



From The ABA and The National Highway Traffic Safety Administration

Spring 2009

The Standardization of Field Sobriety Tests

Judge John M. Priester
Judicial Fellow, Iowa

In "The Man With Two Brains"¹ Steve Martin's character is pulled over by a police officer in Austria for speeding. The officer suspects that Steve Martin has been drinking so he has him submit to sobriety tests.

The first test is to walk a straight line away from the officer. On the way back the officer instructs Steve Martin to walk on his hands, then on one hand. The officer then orders Steve Martin to roll over, turn over and flip flop. The final test has Steve Martin simultaneously juggling three oranges, tap dancing and singing a song. Steve Martin responds, "Damn, your drunk tests are hard!"

Austria apparently has not adopted standardized field sobriety tests.

Walking, Writing and Coins

Prior to 1980, states and local police departments utilized many tests to help officers determine if a driver was under the influence. These tests were wide-ranging and non-standardized. Tests utilized were touching a finger to the nose, walking a straight line and picking up coins.² Other jurisdictions had the suspect write his name and address on paper.³ Suspects were also instructed to walk and pick up a rock on the ground.⁴ Additional tests utilized were subtraction, backwards counting and letter cancellation.⁵

Defendants challenged these tests as not being competent evidence. The tests were attacked as being "without any scientific basis; having no proven correlation to the blood alcohol level of the person being tested; having no established and quantifiable method of evaluation, and thus are purely subjective; and finally being not generally accepted and reliable method of ascertaining the information sought to be found."⁶

Standardizing Standard Testing

In response to these challenges, in 1975, the National Highway Traffic Safety Administration (NHTSA) began to sponsor research that led to the development of a driving while impaired detection guide for officers.⁷ The goal of the studies was to "expose the current generation of law enforcement officers in the U.S. to information critical to DWI enforcement by providing a systematic, scientifically valid, and defensible approach to on-the-road DWI detection."⁸

NHTSA sponsored research to evaluate the field sobriety tests being utilized by law enforcement officers to determine their effectiveness and the "development of a standardized battery of tests for officers to administer to assess driver impairment after an enforcement stop has been made."⁹

A NHTSA-sponsored study looked at the psychophysical tests for DWI arrests in 1977.¹⁰ The study evaluated currently-used sobriety tests, developed more sensitive and reliable measures and attempted the standardization of test administration.¹¹

Six field tests were chosen and evaluated after an exhaustive review of all field tests used. The tests included Alcohol Gaze Nystagmus, Walk and Turn (Heel-Toe), Finger-to-Nose, One-Leg Stand, Finger Counting and Tracing. While all tests were found to be alcohol sensitive, the data analysis led the study to recommend a reduced battery of three tests which include the examination of balance (One-Leg Stand) and walking (Walk-and-Turn), as well as the jerking nystagmus movement of the eyes (Alcohol Gaze Nystagmus).¹²

In 1979 and 1980, a NHTSA-sponsored study did a two-stage analysis. In the first stage of the project, "the literature was reviewed, DWI detection experts were interviewed, a large sample of arrest reports was analyzed, and an on-the-road study of DWI detection was conducted to obtain data on the relative discriminability and frequency of occurrence of visual detection cues."

The end product of the first phase was a set of conclusions about DWI detection, and a prototype DWI detection guide designed to facilitate application of the research findings to on-the-road detection of DWI.¹³ In the second phase of the project a Drunk Driver Detection Guide was developed "and a field test was conducted to evaluate and verify the Guide."¹⁴

In 1981 researchers published the "Development and Field Test of Psychological Tests for OWI Arrest" study.¹⁵ This study's goal was to create a battery of field sobriety tests, and then have the effectiveness of the tests evaluated in the laboratory and in the field.¹⁶ The study determined that the "best" tests included the Horizontal Gaze Nystagmus (HGN) test, the Walk and Turn test, and the One-Leg Stand test, as these "could correctly

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Upcoming *Highway To Justice* Themes

The theme for the Summer 2009 *Highway to Justice* will be DUI Courts. Articles for that issue will be due before April 24, 2009.

The theme for the Fall 2009 *Highway to Justice* will be Ignition Interlock Devices. Articles for that issue will be due August 6, 2009.

