



# THE ADMISSIBILITY OF ALCOHOL TEST RESULTS FROM THE SMART START SMART MOBILE DEVICE IN PROBATION VIOLATION HEARINGS

OCTOBER 2017

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## EXECUTIVE SUMMARY

This paper explores the evidentiary standards regarding the admissibility of alcohol test results from the Smart Start *SMART Mobile Device*. Our research establishes that the test results are admissible as evidence of alcohol use in a probation violation proceeding.

Probationers do have a diminished set of constitutional rights dependent upon the observance of special conditions. As a result, there have been no successful constitutional challenges to alcohol and other drug testing and abstinence requirements when set as a reasonable term of probation.

The more generally accepted legal rule regarding scientific testing and expert opinion is provided in FRE 702 as interpreted by *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). These cases provide guidelines for determining the admissibility of expert witnesses' testimony.

In *People v. Bohrer*, 37 Misc 3rd 370, (July 13, 2012) the court held, "In New York, the admissibility of scientific evidence is governed by the *Frye* rule" which it noted "is that expert testimony based on scientific principles is admissible but only after a principle or procedure has gained general acceptance in its specified field." The court then held that the relevant scientific community

generally accepts the Smart Start ignition interlock device as reliable, and therefore, a *Frye* hearing was unnecessary before accepting it into evidence.

As the *Bohrer* court noted, the Smart Start ignition interlock device meets the National Highway Traffic Safety Administration (NHTSA) standards established for evidentiary and non-evidentiary BAC testing devices. NHTSA has tested the Smart Start technology and found it exceeds their standards.

The Smart Start *SMART Mobile Device* is identical to the equipment contained in the Smart Start ignition interlock, but in a different format. It is a portable, handheld unit that is lightweight and easy to use with a 120-hour battery life and it has an alcohol-specific fuel cell that delivers accuracy at a level that meets the 2013 NHTSA standards. It can be used to monitor all risk-levels of participants based on the number of test windows (customized and/or random), and it is camera-equipped for facial detection. It will also provide a GPS location at the time of the test.

Our research conclusively establishes that the test results of the Smart Start *SMART Mobile Device*, is generally accepted as reliable by the relevant scientific community, and therefore no hearing under FRE 702 or related court decisions is necessary for the admission of those results in a probation violation hearing.

## INTRODUCTION

This paper explores the evidentiary standards regarding the admissibility of alcohol tests results from the Smart Start *SMART Mobile Device*. Our research establishes that these test results are admissible as evidence of alcohol use in a probation violation proceeding.

In recent years illegal alcohol and other drug use has become a long term national epidemic.<sup>1</sup> The well-established connection between drug use and crime and the costly failure of incarceration as a solution to such crime, created a demand for a more effective approach.<sup>2</sup>

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*The Smart Start SMART Mobile Device test results are admissible as evidence of alcohol use in a probation violation proceeding.*

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In response, the criminal justice system has developed a number of new approaches to the supervision of individuals who are suffering from substance use disorders.<sup>3</sup> One of the core principles of all of these approaches has been the use of the technological advances in alcohol and other drug testing.<sup>4</sup> One of these technological advances is in the form of portable alcohol testing devices such as the Smart Start *SMART Mobile Device*.

Probationers do have basic constitutional rights and therefore are entitled to constitutional protection. However, theirs is a diminished set of constitutional rights dependent upon the observance of special conditions, *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). As a result, there have been no successful constitutional challenges to alcohol and other drug testing and

abstinence requirements when ordered as a reasonable term of probation.

## LEGAL STANDARDS OF ADMISSIBILITY

In the absence of any constitutional prohibitions, the only remaining issue is evidentiary. What legal standard applies to the admission of the results of the Smart Start *SMART Mobile Device*?

In utilizing scientific evidence or testimony, almost every state relies upon either a duplicate or a derivative of the requirements provided in the Federal Rules of Evidence (FRE).<sup>5</sup>

The general rule of admissibility of opinion testimony is provided in FRE 701. A lay opinion must be:

- Rationally based on the perception of the witness;
- Helpful to clearly understand testimony or determination of a fact in issue; and,
- Not based on scientific, technical or specialized knowledge.

The general rule on admissibility of expert opinion testimony is provided in FRE 702, which provides:

If scientific, technical or other specialized knowledge will help the trier of fact to determine a fact in issue and:

- The testimony is based on sufficient facts or data;
- The testimony is the product of reliable principles and methods; and,
- The expert has reliably applied the principles and methods to the facts of the case.

