DUIs AND APPLE PIE: A SURVEY OF AMERICAN JURISPRUDENCE IN DUI PROSECUTIONS

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INTRODUCTION

Uncompromising enforcement of laws designed to rid our highways of the scourge of the drunk driver ranks only slightly behind the veneration of motherhood and probably slightly ahead of a robust hankering after apple pie in the hierarchy of values firmly embedded in our culture.¹

Justice Robert L. Clifford of the New Jersey Supreme Court made the above point as the sole dissenter in a case involving prosecutions of driving under the influence (hereinafter DUI) in New Jersey. This Article will explore the effect of the phenomenon described by Justice Clifford on DUI statutes and court decisions across the country. The “uncompromising enforcement” of DUI laws has lead to the continuing erosion of drivers’ ability to defend themselves against DUI charges.

A survey of the case law across the United States shows uniformity in the trend of prosecuting DUIs to the exclusion of the rights of the accused. States are repeatedly creating laws, upheld by the courts, which curb a driver’s right to be presumed innocent, to cross-examine the evidence presented against him, and his right to a trial by jury. Many states have addressed the issues, which will be discussed in this article;² however, to narrow the scope of the discussion, this Article will focus primarily on Minnesota and New Jersey. These states have the most

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extensive body of law on the subject of this article; the issues raised in this Article have been addressed by the Supreme Courts of these states; and the states are representative of the spectrum from the most lenient (Minnesota) to most stringent (New Jersey) DUI laws.

The Article will lay out the pertinent rights of the accused associated with criminal prosecution and will address the specific statutory schemes of New Jersey and Minnesota. Because DUI laws require drivers to submit to scientific testing in order to determine their alleged impairment due to alcohol, a discussion regarding the machines used in the scientific testing is included. Also addressed are drivers' attempts to challenge the validity of this scientific testing. Concentrating on the challenges to the scientific reliability of the breath testing machines illustrates that the law across the United States is evolving in such a way that drivers are precluded from defending themselves in any real sense from a DUI prosecution. Finally, the article concludes with an alternate idea as to how the "scourge of drink driving" may be addressed.

I. Analysis of Rights

There are three specific rights of the accused which are vitiated by the current state of DUI laws across the country: a person is innocent until proven guilty; a person has a right to confront the evidence presented against him; and an accused has a right to a trial by jury. Below, each right will be addressed as to its origin and meaning in the general prosecution of criminals.

A. Innocent Until Proven Guilty

The words "innocent until proven guilty" do not actually appear in the U.S. Constitution. However, the concept is a building block of the foundation of our legal system, and consequently, our jurisprudence. As U.S. Supreme Court Justice Byron White noted, "[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."4

In Coffin v. United States,5 the Defendant was charged with multiple offenses in a fifty (50) count indictment and the case was tried by a jury. After the trial, the judge instructed the jury on the charges. The judge charged the jury at length on the issue of the burden of proof, but neglected to charge the jury on the presumption of innocence. The U.S. Supreme Court heard the case in order to decide whether the judge erred in omitting the presumption of innocence from his instruction to the jury. In essence, the Court was asked to determine whether the

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3 Although the statutes addressed in this article also encompass impairment due to drugs, this article will focus solely on the portions of the statutes pertaining to alcohol.
4 Coffin v. United States, 15 S. Ct. 394, 403 (1895).
5 Id.
presumption of innocence is equivalent to the burden of proof, which in turn, required the Court to engage in an in-depth analysis of the presumption of innocence. The Court defined the right as follows:

[n]ow, the presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty. In other words, this presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created.\(^6\)

The Court went so far as to characterize the presumption of innocence as actual evidence on behalf of the accused.\(^7\) The Court then contrasted the presumption of innocence with the burden of proof. In so doing, the Court noted the burden of proof:

[i]s the result of the proof, not the proof itself, whereas the presumption of innocence is one of the instruments of proof, going to bring about the proof from which reasonable doubt arises; thus one is a cause, the other an effect. To say that the one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually before them; in other words, that the exclusion of an important element of proof can be justified by correctly instructing as to the proof admitted. The evolution of the principle of the presumption of innocence, and its resultant, the doctrine of reasonable doubt, make more apparent the correctness of these views, and indicate the necessity of enforcing the one in order that the other may continue to exist.\(^8\)

The Court's ruling makes it abundantly clear that the presumption of innocence is a fundamental right of the accused. Further, the doctrine of reasonable doubt cannot exist independent of the presumption of innocence.

B. Right of Confrontation

The Sixth Amendment to the U.S. Constitution states, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .”\(^9\) Relatively recently, the U.S. Supreme Court undertook a lengthy and substantive review of the Confrontation Clause and its origins.\(^10\) The

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\(^6\) Id. at 404-05.
\(^7\) Id. at 405.
\(^8\) Id.
\(^9\) U.S. CONST. amend. VI.
Court found that although the right was codified in the Constitution, its roots far pre-date the Sixth Amendment and can be found in Roman times. However, the Court opined that the founders based the Sixth Amendment on English common law principles. The meaning and scope of the Confrontation Clause was clarified through early judicial decisions in various states. One such decision by the North Carolina Superior Court makes clear that although the Confrontation Clause specifically delineates "witnesses," the spirit of the Clause encompasses evidence in general. In discussing the right of confrontation, the Court noted, "it is a rule of common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross-examine . . . ."

In its analysis, the U.S. Supreme Court came to the conclusion that, given the history of the Confrontation Clause, there were two key issues relating to its applicability. First, the Court considered the argument that the Clause only applies to in-court testimony. The Court rejected this view because, in its estimation, the impetus behind the right was an effort to preclude the use of "ex parte examinations" against the accused. The Court went on to address the meaning of "testimony" within the context of the Clause. The Court began with the dictionary definition of testimony which is, "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."

Based on this definition the Court found the Confrontation Clause applicable to a very specific type of out of court statement that it christened a "testimonial statement." The Court gave several examples of testimonial statements such as ex parte in-court testimony, materials such as affidavits, prior testimony that the Defendant was unable to cross-examine, or similar pretrial statements contained in formalized testimonial materials such as affidavits, depositions, prior testimony, or confessions and statements taken by police officers in the course of investigations.

Second, the Court concluded the Framers would not have allowed testimonial statements introduced into evidence by a witness not called at trial unless the witness was unavailable for trial and the Defendant had a prior opportunity to cross-examine the evidence. The Court found the Framers did not intend any exceptions to a Defendant's right to cross examine the witnesses against him.

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11 Id. at 42.
12 Id.
14 Washington, 541 U.S. at 50.
15 Id.
16 Id. at 51.
17 Id.
18 Id. at 52-53.
19 Washington, 541 U.S. at 54.
20 Id.
Consequently, the right to cross-examine is a necessary precursor to the admissibility of evidence against an accused under the Constitution.

C. Right to a Jury Trial

The accused has a right to a trial by jury deriving from two locations in the federal Constitution. First, the Constitution states, "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."21 Second, the Bill of Rights provides, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."22

The constitutional language does not create any distinction between crimes, wherein some require a trial by jury and some do not.23 However, the U.S. Supreme Court has ruled otherwise in several different opinions. In early decisions, the Court found the right to a jury did not extend to every crime.24 At the time the Constitution was adopted there were offenses, dubbed "petty," which were tried without juries by justices of the peace in England or corresponding judicial officers in the Colonies.25 The Court reasoned that the existence of this phenomenon made it clear the Framers did not intend all crimes to be tried by juries. As a result the Court was left to determine what constituted a "petty" crime.