If you would like to submit an article for these upcoming issue please provide them to *Highway to Justice* Editor John Priester, venspriester@prodigy.net, by the date due. Please contact the Editor to let him know that you will be providing an article.

Crackdown 2009



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Editor's Note

Highway to Justice is a publication of the American Bar Association ("ABA") and the National Highway Traffic Safety Administration ("NHTSA"). The views expressed in *Highway to Justice* are those of the author(s) only and not necessarily those of the ABA, the NHTSA, or the government agencies, courts, universities or law firms with whom the members are affiliated.

We would like to hear from other judges. If you have an article that you would like to share with your colleagues, please feel free to submit it for inclusion in the next edition of *Highway to Justice*. To do so, please forward the article to Hon. Judge John Priester, Division of Administrative Hearings, Iowa Department of Inspections & Appeals, 3rd Floor Wallace State Office Building, Des Moines, IA 50319, or email to venspriester@prodigy.net.

Field Sobriety Tests

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classify more than 83% of the evaluation study participants with respect to whether they were above or below a BAC of 0.10%.¹⁷

The Horizontal Gaze Nystagmus test is a field sobriety test that evaluates drivers' ocular movements. "Nystagmus is an involuntary jerking or bouncing of the eyeball that occurs when there is a disturbance of the vestibular (inner ear) system or the oculomotor control of the eye. Horizontal gaze nystagmus (HGN) refers to a lateral or horizontal jerking when the eye gazes to the side. In the impaired driver context, alcohol consumption . . . hinders the ability of the brain to correctly control eye muscles, therefore causing the jerking or bouncing associated with the HGN."¹⁸ More information on the HGN can be found on this link: http://www.ndaa.org/pdf/sci_law2.pdf.

The Walk and Turn test and the One-Leg Stand test evaluate a driver's balance. In the Walk and Turn test the suspect takes nine heel-to-toe steps on a line, turns around keeping one foot on the line, and returns in nine heel-to-toe steps.¹⁹ In the One-Leg Stand test the subject is asked to raise one leg about six inches off the ground and hold that position while counting 30 seconds, generally counted as 1001 to 1030.²⁰

The 1981 study found that the recommended battery of field sobriety tests had the following levels of accuracy when determining a BAC of 0.10:²¹

HGN: 77%
Walk and Turn: 68%
One Leg Stand: 65%
HGN and Walk and Turn Combined: 81%

Follow Up Study

As states began to lower the legal limit to determine intoxication from a BAC of 0.10 to 0.08, NHTSA commissioned two studies to determine the validity of the standardized field sobriety tests at the lower BAC of 0.08.²² This study validated the accuracy of the standardized tests at the lower BAC level of 0.08. The Stuster & Burns study found the field sobriety tests to be accurate at the following levels for a BAC of 0.08:²³

HGN: 88%
Walk and Turn: 79%
One Leg Stand: 83%
HGN and Walk and Turn Combined: 91%

The study's conclusion states that the "results of this study provide clear evidence of the validity of the Standardized Field Sobriety Test Battery to

discriminate above or below 0.08 percent BAC. Further, study results strongly suggest that the SFSTs also accurately discriminate above or below 0.004 percent BAC."²⁴

Thus, through the standardization of the field sobriety testing, officers in the field are able to more accurately gauge the level of an intoxicated driver. By disregarding tests that did not have a foundation based upon science, officers are able to utilize the three tests approved by NHTSA to determine with an accuracy of 91% if a driver is impaired.