The Courts have struggled with these Rules, and have examined them by looking at the forum where the evidence is being provided. This has led to two distinctly different and competing ways to analyze such testimony.

## **THE FRYE STANDARD**

The first standard comes from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), a case almost a century old discussing the admissibility of polygraph tests as evidence. The Court in *Frye* held that expert testimony must be based on scientific methods that are sufficiently established and accepted.

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting experimental testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

States still following *Frye* include: California, Illinois, Maryland, Minnesota, New Jersey, New York, Pennsylvania, and Washington.<sup>6</sup>

Florida adheres to the *Frye* standard to the extent it is procedural in nature.<sup>7</sup> In 2013, the Florida Legislature passed House Bill 7015, and Governor Rick Scott signed it into law. Florida Statutes Chapter 107 (2013) amends Florida's evidence code to conform to Rule 702 of the Federal Rules of Evidence and the principles applicable in federal court under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), with respect to the admissibility of expert

testimony. On February 16, 2017, the Florida Supreme Court declined to adopt the Legislature's "*Daubert* Amendment" to the extent such amendment was procedural, because of "grave concerns about the constitutionality of the amendment."<sup>8</sup>

In the remaining states the *Frye* standard has been superseded by the *Daubert* standard.

## **THE DAUBERT STANDARD**

The majority of states accept the rule regarding scientific testing and expert opinion as provided in *Daubert*, and the cases interpreting it; these cases provide guidelines for determining the admissibility of expert witnesses' testimony. The *Daubert* Standard is used by trial courts to make an initial determination regarding the admissibility of an expert's scientific opinion. The determination rests upon whether the proposed testimony is based on reasoning or methodology that is scientifically valid and can properly be applied to the facts at issue. The *Daubert* factors include: (1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community.

## **"THE DAUBERT TRILOGY"**

The so-called "*Daubert* trilogy" refers to the three U.S. Supreme Court cases that articulated the *Daubert* standard.

1. The *Daubert* case which held that FRE Rule 702 did not incorporate the *Frye* "general acceptance" test as the sole basis for assessing the admissibility

of scientific expert testimony, but instead the rule incorporated a flexible reliability standard.

2. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), which held that a district court judge may exclude expert testimony when there are gaps between the evidence relied on by an expert and the conclusion, and, that an “abuse of discretion” standard of review is the proper one for appellate courts to use in reviewing a trial court’s decision of whether it should admit expert testimony.
3. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), which held that the judge’s “gatekeeping function” identified in *Daubert* applies to all expert testimony, including non-scientific expert testimony.

*Daubert* set the following guidelines for admitting scientific expert testimony:

- **Judge is gatekeeper:** Under Rule 702, the task of “gatekeeping,” or assuring that scientific expert testimony truly proceeds from “scientific knowledge”, rests on the trial judge.
  - **Relevance and reliability:** The trial judge must determine that the expert’s testimony is “relevant to the task at hand” and that it rests “on a reliable foundation.” Concerns about expert testimony cannot be simply referred to the jury as a question of weight; it goes to the heart of admissibility, the task for the judge. Furthermore, Rule 104(a), not Rule 104(b), governs the admissibility of expert testimony; thus, the Judge must find it more likely than not that the expert’s methods are reliable and reliably applied to the facts at hand.
- **Scientific knowledge = scientific method/methodology:** A conclusion will qualify as scientific knowledge if the proponent can demonstrate that it is the product of sound “scientific methodology” derived from the scientific method.
  - **Illustrative Factors:** The Court defined “scientific methodology” as the process of formulating hypotheses and then conducting experiments to prove or falsify the hypothesis, and provided a set of illustrative factors (i.e., not a “test”) in determining whether these criteria are met:
    1. Whether the theory or technique employed by the expert is generally accepted in the scientific community;
    2. Whether it has been subjected to peer review and publication;
    3. Whether it can be and has been tested;
    4. Whether the known or potential rate of error is acceptable; and
    5. Whether the research was conducted independent of the particular litigation or dependent on an intention to provide the proposed testimony.