Initially, the Court faced the question of whether an individual charged with an offense punishable by a fine of not more than $300 or imprisonment of not more than ninety (90) days was entitled to a jury trial. The Court seemed to struggle with the question when it noted, "[t]he court below thought, as we do, that the question is not free from doubt . . . ."26 The Court looked to the crimes which did not require a jury at the time of the adoption of the Constitution to make its decision.27 Because there were at least sixteen (16) crimes punishable by three (3) months or more in jail and at least eight (8) crimes punishable by six (6) months in jail which did not require trial by jury, the Court ruled crimes punishable by ninety (90) days in jail similarly did not entitle a defendant to a trial by jury.28 However, in its ruling, the Court did not create a test for what specifically determined if a crime was "petty" and thereby did not entitle the accused to a jury trial.

21 U.S. CONST. art. III, § 2, cl. 3.
22 U.S. CONST. amend. XIV, § 2.
25 Id. at 624.
26 Id. at 625.
27 Id.
28 Id. at 626-27.
The Court further clarified the right in *Baldwin v. State.* In that case the accused was charged with a crime punishable by up to one (1) year in jail. He was denied a jury trial. The Court held the accused was in fact entitled to a jury trial. In reaching its decision that the possibility of incarceration for one (1) year constituted a "serious" offense as opposed to a "petty" offense, the court laid out the factors to be considered when it noted, "[i]n deciding whether an offense is ‘petty’, [sic] we have sought objective criteria reflecting the seriousness with which society regards the offense, and we have found the most relevant such criteria is [sic] the severity of the maximum authorized penalty." Later in the opinion the Court added, "[a] better guide ‘in determining whether the length of the authorized prison term of the seriousness of the other punishment is enough in itself to require a jury trial’ is disclosed by the ‘existing laws and practices or the Nation.’" The Court did not create a bright line test, but the above language offers guidelines as to how the right should be evaluated. The key to a jury trial is demonstrative evidence that legislatures and the mores of the nation indicate the crime is serious. If it is serious by this standard the accused is entitled to a jury trial.

**II. The Statutory Law**

Although not entirely the same, both Minnesota and New Jersey’s DUI statutes are based on the notion of “implied consent.” These statutes are representative of DUI law across the United States. Generally, implied consent means that by undertaking the act of driving in a particular state, a driver implicitly consents to certain stipulations associated with the act. Specific to the matter at hand, is that the driver agrees to submit to chemical testing of his breath and/or blood alcohol content upon the request of a law enforcement officer who has probable cause to believe the driver is operating a motor vehicle while impaired by alcohol.

**A. Minnesota**

In pertinent part, Minnesota’s implied consent statute specifically states the following:

(a) Any person who drives, operates, or is in physical control of a motor vehicle within this state or any boundary water of this state consents . . . to a chemical test of that person’s blood breath, or urine for the purpose of determining the presence of alcohol . . . . The test must be administered at the direction of a peace officer.

29 *Baldwin, 399 U.S. 66 (1970).*
30 *Id. at 73-4.*
31 *Id. at 68-9.*
32 *Id. at 70 (quoting Duncan v. Louisiana, 391 U.S. 145, 161 (1968)).*
(b) The test may be required of a person when an officer has probable cause to believe the person was driving, operating, or in physical control of a motor vehicle in violation of section 169A.20 (driving while impaired), and one of the following conditions exist ... 33, 34

The statute then goes on to define four (4) instances, in association with probable cause, which authorize the test: if the driver is lawfully under arrest for DUI, the driver has been involved in an accident, the person refuses to submit to preliminary screening, 35, 36 or the preliminary screening indicates the driver has an alcohol concentration of .08 or more. 37

In Minnesota,

it is a crime for any person to drive, operate, or be in physical control of any motor vehicle, as defined in section 169A.03, subdivision 15, except for motorboats in operation and off-road recreational vehicles, within this state or on any boundary water of this state when: (5) the person's alcohol concentration at the time, or as measured within two hours of the time, driving, operation, or being in physical control of the motor vehicle is 0.08 or more ...

According to Minnesota statute, evidence that the results of the breath test were 0.04 or more is "relevant evidence" in indicating whether or not a person was under the influence of alcohol. 39

Minnesota does not have a minimum mandatory sentence for a first time offender provided there are no "aggravating factors present." 40 A first time offender without aggravation is guilty of a fourth (4th) degree misdemeanor. 41 However if aggravating factors, including prior offenses, are implicated in the

33 MINN. STAT. § 169A.51 (2009).
34 This article will focus only on breath testing and will not address blood or urine testing.
35 Section 169A.51 subdivs. 1(b)(1)-(3).
36 An officer with probable cause to believe an individual is driving while impaired by alcohol may require the driver to provide a breath test sample for "preliminary screening" using a device approved for that purpose. Section 169A.41. The results must be used for the purpose of deciding whether or not to arrest the driver, but may only be used in a court in limited circumstances. Id.
37 Section 169A.51 subdiv. 1(b)(4). Although not germane to the topic at hand, the statute also requires a driver to submit to testing if the officer has probable cause to believe the driver is operating a commercial vehicle with the presence of any alcohol. Section 169A.51. Additionally, Minnesota treats a refusal to take the test as a separate crime punishable by the same sanctions as one found guilty of taking the test and blowing over a 0.08. Id.
38 Section 169A.20.
39 Section 169A.45 subdiv. 2.
40 The aggravating factors include a prior impaired driving incident within ten (10) years immediately preceding the current offense, having an alcohol concentration of 0.20 or more within two (2) hours of the event or having a child under the age of sixteen (16) in the vehicle at the time of the offense if the child is more than thirty-six (36) months younger than the driver. Section 169A.03.
41 Section 169A.27 subdiv. 2.
crime there are minimum mandatory sanctions required by the law. For purposes of this article, only first time offenders without aggravating factors will be considered.

B. New Jersey

In contrast to Minnesota’s law, New Jersey’s is much more narrow and strict. Where Minnesota law necessitates probable cause that a person is driving while under the influence of alcohol in conjunction with other factors, New Jersey’s implied consent statute only requires probable cause. New Jersey’s statute states only that:

[a]ny person who operates a motor vehicle on any public road, street or highway or quasi-public area in this State shall be deemed to have given consent to the taking of samples of his breath for the purpose of making chemical tests to determine the content of alcohol in his blood; provided, however, that the taking of samples is made in accordance with the provision of this act and at the request of a police officer who has reasonable grounds to believe that such person has been operating a motor vehicle in violation of the provisions of R.S. 39:4-50 . . . .

The statute specifically provides that no chemical test may be forcibly taken from an individual. However, anyone who refuses to submit to such chemical testing is subject to an additional charge for refusal to submit to a chemical test and harsher sanctions.

New Jersey’s definition of DUI is equally as simple. The statute states, “[a] person who operates a motor vehicle while under the influence of intoxicating liquor . . . or operates a motor vehicle with a blood alcohol concentration of 0.08% or more by weight of alcohol in the defendant’s blood . . . .” is guilty of DUI. Unlike Minnesota, New Jersey does have minimum mandatory sanctions for a first time offender. If a first time offender pleads guilty, or is found guilty of a violation of the statute he must pay a fine between two hundred fifty dollars ($250) and four hundred dollars ($400), be detained between twelve (12) and forty-eight (48) hours on two consecutive days of not less than six (6) hours as prescribed by the program requirements of the Intoxicated Driver Resource

43 Section 39:4-50.2(e).
44 Section 39:4-50.4(a).
45 Section 39:4-50(a).
46 New Jersey also provides harsher sanctions for repeat offenders. Section 39:4-50(2)-(3). But as noted in the Minnesota section, this Article will only address first time offenders without enhanced penalties.
Center, serve a term of imprisonment up to thirty (30) days and forfeit his right to drive for three (3) months.  

