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Admissibility of Field Test Results at Trial to Prove Intoxication

Cover Page Footnote

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**ADMISSIBILITY OF FIELD TEST RESULTS AT TRIAL TO
PROVE INTOXICATION**

**SUPREME COURT OF NEW YORK
NEW YORK COUNTY**

People v. Aliaj¹
(decided May 21, 2012)

I. FACTUAL BACKGROUND

In *People v. Aliaj*, New York County's Supreme Court was faced with the question of whether the results of a portable breath test administered during a traffic stop are admissible at trial to prove intoxication.² The court acknowledged that other trial courts in New York have been applying different standards regarding the admissibility of such tests, and proposed a variety of factors that should be considered before such portable test results may be admissible.³ In this case, the Defendant was pulled over and arrested in the early morning hours of July 11, 2010, for driving while intoxicated.⁴ The events that precipitated the arrest were relatively routine.⁵ The police officer stopped the Defendant for driving through a stop sign.⁶ The officer did not suspect that the Defendant was under the influence of any substances, although the area was well known for its night life.⁷ The Defendant initially denied consuming any alcohol when he was first questioned, but the officer had sensed an alcoholic odor and asked the Defendant to exit the vehicle and submit to a breath test.⁸ After agreeing to the test, the Defendant admitted to having a "couple

¹ 946 N.Y.S.2d 430 (Sup. Ct. 2012).

² *Id.* at 431.

³ *Id.* at 431-32.

⁴ *Id.* at 432.

⁵ *Id.* at 432-34.

⁶ *Aliaj*, 946 N.Y.S.2d at 432.

⁷ *Id.*

⁸ *Id.* at 432-33. The officer admitted that the Defendant did not exhibit any other visible signs of intoxication. *Id.* at 434.

of drinks” despite his earlier denial.⁹ The officer admitted that although he observed the Defendant during the five minutes that had elapsed between the initial stop and the breath test, he had not done so with the intention of observing any activities that could have skewed future breath test results.¹⁰

The breath test device utilized at the stop was previously used by the arresting officer approximately sixty-five times.¹¹ The officer received one-day training for the device’s use in 1998 and this was the only device this particular officer was qualified to use.¹² The device was stored in the rear seat of the officer’s car, required calibration once per year and was shared by multiple officers in the past.¹³ The officer’s testimony indicated that the machine was properly calibrated before the test was given.¹⁴ After the Defendant’s test reading of a 0.110, performed on a CMI portable SD2 device, he was brought into the precinct.¹⁵

Approximately an hour and a half after the initial breath test (with the SD2) the Defendant was subjected to a chemical test (an Intoxilyzer test) at the police precinct, which returned a 0.081 reading.¹⁶ The Intoxilyzer was properly calibrated and was administered by an officer, certified as a Breath Analysis Operator, who observed the defendant carefully for twenty minutes.¹⁷ It was also determined that the Defendant passed two of the three physical coordination tests he was given without incident.¹⁸ The court held that although generally there was no question concerning the reliability and admissibility of the Intoxilyzer test at a trial, the field test conducted by the officer

⁹ *Id.* at 433. Later at the precinct, the Defendant stated that he had consumed two beers within an hour and a half. *Aliaj*, 946 N.Y.S.2d at 434.

¹⁰ *Id.* at 433-34. Unknown to the officer at the time, protocol dictates that the defendant is to be monitored for fifteen to twenty minutes for any activity that may disrupt an accurate reading, such as eating, vomiting, drinking, etc. *Id.*

¹¹ *Id.* at 433.

¹² *Id.* The officer was unsure if his training included information that breath devices are subject to Radio Frequency Interference, which may disrupt reliability, if an officer answers a radio while the device is transmitting information. *Aliaj*, 946 N.Y.S.2d at 433.

¹³ *Id.* at 434. This particular machine was last calibrated on April 22, 2010, approximately three months before it was used on the Defendant. *Id.*

¹⁴ *Id.* at 433.

¹⁵ *Id.* at 434.

¹⁶ *Aliaj*, 946 N.Y.S.2d at 434. The Intoxilyzer self-calibrates upon activation. *Id.*

¹⁷ *Id.* at 434-35.

¹⁸ *Id.* at 434 (noting the defendant made only one mistake on the third test corresponds to alcohol impairment). Both the Intoxilyzer test and the coordination tests at the precinct were video recorded. *Id.*

with the portable SD2, in this instance, did not meet the criteria necessary for admissibility at trial.¹⁹

II. FIELD TEST RESULTS ARE NOT PROTECTED BY A DEFENDANT'S CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION

Individuals are guaranteed by both the federal and state constitutions that they shall not “be compelled in any criminal case to be a witness against” themselves.²⁰ This privilege against self-incrimination arises when a person is compelled to provide “evidence of a testimonial or communicative nature.”²¹ The Supreme Court in *Crawford v. Washington*²² held, in part, that states are free to develop their own hearsay rules regarding the admissibility of non-testimonial evidence.²³ Crawford was tried for assault and attempted murder arising from the stabbing of a man who allegedly tried to rape his wife.²⁴ His wife had previously made a statement during a police interrogation that stated Crawford did not act in self defense.²⁵ The prosecution played the wife’s recorded message to the jury.²⁶ The state’s marital privilege prevented the wife from testifying at trial, and thus, Crawford was unable to cross-examine this testimony.²⁷ The Supreme Court found that because the recording was testimonial in nature and there was no opportunity to cross-examine the witness, that Crawford’s constitutional rights guaranteed under the Confrontation Clause were violated.²⁸ The absence of any opportunity to cross-examine was enough to support the Court’s decision and the issue of reliability, therefore, was not a factor in the holding.²⁹

The court in *Crawford* “le[ft] for another day” the types of evidence that may be considered testimonial in nature, but the Supreme

¹⁹ *Aliaj*, 946 N.Y.S.2d at 441.

