FLORIDA

Florida's *Belvin* Ruling Vacated and En Banc New Excellent Ruling Substituted; Virginia Court of Appeals Seals *Luginbyhl's* Fate

Belvin v. State,

922 So.2d 1046 (Fla.App. 4 Dist. 2006).

Editor's Note: The full 4th Circuit Court of Appeals in Florida withdrew its prior ruling and substituted a much better opinion answering and denying all the State's challenges seeking to allow breath testing affidavits on a variety of

“exceptions” to the hearsay rule. These passages of the opinion are so important that they are reproduced for the subscribers to utilize in their states.

These passages from *Belvin* are worth saving:

On rehearing, we withdraw our prior opinion and substitute the following in its place. Petitioner Bruce Belvin seeks certiorari review of a final decision of the Palm Beach Circuit Court, rendered in its appellate capacity, affirming his conviction and sentence for driving under the influence of alcohol. Because we agree with petitioner that admission of certain portions of the breath test affidavit at his criminal trial violated his constitutional right to confrontation under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), we grant the petition and remand this cause for a new trial.

In a drunk driving prosecution, before introducing breath test results, the state must present evidence that the test was performed substantially in accordance with approved methods, by a person trained and qualified to conduct it, on an approved machine that has been tested and inspected. See *State v. Donaldson*, 579 So.2d 728 (Fla.1991). To simplify the state's burden in presenting this evidence, the legislature passed laws allowing the state to introduce at trial an affidavit containing the necessary evidentiary foundation for breath test results. See §§ 316.1934(5); 90.803(8), Fla. Stat. These statutory provisions permit breath test affidavits to be admitted as a public *1049 records exception to the hearsay rule. Section 316.1934(5) provides:

An affidavit containing the results of any test of a person's blood or breath to determine its alcohol content, as authorized by s. 316.1932 or s. 316.1933, is admissible in evidence under the exception to the hearsay rule in s. 90.803(8) for public records and reports. Such affidavit is admissible without further authentication and is presumptive proof of the results of an authorized test to determine alcohol content of the blood or breath if the affidavit discloses:

- (a) The type of test administered and the procedures followed;
- (b) The time of the collection of the blood or breath sample analyzed;
- (c) The numerical results of the test indicating the alcohol content of the blood or breath;

- (d) The type and status of any permit issued by the Department of Law Enforcement which was held by the person who performed the test; and
- (e) If the test was administered by means of a breath testing instrument, the date of performance of the most recent required maintenance on such instrument.

The Department of Law Enforcement shall provide a form for the affidavit. Admissibility of the affidavit does not abrogate the right of the person tested to subpoena the person who administered the test for examination as an adverse witness at a civil or criminal trial or other proceeding.

Section 90.803(8) provides as an exception to hearsay:

(8) PUBLIC RECORDS AND REPORTS.-

Records, reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to matters which there was a duty to report, excluding in criminal cases matters observed by a police officer or other law enforcement personnel, unless the sources of information or other circumstances show their lack of trustworthiness. *The criminal case exclusion shall not apply to an affidavit otherwise admissible under s. 316.1934 or s. 327.354.* (emphasis added).

[4] As mentioned above, the state argues that certiorari review should not be granted because the above statutes, along with precedent in our district, demonstrate that the circuit court's decision does not violate "a clearly established principle of law." But for purposes of certiorari review, "clearly established law" can derive from recent controlling constitutional law. See *Allstate Ins. Co. v. Kaklamanos*, 843 So.2d 885, 890 (Fla.2003) (noting that "'clearly established law' can derive from a variety of legal sources, including recent controlling case law, rules of court, statutes, and constitutional law").

The recent controlling constitutional law that petitioner relies on is *Crawford v. Washington*, wherein the Court held that hearsay of a testimonial nature is subject to cross-examination in criminal prosecutions. In deciding *Crawford*, the Court overturned *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), which permitted the introduction of hearsay statements of

unavailable witnesses so long as the statements bore "particularized guarantees of trustworthiness" or fell under a "firmly rooted hearsay exception." *Crawford*, 541 U.S. at 60, 124 S.Ct. 1354 (citing *Roberts*, 448 U.S. at 66, 100 S.Ct. 2531). The Court determined that the test set forth in *Roberts* failed to satisfy the historical concerns of the Confrontation Clause, stating:

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. *Id.* at 61, 100 S.Ct. 2531.