III. THE MACHINES

Minnesota and New Jersey use different breath testing machines. Minnesota uses the Intoxilyzer 5000EN manufactured by CMI, Inc. New Jersey uses the Alcotest 7110 MKIII-C manufactured by Draeger Safety Diagnostics, Inc. The specific science utilized by each machine will be addressed below, however both machines are operated based on a “source code.” A “source code” is a “human friendly” version of a program. It is what is actually typed into a computer by the programmer. The source code contains the commands for sequencing the operation of the machine, data entry questions, operational parameters and mathematical formulas necessary for breath testing. Put another way, the source code is the computer instructions followed by the computing device in processing information.

A. Intoxilyzer 5000EN

The Intoxilyzer 5000EN is an infrared spectrometry breath alcohol machine. The premise of the technology is that all matter will absorb electromagnetic radiation in a unique and consistent manner. No two substances have the same molecular structure so the science indicates it is possible to analyze and detect a substance’s presence due to the manner in which the matter absorbs wavelengths of the infrared spectrum. When infrared light of a particular frequency passing through a chamber with no alcohol present strikes a detector it creates a particular level of voltage. As the alcohol level in the chamber increases the amount of light able to pass through the chamber and strike the detector decreases. The difference between the amount of light passing through the chamber with no alcohol and the amount of light passing through the chamber with alcohol repre-

47 Section 39:4-50(a)(1).
48 State v. Underdahl, 767 N.W.2d 677 (Minn. 2009).
50 Id.; Underdahl, 767 N.W.2d. at 677.
52 Saghari, 2002 WL 66139, at *2 n.2.
53 Levine, 747 N.W.2d at 132.
54 Robinson, 860 N.Y.S. 2d at 167.
56 Id.
57 Id.
58 Id.
59 Id.
sents the concentration of alcohol in the breath sample. The machine then displays the result achieved by this process.

B. Alcotest 7110 MKIII-C

The Alcotest is a dual sensoric measuring system. It utilizes both infrared spectroscopy and electrochemical cell technology. The machine purports to measure the concentration of alcohol in a person’s blood through breath testing. The machine uses both infrared technology and electric chemical oxidation in a fuel cell to measure breath alcohol concentration. Consequently, the machine actually produces two results for each breath sample.

When a breath sample is provided, the infrared chamber captures the breath sample and uses infrared energy to calculate absorption of the energy by the alcohol concentrated in the chamber. The electric chemical fuel cell technology uses a catalyst to absorb alcohol and provide a second measurement. In the electric chemical chamber voltage is applied to a small sample to cause a catalytic reaction which causes the alcohol to oxidize. The oxidation process creates electricity which is measured to determine the amount of alcohol interacting with the fuel cell. The Alcotest then reports the infrared technology and electric chemical readings on a printout from the machine. If the results are within acceptable tolerance the printout shows each of the readings to three decimal places. The printout then reports the final breath alcohol result that will be the lowest of the

61 Id.
63 Id.
64 Chun, 943 A.2d at 128.
65 Id.
66 Id.
67 Id.
68 Id.
69 Chun, 943 A.2d at 128.
70 Id.
71 Id.
72 An acceptable tolerance is defined by both control tests and the actual breath sample taken from the driver. Prior to a breath sample the machine tests a solution with a known alcohol concentration of 0.10. To be within tolerance, the results must be between 0.095 and 0.105. If the control test is within tolerance the machine then prompts the operator for a breath sample. To be valid, the breath sample must meet four (4) criteria. It must have a minimum volume of 1.5 liters, minimum blowing time of 4.5 seconds, minimum flow rate of 2.5 liters per minute and the infrared measurement must not differ by more than one percent in .25 seconds. Once provided, the sample is tested and then the machine purges the sample. After a two-minute period, the machine prompts the operator for a second sample. The sample results must be within 0.01 of each other or they are not within tolerance. If the samples are not within tolerance, a third sample will be requested by the machine. See id. at 130, 140.
73 Id.
readings truncated to two (2) decimal places. Finally, the machine uses a conversion rate to change the breath alcohol result to a blood alcohol result.

IV. CHALLENGES TO THE MACHINES

The reliability of breath testing machines has been challenged in many different ways across the United States. For example, the reliability of breath test results has been challenged on the basis of insufficient inspection and maintenance of the machine itself and improper observation of the test subject prior to the breath test sample being taken.

Currently, one of the most prevalent challenges is in regards to the source code. Across the country, defendants are attempting to discover the source code to the particular machine used in their case so as to have the opportunity to independently review the source code. The defendants' reasoning in seeking to uncover errors in the code is that such errors would adversely affect the reliability of the breath test results used in their prosecution. The majority of states that have addressed the issue have not reached the science behind the source code. Instead, they have summarily dismissed the issue on procedural grounds. Specifically, multiple states have found the prosecution is not required to produce the source code to defendants because the source code is not within the possession of the state. Rather it is within the possession of the manufacturer. Minnesota and New Jersey differ from other states in their approach to this issue.

A. Minnesota

On April 30, 2009, the Minnesota Supreme Court decided the issue of the discoverability of the source code. Prior to that, multiple Minnesota lower courts had ruled drivers were not entitled to the source code. However, the Minnesota Supreme Court found otherwise.

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74 Chun, 943 A.2d at 130, 140. Truncating simply means the third decimal place is dropped without rounding. For instance a .079 reading would be reported as a .07. Id.
75 Id.
76 Id. at 138.
77 Donaldson v. State, 561 So.2d 648 (Fla. 4th DCA 1990).
79 See Fargo, 747 N.W.2d at 134 (holding source code is not discoverable because there was no proof the State had possession, custody or control of it); Robinson, 860 N.Y.S.2d at 167 (finding the People were not required to make the source code available because the People never possessed it.)
80 See e.g., Levine, 747 N.W.2d 130; Bernini, 207 P.3d 789; Kuhl, 755 N.W.2d 389; Walters, 2006 WL 785393; Hills, 663 S.E.2d 265; Robinson, 860 N.Y.S.2d 159.
In *State v. Underdahl*, two different defendants sought production of the source code in their respective DUI prosecutions. The State District Court had ordered the State to produce the source codes in both instances. If the State failed to produce the source code within thirty (30) days, the District Court would dismiss charges and find the breath test results inadmissible. However, the Minnesota Court of Appeals reversed the orders finding the defendants had failed to show the source code was relevant to their guilt or innocence. The Minnesota Supreme Court agreed to hear the consolidated cases.

Procedurally, the two defendants were in slightly different postures. On February 8, 2006, Dale Underdahl was stopped for suspicion of DUI. Underdahl performed poorly on field sobriety exercises and was subsequently arrested for DUI. Underdahl submitted to the implied consent statute and provided a breath test sample. The breath test was performed on the Intoxilyzer 5000EN. The results were over the legal limit and Underdahl was formally charged with DUI. Underdahl filed a motion for discovery requesting the source code for the Intoxilyzer 5000EN. Underdahl argued that challenging the validity of the breath results was the only way for him to dispute the charges against him. Further, he argued that in order for him to challenge the validity of the Intoxilyzer 5000EN results he needed the source code. However, Underdahl failed to introduce any memoranda or exhibits in support of his argument.

