

---

# The New OVI Law and Other Traffic Changes

---

Reference Manual  
Volume No. 17-W023



OHIO STATE BAR  
ASSOCIATION  
Connect. Advance. Succeed.

*Ohio State Bar Association Continuing Legal Education  
is a division of the Ohio State Bar Association.*

Ohio State Bar Association CLE is a division of the Ohio State Bar Association. CLE speakers are volunteers serving the legal profession in its highest and best tradition and as recommended by the Ohio Rules of Professional Conduct.

CLE supports gender neutral language. Unless used to illustrate a specific case, all references to gender should be understood to refer, without bias, to male and female.

Books and seminar materials are published as part of the Ohio State Bar Association's educational services. Authors are given the opportunity to express their individual interpretations and opinions. These do not reflect in any way a position of CLE, the Ohio State Bar Association or its governing board. Chapters written by employees of state or federal agencies are not necessarily statements of governmental policies.

© 2017 by Ohio State Bar Association CLE. All Rights Reserved.

---

*Ohio State Bar Association CLE publications, oral presentations, video, audio and electronic media programs are provided with the understanding that the Ohio State Bar Association and OSBA CLE do not render any legal, accounting, or other professional advice or service. Attorneys using OSBA CLE publications or orally, visually or electronically conveyed information in dealing with a specific client's or their own legal matters should also research original sources of authority.*

---

The CLE office is located at 1700 Lake Shore Drive, Columbus, Ohio 43204

Mail may be addressed to:  
P.O. Box 16562  
Columbus, Ohio 43216-6562

CLE telephone numbers are:  
614-487-8585  
800-232-7124

**OHIO STATE BAR ASSOCIATION  
CONTINUING LEGAL EDUCATION**

**The Ohio State Bar Association  
Mission Statement**

**Our Core Purpose**

To advance the professional interests of  
members of the Ohio State Bar  
Association.

**Our Core Values**

Member satisfaction, professionalism,  
foresight, and quality services and  
products.

**Our Goal**

To make membership in the Ohio State  
Bar Association indispensable to Ohio  
Lawyers.

**THE CLE STAFF**

**Fran Wellington**  
*Director*  
[fwellington@ohiobar.org](mailto:fwellington@ohiobar.org)

**Todd Burch**  
*CLE Program Manager*  
[tburch@ohiobar.org](mailto:tburch@ohiobar.org)

**Kerschie Byerly**  
*Senior CLE Publications Editor*  
[kbyerly@ohiobar.org](mailto:kbyerly@ohiobar.org)

**Deanna Freeman**  
*CLE Program Administrator*  
[dfreeman@ohiobar.org](mailto:dfreeman@ohiobar.org)

**Jennifer Harrell**  
*Senior CLE Program Manager*  
[jharrell@ohiobar.org](mailto:jharrell@ohiobar.org)

**Chris Loehrer**  
*Studio Operations Manager*  
[cloehrer@ohiobar.org](mailto:cloehrer@ohiobar.org)

**Lynda Morris**  
*CLE Program Coordinator*  
[lmorris@ohiobar.org](mailto:lmorris@ohiobar.org)

**Melissa Quick**  
*Manager of CLE Certification and Specialization*  
[mquick@ohiobar.org](mailto:mquick@ohiobar.org)

---

# The New OVI Law and Other Traffic Changes

Vol. # 17-W023

1.0 CLE Credit Hour

---

Wednesday, March 15, 2017 at 1:00pm

Featuring:

Cleve M. Johnson; Law Office of Cleve M. Johnson; Columbus

*This presentation is a live webcast. If you have a question for the speaker during the presentation, please feel free to submit your inquiry to [webquestions@ohioabar.org](mailto:webquestions@ohioabar.org) with "New OVI Law" in the subject line or call 1-800-232-7124, and let the operator know that you have a question for the seminar speaker.*

*The Supreme Court Commission on CLE has requested that we advise you that this webcast seminar is considered self-study. Under current regulations you are allowed to earn up to 6 of your 24 required CLE credits through self-study. In order to receive CLE credit for this webcast, you must view the entire program. No partial credit can be given.*

*As you watch today's webcast at your computer, you should be looking for four unique Attendance Verification code letters. Each part of the code consists of a single letter that will appear on your screen periodically during the program. These four letters form a four-part code that documents your participation in this CLE program.*

*When the course ends, go back to your self-study CLE account, from where you launched the webcast. Click on the tab marked "Certificate" and enter the four code letters in the order you received them. If the code is correct, the participation code requirement will display "complete." You will also need to complete the course evaluation. Once these two requirements are met, you will be able to access a Certificate of Completion documenting your attendance and CLE credit hours.*

*CLE regulations require that we submit requests for credit within 30 days of the date of the seminar or be assessed a late fee. If you do not enter the attendance verification codes or complete the evaluation, then we will not be able to report your credit.*

## Speaker Biographies

---

### **Cleve M. Johnson**

Law Office of Cleve M. Johnson  
Columbus, Ohio

Mr. Johnson received his BA from The Ohio State University and his JD from Capital University Law School. His professional memberships include the National College for DUI Defense, Ohio Association of Criminal Defense Lawyers, Ohio State Bar Association (Chair, Traffic Law Committee), Columbus Bar Association, Central Ohio Association of Criminal Defense Lawyers, Governor's Task Force on Impaired Driving, and Ohio Criminal Sentencing Commission (Traffic Subcommittee). Mr. Johnson has been a criminal defense attorney since 1979 and is a frequent contributor to legal education seminars on topics relating to OVI and traffic law. He frequently testifies before committees of Ohio legislature and is certified to operate, calibrate, and perform diagnostic verification on a DataMaster breath-testing machine. For additional information, please visit [www.clevejohnson.com](http://www.clevejohnson.com).