ENDNOTES

- 1 "The Man With Two Brains" (Warner Bros., 1983).
- 2 *People v. Miller*, 113 Ill.App.3d 845, 447 N.E.2d 1060, 1061 (Ill.App.4 Dist., 1983).
- 3 *City of Piqua v. Hinger*, 15 Ohio St. 2d 110, 238 N.E.2d 766 (Ohio 1968).
- 4 *Burris v. State*, 156 Tex.Crim. 485, 244 S.W.2d 211, 212 (Tex.Cr.App. 1951).
- 5 Tharp, Burns & Maskowitz, *Development and Field Test of Psychophysical Tests for DWI Arrest* (1981) Final Report, DOT-HS-805-864, NHTSA.
- 6 *State v. Arsenault*, 115 N.H. 109, 336 A.2d 244, 245 (N.H. 1975).
- 7 *Development of a Standardized Field Sobriety Test*, SFST Training Management System, www.nhtsa.gov.
- 8 *Id.*
- 9 *Id.*
- 10 Burns, M. and Moskowitz, H. (1977). *Psychophysical Tests for DWI Arrest*. U.S. Department of Transportation, National Highway Traffic Safety Administration, DOT-HS-5-01242, Washington, D.C.
- 11 *Id.*
- 12 *Id.*
- 13 Harris, D.H., Dick, R.A., Casey, S.M., and Jarosz, C.J. (1980). *The Visual Detection of Driving While Intoxicated*. U.S. Department of Transportation, National Highway Traffic Safety Administration, DOT-HS-7-1538, Washington, D.C.
- 14 *Id.*
- 15 Tharp, Burns & Maskowitz, *Development and Field Test of Psychophysical Tests for DWI Arrest* (1981) Final Report, DOT-HS-805-864, NHTSA.
- 16 *Id.*
- 17 *Id.*
- 18 National Traffic Law Center, *Horizontal Gaze Nystagmus: The Science and the Law*. American Prosecutor Research Institute.
- 19 Tharp, Burns & Maskowitz, *Development and Field Test of Psychophysical Tests for DWI Arrest* (1981) Final Report, DOT-HS-805-864, NHTSA.
- 20 *Id.*
- 21 *Id.*
- 22 Stuster, J. and Burns, M. (1998). *Validity of the Standardized Field Sobriety Test Battery at BACs Below 0.10*. U.S. Department of Transportation, National Highway Traffic Safety Administration, DOT-HS-808-654, Washington, D.C.
- 23 *Id.*
- 24 *Id.*

Discovering Source Codes: A Survey

Judge Brian MacKenzie
Judicial Fellow, Michigan

In recent years defendants charged with DWI offenses have attempted to obtain the software source codes relative to breath testing instruments. These attempts have produced appellate and trial decisions encompassing such questions as the nature of material evidence, the protection given to trade secrets, and individual constitutional rights.

The leading case comes from New Jersey where the Supreme Court, faced with a challenge to a new type of breath testing device, appointed a special master to conduct a plenary hearing as to its scientific reliability. See, *State v. Jane H. Chun*, et al. Dkt #58,879, (N.J. Dec. 15, 2005).

Initially, the government took the position that the source codes were a trade secret of the manufacturer and that it did not possess them. The manufacturer refused to participate in the hearing or to provide the codes. The manufacturer entered into an agreement with the defendants for an outside independent review of the source codes. Based on the testimony and the promised review, the special master found that the results were scientifically reliable.

The Supreme Court remanded for testimony about the source codes. The Court ordered the manufacturer to provide the codes, and protected against outside disclosure. See, *State v. Chun et al.*, 191 N.J. 308, 923 A.2d 226 (2007). After considering the expert testimony, the special master submitted his findings. Based on those findings, the Court, citing the extensive record, held the source codes did not cause inaccuracies in the testing

results. *State v. Chun*, 194 N.J. 54, 104-105, 943 A.2d 114 (2008).

No other court has required such an extensive evaluation. Many have simply accepted the claim that the source codes are business trade secrets which the state does not possess and are therefore exempt from discovery. The decision in *Moe v. State*, 944 So.2nd 1096 (Fla. 2006), is a good example. The Court of Appeals upheld a lower court ruling denying a defense motion to compel production of the source codes as a trade secret protected from discovery by either the defense or the state. In *City of Fargo v. Levine*, 2008 ND 64, 747 N.W.2d 130 (2008), the Supreme Court held the source code was a trade secret, so the prosecution's failure to provide it to the defendant was not a *Brady* violation as the state did not possess them. See, *Brady v. Maryland*, 373 U.S. 83 (1963). See also, *Pflieder v. State*, 952 So.2nd 1251 (Fla. 2007), *State v. Kuhl*, 16 Neb. App. 127, 741 N.W.2d 701 (Neb. 2007), *People v. Cialino*, 14 Misc.3d 999, 831 N.Y.S.2d 680 (N.Y. 2007), *State v. Burnell*, 2007 WL 241230 (Conn. 2007), *State v. Walters*, 2006 WL 785393 (Conn. 2006).