²⁰ *People v. Berg*, 708 N.E.2d 979, 980 (N.Y. 1999); U.S. CONST. amend. V; N.Y. CONST., art. I, § 6.

²¹ *People v. Hager*, 505 N.E.2d 237, 238 (N.Y. 1987); *Schmerber v. California*, 384 U.S. 757, 761 (1966).

²² 541 U.S. 36 (2004).

²³ *Id.* at 68.

²⁴ *Id.* at 38, 40.

²⁵ *Id.* at 38.

²⁶ *Id.*

²⁷ *Crawford*, 541 U.S. at 40.

²⁸ *Id.* at 68.

²⁹ *Id.*

Court has since begun to define the term.³⁰ In *Melendez-Diaz v. Massachusetts*,³¹ a drug trafficking case, the Court applied *Crawford's* holding that “[t]he Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits.”³² The trial court permitted the prosecution to introduce affidavits of forensic test results that identified the substance in the defendant’s possession as cocaine.³³ The court denied defense counsel’s request to cross-examine the analysts responsible for the forensic analysis.³⁴ The Supreme Court stated that the affidavits did not fall under a business records exception to hearsay, were clearly prepared for litigation and, therefore, testimonial in nature.³⁵ The court explained that when the purpose of a regularly conducted business activity is to produce evidence for trial, this activity invokes a defendant’s rights under the Confrontation Clause.³⁶ The Confrontation Clause was intended to provide a defendant with means to contest the accuracy and reliability of these types of test results, and guard against fraud or incompetence.³⁷

Testimonial or communicative evidence are indicative of a person’s “subjective knowledge or thought processes.”³⁸ Physical performance tests or field sobriety tests require observation and interpretation by law enforcement officials and do not reveal any subjective knowledge of the defendant that may be used against him in a judicial proceeding.³⁹ In addition, documentary evidence such as calibration and maintenance schedules, necessary for establishing a proper foundation, may be admitted into evidence without concern of the preparer’s availability for cross-examination.⁴⁰ Evidence such as this, required for a proper foundation, are not the “result from struc-

³⁰ *Id.*

³¹ 557 U.S. 305 (2009).

³² *Id.* at 329; *see Crawford*, 541 U.S. at 51-52.

³³ *Melendez-Diaz*, 557 U.S. at 307.

³⁴ *Id.* at 309.

³⁵ *Id.* at 311, 322.

³⁶ *Id.* at 321; U.S. CONST. amend. VI (establishing the right of a defendant “to be confronted with the witnesses against him”).

³⁷ *Melendez-Diaz*, 557 U.S. at 319.

³⁸ *Hager*, 505 N.E.2d at 238.

³⁹ *Id.*

⁴⁰ *People v. Lent*, 908 N.Y.S.2d 804, 808-10 (App. Term 2010); *see People v. Lebrecht*, 823 N.Y.S.2d 824, 828 (App. Term 2006) (noting that although the documents are often used in litigation, they were not specifically prepared for that purpose); *People v. Stevenson*, 873 N.Y.S.2d 236 (App. Term 2008).

tured police questioning, they are not created in response to any effort at gathering incriminating evidence against a particular accused, [but instead] reflect objective facts without discretionary aspect.”⁴¹

It is well-settled that field sobriety tests, taken during a temporary roadside detention, may be admitted into evidence regardless of whether the defendant has been issued Miranda warnings.⁴² The privilege against self-incrimination has not been extended to occasions where a defendant has been compelled to “submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.”⁴³ Conduct that does not “constitut[e] a custodial interrogation, is admissible.”⁴⁴ A field sobriety test administered during a traffic stop is not “the equivalent of real or physical evidence [] protected under the Fifth Amendment.”⁴⁵ The element of compulsion is absent because the defendant ultimately retains the option of whether or not to submit to a field test.⁴⁶ “[A] temporary roadside detention pursuant to a routine traffic stop is not custodial within the meaning of Miranda.”⁴⁷ However, a roadside detention may become custodial if a reasonable person in the defendant’s position would believe he is no longer free to leave.⁴⁸ Neither the officer’s nor the defendant’s subjective belief are determinative in deciding whether a temporary detention has become custodial.⁴⁹ So long as the temporary roadside detention remains non-custodial, Miranda warnings are unnecessary, and statements or evidence collected during this period may be considered voluntary.⁵⁰

⁴¹ *Lent*, 908 N.Y.S.2d at 808-09.

⁴² *Berg*, 708 N.E.2d at 980 (holding evidence of a defendant’s refusal to submit to a breathalyzer may be admissible at trial); *Hager*, 505 N.E.2d at 238; *People v. Jacquin*, 522 N.E.2d 1026, 1027 (N.Y. 1988).

⁴³ *Schmerber*, 384 U.S. at 764.

⁴⁴ *Jacquin*, 522 N.E.2d at 1027.

⁴⁵ *People v. Havrish*, 866 N.E.2d 1009, 1013 (N.Y. 2007).

⁴⁶ *South Dakota v. Neville*, 459 U.S. 553, 563-64 (1983).