In 2000, Rule 702 was amended in an attempt to codify and structure elements embodied in the “*Daubert* trilogy.” In 2011, Rule 702 was again amended to make the language clearer.<sup>10</sup> The current version of the Rule is provided above. While some federal courts still rely on pre-2000 opinions in determining the scope of *Daubert*, as a technical legal matter, any earlier judicial rulings that conflict with the language



of amended Rule 702 are no longer good precedent.<sup>11</sup>

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### *The reliability of breath alcohol detection instruments in general is well established.*

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When seeking to admit test results without its author giving testimony, other significant U.S. Supreme Court decisions that must be considered include:

- *Crawford v. Washington*, 541 U.S. 36 (2004), where the Court determined that “[I]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” As well, the Court held that if evidence is “testimonial” and apparent it would likely be used to prosecute, the defendant must have opportunity for cross examination.
- In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the Court held that a forensic lab report is “testimonial” and its author is therefore subject to cross-examination. A strongly worded dissent argued that the majority had cavalierly dispensed “with the long held rule that scientific analysis could be introduced into evidence without testimony from the analyst who produced it.” The dissent further argued that a lab report is not a “witness” and therefore not subject to cross-examination.
- Subsequently, in *Bullcoming v. New Mexico*, 564 U.S. 647 (2011) the Court held that a blood analysis report is “testimonial.” And so, a defendant has a “[right] to be confronted with the witnesses against him” and

“[s]urrogate testimony” is not good enough.

Based on the current status of the law, it appears that the following are admissible, as they are not “testimonial:”

- Blood Alcohol Content log books;
- Calibration records;
- Quality control reports;
- Operators’ certification record;
- Certification of compliance in a blood test kit; and,
- 911 calls (with some exceptions for reporting impaired drivers on the road).

Of value to our analysis is a 2012 decision from the Justice Court of Town of Penfield, Monroe County, New York. In *People v. Bohrer*, 37 Misc 3rd 370 (July 13, 2012), the court analyzed the state of the law regarding the use of non-evidentiary testing devices in probation violation hearings. In that case, a violation was alleged based upon results from a Smart Start ignition interlock installed in the probationer’s vehicle. After a reported positive alcohol test, the court scheduled a hearing to determine whether the probationer violated an abstinence condition of his sentence. He contended that the test results from the ignition interlock device were inadmissible unless the scientific reliability of the device was first established at a *Frye* hearing. The prosecution contended that *Frye* inquiries are unwarranted in the context of a probation violation hearing.

As the *Bohrer* court held, “In New York, the admissibility of scientific evidence is governed by the *Frye* rule” which it noted

“is that expert testimony based on scientific principles is admissible but only after a principle or procedure has gained general acceptance in its specified field.”

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*The Smart Start SMART Device is identical to the equipment contained in the Smart Start ignition interlock.*

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The *Bohrer* court held that the relevant scientific community generally accepts the Smart Start ignition interlock device as reliable, and therefore, a *Frye* hearing was unnecessary. As the court there held, a court “need not hold a *Frye* hearing where it can rely upon previous rulings in other court proceedings as an aid in determining the admissibility of the proffered testimony.”

The *Bohrer* court explored the issue further, holding that “[a]n ignition interlock is a blood alcohol concentration (BAC) measuring device connected to a motor vehicle ignition system that requires the operator to provide a deep-lung breath sample to determine the operator’s BAC level before the vehicle can be started. ...If the operator’s BAC exceeds the calibrated setting on the device, the vehicle will not start and a failed test report is sent to the monitoring agency.” Although no New York judicial opinions had previously addressed the validity of test results from ignition interlock devices, the court found that the reliability of breath alcohol detection machines in general is well established.

The *Bohrer* court further noted that the National Highway Traffic Safety Administration (NHTSA) has established standards for both evidentiary and non-evidentiary BAC testing devices. In New

York, the Department of Highways (DOH) certifies such devices, which must meet or exceed NHTSA standards. The court noted that the New York DOH had included the Smart Start ignition interlock device on its list of accepted devices. Further, the New York Office of Probation and Correctional Alternatives had included the Smart Start ignition interlock device on its list of Qualified Ignition Interlock Device Manufacturers. The Smart Start ignition interlock device is included on the published list for all regions which further supports a finding that the relevant scientific community has accepted the device’s reliability.