When a defendant is able to overcome a claim that the source code is a trade secret, the defense still has an obligation to show the request may lead to material evidence. In *Underdahl v. Comm'r of Pub. Safety*, 735 N.W.2d 706 (Minn. 2007), the Supreme Court concluded the code was owned by the state and remanded it for further hearing. On remand, the Court of Appeals held that the defendant failed to make an adequate showing that discovery of the code would produce relevant or material evidence. *State v. Underdahl*, 749 N.W.2d 117 (Minn. 2008). See also, *State v. Olcott*, No. A06-2340 (Minn. 2008). In *Abbott v. Commissioner of Public Safety*, A08-0399 (Minn. 2009), wherein the Court of Appeals, after questioning whether the Supreme Court actually found that the

state owned the source code, upheld that the lower court's determination that the source code would not produce relevant evidence. Similarly, in *State v. Bastos*, 985 So.2d 37 (Fla. 2008) the appellate court rejected a subpoena for source codes, as the defense failed to show how obtaining them would lead to the introduction of material evidence at trial.

The Kentucky Court of Appeals reached a different conclusion in *House v. Commonwealth*, 2008 WL 162212 (Ky. App. 2008) where it required the manufacturer to produce its source code in response to a defendant's discovery subpoena. The Court also rejected the manufacturer's trade secret claim, but directed the lower court to issue a protective order. This appears to be a far broader view of materiality than in the other cases referenced above.

Denying a defendant's right to present potentially exculpatory evidence to protect a trade secret has serious constitutional implications. See, *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). The rulings in *Chun* and *House* avoid this potential conflict by protecting both the defendant's rights and the manufacturer's intellectual property, leaving only the requirement that the defendant establish the materiality of proposed exculpatory evidence.

The weight of case law establishes the following. First, the source codes belong to the manufacturer of the testing device and are beyond discovery. Second, the source codes do not cause inaccuracies in the testing results. Therefore, evidence of the codes is not material to the question of the defendant's guilt, and motions to produce the codes should be denied.

Editor's note: This article is to provide you with the latest case law concerning source code cases. As this is an evolving area of law, you should check your State's latest case law on the issue and review any updates from other States.

CONTACT INFORMATION

To learn more about programs offered by NHTSA, please contact one of the following:

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Challenges to the Field Sobriety Tests

Judge MaryAnne Majestic
Tempe, Arizona

The typical Driving Under the Influence (DUI) arrest will include the performance of field sobriety tests by the driver. Defense challenges to field sobriety tests predominately take place during trial rather than a pre-trial motion to suppress. Although there have been some legal challenges to the tests, most attorneys will attack the credibility of the test results by arguing, through cross examination, that subjective factors on the part of the officer have compromised the results of the tests. The subjective factors might include the officer's predisposition to arrest someone they believe is driving under the influence and the fact that the officer may have deviated from the National Highway Traffic Safety Administration (NHTSA) guidelines for administering the tests.

These challenges will take place in basically two ways. The attorney will attempt to diminish the officer's credibility by asking questions concerning the officer's knowledge of the NHTSA guidelines for administering the tests, and then challenge the officer's compliance with the test guidelines mandated by NHTSA and his ability to "grade" the tests accurately.

Many DUI arrests are conducted by "motor" officers who are assigned strictly to the investigation of drivers who are suspected of driving under the influence of alcohol or drugs. These officers specialize in the area of DUI detection and most likely have more training than the average patrol officer in the nuances of conducting and testifying in the subject matter of field sobriety tests. However, it is not uncommon for even these seasoned veterans of DUI arrests to pause for answers when challenged on their familiarity with specific NHTSA guidelines concerning field sobriety tests.

Knowledge of NHTSA

The first issue that is usually brought to the attention of the jury is the fact that NHTSA has validated only three tests (Horizontal Gaze Nystagmus (HGN), Walk and Turn and One Leg Stand). Some patrol officers may not even be aware of what NHTSA is, let alone remember what tests they have validated. An experienced defense attorney will know this and will ask the officer if she is familiar with NHTSA and to explain to the jury what this

organization does. Obviously, if the officer does not know, the defense attorney, through cross examination, will establish that this agency is the heartbeat of field sobriety testing and therefore make it appear as though the officer cannot possibly be credible if she does not know something that basic.