On July 28, 2007, Timothy Brunner was stopped on suspicion of DUI. He also submitted to the implied consent statute and provided a breath sample. The breath test was performed on an Intoxilyzer 5000 EN. The results were over the legal limit and Brunner was formally charged with DUI. Brunner filed

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82 The two defendants were Dale Lee Underdahl and Timothy Arlen Brunner. *Underdahl*, 767 N.W.2d at 679.
83 Id.
84 Id.
85 Id.
86 Id. at 680.
87 Underdahl, 767 N.W.2d at 680.
88 Id.
89 Id.
90 Id.
91 Id.
92 Underdahl, 767 N.W.2d at 680.
93 Id.
94 Id. at 685.
95 Id. at 680.
96 Id.
97 Underdahl, 767 N.W.2d at 680.
98 Id.
a motion for discovery of the source code of the Intoxilyzer 5000EN. In support, Brunner submitted a memorandum of law and nine (9) exhibits. The exhibits were as follows:

[T]he first exhibit was the written testimony of David Wagner, a computer science professor at the University of California in Berkeley, which explained the source code in voting machines, the source code’s importance in finding defects and problems in those machines, and the issues surrounding the source code’s disclosure. The next exhibits detailed Brunner’s attempts to obtain the source code, both from the State and CMI. The last exhibit was a copy of a report prepared on behalf of the Defendants in New Jersey litigation about the reliability of New Jersey’s breath-test machine.

The Court’s decision as to both defendants turned on the requirements of Minn. R. Crim. P. 9.01. The rule governs discovery in criminal cases. The Rule first delineates what discovery the prosecution must disclose without a court order. Second, the rule outlines under which circumstances a court may use its discretion to order additional discovery. Due to the language of the rule, there is no argument the source code is discoverable without a court order. Therefore, the pertinent part of the rule is as follows,

[upon motion of the defendant, the trial court any time before trial, may in its discretion, require the prosecuting attorney to disclose to defense counsel and to permit the inspection, reproduction or testing of any relevant material and information not subject to disclosure without order of court under Rule 9.01, subd. 1, provided, however a showing is made that the information may relate to the guilt or innocence of the defendant or negate guilt or reduce the culpability of the defendant as to the offense charged.

The Minnesota Supreme Court then framed the issue as whether the source code is relevant under the rule, and if so, whether or not the defendants made a showing that the source code related to their guilt or innocence.

The Court acknowledged it had not previously reached the issue of what type of showing is required to prove that information relates to a defendant’s guilt or innocence. Because it had not addressed the issue previously, the Court drew an analogy to circumstances wherein a defendant wishes to review confidential
information as a part of his defense. In those cases, the Court enumerated a standard wherein the defendant must show, "some plausible showing that the information sought would be both material and favorable to the defense." The Court then extended this standard to the issue of the source code.

In applying this standard, the Court compared and contrasted the motions of Underdahl and Brunner. The Court found that in requesting the source code, Underdahl did not support the motion with any additional information. Conversely, as stated, supra, Brunner provided substantial support for his motion in the form of a memorandum of law and multiple exhibits. As a result the Court ruled that, "Underdahl made no threshold evidentiary showing whatsoever; while he argued that challenging the validity of the Intoxilyzer was the only way for him to dispute the charges against him, he failed to demonstrate how the source code would help him do so." However, in regards to Brunner, the Court found that, "Brunner's submissions show that an analysis of the source code may reveal deficiencies that could challenge the reliability of the Intoxilyzer and, in turn, would relate to Brunner's guilt or innocence."

Once determining the source code was relevant and related to Brunner's guilt or innocence, the Court faced the final question of whether the source code was within the possession of the prosecution. In finding the source code was within the possession of the State, the Court relied upon the "request for proposal" issued by the State when it replaced the previous breath test machine with the Intoxilyzer 5000EN. The request for proposal stated that any copyrightable material would be the contracted property of the State. Therefore, the Court concluded the State owned some of the source code because of the copyright language in the request for proposal. As a result, the Court held Brunner was entitled to the source code, while Underdahl was not.

Since the Minnesota Supreme Court's ruling in Underdahl, multiple Minnesota lower courts have found the State is required to produce the source code to defendants or face results adverse to the prosecution. However, to date, CMI and

108 Id. (Citations omitted.)
109 Id.
110 Id. at 685.
111 Underdahl, 767 N.W.2d at 685.
112 Id.
113 Id. at 686.
114 Id.
115 Id. at 687.
the State of Minnesota are still locked in litigation as to the production of the source code.\textsuperscript{117} Consequently, the source code has not yet been reviewed by an independent party as to how it impacts on the reliability of the Intoxilyzer 5000 EN.

B. \textit{New Jersey}

In New Jersey, the State Supreme Court undertook its own review of the reliability of the breath testing machines used in the state. In \textit{State v. Chun}\textsuperscript{118} the Defendants were twenty (20) individuals arrested throughout New Jersey for DUI.\textsuperscript{119} Each of the Defendants had challenged the admissibility of the breath test results in their particular cases.\textsuperscript{120} Prior to its examination of the current breath testing machine, the Court briefly related the legal history of breath testing within the State.

The Court found that the reliability of breath testing machines had not been at issue for decades in New Jersey.\textsuperscript{121} The Court had long ago ruled that breath testing machines were scientifically reliable and accurate instruments for determining the blood alcohol concentration of drivers.\textsuperscript{122} The results were deemed so reliable that anyone driving with a blood alcohol concentration over the legal limit was \textit{per se} guilty of DUI.\textsuperscript{123} The Court recognized that in the years between their finding of reliability and the case at bar, the breath test machines had fallen into ill repair.\textsuperscript{124} As a result, New Jersey’s Office of the Attorney General selected a new breath testing machine called the Alcotest 7110 MKIII-C (“Alcotest”).\textsuperscript{125}

In \textit{Chun}, the Court examined the reliability of the Alcotest.\textsuperscript{126} In order to do so, the Court appointed a Special Master to conduct hearings regarding the reliability of the machine.\textsuperscript{127} The hearings spanned four (4) months and included testimony from eleven (11) witnesses called by the State and two (2) from the defense.\textsuperscript{128} The Special Master ordered the State to provide the source code for the Alcotest and several Alcotest machines to the defense for their analysis in

\textsuperscript{117} Crane, 766 N.W.2d at 72.
\textsuperscript{118} State v. Chun, 943 A.2d 114 (N.J. 2008).
\textsuperscript{119} Chun, 943 A.2d at 121.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id. at 120.
\textsuperscript{123} Id.
\textsuperscript{124} Chun, 943 A.2d at 120.
\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id. at 121.
\textsuperscript{128} Id. at 132.
preparation for the hearings.\textsuperscript{129} Draeger, the manufacturer of the Alcotest, refused to disclose the source code because it considered the code proprietary information.\textsuperscript{130}

The Supreme Court intervened and issued an order requiring Draeger to provide the source code for analysis by an independent software house agreed upon by both Draeger and the defense.\textsuperscript{131} However, the defense and Draeger could not agree on a software house.\textsuperscript{132} The Court again intervened and ordered each party to hire an independent software house to review the source code at its own expense.\textsuperscript{133} The software houses came to different conclusions regarding the reliability of the machine which necessitated further hearings.\textsuperscript{134} After the hearings, the Special Master concluded the Alcotest was generally scientifically reliable with the caveat that certain changes be made to account for potential errors in breath test results.\textsuperscript{135} The New Jersey Supreme Court reviewed the findings of the Special Master at length and adopted some, though not all, of his recommendations.\textsuperscript{136}