⁴⁷ *People v. Parris*, 809 N.Y.S.2d 176, 177 (App. Div. 2d Dep’t 2006) (quoting *People v. Myers*, 766 N.Y.S.2d 581, 582 (App. Div. 2d Dep’t 2003)); see *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966) (providing that before evidence procured from a custodial interrogation may be admitted at trial, a defendant must be expressly warned of his constitutional rights against self-incrimination); see also *People v. Mackenzie*, No. 2002-55 OR CR, 2005 WL 2358350, at * 1 (N.Y. App. Term 2005) (adding that “limited questioning appropriate to such investigations and the administration of performance tests” are similarly permissible).

⁴⁸ *People v. Yukl*, 256 N.E.2d 172, 174 (N.Y. 1969).

⁴⁹ *Id.*; *Hicks v. United States*, 382 F.2d 158, 161 (D.C. Cir. 1967).

⁵⁰ *People v. Parulski*, 716 N.Y.S.2d 260, 261 (App. Div. 4th Dep’t 2000); *Mackenzie*,

Furthermore, the Supreme Court has held that an individual's bodily fluids, including one's breath, may be subject to a warrantless taking in order to preserve evidence that would otherwise be destroyed.⁵¹ As long as the law enforcement official reasonably believed that evidence would likely be destroyed during the time elapsed to obtain a warrant, the Fourth Amendment protection against warrantless searches does not apply.⁵² However, the test must still be applied in reasonable matter, regardless of the absence of Fourth Amendment protection.⁵³

III. NEW YORK LEGISLATIVE HISTORY AND JUDICIAL INTERPRETATION

New York courts have taken a variety of conflicting approaches in recent years regarding the admissibility of portable field test results to demonstrate a person's intoxication.⁵⁴ To understand why there is such difficulty in achieving uniform results at the trial court level, one must first look to the statutory language that governs field tests and chemical tests, and the standards set forth therein.⁵⁵ New York Vehicle and Traffic Law differentiates a field test from a chemical test.⁵⁶ A police officer may subject an individual to a field test when a motor vehicle operator has either been in an accident or the individual has operated the motor vehicle in violation of Vehicle and Traffic Law § 1194.⁵⁷ Upon a positive field test showing, or a reasonable belief that the individual has consumed alcohol, an officer may request a chemical test be administered within two hours of the field test.⁵⁸

However, while the Vehicle and Traffic Law addresses the admissibility of a valid chemical test, it does not explicitly address

2005 WL 2358350, at * 1.

⁵¹ *Schmerber*, 384 U.S. at 770.

⁵² *Id.* (noting that an individual's blood to alcohol ratio may change substantially over a short period of time); U.S. CONST. amend. IV (protecting "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures").

⁵³ *Schmerber*, 384 U.S. at 771.

⁵⁴ *Aliaj*, 946 N.Y.S.2d at 431-32.

⁵⁵ *Id.* at 432.

⁵⁶ N.Y. VEH. & TRAF. LAW § 1194 (McKinney 2010).

⁵⁷ N.Y. VEH. & TRAF. LAW § 1194(1)(b) (McKinney 2010).

⁵⁸ N.Y. VEH. & TRAF. LAW § 1194(2) (McKinney 2010).

the admissibility of a portable field test results at trial.⁵⁹ Thus, while there is no dispute regarding the admissibility of the results of a properly administered chemical test, the Vehicle and Traffic Law has seemingly left it to the court system to decide whether field test results are admissible to prove intoxication.⁶⁰ To further complicate matters for the courts, the New York State Department of Health has adopted the National Highway Traffic Safety Administration's (NHTSA) list of breath measurement devices deemed to have met standard reliability criteria.⁶¹ This list includes some portable breath testing devices.⁶²

Some New York courts have regarded the Vehicle and Traffic Law's silence on field test admissibility as an indication that portable breath tests may never be admissible at trial to demonstrate a defendant's intoxication.⁶³ In *People v. Thomas*,⁶⁴ the defendant claimed that mechanical automotive defects caused his car to collide with another automobile, killing the driver.⁶⁵ At the scene, the defendant was subjected to a preliminary screening test which indicated the presence of alcohol.⁶⁶ He was arrested, brought to the precinct, and later registered a 0.14% on a breathalyzer test.⁶⁷ At the trial, the results of the breathalyzer test at the precinct were introduced as well as testimony regarding the screening test.⁶⁸ The defendant was convicted of driving under the influence of alcohol, as well as other charges, and he appealed the judgment.⁶⁹ The defendant argued that he was unfairly prejudiced by the jury's use of the field test at trial to prove

⁵⁹ N.Y. VEH. & TRAF. LAW § 1195(1) (McKinney 2010) ("Upon the trial of any action or proceeding arising out of actions alleged to have been committed by any person arrested for a violation of any subdivision of section eleven hundred ninety-two of this article, the court shall admit evidence of the amount of alcohol or drugs in the defendant's blood as shown by a test administered pursuant to the provisions of section eleven hundred ninety-four of this article.").

⁶⁰ *Id.*

⁶¹ *Aliaj*, 946 N.Y.S.2d at 436; N.Y. VEH. & TRAF. LAW § 1194(6)(c) (McKinney 2010); N.Y. COMP. CODES R. & REGS. tit. 10, § 59.4(b) (2012).

⁶² See *People v. Jones*, 927 N.Y.S.2d 586, 588-89 (Crim. Ct. 2011) (recognizing the portable device at issue was on the conforming products list).

⁶³ *Aliaj*, 946 N.Y.S.2d at 431.

⁶⁴ 509 N.Y.S.2d 668 (App. Div. 4th Dep't 1986), *aff'd*, 517 N.E.2d 1323 (N.Y. 1987).