Questions that will proceed from this point might include the following:

- How many field sobriety tests did you ask my client to complete? Are you aware of the fact that NHTSA has validated only three of these field sobriety tests?
- Do you know which three field sobriety tests NHTSA has validated?
- If only three of the tests are valid, why did you give the other field sobriety tests?
- Are you familiar with any of the reasons NHTSA may have for validating only three of these tests?
- If the other tests that you gave have no validation from NHTSA, what is their value in your investigation for DUI?

It has been my experience, both as an attorney practicing in the field of DUI and a Judge who has heard these cases for over fourteen years, that even the most experienced officer is going to falter somewhat when it comes to knowing all of the specifics of the NHTSA guidelines concerning field sobriety tests. Officers do participate in DUI detection and advanced training. However it appears that some of the finer details of this training (such as memorizing percentages of reliability of each test in correlation to a specific blood alcohol reading) are not given as much emphasis as the practical "how to" part of the training.

Knowledge of the Tests

The second method of discrediting the field tests is to challenge the way in which the officer conducted the test. In dealing with the three NHTSA validated tests, the HGN, One Leg Stand and Walk and Turn tests, the challenge will begin with attempting to get the officer to classify the subject's performance on the test as "pass" or "fail." Officers are not taught that these are pass/fail tests, and will struggle characterizing a subject's performance in this manner. In cases where the untrained person would view someone performing well on the tests, the attorney will utilize this fact to attempt to establish that the subject did not fail the test at all. Some questions to demonstrate this fact are:

- So, out of the 8 things that you told my client to do, he performed 6 of them correctly?
- And yet, just because he did two things incorrectly, you failed him on this test, isn't that correct?

The questions will then attempt to elicit testimony from the officer on the exact conditions and instructions that must be followed to consider these tests valid. Again, depending on the experience of the officer, some will know what these are and some will not. The attorney will ask the jury to follow the logical assumption that if an officer does not know what the guidelines are, then he cannot have properly conducted the tests.

Defense counsel will then review each test individually with the officer, step by step, and inquire if each of these steps was in compliance with NHTSA. For example, part of the HGN test requires the officer to estimate when the eye has reached a deviation angle of 45 degrees. Each officer uses his own methodology to estimate this while in the field, although during training they used a template. Questions will be asked about how the officer "guessed" what 45 degrees was or how the officer "guessed" how far away the stimulus was from the subject's eyes. NHTSA has a document entitled "The Robustness of HGN" and it is available on its website: <http://www.nhtsa.dot.gov/staticfiles/DOT/NHTSA/Traffic%20Injury%20Control/Articles/Associated%20Files/810831.pdf>.

Challenges will be made to the validity of the Walk and Turn test based on whether the officer utilized an actual physical line, as required by NHTSA, or whether the officer had the subject use an "imaginary" line.

Part of the One Leg Stand test requires the subject to keep his arms at his sides. If the subject raises his arms, the officer is supposed to determine whether the subject's arms were raised more than six inches. The officer will be questioned about how he measured the distance and the jury will be asked to consider the fact that perhaps he could have been off by an inch, meaning the subject may have "passed" the test.

Whether or not these trial tactics are successful in persuading a jury that a subject's performance on field sobriety tests constitutes evidence of DUI cannot be easily determined by judges. Jury verdicts are based upon myriad factors. However, the one thing that I am sure of is the fact that in order to mount any type of credible challenge to these tests, the defense attorney must be incredibly familiar with the NHTSA data and guidelines on field sobriety tests.

New Technology and New Legal Challenges

Judge Margarita Bernal
Tucson, Arizona

The sophistication of and application of new technology to impaired driving cases continue to present judges with issues that make this a multilayered area of the law. The litigation before our courts continues to evolve and to provide us areas of research in civil law and constitutional rights.

Arizona courts have recently been weighing conflicting notions of civil law in the protection of copyrights for software technology against constitutional protections. Specifically, litigation involving over approximately 7000 cases filed since Dec 1, 2006 will be potentially affected by various court rulings on an instrument known as the Intoxilyzer 8000.

