

NJ Supreme Court holds new Alcotest DWI breath testing machine results admissible

The Supreme Court on March 17, 2008 adopted, as modified, the reports and recommendations of Special Master Judge King. This landmark decision changes the prosecution of DWI cases in New Jersey forever. Subject to certain conditions, the Court holds that the Alcotest is scientifically reliable and that its results are admissible in drunk driving prosecutions. State v. Chun 194 NJ 54 3-17-08 (A-96-06)

The Supreme Court held:

1. There is sufficient credible evidence to support the continued use of a 2100 to 1 blood/breath alcohol ratio to estimate BAC from a breath sample. The overwhelming evidence demonstrates that use of this ratio tends to underestimate the actual BAC in the vast majority of persons whose breath is tested. Although there may be a small number of individuals who are disadvantaged by a device that uses the 2100 to 1 blood/breath ratio, there is sound scientific support for its continued utilization.

2. The four criteria used by the device to identify a valid breath sample are, with one modification, appropriate. The Court adopts the recommendation that the minimum breath volume requirement should be lowered, for women over sixty years of age only, from 1.5 liters to 1.2 liters and concludes that this modification does not violate equal protection rights. Regardless of minimum breath requirements, no test will be accepted by the machine until the infrared measurement plateaus, which only occurs when a suspect is expelling deep lung air. Further, while selectively lowering the breath volume requirement will create a different level at which women over sixty may be charged with refusal, the record demonstrates that this group, and only this group, may not have the physiological capability of providing a larger sample. In pending prosecutions, and in future prosecutions based on tests conducted prior to the implementation of the Court's directives, an Alcotest AIR with an insufficient volume error message may not be used as evidence of refusal against women over the age of sixty, unless they also provided another sample of at least 1.5 liters.

3. The Supreme Court declined to adopt the recommendation that a breath temperature sensor be added to the Alcotest, concluding that this device is both unnecessary and impractical. The record includes scant evidence of a correlation between breath temperature and increased breath alcohol concentration, and no evidence that the theoretical increase in breath alcohol concentration would translate into an inaccurately elevated BAC. Further, any potential effect is ameliorated by the 2100 to 1 blood/breath ratio and by use of truncated, rather than rounded, results, both of which serve to underestimate results. Requiring the addition of a breath temperature sensor would also

present an unreasonable maintenance burden on New Jersey's breath testing program.

4. A tolerance range of an absolute 0.01 percent (plus or minus 0.005 percent from the mean) BAC standard, coupled with the use of a like percentage range of tolerance expressed as five percent plus or minus deviation from the mean, is both scientifically appropriate and consistent with the intention of the Legislature in adopting per se limits. The device must therefore be reprogrammed to comply with this standard. In pending prosecutions, and in future prosecutions based on tests conducted prior to the implementation of the Court's directives, in which the AIR reports a BAC obtained using a doubled tolerance range, the reported breath samples must be reviewed to determine whether the results meet this tolerance range. Any AIR that does not include two valid tests within tolerance under this standard cannot be deemed to be sufficiently scientifically reliable to be admissible and shall not be admitted into evidence as proof of a per se violation.

5. The Alcotest's use of the fuel cell "drift" algorithm does not undermine its reliability. Scientific evidence demonstrates that fuel cells begin to age as soon as they are put into service, and will eventually cause the Alcotest's electric chemical test to underestimate BAC. While there may be other means to compensate for this "drift," those means would not, in the end, be any more advantageous to defendants than the minor upward adjustment that the algorithm effects. However, the Court adopts the Special Master's recommendation that the devices be recalibrated semi-annually instead of annually. A semi-annual calibration is consistent with the manufacturer's recommendations and provides a useful safeguard by affording a more regular opportunity to evaluate and replace aging fuel cells

6. The Supreme Court concluded that the Alcotest's "weighted averaging" algorithm is an appropriate calculation that results in a more accurate infrared measurement. It gives greater weight to the breath that, inevitably, includes the deepest air drawn from the lungs. It therefore focuses the analysis on the portion of the breath sample that most accurately represents the subject's BAC