⁶⁵ *Id.* at 670.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Thomas*, 509 N.Y.S.2d at 670.

his intoxication.⁷⁰ The appellate court agreed with the defendant stating that “[t]he Alco-Sensor testimony was clearly not admissible to show intoxication.”⁷¹ The court reasoned that the People did not present the proper foundation demonstrating the device’s reliability to permit admission at trial for the purpose of proving intoxication.⁷² The court recognized the admissibility of screening test results for the purpose of establishing probable cause to make an arrest, but stated that the results are not required as part of the foundation for the results of the subsequent test at the precinct to be admissible.⁷³ The appellate court reversed the convictions, ordered a new trial and the People appealed.⁷⁴ The Court of Appeals affirmed the appellate court’s decision, agreeing that the field test results were irrelevant in regard to the defendant’s intoxication.⁷⁵

In *People v. Reed*,⁷⁶ the defendant, charged with driving while intoxicated, asserted that field test results should have been suppressed as a result of an administrative defect.⁷⁷ The People wished to use the field test results as evidence of intoxication.⁷⁸ A chemical test was not administered within two hours of the field test, a standard established by the legislature.⁷⁹ The court recognized that “the purpose of a field test is to provide probable cause for [an] arrest, rather than to serve as evidence at trial.”⁸⁰ The court stated that the “[l]egislature intended to differentiate between preliminary tests done at the scene of the crime and those conducted back at the station house” due to issues concerning accuracy and reliability.⁸¹ Despite the inclusion of the field test device on the approved instrument list, the court concluded that the results could not be introduced against the defendant.⁸²

⁷⁰ *Id.* at 671 (noting the absence of a limiting instruction to the jury).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 671-72 (noting that the requisite two-hour time frame between tests, proof the device was properly functioning and certification of the device’s internal chemical elements are part of the necessary foundation).

⁷⁴ *Thomas*, 509 N.Y.S.2d at 671.

⁷⁵ *People v. Thomas*, 517 N.E.2d 1323, 1323-24 (N.Y. 1987).

⁷⁶ No. 2003BX039117, 2004 WL 2954905, at *1 (N.Y. Sup. Ct. Dec. 15, 2004).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*; N.Y. VEH. & TRAF. LAW § 1194(2)(a)(2) (McKinney 2010).

⁸⁰ *Reed*, 2004 WL 2954905, at *5.

⁸¹ *Id.* at *7.

⁸² *Id.* at *6-*7 (taking the plain meaning of the statute, case law, and the People’s admis-

In *People v. Santana*,⁸³ the defendant was charged with driving while intoxicated and sought to exclude any evidence pertaining to his portable breath test results.⁸⁴ The court stated that Vehicle and Traffic Law dictates that the field test is to be used only for a probable cause determination and only the chemical test is admissible at trial to prove intoxication.⁸⁵ Although the device at hand was included on the list of approved instruments, the court concluded the statutory language does not permit the admission of field test results at trial.⁸⁶ In granting the defendant's motion to suppress, the court substantiated its ruling by addressing evidentiary reliability concerns with allowing utilization of field tests for more than a probable cause determination.⁸⁷ In addition, the court was concerned that the defendant's due process rights would be violated if he were not informed at the time of testing that the evidence may be used against him at trial.⁸⁸ The court concluded that "[t]o admit evidence of a portable breath test in a case in chief would be to circumvent the law."⁸⁹

In *People v. Harper*,⁹⁰ the police were dispatched in response to a domestic disturbance.⁹¹ They found the defendant outside of his apartment building, and although the defendant seemed confused, the officers did not observe any outward signs of intoxication.⁹² The dispute allegedly arose because the defendant and his girlfriend had been drinking and the defendant felt she should not be driving with alcohol in her system.⁹³ The police did not issue any citations and moved on to an apartment building closeby.⁹⁴ It was here that the officer observed a vehicle swerving over the center line in the road, and upon pulling the vehicle over, discovered it was the same man from

sion that field tests are meant to establish probable cause to make an arrest into consideration).

⁸³ No. 2010NY044345, 2011 WL 2119503, at *1 (N.Y. Sup. Ct. May 16, 2011).

⁸⁴ *Id.*

⁸⁵ *Id.*; see N.Y. VEH. & TRAF. LAW § 1194.

⁸⁶ *Santana*, 2011 WL 2119503, at *1.

⁸⁷ *Id.* at *2 (noting that some states video record field tests and this procedure lends reliability to the process).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ No. 07 06 0113, 2007 WL 4571180, at *1 (N.Y. Just. Ct. 2007).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

the domestic dispute.⁹⁵ The defendant failed three sobriety tests at the scene and was eventually arrested after a field test revealed the presence of alcohol.⁹⁶ When admission of field test results was challenged by the defense at trial, the court stated that a field test may be a factor used to establish probable cause for an arrest, but taken alone it is insufficient, as a finding of probable cause is based on the totality of the circumstances.⁹⁷ Agreeing with the court in *Thomas*, the court held that a field test is inadmissible at trial to establish a defendant's intoxication due to insufficient reliability of the test.⁹⁸

In *People v. MacDonald*,⁹⁹ the defendant was convicted of driving while impaired and criminally negligent homicide.¹⁰⁰ He was involved in a motorcycle accident which resulted in the death of his wife who was riding with him.¹⁰¹ Medical personnel that arrived on the scene smelled alcohol on the defendant and noticed his speech and motor skills were impaired.¹⁰² The defendant failed to complete an alcohol pre-screening test at the scene of the accident.¹⁰³ The defendant contended that any testimony elicited at trial regarding the field test was improperly admitted.¹⁰⁴ The appellate court acknowledged that alcohol pre-screening results are not admissible as proof of intoxication, but found that the People introduced the test, namely the failure to complete it, as evidence of the defendant's guilty conscience.¹⁰⁵

Other courts in New York have determined that portable breath tests may be admissible at trial if the People can establish a proper foundation for reliability.¹⁰⁶ In *People v. Jones*,¹⁰⁷ the trial court permitted the results of a portable breath test into evidence to demonstrate the defendant's blood alcohol content.¹⁰⁸ Expressly disagreeing with the holdings in *Santana* and *Reed*, the court justified

⁹⁵ *Harper*, 2007 WL 4571180, at *1.