In determining whether to adopt the specific recommendations of the Special Master, the Court related the standard of admissibility for scientific evidence. As articulated by the Court, the standard is as follows:

\begin{quote}
(a)dmissibility of scientific tests results in a criminal trial is permitted only when those tests are shown to be generally accepted, within the relevant scientific community, to be reliable. That is to say, the test must have a “sufficient scientific basis to produce uniform and reasonably reliable results and will contribute materially to the ascertainment of the truth.”\textsuperscript{137}
\end{quote}

Further,

\begin{quote}
[p]roof of general acceptance does not mean that there must be complete agreement in the scientific community about the techniques, methodology, or procedures that underlie the scientific evidence. Even the “possibility of error” does not mean that a particular scientific device falls short of the required showing of general acceptance.\textsuperscript{138}
\end{quote}

\textsuperscript{129} Chun, 943 A.2d at 122.
\textsuperscript{130} \textit{Id.} at 123.
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{Id.}
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} Chun, 943 A.2d at 122.
\textsuperscript{135} \textit{Id.} at 123.
\textsuperscript{136} \textit{Id.} at 144.
\textsuperscript{137} \textit{Id.} at 136 (citations omitted).
\textsuperscript{138} \textit{Id} (citations omitted).
1. Findings of the Special Master

It is not necessary to discuss every finding and recommendation of the Special Master for the purposes of this Article. Instead, a few findings, and the subsequent analysis by the Supreme Court, show two things pertinent to this Article. First, the review of the Alcotest and its source code revealed potential errors in blood alcohol results. Second, in some circumstances where there were potential errors, the New Jersey Supreme Court determined the risk to a particular defendant was outweighed by the benefit of streamlining DUI prosecution as a whole. It is the findings by the Special Master which raise these issues which will be focused on below.

Utilizing the above standard regarding scientific evidence, the Court reviewed the findings of the Special Master. The Alcotest uses breath test results to extrapolate the blood alcohol content of a driver.\textsuperscript{139} The Alcotest uses a mathematical calculation based on a blood/breath ratio to convert the breath result to a blood result.\textsuperscript{140} The Special Master recommended that the Alcotest was reliable in regards to the ratio, and the ensuing blood alcohol results. The Court accepted this finding by the Special Master.\textsuperscript{141}

A breath sample must meet certain criteria to be valid. According to these criteria, the sample must be a minimum volume of 1.5 liters.\textsuperscript{142} The Special Master found evidence that women over sixty (60) years of age are not capable of providing the required sample of 1.5 liters.\textsuperscript{143} As a result, the Special Master recommended lowering the minimum volume to 1.2 liters for women over sixty (60).\textsuperscript{144} Based on the scientific evidence, the Supreme Court adopted the lowering of the minimum volume to 1.2 liters for women over sixty (60).\textsuperscript{145} The Court found the minimum volume issue mostly related to cases where woman over sixty (60) were charged with a refusal to provide a breath sample despite the fact it may have been they were physically incapable of providing the sample.\textsuperscript{146} Therefore, the Court found absent some other evidence which indicated a defendant woman over sixty (60) was capable of providing the sample, a readout generated by the machine which indicated an insufficient breath volume could not be used against the defendant to prove a refusal charge.\textsuperscript{147}

\textsuperscript{139} As noted in the Part II, the New Jersey statute relies upon the alcohol content of a driver's blood, as opposed to breath, in DUI prosecution. See N.J. STAT. ANN. § 39:4-50 (West 2009).
\textsuperscript{140} The blood breath ratio utilized by the Alcotest is twenty-one hundred (2100) to one (1).
\textsuperscript{141} Chun, 943 A.2d at 138.
\textsuperscript{142} Id. at 139.
\textsuperscript{143} Id.
\textsuperscript{144} Id. at 140.
\textsuperscript{145} Id.
\textsuperscript{146} Chun, 943 A.2d at 144.
\textsuperscript{147} Id.
The Special Master recommended the acceptable tolerance range between results be changed to 0.005 percent blood alcohol content or plus or minus five (5) percent of the mean of the four readings, whichever is greater.\textsuperscript{148} According to the Court, precision and accuracy can be ensured by a narrow range, while the wider the range the more question there is as to the reliability of the results.\textsuperscript{149} Therefore, as noted by the Court, the acceptable range is of the utmost importance when an acceptable reading above the legal limit makes a defendant \textit{per se} guilty of the offense.\textsuperscript{150} Prior to \textit{Chun}, the acceptable tolerance range was 0.01 percent blood alcohol content or plus or minus ten (10) percent whichever is greater.\textsuperscript{151}

In analyzing the Special Master’s recommendation to lower the acceptable range, the Court pointed out it had specifically endorsed the tolerance range of 0.01 percent blood alcohol content.\textsuperscript{152} However the addition of the “or plus or minus ten (10) percent whichever is greater”, was effectively a mistaken interpretation of the Supreme Court’s ruling by a lower court.\textsuperscript{153} The result of the mistake was to double the tolerance range allowed.\textsuperscript{154} The Court even acknowledged that interpretation of its ruling doubling the range was in response to complaints about the machine having too many readings which were not in tolerance.\textsuperscript{155} Meaning the machines were programmed in such a manner as to allow for wider range between acceptable readings, but at the expense of the accuracy of the results.

Consequently, in \textit{Chun}, the Court directed that the machine be programmed to have an acceptable tolerance range of plus or minus 0.005 percent blood alcohol content from the mean or plus or minus five (5) percent of the mean, whichever is greater.\textsuperscript{156} For those cases pending wherein the machine may have deemed results acceptable that were outside of the range, the Court created a formula to ascertain whether the results were in fact out of tolerance.\textsuperscript{157} If, according to the formula, the results were out of tolerance they are not admissible in court.\textsuperscript{158}

The Alcotest uses fuel cells to pass an electrical current through a sample of breath.\textsuperscript{159} The electrical charge reacts with the alcohol.\textsuperscript{160} The reaction of the

\begin{footnotesize}
\begin{tabular}{l}
148 Id. at 147. \\
149 Id. \\
150 \textit{Chun}, 943 A.2d at 147-48. \\
151 Id. \\
152 Id. at 147. \\
153 Id. at 148. \\
154 Id. \\
155 \textit{Chun}, 943 A.2d 149. \\
156 Id. at 151. \\
157 Id. at 152. \\
158 Id. \\
159 Id. at 154. \\
\end{tabular}
\end{footnotesize}
fuel cell can be represented graphically as a curve and the percentage of alcohol is measured by calculating the area under the curve.\textsuperscript{161} As fuel cells age, the shape of the curve changes, although the area under the curve is unchanged.\textsuperscript{162} This phenomenon is called fuel cell drift.\textsuperscript{163} Because of the change in the curve, a portion of the area that is the basis for the alcohol measurement is not captured by the machine.\textsuperscript{164} The result is lower than accurate readings.\textsuperscript{165} However, unknownst to anyone prior to Chun, the manufacturer had installed a compensating algorithm into the source code.\textsuperscript{166} If fuel cell drift was detected by the machine during a control test, the machine mathematically increased the final result according to the algorithm.\textsuperscript{167} The Court found that in the future fuel cell drift could be controlled by more regular replacement of the fuel cells as opposed to the algorithm.\textsuperscript{168} However, as to those cases where the algorithm had adjusted the results, the Court ruled there was not sufficient evidence to cast doubt on the reliability of the results, and they would therefore be admissible.\textsuperscript{169}