Although the *Crawford* Court declined to provide a complete definition of "testimonial" evidence, petitioner argues that its partial definition encompasses the breath test affidavit. Indeed, the Court included affidavits in its list of examples of testimonial evidence. The Court explained that the Confrontation Clause:

[A]pplies to "witnesses" against the accused--in other words, those who "bear testimony." "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent--that is, material such as *affidavits*, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; "extrajudicial statements ... con-

tained in formalized testimonial materials, such as *affidavits*, depositions, prior testimony, or confessions"; "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial"

Id. at 51-52, 124 S.Ct. 1354 (citations omitted) (emphasis added).

Breath test affidavits are usually generated by law enforcement for use at a later criminal trial or driver's license revocation proceeding. They thus qualify as "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

The state argues that breath test affidavits are admissible under *Crawford* because: (1) the affidavits are not testimonial in nature, and (2) they qualify as "public records" excluded from *Crawford's* definition of testimony. Though the state acknowledges that *Crawford* lists affidavits among those items which could be considered testimonial in nature, it contends that breath test affidavits are different from the affidavits contemplated in *Crawford*, because they "simply involve a technician's observations regarding the administration of a breath test, not the examination of a declarant and the give-and-take of questions and answers."

In our view, this is a distinction without a difference. Breath testing operators are required to follow certain procedures to ensure the reliability of the test results, including maintaining a breath test log, observing the defendant for a fixed period of time, and analyzing the requisite number of samples within a specified time frame. Their affidavits are based on what they did and observed while testing the subject. Among other things, the affidavit contains the technician's statement of when he began the period of observation and what procedures he followed in conducting the breath test.

These recordings are "testimonial" in our view. And though Florida has adopted a "substantial compliance" standard, which means that minor deviations from the rules will not result in the exclusion of test results, the information recorded by the technician who administered the test is admitted to establish a critical element of the crime of driving under the influence.

VIRGINIA

However, as good as the substituted Florida opinion is, Virginia's appellate court is equally bad for defense rights.

Luginbyhl v. Commonwealth,

--- S.E.2d ---, 2006 WL 850560 (Va.App., 2006).

Virginia's Court of Appeal vacated its prior opinion in *Luginbyhl v. Com.*, 46 Va.App. 460, 618 S.E.2d 347 (2005) and sealed Luginbyhl's coffin by holding:

The agreed statement of facts recites that "the driver of the vehicle was identified as the defendant" and that the defendant told Officer Day, "I'm drunk." This confession is corroborated, again quoting from the agreed statement of facts, because appellant "had a strong odor of alcohol," "glassy and bloodshot" eyes, and a "red face"; "exhibited sluggish motor skills"; and "fell forward as he stepped from his vehicle." Appellant told Officer Day he had "a lot to drink" and defined "a lot" as "6, 7 or 8 vodka drinks" the size of a 12-ounce cup in his vehicle. Appellant "attempted to touch his nose four times ... [but only] ... succeeded one time." While failing a one-legged stand test, the appellant began to cry and told Officer Day, "I'm an alcoholic." This evidence, without the breath analysis, proves guilt beyond a reasonable doubt.

This evidence, without the breath analysis, proves guilt beyond a reasonable doubt. Upon this record, assuming but not deciding that the trial court committed constitutional error by admitting the breath test analysis and its accompanying certificate, ***we conclude the error was harmless beyond a reasonable doubt.***

GEORGIA

U.S. Supreme Court Expands Authority of Residential Co-Tenant to Refuse Search of Home when other Co-Occupant Gives Consent

Georgia v. Randolph,

547 U.S. ----, 126 S.Ct. 1515, --- L.Ed.2d --- (2006)

The search of a Georgia attorney's home authorized by his disgruntled wife (from whom he was separated) led to felony drug possession charges. The defendant in this case - Scott Randolph - and his wife separated in 2001, but the wife came back to their home with their son a few weeks later. She called the police to complain that her husband took their son from her residence af-

ter a domestic dispute, and told the police officers that there were items relating to his drug use in the house. The police went to Randolph's residence (which was co-owned by both Mr. and Mrs. Randolph).

Soon thereafter, he returned (with their son in his car) to the marital home (which he was occupying without the wife during the separation) shortly after the arrival of the police to find both the police and his angry wife at the residence. The police asked to search the residence, and Randolph adamantly refused. His wife consented to their search, and the officers found evidence of cocaine use.

Randolph argued that the wife could not consent to a search of areas that were (at that time) exclusively within his dominion and control. Agreeing with the Georgia courts that had ruled in Mr. Randolph's favor, the high court held that his refusal to consent should have been honored.