⁹⁶ *Id.* at *2.

⁹⁷ *Id.* at *4.

⁹⁸ *Id.*

⁹⁹ 641 N.Y.S.2d 749 (App. Div. 3d Dep't. 1996).

¹⁰⁰ *Id.* at 750.

¹⁰¹ *Id.*

¹⁰² *Id.* at 751.

¹⁰³ *Id.*

¹⁰⁴ *MacDonald*, 641 N.Y.S.2d at 751.

¹⁰⁵ *Id.*

¹⁰⁶ *Aliaj*, 946 N.Y.S.2d at 431-32.

¹⁰⁷ 927 N.Y.S.2d 586 (Crim. Ct. 2011).

¹⁰⁸ *Id.* at 588.

the admission by stating that “the portability or immobility of a breath testing device is not a factor relevant to the admissibility of its results.”¹⁰⁹ The court stated that the only relevant inquiry that must be made, before admission of portable breath test results, is whether the People have established a proper foundation.¹¹⁰ Whether or not the officer at the scene continually observed the defendant for fifteen minutes is not a determinative factor, but merely goes to the strength of the evidence.¹¹¹ The device must be properly used, must be in proper working order, and the results must be scientifically reliable.¹¹² A device’s reliability is substantiated when it is included on the National Highway Traffic Safety Administration’s List of Evidential Breath Alcohol Measurement Devices.¹¹³ The court asserted that once a device is identified on this list, it is unnecessary for the People to lay a foundation to establish the device’s accuracy and reliability.¹¹⁴ Inclusion on the list of approved devices also eliminates the necessity for expert testimony at trial.¹¹⁵

In *People v. Hargobind*,¹¹⁶ the defendant was arrested after he was stopped by an officer who observed indicia of intoxication.¹¹⁷ The People moved to have the results of the portable breath test administered to the defendant admitted into evidence.¹¹⁸ The defendant asserted that the court in *Thomas* held that portable breath test results cannot be introduced to prove intoxication.¹¹⁹ The court in *Hargobind* rejected this contention, explaining that the court in *Thomas* “did not categorically rule out the admission of field breath tests,” but instead held that a proper foundation was not established in that case by the People.¹²⁰ The court noted New York Vehicle and Traffic Law does not explicitly bar the admission of field test results at trial.¹²¹ Furthermore, facts such as the device’s inclusion on the

¹⁰⁹ *Id.* at 588, 590.

¹¹⁰ *Id.* at 588.

¹¹¹ *Id.* at 591.

¹¹² *Jones*, 927 N.Y.S.2d at 588.

¹¹³ *Id.* (stating the portability of a device on the list is irrelevant).

¹¹⁴ *Id.*

¹¹⁵ *Id.*; *Lent*, 908 N.Y.S.2d at 806 (asserting that the inclusion of a device on the approved list leaves no question as to the scientific accuracy).

¹¹⁶ No. 2009KN024543, 2012 WL 762897, at *1 (N.Y. Crim. Ct. 2012).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at *2.

¹²⁰ *Id.*

¹²¹ *Hargobind*, 2012 WL 762897, at *2.

approved list or the portable nature of the device are not dispositive on the issue of admissibility.¹²² Rather, the court stated to lay a proper foundation for admissibility, the People must show that “the device had been tested, producing a reference standard, within a reasonable period prior to [d]efendant’s test.”¹²³ In addition, there must be evidence of proper calibration, proper administration of the test, and police observation of the defendant for a minimum of fifteen minutes before the test is given.¹²⁴ These guidelines for laying a foundation compensate for the lack of a controlled environment and aid in ensuring reliable results.¹²⁵ Upon establishing these criteria, the court granted the People’s motion to admit the test results contingent on a showing of a proper foundation.¹²⁶

IV. OUT-OF-STATE APPROACHES

A. California

In California, the courts have allowed results of portable breath tests into evidence as long as the device and methods used comply with California’s statutory provisions governing procedures.¹²⁷ Portable breath tests are admissible as long as the machine is properly functioning and is administered properly by a qualified individual.¹²⁸ In *People v. Williams*¹²⁹ the defendant sought to suppress portable breath test results on the grounds that the officer did not adhere to the proper procedures set by legislature.¹³⁰ The arresting officer directly observed the defendant for “[thirteen] instead of [fifteen] minutes,” and decided to take only “one [test] instead of two tests.”¹³¹ The California Supreme Court held that even though every procedure was not followed, the evidence was still admissible.¹³² The

¹²² *Id.* at *2-*3.

¹²³ *Id.* at *4.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Hargobind*, 2012 WL 762897, at *5.

¹²⁷ See *People v. Williams*, 49 P.3d 203, 209 (Cal. 2002); see also *People v. Wilson*, 8 Cal. Rptr. 3d 167, 170 (2003).