Defendants with pending criminal cases and charged with driving with an alcohol concentration of .08 or more are asking the Arizona courts to have produced the software configuration ("source code") of the Intoxilyzer 8000, the breath-testing instrument currently used by local law enforcement agencies. In my Court, this litigation impacts approximately 70% of the 7000 cases pending.

The defendants have argued that they have a "substantial need" for the source code in preparing their defenses; that the source code was "material and information not otherwise covered" in the disclosure required by the Arizona Rules of Criminal Procedure Rule 15.1; and that they were "unable . . . without undue hardship to obtain the substantial equivalent by other means."

Several of my colleagues have taken extensive testimony on the manner, method, and process of the software and whether it can or should be disclosed to the criminally-accused defendants. Each of the listed defendants is accused of having blood alcohol contents (BAC) equal to or greater than .08 or .15 (which determines the length of mandatory jail sentence if convicted). The prosecution intends to use the results of the Intoxilyzer 8000 test as the primary source of evidence of the defendants' impairment. Their guilt rests upon the readings from the breath testing equipment at issue. The defendants seek information on how the instruments evaluate each breath sample

to determine whether the readings are accurate and reliable.

The State in each case does not object in principle to the defendant's possessing or analyzing the source codes. The State, however, denies that it has access to or possession of the source code. Litigation is currently working at two levels: the Municipal Court, which has specific factual distinctions involving the purchase of the instruments, production of checklists, and the processes that were coordinated by the local law enforcement agency and the prosecuting agency; and the Superior Court, which involves felony cases where the county attorney's office did not control, direct or participate in the creation of the specific checklists, retesting procedures and related issues.

The distinction is critical: one law enforcement agency was actively involved in the process to bring the software and machine in compliance with the individual agency requests, while the second agency used the device after it was approved by the Department of Public Safety. Each Court has distinct but related factual issues.

A general jurisdiction Superior Court trial judge, after a two-day evidentiary hearing and several additional hearings, ordered that CMI, a Kentucky corporation which manufactures the Intoxilyzer instrument and owns the source code, produce the requested material. The judge ruled:

The court finds that the source code for the Intoxilyzer 8000 is not within the possession or control of the _____ County Attorney's office, any law enforcement agency or any other Person that has participated in the investigation that is under the direction or control of the _____ County attorney's office and therefore the court declines to find that the State has Rule 15. 1 (Arz Rule of Crim P) obligation to produce the programming language or software utilized by CMI in its Intoxilyzer 8000 machines. The Court further finds that while a defendant is entitled to any evidence "that potentially could rebut the state's prima facie showing" that an Intoxilyzer was operating correctly and is entitled to attack the Intoxilyzer's reliability before a jury such information is not *Brady*

material. (NOTE: *Brady v. Maryland*, 373 U S 83, 87 (1963), the 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 punishment).

In an unpublished memorandum decision, an appellate court reversed the Superior Court judge's order and ruled that CMI disclose the source code to the defendants, that the State obtain the source code from CMI and that the State serve the order to show cause on CMI why they should not be held in contempt for failure to respond to the court's order.

After filing a Petition for Special Action, the County Attorney's office wrote to CMI requesting disclosure of the source code and had the Superior Court judge's order served on a representative of CMI. In addition, the state sought enforcement of those orders in a Kentucky court. The Kentucky court quashed the orders, finding the Intoxilyzer 8000 source code subject to protection as a trade secret. CMI subsequently stated it would produce the source code, provided all parties agree to a protective order and sign a nondisclosure agreement.

However, at the Municipal Court level, judges are confronting unusual factual issues regarding the local law enforcements' creation, modification or dictation of the procedures for the Intoxilyzer 8000. The involvement of the prosecuting agency and the criminalist for the police department, prior to the in-service use of the instrument in December 2006, creates unique and distinct legal issues from the felony litigation.

Many of the hearings involving testimony of the CMI representative indicated that several versions of the source code and software had been tested and evolved pursuant to issues raised by the Arizona Department of Public Safety and the local enforcement agency in question. Moreover, unique Arizona appellate cases provide justification for the defendants' argument that the "primary scientific evidence of the defendants' BAC," the source code and related software should be disclosed for review and analysis by their experts.