In a 5-3 split (Alito not participating) the high court expanded traditional consent issues from what most observers thought was a clear line between a adult co-occupants or co-owners being allowed to override the refusal of consent by the other.

FEDERAL

Where Essential State Witnesses Have Been Deployed to War Effort, Government's Motion to Dismiss DUI Prosecution without Prejudice (Until Witnesses Return) is Proper to Grant

United States v. Crowser,

____. F. Supp. ____ (Case No. S-06-018 GGH (E.D.Cal. 04/07/2006)

The government sought to dismiss pending DUI charges pursuant to Rule 48, due to unavailability of two key witnesses, who were temporarily stationed overseas in the Iraq war effort. The defendant rejected the government's plea offers (details not disclosed), and sought trial on the stated date in April of 2006. The issue was framed by the magistrate judge as follows:

The Government case is built on the defendant's .24 and .25 EPAS (breath analyzer) to prove the Government's case against the defendant that he was intoxicated when he drove on Beale Air Force Base. The Government learned that Tech Sgt. Nicholas Spina is currently deployed overseas for the next four months. Tech Sgt. Spina admin-

istered the EPAS test to the defendant and kept all logs on the EPAS machine from October 14, 2005 to November 28, 2005. The only witness to the administration of the EPAS test was Lt. Frank Bigelow. Lt. Bigelow is deployed out of the country for the next year. Due to the Officers being deployed overseas they are unavailable to testify on April 17, 2006 to the crucial piece of evidence implicating that the defendant was driving under the influence of alcohol on November 1, 2005. The Government gave a new offer to dispose of this matter on March 22, 2006, based on the Officer's unavailability, but this offer was rejected on March 26, 2006. The defendant wishes to proceed to trial and does not agree to the granting of a continuance of defendant's case to a later date. Therefore, the Government now requests a Rule 48(a) dismissal without prejudice due to the Officer's unavailability.

The public defender tried to argue that the government had the power and authority to subpoena these officers to come from Iraq, but the magistrate judge pointed out the cost and logistical nightmare created by such requests, in the time of war. This was found to be a proper showing of "unavailability" to satisfy the judge. Motion to dismiss the DUI charges and then (upon the officers' return) to later allow the government to reassert the charges was granted.

INDIANA

Indiana Supreme Court Accepts Transfer of Two "BOLO" Cases to Help Establish a Means of Analyzing Telephone Crime Tips from Informants

Sellmer v. State,

842 N.E.2d 358 (Ind., 2006).

[This was a 3-2 split decision].

First, the good case (for criminal defendants). The facts of this case that led to Sellmer's conviction being overturned are as follows:

At approximately 5:00 p.m. on November 19, 2001, Noblesville police received a call from an anonymous informant, describing the make and color of an automobile the caller alleged contained a large amount of drugs: a silver Dodge parked backwards into a parking spot in front of a Supercuts Hair Salon located at 2610 Conner Street in Noblesville. Acting on this tip, the Noblesville police dispatched officers Wade Roberts and Mike Freibel to the Supercuts to investigate further. At

the scene, Officer Roberts saw a vehicle that matched the vehicle described in the anonymous tip. As he drove his police cruiser by the vehicle, he observed two women exit the car and enter the Supercuts. Officers Roberts and Freibel entered the Supercuts where Officer Roberts spotted Defendant Sarah Sellmer, the driver of the silver Dodge, in the customer waiting area. He asked her whether she owned the silver Dodge and when she answered affirmatively, he asked her to step outside.

Once outside, Officer Roberts and Sellmer engaged in a conversation that will be described in greater detail later in this opinion. At the end of this conversation, Sellmer gave Officer Roberts permission to search the vehicle. On the basis of this permission (but without a warrant), Officer Roberts conducted a search and discovered a large quantity of marijuana. Sellmer was arrested and charged with Possession of Marijuana Over Thirty Grams.

In *Sellmer*, the question of whether a telephone tip to the police provided sufficient details and indicia of reliability to arise to "reasonable articulable suspicion" of criminal activity necessary to justify an investigatory stop was also at issue. The high court compared the *Kellems* decision and *Sellmer* as it worked through the applicable legal precedent. Ultimately, the high court anchored its ruling on U.S. Supreme Court precedent:

[W]e followed the directive of the Supreme Court that reasonable suspicion determinations are to be made "by looking at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *U.S. v. Arvizu*, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L. Ed.2d 740 (2002). We do the same here.