¹²⁸ *People v. Bury*, 49 Cal. Rptr. 2d 107, 111 (1996).

¹²⁹ 49 P.3d 203 (Cal. 2002).

¹³⁰ *Id.* at 204.

¹³¹ *Id.* at 208.

¹³² *Id.*

court reasoned that the officer's failures were only minor and "could not produce false positive results."¹³³ The court emphasized, however, the importance of complying with the procedures as it "guarantees the People quick and certain admission of evidence, eliminating laborious qualification, critical cross-examination, and the risk of exclusion."¹³⁴

The defendant in *People v. Wilson*¹³⁵ also attempted to suppress his breath test results.¹³⁶ The court acknowledged that portable breath test results are admissible if the prosecution can establish the foundational requirements as established in *Bury*.¹³⁷ The court noted that there are scientific differences between chemical tests and portable breath tests, and although a portable breath test may not be the equivalent of a chemical test, it can be utilized to prove a defendant's guilt nonetheless.¹³⁸ In essence, the portable breath test should be used to establish probable cause for the more reliable and accurate chemical test, but this does not preclude portable breath test results from serving as an important piece of evidence at trial.¹³⁹

B. New Jersey

In *State v. Chun*,¹⁴⁰ the New Jersey supreme court established guidelines to govern the admissibility of portable breath test results so "prosecutions should be able to proceed in an orderly and uniform fashion."¹⁴¹ *Chun* was a consolidated action of twenty convicted defendants who challenged the admission of their portable breath test results at trial.¹⁴² The court, in analyzing the scientific reliability and admissibility of the portable breath test at issue, looked to the legislative framework for guidance.¹⁴³ The court noted over the past few decades, the New Jersey legislature has become more and more strin-

¹³³ *Id.*

¹³⁴ *Williams*, 49 P.3d at 209 (noting that compliance with regulations ensures accurate and reliable results).

¹³⁵ 8 Cal. Rptr. 3d 167 (2003).

¹³⁶ *Id.* at 168.

¹³⁷ *Id.* at 169-70.

¹³⁸ *Id.* at 171.

¹³⁹ *Id.* at 171-72.

¹⁴⁰ 943 A.2d 114 (N.J. 2008).

¹⁴¹ *Id.* at 121.

¹⁴² *Id.* The device at issue in this case was the Alcotest 7110 MKIII-C. *Id.* at 120.

¹⁴³ *Id.* at 123-24 (recognizing that it was the legislature's intent to enable efficient and successful prosecutions of drunk drivers).

gent with the rules governing intoxicated drivers.¹⁴⁴ The court acknowledged that although New Jersey violations are determined according to the blood to alcohol concentration, practicalities call for breath testing to be an acceptable method for arrest and conviction.¹⁴⁵ Since portable breath tests are the preferred method of detecting impaired drivers, the court voiced their concern about the precision and accuracy of the device.¹⁴⁶ For example, protocol dictates a twenty minute observation of the defendant prior to the test, a control test to ensure the device is calibrated properly, and requires two samples to be taken.¹⁴⁷

After a detailed analysis of the scientific specifications and procedures, the court addressed possible Confrontation Clause issues with the evidence needed to establish a foundation for breath test results, particularly documents regarding the operator's qualifications, documents demonstrating the machine's condition, and the report generated by the device.¹⁴⁸ The court stated that a certificate showing the operator's qualifications clearly falls within New Jersey's business record exception to hearsay and would pose no Confrontation Clause violation, especially because the device operator typically testifies at trial.¹⁴⁹ Documents pertaining to the test machine also fall within the business record exception and are neither testimonial in nature nor are they typically "subject to manipulation by the preparer."¹⁵⁰ Documents needed to establish a proper foundation include "the most recent calibration report prior to a defendant's test", the "credentials of the coordinator who performed the calibration", and "the certificate of analysis of the [] simulator solution used in a defendant's control tests."¹⁵¹ The court recognized that even though the test results may incriminate the defendant, they are non-testimonial.¹⁵² They represent a present report of information con-

¹⁴⁴ *Chun*, 943 A.2d at 124-25 (noting the gradual decrease in alcohol tolerance and the increase in penalties, including a decrease in the acceptable BAC content and the zero tolerance policy towards drivers under the age of twenty-one).

¹⁴⁵ *Id.* at 127 (stating that the ease of administering a breath test in comparison to a blood test make it a preferable testing method).

¹⁴⁶ *Id.* at 127-28.

¹⁴⁷ *Id.* at 129-30.

¹⁴⁸ *Id.* at 165.

¹⁴⁹ *Chun*, 943 A.2d at 166.

¹⁵⁰ *Id.* at 167.

¹⁵¹ *Id.* at 169.

¹⁵² *Id.* at 169-70.

temporarily recorded by a machine unable to be influenced by the operator, and could very well *clear* the name of the test subject.¹⁵³ Despite the conclusion that the report is non-testimonial, the court directed that the availability of the device's operator to testify was still required.¹⁵⁴ By requiring these documents and instituting safeguards to protect the defendant, the court established groundwork to ensure that the machine's results are scientifically reliable and declared the framework above a requisite to permit portable breath test results into evidence.¹⁵⁵

In *State v. Holland*,¹⁵⁶ the defendants challenged the admission of his portable breath test results on the grounds that the use of an alternate manufacturer's temperature probe in the testing device rendered the results inadmissible under the *Chun* standard.¹⁵⁷ The defendants argued that the guidelines established in *Chun* must be strictly adhered to and calibration with an alternate temperature probe should render the results inadmissible.¹⁵⁸ The court stated that "breath-testing devices, known as breathalyzers, are scientifically reliable and accurate instruments used for determining BAC."¹⁵⁹ The court noted that *Chun*'s foundational requirements are not the end of the inquiry, but the State must produce any other non-core foundational documents, as referenced in *Chun*, that may expose flaws in the testing process.¹⁶⁰ The court held that failure to produce the exact non-core documents referenced in *Chun* does not automatically render the results inadmissible.¹⁶¹ The emphasis, the court states, should not be on a particular probe or piece of documentation, but the ability to produce appropriate documentation that demonstrates the accuracy and reliability of the testing device.¹⁶² The court explained that once the State meets its burden to qualify admission, the defense may then

¹⁵³ *Id.* at 170.