# The New OVI Law and Other Traffic Law Changes HB 388, Interlock, and SCRAM

---

**Cleve M. Johnson**  
Law Office of Cleve M. Johnson  
Columbus, Ohio

## Table of Contents

Retroactivity.....	1
Eliminated Suspension as a condition of probation.....	1
§ 4510.022 New Interlock Section.....	1
Interlock Violation Penalties.....	3
Cameras .....	3
§ 4511.19 OVI Offenses .....	5
§ 4511.191 ALS .....	6
§ 4511.193 .....	8
§ 4511.195 .....	8
Appendix.....	9
LifeSafer Interlock of Ohio.....	11
The Special Case of CDL School Bus Drivers .....	13
Some Arguments That May Be Helpful If the Law on Interlock Hearings Is Similar to Probation Violations .....	14
Miscellaneous Technical Sources and Notes.....	17



- Effective 4/9/17
- **Retroactivity**--Normally **ORC §1.58 applies** with regard to this issue. ORC §1.58 (B) reads as follows:
  - “If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.”
  - So is **unlimited** driving but with an **interlock a reduction** in penalty? The **10 year** look back certainly **isn't**.
  - **Strict construction** in favor of the accused is required and any ambiguity should be resolved in favor of the licensee under Ohio Rev. Code §2901.04(A)
- Changed **10 year** for OVI look back and related statutes (**BUI**)
- Felony Look back §2929.142
- Definition interlock 4511.83 4510.01
- Added new requirement that **muni code be substantially similar** to allow interlock as a condition of probation §2951.02 (C)(1)
- **Eliminated suspension as a condition of probation** (important re CDL off record suspension) and substituted interlock as a condition of probation. §2951.02 (C)(1)
- Get a **new restricted license** that says interlock on it. §2951.02 (C)(2) & (3)
- **Ten year** time out for school **bus drivers** following OVI conviction (not physical or reckless §3327.10(F)(2) [*But see appendix. There is a regulatory time out for reckless and school bus drivers*])
- Provisions for salvage certificates for motorcycles and off road vehicles 4505.11
- **4510.022 New Interlock Section**
  - §4510.022(A)(9) **court** required to **give notice of consequences at time of interlock order**. Looks like new language but really just moved. What if they didn't give notice? Is this a defense (appeals statute says no).

**CLEVE M. JOHNSON**

ATTORNEY AT LAW  
 495 S. High Street, Suite 400  
 Columbus, OH 43215-5058  
 (614) 299-8235  
 FAX (614) 358-6633  
 cj@clevejohnson.com



- **Employer owned vehicle** exception still present. §4510.022(C)(2)(a) and 4510.43 (C)
- **“Unlimited driving privileges’ means** driving privileges that **are unrestricted as to purpose, time, and place**, but that are subject to any **other reasonable conditions** imposed by a court under division (C)(2) of this section.” §4510.022(A)(3)
  - **By definition** an order that **restricts purpose, time, or place is not an unrestricted order** and does not trigger the provisions applicable to unrestricted orders. §4510.022(C)(2)(a).
    - So if the **judge wants** to impose **jail** (see below), all that is necessary is to **put a restriction in the order**.
- §4510.022(C)(1) Court given **discretionary** power grant **unlimited driving** with an interlock.
  - **Not during any mandatory minimum** suspension periods though (ALS and court). *Id.*, §4510.13(A)(2), §4510.13(A)(5) and §4510.13(A)(6).
- Courts given **discretionary** power to **reduce suspension up to half** if **unlimited** privileges §4510.022(C)(2)(b).
- **If** the court grants **unlimited** privileges **no jail is allowed** (absent an interlock violation), **maximum or minimum**:
 

Under §4510.022(C)(2) “All of the following apply when a court grants unlimited driving privileges with a certified ignition interlock device to a first-time offender:”

....

“(c) The court *shall* suspend *any* jail term imposed for the OVI offense.” §4510.022(C)(2)(c)
- But if there is a **violation**, the **suspended jail** can be **imposed**.
 

4510.22(C)(2)(c) “... if the offender violates any term or condition of the order during the period of suspension, the court shall require the first-time offender to serve the jail term.”

  - All of it? The statute isn’t really clear.
- §4510.022(D)(1) [and §4510.13 (F)(1)] Get actual license with restriction (like glasses) not just a limiteds order and under §4510.13 (F)(3) **can’t drive until get restricted license (court order not good enough)**. It is a **M-1 violation of 4510.14, mandatory 3 days** if drive on court order without getting license.