The telephone tip in *Sellmer* came from an anonymous caller and that fact was largely determinative of our conclusion that the tip did not provide the reasonable suspicion necessary to justify an investigatory stop. Here, as already noted, the tipster identified herself. Nevertheless, *Kellems* contends that there was not sufficient reasonable suspicion to perform an investigatory stop. The United States Supreme Court, however, has indicated that while a tip from an identified or known informant may not be sufficient to support a probable cause finding, such tips are sufficiently reli-

able to justify an investigatory *Terry* stop. See *Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990) (reiterating its approach established in *Adams v. Williams*, which held that an unverified tip from a known informant was sufficiently reliable to justify a *Terry* stop, although it might not have been reliable enough to establish probable cause); *Adams v. Williams*, 407 U.S. 143, 146-47, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972) (holding that a tip from a known informant can be the basis of reasonable cause for police officer's investigatory stop).

SOUTH DAKOTA

Split South Dakota Court Upholds Common Law DUI Conviction on Scant Evidence and Flawed Jury Instructions

State v. Motzko,

710 N.W.2d 433 (S.D. 2006)

A 3-2 decision from the South Dakota Supreme Court centered on two issues:

(1) Whether the trial judge's refusal to give a jury instruction that stated that merely drinking and driving was not necessarily a crime was reversible error; and

(2) Where Motzko was rear-ended by a pickup truck while riding her motorcycle (not her fault), and (due to an ankle injury) was unable to perform any field tests, whether the trial judge erred in not granting the motion for judgment of acquittal (directed or instructed verdict) due to insufficient evidence of impaired driving to make the DUI arrest.

A third issue of jury misconduct never gained any traction at the appellate level even with 7 affidavits from the jurors that they misunderstood the common law DUI count. The South Dakota high court determined that this issue was not proper for appeal due to the issue being an intrinsic matter versus misconduct from an extrinsic source.

Blood tests revealed readings of 0.118 and 0.114. The jury acquitted her of the per se DUI offense despite the breath results being in evidence. However, South Dakota allows testimony of relation back to the time of driving, and the blood was drawn a significant time after driving. Moreover, at the scene of the crash, Motzko told the officers when she consumed alcohol, and that was at a significantly earlier hour.

A state expert (Dr. Robert Looyenga) testified (apparently unrefuted by a defense expert) that impairment occurs at around 0.05 to 0/07 grams %. Based on the expert's testimony about this fact and his retrograde calculations, the evidence *could have been* sufficient to convict of the common law DUI yet been insufficient to support the per se DUI.

The observations of signs of impairment relied upon by the majority consisted of the following:

talking with Motzko, Fox noticed what he described as "the odor of an alcoholic beverage coming from -- what seemed to be coming from her person." Fox asked Motzko whether she had been drinking. Motzko admitted that she had been drinking, stating that she had one glass of wine about two or three hours before the accident.

The majority was satisfied that the Prosecution's instruction was a correct statement of law, and it "covered" the issue well enough to ignore the defense's request:

Jury Instruction 10: It is not essential to the existence of the offense that the driver of the vehicle should be so intoxicated that the vehicle cannot be

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safely driven. The expression "under the influence of an alcoholic beverage" covers not only all well known and easily recognized conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of indulging in any degree in an alcoholic beverage and which tends to deprive the driver of that clearness of intellect and control of oneself which the driver would otherwise possess. The dissent pointed out the standard of "impairment" as defined in South Dakota.

The Prosecution claimed that the evidence produced showed that Motzko had: an abnormal mental and physical condition depriving her of the clearness of intellect and self control she normally possessed. There is no showing that Motzko had an abnormal mental or physical condition. There is also no showing that Motzko was deprived of the clearness of intellect and self control she normally possessed.

The dissent would also have reversed based

on the trial court's refusal to give a specifically requested defense instruction, which was as follows:

In South Dakota it is not illegal to drink and drive unless the consumption of alcohol is of a degree to render the driver under the influence of an alcoholic beverage as stated in the foregoing instruction.

The dissent further noted: "This is a correct statement of the law in South Dakota and the jury should have been so instructed under the circumstances of this case."

Editor's Note: This is a troubling decision that clearly could have (and likely should have) been decided in favor of the defendant. Shortcomings by the trial judge and omissions by the defense attorney seem to have combined with a reluctant majority at the supreme court to grant relief. The right thing for the high court to do was to grant a new trial on the omitted jury instruction, the omission of which clearly could have cost Motzko this conviction.

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