Additionally, breath tests have been recognized by the Arizona Court of
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Judicial Outreach Liaisons Named for Three Regions



JUDGE KENTON G. ASKREN

Judge Kenton G. Askren was elected Associate Circuit Judge, Cooper County, Missouri 18th Circuit in 1974, where he served 8 terms. He is Past President, Missouri Association of Probate and Associate Circuit Judges, chaired a committee that created Missouri Substance Abuse Traffic Offender Program (SATOP)/Alcohol Drug Education Program (ADEP), and Small Claims Court and participated on committee that created the Missouri Statewide Fine Collection Center. He was the Juvenile Judge sponsor of the Cooper County Teen Court. He created the Cooper County Family Counseling in Problem Drinking, Domestic Violence Counseling Program and Financial Management Program. He also partnered with the Missouri Department of Corrections Restorative Justice Program and was the founding chair of the Boonslick Habitat for Humanity.

Judge Askren received his BA in Business Administration from Central Missouri State University in 1971, and his JD in 1974 from the University of Missouri, Columbia, School of Law. He has been a member of the Missouri Bar since 1974. A member of the American Bar Association since 1975, he has been or is a member of the Dispute Resolution Section, Family Law Section, Conference of State Trial Judges and National Conference of Special Court Judges. He is also a member of the Association of Missouri Mediators, Inc.

In 2007 Judge Askren opened the Askren Law Office which provides arbitration and mediation services, Guardian ad Litem (GAL)/lawyer representation in juvenile, domestic and probate cases and limited appearances for urban law firms.

Judge Askren and his wife, Linda, have been married for 30 years and have two daughters, Elizabeth and Jennie. He is serving as an Elder at the Broadway Christian Church (Disciples of Christ) Columbia, MO.



JUDGE G. MICHAEL WITTE

Hon. G. Michael Witte has served as judge of the Dearborn Superior Court No. 1, Lawrenceburg, Indiana, and judge of the Dearborn County Court. He was the first Asian American to serve as judge in the State of Indiana. He received both his B.A. and J.D. degrees from Indiana

University, serves as President of the law school's Alumni Board, and was honored in 2008 by the Alumni Association as its Distinguished Asian Alumni.

He is a 1991 graduate of the Indiana Judicial College, the 2002 class of the Graduate Program for Indiana Judges, and a former member of the Indiana Commission on Courts. Judge Witte served as the Judicial Fellow for the National Highway Traffic Safety Administration (NHTSA) from 1995-98, and served on the Congressional Advisory Committee for Commercial Driver's License, 2007-08. He served as Chairman of the American Bar Association National Conference of Specialized Court Judges, 2005-06, is currently Vice-Chair of the ABA Judicial Division, and also serves as Co-Chair of the Division's Standing Committee on Minorities in the Judiciary.

In addition, he has served as faculty for programs presented by the American Bar Association, the National Judicial College, NHTSA, the National Center for State Courts, the National Criminal Justice Association, the Indiana Judicial Center, and the Indiana Continuing Legal Education Forum. Judge Witte's teaching experience is primarily in the field of impaired driving, traffic court, and small claims issues. His legal teaching assignments have occurred in Arkansas, Hawaii, Indiana, Illinois, Ohio, District of Columbia, Florida, Georgia, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, South Carolina, Tennessee, Texas, Virginia, Toronto, Canada, and Washington. Judge Witte has performed NHTSA assessments of impaired driving programs for Hawaii, Missouri, Montana, South Carolina, Rhode Island, Kansas, and Maryland. Judge Witte joined The National Judicial College faculty in 1994.



JUDGE FREDERIC RODGERS

Judge Rodgers is a graduate of Amherst College and the Albany Law School. He has been a judge since 1969 when he served as one of the first U.S. Army military judges in Vietnam; there he was awarded two Bronze Stars and the Air Medal. He has also been chief deputy district attorney in Denver, magistrate of the Denver Juvenile Court

and in private practice in Breckenridge, CO representing ski resort businesses. In 1986 he was appointed judge of the Galpin County Court. He has been retained by election five times. He received the ANTHONY GRECO AWARD FOR EXEMPLARY JUDICIAL ACHIEVEMENT in 2008, the OUTSTANDING STATE CHAIR OF THE ABA FELLOW'S AWARD in 2009, the 1992 OUTSTANDING COUNTY JUDGE AWARD from the 17th Judicial District Victims' Advocacy Coalition, and the 2003 AWARD OF MERIT from the Denver Law Club.