During the analysis of the source code, the manufacturer's own expert identified a significant flaw in the source code which can lead to an inaccurate blood alcohol result.\textsuperscript{170} The error comes into play when a subject provides two samples that are outside the acceptable tolerance range.\textsuperscript{171} The machine then requests a third sample. The three breath samples create six (6) results.\textsuperscript{172} However, the machine is programmed to retain only four (4) results at a time.\textsuperscript{173} The machine compensates by retaining the first and last two readings, but drops the middle two readings.\textsuperscript{174} If the middle two readings are the lowest readings, the mean result will not include the lowest readings thereby erroneously raising the blood alcohol results.\textsuperscript{175}

Consequently, New Jersey's highest court ordered that the error be fixed.\textsuperscript{176} However, it did not reject all results that implicated the error. Instead it em-

\begin{flushleft}
\textsuperscript{160} Chun, 943 A.2d at 154.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} Chun, 943 A.2d at 154.
\textsuperscript{166} Id.
\textsuperscript{167} Id. at 154.
\textsuperscript{168} Id. at 155.
\textsuperscript{169} Id. at 156.
\textsuperscript{170} Chun, 943 A.2d at 157.
\textsuperscript{171} Id.
\textsuperscript{172} There are three results using infrared spectrometry and three results using electrochemical cell technology. See id.
\textsuperscript{173} Id.
\textsuperscript{174} Id.
\textsuperscript{175} Chun, 943 A.2d at 157.
\textsuperscript{176} Id. at 172.
\end{flushleft}
ployed a formula developed by the manufacturer, which purports to rectify the error.\footnote{Id. at 158.} Once the formula is applied to the six (6) results reported on the electronic printout from the machine, the results from the formula are admissible in a DUI prosecution.\footnote{Id.}

The original source code of the Alcotest had a “catastrophic error detection device.”\footnote{Id. at 159.} With the device, if the machine encountered a catastrophic error, the machine would shut down.\footnote{Chun, 943 A.2d at 159.} However, the source code was subsequently programmed to disable the device.\footnote{Id.} The Special Master recommended, and the Supreme Court agreed, that the device should be re-enabled immediately.\footnote{Id.} However, the Court found there was no evidence the lack of the device had an adverse effect on particular blood alcohol results.\footnote{Id.} Therefore, the admissibility of blood alcohol results was not affected in any way by the finding.

V. Application of the Law to Constitutional Rights

A. Presumption of Innocence

As discussed in the Rights section, the presumption of innocence has been a building block of jurisprudence since common law. The eighteenth century English legal scholar, William Blackstone\footnote{The Blackstone Institute, http://www.blackstoneinstitute.org/ (last visited Jan. 31, 2010).} coined what has been called “Blackstone’s Ratio”: the concept that, “it is better that ten guilty persons escape than that one innocent suffer.”\footnote{Think Exist, http://thinkexist.com/quotes/william_blackstone/ (last visited Jan. 31, 2010).} This “ratio” has been all but lost in modern DUI laws and prosecution. It has been supplanted by a notion that aggressive prosecution is more important than preserving the presumption of innocence so that the innocent do not suffer.

As noted previously, Minnesota and New Jersey represent the ends of the current continuum of DUI prosecution, with Minnesota at the relatively lenient end and New Jersey at the stricter end. However, there can be no doubt DUI law as a whole is trending towards New Jersey.\footnote{KAN. STAT. ANN. § 8-1005 (2009) (wherein a breath alcohol of 0.08 or more is \textit{prima facie} evidence of guilt); FLA. STAT. § 316.193 (2009) (wherein a breath alcohol level of 0.08 or higher establishes a rebuttable presumption of guilt); and WASH. REV. CODE § 46.61.502 (2009) (wherein a person is guilty of DUI with an alcohol concentration of 0.08 or higher within two hours after driving as shown by an accurate and reliable analysis of the person’s blood).} According to Minnesota’s statute, evidence that the results of the breath test were 0.04 or more is “relevant evidence”
in indicating whether or not a person was under the influence of alcohol.\textsuperscript{187} Although the results are relevant, they do not in and of themselves require guilt. Not so in New Jersey.

In 1964, in New Jersey, the legal limit was 0.15 blood alcohol content.\textsuperscript{188} That statute further stated a blood alcohol result of 0.15 or over constituted a “presumption” the defendant was under the influence of alcohol.\textsuperscript{189} However, the presumption was not conclusive and the defendant was able to produce rebuttal evidence to show he was not in fact impaired by alcohol despite the results of the blood alcohol test.\textsuperscript{190} In 1964, the Supreme Court of New Jersey actually held, “[t]he presumption is not conclusive since contradicting evidence is expressly permitted and the statute does not make it an offense simply to operate a motor vehicle when a chemical test shows 0.15 percent or more of alcohol in the blood of the driver.”\textsuperscript{191}

Clearly a “presumption of guilt” based on a test result neutralizes the “presumption of innocence” believed to be a well-settled part of American jurisprudence. But at the very least it allows a defendant to present evidence in his own defense to counteract the presumption. As the law has evolved in New Jersey, even that concession is no longer available to defendants.

In 1987, the Supreme Court of New Jersey revisited the issue of whether or not the presumption of guilt associated with a blood alcohol result over the legal limit was rebuttable and found that it was not, in \textit{State v. Tischio}.\textsuperscript{192} In \textit{Tischio}, the specific question before the Court was whether a defendant could present evidence showing that despite his blood alcohol level being over the limit at the time of the breath test, it was not over the limit at the time he was driving.\textsuperscript{193} This so-called “extrapolation evidence” is based on the theory that in the time it takes to get a driver from the location of the arrest to the location of the breath test his blood alcohol content is continuing to rise.

The Supreme Court held that a defendant may be convicted of DUI when his blood alcohol level is over the legal limit at the time of the test, regardless of what his blood alcohol level was at the time of the offense.\textsuperscript{194} In so ruling, the Court went even further by forbidding defendants from presenting any evidence attacking the reliability or accuracy of the blood alcohol results. The Court found

\textsuperscript{187} \textsc{Minn. Stat.} § 169A.45 (2009).
\textsuperscript{188} \textit{State v. Johnson}, 199 A.2d 809, 812 (N.J. 1964).
\textsuperscript{189} \textit{Id.}
\textsuperscript{190} \textit{Id.} at 824.
\textsuperscript{191} \textit{Id.}
\textsuperscript{192} \textit{Tischio}, 527 A.2d at 388.
\textsuperscript{193} \textit{Id.} at 388-89.
\textsuperscript{194} \textit{Id.} at 389.
that any such evidence had no probative value and was therefore inadmissible.\textsuperscript{195}

The Court defended its ruling by noting,

\textit{[t]he overall scheme of these laws reflects the dominant legislative purpose to eliminate intoxicated drivers from the roadways of this State. To this end, the Legislature, working in tandem with the courts, has consistently sought to streamline the implementation of these laws and to remove the obstacles impeding the efficient and successful prosecution of those who drink and drive.}\textsuperscript{196}

What the legislature did, in tandem with the courts, is eliminate completely the presumption of innocence from DUI cases.

