

DOCKET NO. MV08-0618915 : SUPERIOR COURT  
STATE OF CONNECTICUT : JUDICIAL DISTRICT OF FAIRFIELD  
VS. : AT G.A. 2  
\_\_\_\_\_ : OCTOBER 10, 2008

**MEMORANDUM OF LAW IN SUPPORT OF**  
**MOTION TO SUPPRESS CHEMICAL BREATH TESTS**  
**ON THE BASIS THAT THE INTOXILIZER 5000 IS BIASED**  
**AGAINST AFRICAN AMERICANS**

Article I, Section 20 of the Connecticut Constitution states unequivocally:

“No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability. “

Thus, any discrimination based on race violates the constitutional provision, and must be disfavored by the judiciary.

It is important to note that the prohibition of discrimination bans both private and public action. While the contours of the effect on private action have not fully been delineated, the restriction on State action is clearly settled. If the Department of Public Safety – as a state agency - employs a scientific method that discriminates based race, or both, such action is clearly banned by the State constitution. The testimony in this case clearly demonstrates that the Intoxilyzer 5000 EN does fall within this constitutional proscription.

To be sure, instances of state action that discriminate based on race are few and far between. The judiciary has encountered this issue most often in the context of jury selection in criminal trials. In such a forum, the State, represented by the State's

Attorney, is precluded from using a peremptory challenge on gender and racial grounds. Such action violates not only the Federal Constitution, Batson v Kentucky, 476 U.S. 79, 106 S. Ct 1712, 90 L Ed 2cd 69(1986) J.E.B. v Alabama, ex rel T.B., 511 U.S. 127, 114 S. Ct 1419, 128 L Ed 2d 89 (1994) but the State Constitution as well.

This constitutional prohibition is grounded on the guarantee of equal protection of the laws for the venire man. It also implicates the specter of State discriminatory action which is clearly prohibited since” the perceived fairness of the judicial system as a whole” . State v. Gonzalez 206 Conn. 391, 394 (1988) is of paramount importance. Where the State employs such discriminatory tactics, not only is the venire man the victim of discrimination, but also the judicial system as a whole is compromised. In order to forestall any State discriminatory action, a discriminatory claim can be raised not only by the venire man directly afflicted, but also by a party to the action even if that party does not fit the profile that invokes the discrimination. Powers v Ohio 499 U.S. 400, 111 S. Ct 1364, 113 L. Ed 2d 411 (1991)(White jurors can claim Batson error even though black jurors were the ones improperly excluded.

Dr. Hlastala has testified in Connecticut that the Intoxilyzer 5000 is biased against African Americans in that the lung capacity of the African American male is approximately 3% smaller than the Caucasian. This testimony is attached hereto as Exhibit A. Because of the physiologically smaller capacity an African American arrestee must expel a greater fraction of his lung capacity, the Intoxilyzer 5000 results are inflated by a factor of 3%.

Moreover, the issue of racial bias rises to the fore in the use of the Intoxilyzer 5000. Dr. Hlastala opined that the distorting effect based on race was 3%. (T2B, p37)

While at first sight this might appear to be *de minimis*, State should not countenance racial discrimination in any degree whatsoever.

The Defendant

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