¹⁵⁴ *Chun*, 943 A.2d at 170 (implementing the need for the operator's testimony as a safeguard).

¹⁵⁵ *Id.*

¹⁵⁶ 27 A.3d 1212 (N.J. Super. Ct. App. Div. 2011).

¹⁵⁷ *Id.* at 1214.

¹⁵⁸ *Id.* Rather than the Ertco Hart probe used in *Chun*, a Control Company probe was utilized in this particular device. *Id.*

¹⁵⁹ *Id.* at 1215 (adding that a test reading over the legal limit is a per se violation of driving while intoxicated).

¹⁶⁰ *Holland*, 27 A.3d at 1217.

¹⁶¹ *Id.* at 1218.

¹⁶² *Id.* at 1218-19 (rejecting the defendants' assertion that a strict interpretation of *Chun*, and only an Ertco Hart probe and its supporting documents render the results admissible).

contest the evidence with a showing that alternate components or documentation belie a showing of unreliable results.¹⁶³ As a result, the court found that because the lower court judge found the results automatically inadmissible, issues regarding the reliability of the device were never properly addressed.¹⁶⁴ The record was insufficient to allow the court to reach a decision on the merits, and the case was remanded for an investigation into the reliability of the results.¹⁶⁵

C. Illinois

In stark contrast to the approaches used in New York, California, and New Jersey, Illinois courts prohibit the prosecution from introducing portable breath test results during a criminal proceeding.¹⁶⁶ In *People v. Rose*,¹⁶⁷ the defendant sought to suppress his portable breath test results on the grounds that no established authority supported admission.¹⁶⁸ The Illinois legislature explicitly stated that “[t]he result of a preliminary breath screening test may be used by the *defendant* as evidence in any administrative or court proceeding,” but left silent whether it was similarly available to the state.¹⁶⁹ Reading into the absence of text indicating legislative intent to permit prosecution to use the results in criminal proceedings, the court held that the test was intended only to establish probable cause for an arrest and is “[in]admissible by the State during its case in chief in a criminal proceeding involving a DUI charge.”¹⁷⁰ In coming to this conclusion, the court noted differences in the level of regulation and standards between portable breath tests and chemical tests, as well as the absence of portable breath tests from approved evidentiary devices, supported its exclusion in criminal proceedings.¹⁷¹

In *People v. Brooks*,¹⁷² the defendant was pulled over after his vehicle was observed swerving and he was subjected to a variety of

¹⁶³ *Id.* at 1220.

¹⁶⁴ *Id.* at 1221.

¹⁶⁵ *Holland*, 27 A.3d at 1221.

¹⁶⁶ *People v. Rose*, 643 N.E.2d 865, 871 (Ill. 1994).

¹⁶⁷ 643 N.E.2d 865 (Ill. 1994).

¹⁶⁸ *Id.* at 866; 625 ILL. COMP. STAT. ANN. 5 / 11-501.5 (West 2001).

¹⁶⁹ *Rose*, 643 N.E.2d at 867 (1994) (emphasis added); 625 ILL. COMP. STAT. ANN. 5 / 11-501.5 (a) (West 2001).

¹⁷⁰ *Id.* at 870.

¹⁷¹ *Id.* at 871.

¹⁷² 778 N.E.2d 336 (Ill. App. Ct. 2002).

field sobriety tests when the officer noticed slurred speech and eye irritation.¹⁷³ After failing three out of the four tests given, the defendant refused to take the portable breath test and was promptly arrested.¹⁷⁴ At trial, the defendant denied failing any of the field sobriety tests and attributed any physical abnormalities observed during the test to a surgical procedure which affected the use of his legs.¹⁷⁵ The defendant was convicted at trial of DUI and appealed the verdict on the grounds that the officer's testimony regarding his refusal to take the portable breath test, or any reference to the refusal, was prejudicial error.¹⁷⁶ He argued that since portable breath test results were inadmissible in Illinois for use by the State, any reference to the test or refusal to take one should be equally inadmissible.¹⁷⁷ The State argued that mention of the portable breath test was not intended to prove intoxication, but was intended to demonstrate a guilty mind.¹⁷⁸ The court found the State's argument troublesome and reasoned that not only could the testimony have had a substantial prejudicial effect, but the testimony was irrelevant on the issue of guilt.¹⁷⁹ The court was concerned with the possibility that the jury "could infer [the] defendant's guilt from his refusal to submit to a test, even though the results of the test are inadmissible to prove [the] defendant's guilt."¹⁸⁰ The court held that any testimony alluding to the portable breath test, the accuracy of the test, or the defendant's refusal to take the test inadmissible.¹⁸¹

V. HAS THE COURT IN *ALIAJ* TAKEN THE PROPER APPROACH TOWARDS PORTABLE BREATH TESTS ADMISSIBILITY OR SHOULD COURTS LIMIT THEIR ADMISSIBILITY TO PROBABLE CAUSE AS A MATTER OF LAW?