There was a single dissenting voice in \textit{Tischio}. Justice Clifford wrote a scathing dissent wherein he pled with the majority to return to a view where drivers could defend themselves from a DUI charge by presenting evidence to rebut the presumption of guilt. Justice Clifford opined that a blood alcohol result over the legal limit should be \textit{prima facie} evidence of guilt, as opposed to conclusive proof of guilt.\textsuperscript{197} Justice Clifford commented on what should be obvious when he stated,

\textit{[s]urely a defendant should be allowed to show, through expert proof extrapolating the breathalyzer results back to the time of operation, that the State’s \textit{prima facie} case has been overcome, and that in fact the proofs are insufficient to establish beyond a reasonable doubt an excessive reading at the time the vehicle was being driven.}\textsuperscript{198}

In truth, the defendant cannot present evidence challenging the results of a blood alcohol test, thereby eliminating even the illusion of the presumption of innocence in these types of prosecutions.

In New Jersey, the courts do not even make a pretense of protecting the rights of the innocent at the expense of the possibility of a guilty person going free. In other words, the New Jersey legal system has completely eschewed Blackstone’s Ratio. This reality is evidenced by Supreme Court decisions in the State.

As previously noted, the Alcotest uses a blood/breath ratio of twenty-one hundred (2100) to one (1) to calculate the blood alcohol content in a Defendant’s blood.\textsuperscript{199} In \textit{Chun}, the New Jersey Supreme Court found this ratio was reliable despite acknowledging, “\textit{[t]here is some evidence that there is a percentage of the population for whom the 2100 to 1 blood/breath ratio may actually overstate the presence of blood alcohol. . .}”\textsuperscript{200} The Court justified its finding by alleging, “\textit{[t]he

\textsuperscript{195} \textit{Id.} at 395.
\textsuperscript{196} \textit{Id.} at 393.
\textsuperscript{197} \textit{Tischio}, 527 A.2d at 399 (Clifford, J., dissenting).
\textsuperscript{198} \textit{Id.}
\textsuperscript{199} \textit{Chun}, 943 A.2d at 138.
\textsuperscript{200} \textit{Id.} at 139.
percentage of individuals for whom there may be an overestimation by use of this ratio remains 'extraordinarily small.' A simple question illustrates the danger of the decision. What if you were one of the individuals in this "extraordinarily small" group?

Chun was not the first time the New Jersey Supreme Court had reviewed the issue of the blood/breath ratio. In State v. Downie, the Court also ruled the ratio was reliable. Similar to Chun, the Court did not concern itself with innocent individuals who may be caught in the inaccuracy of the ratio. During the case, one of the State experts estimated that only three persons in a thousand might be convicted as a result of an erroneous reading. The Court also admitted that erroneous results due to the ratio could wrongfully convict 2.3 percent of suspected DUI Defendants. Despite this knowledge, the Court found the ratio reliable when it held, "[w]e are confident that continued use of the breathalyzer will not lead to unjust convictions... The legislature wanted drunk drivers off the road. As a measure for determining a motor vehicle violation, a scientific test that produces predictably accurate results in 97.7% of the cases is not unreasonable." Blackstone would not have shared the Court's confidence or assessment as to what is reasonable under common law and American jurisprudence.

B. Right of Confrontation

It is not difficult to see that allowing a breath test result over the legal limit to establish per se guilt against a defendant causes fatal harm to a defendant's right to confront the evidence against him. Even allowing a result over the legal limit to stand as prima facie evidence, or presumptive proof of the crime, damages the right. As discussed at length in Section I.B., the spirit behind the right of confrontation is to ensure no one is convicted by evidence, which he has not had the ability to cross-examine. However, that is exactly what is happening in current DUI prosecutions.

As the right to confrontation stands now, testimonial statements by a witness not called at trial are only admissible if the witness is unavailable for trial, and the defendant had a prior opportunity to cross-examine the evidence. In order to prove a DUI based on an unlawful breath test result, prosecutors rely on the computer results generated by the breath test machine in a particular case. These results are produced by the machine in the form of a computer printout, which also identifies the breath test operator who administered the test. If the State shows the breath test machine has been properly maintained and is in good work-

201 Id.
203 Id. (emphasis added).
204 Id. at 248.
205 Id. at 469.
ing order, the printout is entered into evidence and the results are proof of the crime of DUI.

There can be no question the printout is testimonial. As the Florida Supreme Court noted, "[a] breath test affidavit is created under circumstances where the technician is expecting it will be used at a later trial. More precisely, the sole purpose of a breath test affidavit is to authenticate the results of the test for use at trial." Despite this seemingly obvious conclusion, the New Jersey Supreme Court disagreed when it held,

[t]he essential elements of testimonial evidence are a report of a past event, given in response to police interrogation, with the purpose of establishing evidence that a Defendant committed an offense. Judged against this standard, the AIR\textsuperscript{208} falls outside the definition of testimonial on two, and arguably all three, grounds. First, the AIR reports a present, and not a past, piece of information or data. Second, although given in the presence of a police officer who operates the device, nothing that the operator does can influence the machine's evaluation of the information on its report of the data. Third, although the officer may have a purpose of establishing evidence of a BAC in excess of the permissible limit, the machine has no such intent and may as likely generate a result that exonerates the test subject as convicts him or her. Seen through this prism, we conclude that the AIR is not testimonial in the sense that was intended by the Framers of the Confrontation Clause.\textsuperscript{209}

New Jersey's tortured analysis of the Confrontation Clause leaves doubt as to whether even the most obvious instances of testimonial evidence would meet its standard.

The Court says the printout records a present event; however, when it is presented as evidence in court it is evidence of a past event. Putting that aside, the analysis still does not hold. For instance, when a police officer interviews a witness to a crime, he takes a statement. That statement is the person's "present" thoughts on the past crime being investigated in exactly the same way the blood alcohol results are the "present" evidence of what the driver's blood alcohol was when he was driving in the past.

Although the Court suggests there is nothing the breath test operator can do to influence the results of the test, this presumes he is conducting an honest test. For instance, he could hold a gun to the defendant's head and force him to drink alcohol prior to the breath test. Although admittedly extreme, the point is that

\textsuperscript{207} State v. Belvin, 986 So. 2d 516, 521 (Fla. 2008) ("breath test affidavit" is Florida's nomenclature for what is being called a "computer printout" in this Article).

\textsuperscript{208} "AIR" is New Jersey's nomenclature for what is being called a "computer printout" in this Article.

\textsuperscript{209} Chun, 943 A.2d at 169-70.
only if one assumes the breath test operator is honestly conducting the test, can it be said he has no influence. Similarly, in the example of the witness statement, if one assumes the officer is conducting an honest interview, he cannot influence the statement. The witness will simply say what he says and the officer will record it.

Finally, the Court opines the machine may exonerate the Defendant as much as convict him. If the results of the breath test were below the legal limit, one presumes there would be no trial and therefore the issue of whether the printout is testimonial is moot. The same can be said of the hypothetical witness. The witness may give information about the crime, which could exonerate the accused as much as convict him. The officer would not know which type of statement it was until he took it. Therefore, under the New Jersey Supreme Court’s analysis, the hypothetical statement taken by the officer is not testimonial and may be presented in court without calling the witness. This is a quintessential example of what the Confrontation Clause prohibits.