7. The buffer overflow error is a real error in the programming that may cause the Alcotest to report incorrect results in situations involving a third breath sample, which is taken only when the measurements from the first two tests are not in tolerance. The buffer overflow programming error, which must be corrected, affects only the final BAC result reported on the AIR. Because the infrared and electric chemical measurements for all of the test samples are accurately reported on the AIR, the correct BAC value can, and must, be computed from those measurements by applying a corrective formula. In pending prosecutions, and in future prosecutions based on tests conducted prior to the implementation of the Court's directives, the State must review all AIRs that include three tests, perform the calculations to identify the correct BAC in accordance with the corrective formula, and provide that data to the court. The calculations must be made a part of the evidence in any prosecution to facilitate appellate review.

8. The Supreme Court found adequate support in the record that catastrophic error detection should be re-enabled in the Alcotest. This detection will allow the machine to recognize catastrophic errors and respond by shutting down. There is no basis for the Court to conclude that the lack of catastrophic error detection could result in an inaccurate AIR in any pending prosecution.

9. The Supreme Court found the overall programming style and design of the source code to be acceptable. The exhaustive review undertaken in this case revealed few actual errors or issues within the source code. There being no evidence in the record that any other asserted shortcomings are more than stylistic or theoretical challenges, the Court declines to require any specific programming standards at this time.

10. In future revisions to the Alcotest software, The Supreme Court ruled the State must: have the Alcotest software locked so that only the manufacturer can make revisions to the source code; have the software revised so that the Alcotest identifies and prints the software version that it is utilizing on each AIR; and give detailed notice consistent with due process to the public and the New Jersey State Bar Association of any future revisions.

11. The Supreme Court ruled Draeger must make Alcotest training, comparable to that provided to the State, available to licensed New Jersey attorneys and their experts at reasonable times and locations within New Jersey and at a reasonable cost.

12. The Supreme Court ruled the twelve foundational documents identified by the Special Master must be provided during discovery in all matters. The operator of the device shall be available to testify and shall produce evidence of his qualifications to operate the device. The following foundational documents, evidencing the good working order of the machine, shall be admitted into evidence in prosecutions based on Alcotest breath testing results: the most recent calibration report, including control tests, linearity tests, and the credentials of the coordinator who performed the calibration; the most recent new standard solution report prior to a defendant's test; and the certificate of analysis of the 0.10 simulator solution used in a defendant's control tests. These foundational documents are not "testimonial," as defined by the United States Supreme Court in Crawford v. Washington and its progeny. In so holding, the Court aligns itself with the majority of other courts, which have found that such documents are business records, which do not implicate the Confrontation Clause.

13. The Supreme Court ruled the AIR itself, a "statement" of a machine, is not testimonial under Crawford because it does not implicate Crawford's core concerns -- it is not a report of a past event, given in response to police interrogation, with the purpose of establishing evidence that a defendant committed an offense. Although the AIR is not testimonial evidence, the Court nevertheless mandates various safeguards to protect a defendant's due process rights: the opportunity to cross-examine the operator of the Alcotest, the routine production of all foundational documents in discovery, and the admission of the core foundational documents into evidence at trial.

The Court contemporaneously issued an Order vacating its January 10, 2006, stay of drunk driving prosecutions, appeals, and sentencing, which shall proceed in accordance with the directives set forth therein.

The full 130 page opinion will be available at <http://www.njlaws.com/statevchun.htm>

Kenneth Vercammen is the 2008 Municipal Court Attorney of the Year by the Middlesex County Bar Association. He was selected one of only three attorneys as a Super Lawyer 2008 in NJ Monthly in the Criminal – DWI category. Kenneth Vercammen was the NJ State Bar Municipal Court Attorney of the Year and past president of the Middlesex County Municipal Prosecutor's Association. □ □ He is the past chair of the NJ State Bar Association Municipal Court Section. He is the Deputy chair of the ABA Criminal Law committee, GP Division.

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