Judge Rodgers has taught at numerous national, international and state CLE programs and has published articles in *The Judges' Journal* and *The Colorado Lawyer*. He is co-author of the NJC Benchbook MODERN JUDICIAL ETHICS, of Chapter 16 of the book THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE (7th ED.) and served on the editorial board of the *Judges' Journal*. He provided judicial training and law drafting assistance to the Vietnam Supreme People's Court, National Assembly and Ministry of Justice for USAID and the U.N. Development Programme in 2002-2003. He has been president of the Colorado Municipal Judges Association, the Colorado County Judges Association, the Denver Law Club, the National Conference of Special Court Judges, Rhone-Brackett American Inn of Court, Vice-chair of the Colorado Trial Judges Council, and Chair of the ABA Judicial Division. He served in the ABA House of Delegates, ABA Nominating Committee, on the ABA Board of Governors representing the states of CO, AZ and OK, and was the Colorado Bar Association Senior Vice-President for 2004-05. He served on the Boards of the American Judicature Society and of the National Judicial College, whose faculty he joined in 1990, and was Chair of its Faculty Council in 1999. He is Chair-elect of the Board of Trustees of the National Judicial College for 2008-09.

Elected a Life Fellow of both the American and Colorado Bar Foundations, he chairs the Colorado ABA Fellows, and his name appears in *Who's Who in America*. He skis, bikes, plays banjo, writes songs and performs music as he teaches judges. Check out his tunes at www.son.gs/fred.htm. He is married to Valerie McNaughton and they have a teen-age son, Gabriel.

New Technology

(continued from page 5)

Appeals as dispositive of guilt or innocence.

Because DUI cases "are particularly susceptible of resolution of chemical analysis of intoxication, *Montano* (149 Ariz. at 391,719 P.2d at 277) and because the test results are "virtually dispositive of guilt or innocence," *Id.* (citations omitted) *due process* requires that the state ensure that the tests it demands drivers submit to produce reasonably accurate results.

Mack v. Cruikshank, 196 Ariz. 541 2 P.3d 100 (Ariz. App. Div 2, 1999) (emphasis added).

In the Municipal Court litigation, the State, although defending CMI's refusal to release the software, claims no ownership of the source code and no involvement in the procedures or processes used by the law enforcement agency, CMI specifically modified several software and procedural criteria based on the police department's demands. The factual involvement created

more constitutionally-based arguments by the defendants. In the end, the majority of the Municipal Court judges found that the constitutional issues overrode the complex copyright and civil jurisdictional arguments.

The Sixth Amendment of the United States Constitution and the Arizona Constitution, Article 2, Section 24, guarantee a defendant in a criminal case the right to "be confronted with the witnesses against him." *State v. Conroy*, 131 Ariz. 528, 530, 642 P.2d 873 (Ariz.App. 1982). The Sixth Amendment requires meaningful cross examination and includes the right to investigate, challenge by pretrial investigation, and preparation and access to information that could potentially impeach the adverse witness. *Davis v. Alaska*, 415 US 308, 316 (1974), *State v. ex rel Romely*, 183 Ariz. 139, 901 P.2d 1171 (1995).

Based upon this analysis, and CMI's continued declination, failure or refusal to allow the release of the source code software for analysis, Municipal Court judges have suppressed introduction of the BAC or have provided juries with instructions that allow it to weigh the inability of the defendant to challenge the technology.

The results of all of these challenges: many of the cases involved in the litigation go forward to jury trials without the BAC reading (with mixed results), many are on appeal awaiting the appellate process to wind its way through the system, and, in many cases, the State chooses to dismiss the charges rather than proceed without the BAC reading.

So the controversy boils down to conflicting rights. Do the civil copyright laws of an out-of-state company with unique software technology outweigh the constitutional rights of the defendants accused of what has become a very serious crime: driving under the influence of alcohol? I will continue to update the readers of *Highway to Justice* as the litigation is resolved.

We as judges, with our skills and training, continue to decide the cases and find resolution for the issues that confront our courts. That fortunately is the essence of our work: to resolve matters that are brought before our society, with dignity, in a calm, deliberate and timely manner.