Interestingly, despite their completely divergent analysis, Florida and New Jersey each end up with the result that the government can introduce evidence against the driver which the driver is not able to confront. These states pay only lip service to the right to confrontation. In both states, in order for the computer printout to be admissible, the defendant must be allowed to cross-examine the breath test operator regarding the printout.\(^{210}\) Taken at face value it seems to meet the requirements of the right, however, the breath test operator does nothing more than observe the Defendant and respond to the prompts of the machine.\(^ {211}\) The operator does not generate the results. Making the breath test operator available does not comport with the spirit of the Confrontation Clause as one cannot challenge the results of the test through cross-examination of the operator.

In order to cross-examine the evidence of the breath test results, the defendant must be allowed to cross-examine the science and the accuracy of the results. As discussed at length above, New Jersey has expressly prohibited this type of challenge. Most other states are effectively prohibiting the challenge by refusing to make the source code available to defendants.\(^ {212}\) Defendants are left with no option but to accept that the machine performed properly in their case and the results are accurate whether that is the truth or not. The consequence is the death of the right to confront the evidence against a defendant in a DUI case.

\(^{210}\) Id. at 148; Belvin, 986 So. 2d at 521.

\(^{211}\) Chun, 943 A.2d at 165.

\(^{212}\) See Levine, 747 N.W.2d 130; House, 2009 WL 2705919; Robinson, 860 N.Y.S. 2d 861; Hills, 663 S.E.2d 265; Walters, 2006 WL 785393; Kuhl, 755 N.W.2d 389; Bernini, 207 P.3d 789; and Bastos, 985 So. 2d 37.
C. Right to a Jury Trial

In *Blanton v. City of North Las Vegas*, the U.S. Supreme Court evaluated the right to a jury trial in the context of a DUI. As in the past, the Court attempted to determine whether the crime is petty or serious. In so doing, it further refined the test to make the determination, but stopped just short of creating a bright line.\(^{213}\)

In *Blanton*, the accused faced a minimum of two (2) days in jail and a maximum of six (6) months in jail or forty-eight (48) community service hours while dressed in such a way as to identify the accused as a DUI offender.\(^{214}\) Additionally, the defendant had to pay a fine ranging from two hundred (200) to one thousand (1000) dollars, surrender his driver's license for a suspension of ninety (90) days, and take an alcohol education course at his own expense.\(^{215}\)

In applying the standard enumerated in *Baldwin*, the Court found the seriousness of the offense to not be determined solely by the maximum possible term of incarceration, but also the other penalties associated with the offense.\(^{216}\) However, the Court noted that offenses which carried a possible incarceration of six (6) months or less could be presumed petty.\(^{217}\) In those cases, an accused would only be entitled to a jury trial if he could demonstrate the additional penalties were so severe as to show the legislature viewed the offense as a "serious" one.\(^{218}\)

In applying this refined standard to the case at bar, the Court found the defendant in *Blanton* was not entitled to a trial by jury.\(^{219}\)

There can be no credible argument made that legislatures view a DUI as anything less than serious. As an example, in New Jersey the case law repeatedly cited in this Article is riddled with declarations of the importance of DUI prosecution. In its legislative findings regarding adding additional sanctions for DUI offenders, the New Jersey Legislature expressly stated,

[t]his State's penalties for drunk driving, including the mandatory suspension of driver's licenses and counseling for offenders are among the strongest in the nation. However, despite the severity of existing penalties, far too many persons who have been convicted under the drunk driving law continue to imperil the lives of their fellow citizens by driving while intoxicated . . . The judicious deployment of ignition interlock devices, as provided under this act, will enhance and strengthen the State's existing efforts to keep drunk drivers off the highways.\(^{220}\)


\(^{214}\) Id. at 1291.

\(^{215}\) Id.

\(^{216}\) Id. at 1292.

\(^{217}\) Blanton, 489 U.S. at 543.

\(^{218}\) Id. at 1293.

\(^{219}\) Id.

\(^{220}\) N.J. STAT. ANN. § 39:4-50.16 (West 2000).
The legislature clearly stated how important it believes DUI enforcement is and, as demonstrated throughout this article, New Jersey courts regularly use its importance as a justification for continually curbing the rights of the accused. Despite this oft-repeated importance, a DUI defendant in New Jersey does not have the right to a jury trial. Instead, trial is treated as a “quasi-criminal” proceeding and is judged by a magistrate. Again, the rights of the accused are sacrificed at the altar of protecting the public from the “scourge of drunk driving.” Even in those States where the accused is entitled to a jury trial, the trial is a sham. The continued erosion of rights, such as the presumption of innocence and the right to confrontation, lead to truncated proceedings in front of a jury wherein the defendant is severely limited in his defense. This is not the right to a jury trial outlined by the Founding Fathers in the Constitution.

CONCLUSION

States are imposing even more severe sanctions on first time DUI offenders, while simultaneously restraining the alleged offender’s ability to defend himself from the charge. All of this is done in the name of protecting the general public against the dangers of drunk driving. Increasingly severe prosecution is not the answer for two reasons. First, it is a dangerous and slippery slope to exchange constitutional rights for supposed safety. Second, there is a better way to reach the desired goal of less drunk drivers on the road.

Benjamin Franklin said, “[t]hey that can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety.” There is no more eloquent way to state the danger in trading constitutional rights for alleged safety. Even if affording fewer rights to those accused of DUI works, it is at too great a cost.

If overriding constitutional rights is acceptable in DUI cases, then why not more serious crimes, or all crimes for that matter? The rights DUI defendants are losing are the fundamental building blocks of the Constitution and American jurisprudence. The presumption of innocence, the right to confront the evidence presented against the accused, and the right to a trial by jury in criminal matters are the bedrock of American legal society. Without them, our system ceases to be what makes it great. Our system was not built on the notion that every criminal will be found guilty, but rather it is built on the principle that no innocent person will be found guilty. The current state of DUI prosecutions is setting a dangerous trend in the opposite direction and it must not be tolerated.

222 Johnson, 199 A.2d at 815.
223 Tischio, 527 A.2d at 397.
Even if one is not persuaded by the philosophical dangers in curbing the rights of the accused, there are concrete reasons to choose a different path. DUI is the only crime wherein the accused does not know when they are committing it. A legal activity can suddenly become illegal at an indeterminate point in time. The point at which a person is over the legal limit cannot be determined without the benefit of a breath test machine. Through anecdotal experience as both a prosecutor and a criminal defense attorney specializing in DUI defense, few if any drivers start drinking alcohol intending to drive intoxicated.

Because these drivers do not have the express purpose of committing a crime, more severe sanctions are not a deterrent. They are not thinking about the consequences of their crime, because they are not thinking they are committing a crime. Therefore, the increased cost to tax payers of prosecuting DUIs is not money well spent. Instead, the answer lies in ubiquitous public transportation.

The battle is already lost when a person who intends to drink some amount of alcohol leaves the house with their car keys. Before they ever have a drink of alcohol, the risk they will drive while intoxicated has gone up because they intend to drive after drinking. It is equally true, that people are not going to stop leaving their homes to drink socially. Therefore, the answer lies in providing easy and affordable ways for people to do so without driving. A public transportation infrastructure that runs after drinking establishments are closed to all parts of the city at an affordable rate will solve the problem. If a person leaves their house to drink without their car and plans from the start to take an alternate method of transportation, the risk of drunk driving is eliminated. Many college campuses employ such a system to great benefit. These systems need to be expanded to cities as a whole. Public transportation, which has benefits aside from just drunk driving, is a much better use of resources than increasingly expensive and aggressive prosecution. The “scourge of drunk driving” discussed by Justice Clifford can be better eliminated by proactive solutions than by reactive prosecution.