### **THE SMART MOBILE DEVICE**

The Smart Start *SMART Mobile Device* is identical to the equipment contained in the Smart Start ignition interlock, but in a handheld format.<sup>12</sup>

The *SMART Mobile Device* is a portable, handheld unit that is lightweight and easy to use with a 120-hour battery life. It has an alcohol-specific fuel cell that delivers accuracy at a level that meets the 2013 NHTSA standards. Just like the Smart Start ignition interlock device, it can be used to monitor all risk levels of participants based on a number of test windows (customized and/or random), and is camera-equipped for facial detection. It also will give a GPS test location. It has a client test alert and provides immediate violation notification.<sup>13</sup>

If a violation occurs (BrAC<sup>14</sup> level at .02 or greater) there is a temporary pause and the device does not accept another test during the two minutes it takes for the fuel cell to clear.<sup>15</sup> To ensure accurate results, a positive BrAC test requires two default re-tests. For the violation re-test, wait time clears the alcohol reading for next test and, after

wait time, *SMART Mobile* requests a new re-test which allows for re-tests to validate the original test.<sup>16</sup> Re-tests allow clients to rinse their mouth if the previous result was environmental based and retake test.<sup>17</sup> The re-test loop ends after second re-test with a pass, skip, or fail.<sup>18</sup>

The *SMART Mobile* uploads data after each test window closes and all relevant information is uploaded<sup>19</sup> as are photographs and GPS data via a cellular connection.<sup>20</sup>

To ensure accountability, the *SMART Mobile* detects the person's face during testing and requires a re-test if *SMART Mobile* does not detect a face.<sup>21</sup> The Client must pass before any breath test is officially completed.<sup>22</sup>

This device is designed to be more accurate than EtG testing, and the results are available immediately.<sup>23</sup> *SMART Mobile* features a display for viewing accurate results.<sup>24</sup> Additional features include "USB charging capabilities, 120 hours of battery life, GPS, and removable mouth piece."<sup>25</sup>

## **PROBATION VIOLATION HEARINGS**

For the purposes of probation violation hearings, the standard of proof and the type of evidence allowed are more limited than in a criminal trial.<sup>26</sup> Unlike a criminal trial where the prosecutor must prove the case beyond a reasonable doubt, the prosecutor in a probation revocation hearing only needs to prove by a preponderance of the evidence that the probationer violated conditions.<sup>27</sup> This means that the prosecution only needs to prove that it is "more likely than not" or just over a 50% likelihood that a violation occurred.<sup>28</sup>

As well, at a violation hearing, hearsay testimony<sup>29</sup> is admissible as long as it

is reliable.<sup>30</sup> Courts may consider any information "so long as it has 'sufficient indicia of reliability to support its probable accuracy,'" thus specifically permitting consideration of reliable hearsay. *United States v. Waters*, 158 F.3d 933 (6th Cir. 1998)<sup>31</sup> Furthermore, the use of reliable hearsay is not barred by Rule 32.1(a)(2)(D)). Thus, the rationale underlying *Crawford*, et al. has no bearing on the admissibility of test results.<sup>32</sup>

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*Whether a state follows Frye, Daubert or a hybrid of the two, it is clear that testing device results are admissible for the purposes of probation violation hearings or to determine violations.*

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Courts may thus consider test results "so long as they have 'sufficient indicia of reliability to support their probable accuracy,'" thus specifically permitting consideration of reliable hearsay. The court must also consider the reliability of the evidence. See *United States v. McCormick*, 54 F.3d 214 (5th Cir. 1995), *United States v. Kindred*, 918 F.2d 485 (5th Cir. 1990) (defendant's confrontation rights were not violated by admission of urinalysis test through the testimony of probation officer).

As the court in *Bohrer* wrote: "to determine whether a defendant has violated a condition of his sentence, 'the court may receive any relevant evidence not legally privileged.' To be relevant, evidence must have a tendency to make the existence of a material fact 'more probable or less probable than it would be without the evidence.'"<sup>33</sup> Thus, hearsay evidence that is scientifically accepted is admissible without a prolonged foundational hearing.

## CONCLUSION

Whether a state follows *Frye*, *Daubert* or a hybrid of the two, it is clear that testing device results are admissible for the purposes of probation violation hearings or to determine violations. Testing devices approved by NHTSA for evidentiary purposes can have their results used for the purpose of determining guilt in a trial and therefore it is clear that these same results should be accepted in violation hearings.<sup>34</sup> There is a level of reliability and accuracy guaranteed by the testing device's ability to meet or exceed NHTSA standards, and the courts have relied upon those standards. The technology used in the Smart Start *SMART Mobile Device* meets NHTSA standards.<sup>35</sup>

There is a growing need for reliable testing to ensure court participants are complying with court orders designed to prevent alcohol use. These testing device results must meet the minimum legal standards for admissibility in a probation violation hearing.