In *Aliaj*, the court admitted that a test administered at the sce-

¹⁷³ *Id.* at 338. The field tests administered included "the horizontal-gaze-nystagmus (HGN) test, [] the one-leg-stand test, [] the finger-count test, and [] the walk-and-turn test." *Id.* at 339.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Brooks*, 778 N.E.2d at 339-40.

¹⁷⁷ *Id.* at 341.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 342.

¹⁸¹ *Brooks*, 778 N.E.2d at 342. The court affirmed the defendant's conviction, nonetheless, claiming the defendant, in this case, was not substantially prejudiced. *Id.* at 342-43.

ne can be more probative of the Defendant's intoxication at the time of the initial violation than a test given after arrest.¹⁸² However, if a proper foundation for the device's reliability is not established, the existence of many extrinsic factors that may have skewed otherwise reliable readings remains a possibility.¹⁸³ The court proposed that a rebuttable presumption of inadmissibility should belie the results of portable field test results.¹⁸⁴ To overcome the presumption of inadmissibility, the court suggested that a number of factors, which the court calls "threshold showings," must be met.¹⁸⁵ The reliability of the device must be proven either by its inclusion within the Conforming Products List of Evidential Breath Alcohol Measurement Devices or by the People at trial.¹⁸⁶ The test must have been properly calibrated and administered.¹⁸⁷ Finally, the officer must have had "reasonable grounds to believe the motorist has committed an Alcohol Related Violation."¹⁸⁸

However, the court suggested that the inquiry should not end if the "threshold showings" are satisfied, but more should be required.¹⁸⁹ A minimum fifteen minute observation period of the defendant must be adhered to.¹⁹⁰ The test operator must be properly qualified by either possessing a "Health Department certification or some equivalent level of training."¹⁹¹ The device must have been properly tested, maintained and operated.¹⁹² Finally, the court should review the record of the results and the circumstances surrounding how the test was administered.¹⁹³ All of these factors should be viewed together in total, with deficiencies in one area not necessarily determinative of admissibility.¹⁹⁴

¹⁸² *Aliaj*, 946 N.Y.S.2d at 441.

¹⁸³ *Id.* at 438, 441 (acknowledging that factors such as lighting, air quality, temperature, radio interference or acoustics could skew portable field test results).

¹⁸⁴ *Id.* at 438.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Aliaj*, 946 N.Y.S.2d at 438.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 439.

¹⁹⁰ *Id.* Failure to observe the defendant for the required time period will not automatically result in exclusion, but will affect the probative value of the results. *Id.*

¹⁹¹ *Aliaj*, 946 N.Y.S.2d at 440.

¹⁹² *Id.*

¹⁹³ *Id.* at 441.

¹⁹⁴ *Id.* (stating the reliability of the device must be proven by clear and convincing evidence).

The court found that the failure to observe the Defendant twenty minutes prior to the test, the officer's limited training in the use of the device, the lack of minimal safeguards on the device, and lack of testing records weighed against admissibility in this case.¹⁹⁵ The court held the positive factors surrounding the test were outweighed by the negatives, and the results were clearly unreliable to demonstrate that the Defendant was driving while intoxicated.¹⁹⁶

Throughout the opinion in *Aliaj*, the court expressed concern about the lack of a New York standard regarding the admissibility of portable breath tests, and the different approaches used in recent years by various New York courts. Until either the legislature enacts specific guidelines governing the admissibility of these devices in the Vehicle and Traffic Law, or the Court of Appeals rules definitively on the issue, the trial courts will likely continue to apply inconsistent criteria for admission. In effect, this could prove quite damaging to a defendant's case depending on which court he were to be tried in. The absence of directive statutory language in regard to field test admissibility leaves the court with no alternative but to presume the legislature's intent. Some courts have interpreted the legislature's inclusion of language concerning chemical test admissions and the absence of rules in respect to field tests as making the latter inadmissible. Other courts have viewed the legislature's silence as a door to promulgate their own rules regarding field test admissibility.

Until there is definitive guidance, the factors outlined in *Aliaj* and holding that field tests may be admissible at trial to prove intoxication could still be challenged. On one hand, it provides the prosecution with a tool to prove their case, while permitting the defendant to challenge the accuracy, reliability and credibility of the test results and surrounding circumstances. However, to get the evidence through the door, the prosecution can still assert that the devices used to administer the field tests are on the approved list, have passed all the minimum guidelines set in place by Vehicle and Traffic Law, and may fail to implement other safeguards to ensure proper results due to reliance on the approved list. Mandatory procedures such as the requisite observation period, calibration and record keeping, and police training are necessary to ensure that a particular device is properly used. However, external factors still remain that may lead to inac-

¹⁹⁵ *Id.* at 439-41.

¹⁹⁶ *Aliaj*, 946 N.Y.S.2d at 441.

curate test results. Without a controlled environment in which the test is to be administered, or a video recording of the test made available for judicial review, trial court judges will continue to make subjective evidentiary rulings on conditions that were not accounted for, such as weather conditions. There also remains the possibility that field tests results will be utilized in cases where other direct or circumstantial evidence against the defendant is relatively weak. In these cases, the jury may rely largely on the field test results to convict a defendant off of potentially unreliable results. Where there is stronger corroborating evidence, the potential for an erroneous conviction would be substantially less. With the current state of the law, a defendant's fate may well be determined by which court he is to be prosecuted in. One thing is clear - there must be consistent application of the law to preserve the integrity of the justice system.

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