Our research conclusively establishes that the test results of the Smart Start *SMART Mobile Device*, is generally accepted as reliable by the relevant scientific community, and therefore no hearing under FRE 702 or related court decisions is necessary for the admission of those results in a probation violation hearing.

## ENDNOTES

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2. *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, U.S. Department of Justice Office of Justice Programs Bureau of Justice Statistics.
3. <https://www.drugabuse.gov/publications/drugfacts/treatment-approaches-drug-addiction-2016>.
4. Cone Edward J., "The Power of Drug Testing" *Problems of Forensic Sciences*, vol. XLII, 2000, [http://www.forensicscience.pl/pfs/42\\_cone.pdf](http://www.forensicscience.pl/pfs/42_cone.pdf).
5. The Federal Rules of Evidence are a set of rules that govern the introduction of evidence at civil and criminal trials in Federal trial courts. Congress initially passed the current rules in 1975 after several years of drafting by the Supreme Court.
6. Morgenstern, Michael, "*Daubert v. Frye* – A State-by-State Comparison" The Expert Institute 2017 <https://www.theexpertinstitute.com/daubert-v-frye-a-state-by-state-comparison/>
7. See generally "Florida Supreme Court Rejects Procedural Aspects of *Daubert* Based on 'Grave Constitutional Concerns'," Greenberg Taurig (Feb. 21, 2017) <https://www.gtlaw.com/en/insights/2017/2/florida-supreme-court-rejects-procedural-aspects-of-daubert-based-on-grave>.



8. See *In re Amends.* to the Fla. Evid. Code, No. SC16-181, 2017 WL 633770 (Fla. Feb. 16, 2017).
9. See Legal Information Institute, Cornell University School of Law, [https://www.aw.cornell.edu/rules/fre/rule\\_702](https://www.aw.cornell.edu/rules/fre/rule_702).
10. *Id.*
11. *Id.*
12. <https://www.smartstartinc.com/smart-mobile/>
13. *Id.*
14. Breath Alcohol Concentration (BrAC)
15. *Id.* at Endnote 12
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. [https://www.law.cornell.edu/rules/frcrmp/rule\\_32.1](https://www.law.cornell.edu/rules/frcrmp/rule_32.1)
27. <https://www.avvo.com/legal-guides/ugc/probationparole-revocation-burden-of-proof-general--not-state-specific>
28. <https://www.avvo.com/legal-guides/ugc/probationparole-revocation-burden-of-proof-general--not-state-specific>
29. Hearsay evidence is any statement, offered for its truth, that is not made by a witness testifying at the hearing. Massachusetts Court Systems, Rule 6, Conduct of Probation Violation Hearings, <http://www.mass.gov/courts/case-legal-res/rules-of>

- court/district-muni/probation/rule6.html; *Marquis L. Bell, Jr., v. State of Florida*, No. 5D14-1569 (October 09, 2015).
30. See *United States v. Stephenson*, 928 F.2d 728 (6th Cir. 1991); *United States v. Pratt*, 52 F.3d 671 (7th Cir. 1995); *United States v. Burkhalter*, 588 F.2d 604 (8th Cir. 1978); *United States v. Miller*, 514 F.2d 41 (9th Cir. 1975); cf. U.S.S.G. § 6A1.3, comment.
  31. See also *United States v. O'Meara*, 33 F.3d 20 (8th Cir. 1994); *United States v. Reynolds*, 49 F.3d 423 (8th Cir. 1995); *United States v. Walker*, 117 F.3d 417 (9th Cir. 1997); *United States v. Frazier*, 26 F.3d 110 (11th Cir. 1994).
  32. See *United States v. Martin*, 382 F.3d 840, 844 n.4 (8th Cir. 2004); *United States v. Barraza*, 318 F. Supp. 2d 1031 (S.D. Cal. 2004); see also *United States v. Taveras*, 380 F.3d 532 (1st Cir. 2004).
  33. *People v. Bohrer*, 37 Misc 3rd 370 (July 13, 2012).
  34. Overview Of Probation And Probation Revocation Law Revised And Updated By Kathryn Seligman, Kimberly Fitzgerald, And Gabriel Tames October 2003 First District Appellate Project, <http://www.fdap.org/downloads/seminar-criminal/probation-revocation.pdf>; Understanding Evidentiary Issues At A Probation Surrender Hearing, <https://www.avvo.com/legal-guides/ugc/understanding-evidentiary-issues-at-a-probation-surrender-hearing>.
  35. Federal Register Vol. 78 No. 89 2013 tests

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**This project was supported by a contribution from  
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