**CLEVE M. JOHNSON**  
 ATTORNEY AT LAW  
 495 S. High Street, Suite 400  
 Columbus, OH 43215-5058  
 (614) 299-8235  
 FAX (614) 358-6633  
 cj@clevejohnson.com

- **SCRAM** if interlock violation. §4510.022(E)
  - **1<sup>st</sup> violation may require** SCRAM §4510.022(E)(1)
  - **2<sup>ed</sup> violation shall** require SCRAM for **40 days** §4510.022(E)(2)
  - **3<sup>rd</sup> violation shall** require SCRAM for **60 days** §4510.022(E)(3)
- **Interlock violation penalties.** [False positives mean more money for interlock provider]
  - §4510.13 (A)(8)(c) Court **may double** suspension the suspension **hard time** [but can't exceed the statutory maximum—see 4510.46(E)]
- Under §4510.13 (A)(8)(d) if violation occurs **within 60 days** of the **end** of the suspension, the court **shall**:
  - On a **first** violation, **extend** the suspension for **60 days** (from the violation date). §4510.13 (A)(8)(d)(i).
  - On each **additional** violation, **extend** the suspension for an additional **60 days** (from the violation date). §4510.13 (A)(8)(d)(ii). [Note, bad drafting, no need for (i) and (ii). Could just say 60 for each violation.]
- §4510.17(E)(3) Allows **unlimited interlock** driving for Ohioans who get **out of state OVI's** and seek to drive in Ohio.
  - Suspension **length** is still the **same** as before, **6 months** (Class D) or when the out of state one ends. See §4510.17(A) ¶2
  - They also have to get **interlock license** before driving and is M-1 DUS if don't. See §4510.17(E)(6)(b)
  - §4510.17(F) says the **violation penalty provisions** of §4510.13 (A)(8)(a)-(d) **apply** to this section [mandatory extension of suspension penalties apply to this section]. **Not clear** that can an **Ohio** court has jurisdiction to **extend** the length of **another state's suspension** though.
- **Cameras.** How do they know D was driving (it's not an ankle bracelet). Presumption in a PV???? Someone else could have been driving legally say with a .06. *Some have cameras.* Note, beginning **1/1/20 cameras** will be required §4510.43.(A)(2)(k).
- **Tampering** with or circumventing interlock is **M-1** (mostly old law). §4510.44

**CLEVE M. JOHNSON**  
 ATTORNEY AT LAW  
 495 S. High Street, Suite 400  
 Columbus, OH 43215-5058  
 (614) 299-8235  
 FAX (614) 358-6633  
 cj@clevejohnson.com

- Providing interlocks at a **reduced fee for indigents** is a condition of gaining approval. The amount of the fee is to be set by **director** of public safety. §4510.45(A)(2)
- §4510.46 **Violation procedure/Appeals**. Violation means starting disabled or tampering. They tell court. Court sends notice
  - § 4510.46 (A)(2) appears to say any **positive reading** the machine produces **is a violation**. It's defined in terms of what the machine does rather than what the defendant does. A **false positive is technically a violation**.
  - Offender can **appeal to court w/i 14 days** of D **receiving notice** (how do they know when that was) §4510.46(C)(6)
  - Is an appeal **hearing required?** §4510.46(D) says: "If the offender files a timely motion, the court *may hold* a **hearing** on the matter." On the other hand, the next paragraph of that same subsection **also says** "If the court **finds by a preponderance** of the evidence..." I am not quite sure **how** you determine the preponderance of the evidence **without a hearing**.
    - The hearing language isn't real clear. We can always argue strict construction in favor of the defendant. If they deny a hearing, there is, of course a **procedural due process issue** on holding hearings, which theoretically should work but in reality ends up being a weak argument with trial court judges.
    - 4510.46(D) provides in part that: "The **scope** of the hearing is **limited** to determining **whether** the offender in fact was **prevented from starting** a motor vehicle that is equipped with a certified ignition interlock device **because** the **offender committed** an ignition interlock device **violation**."
      - Is this a **Vega** provision? Are arguments about the whether the machine was working correctly prohibited?
      - In other words, you have the right to an appeal you just can't raise any issues that might help you. So the right to appeal is essentially **illusory**. I had a particularly egregious interlock case some years back where the reading went from **.094 to .000 within** a few **minutes**. This was not the only problem it was just the most extreme one. The Interlock was so bad that even one of our more difficult counties agreed to dismiss the probation violation (They were sure it was a good case until I demanded all the underlying records and started going through it pointing out all the problems). It would seem that this sort of thing couldn't be raised under the new statute. There are all kinds of mandatory consequences that are triggered by a violation that are appeal proof if you follow the strict wording of the statute.

**CLEVE M. JOHNSON**  
 ATTORNEY AT LAW  
 495 S. High Street, Suite 400  
 Columbus, OH 43215-5058  
 (614) 299-8235  
 FAX (614) 358-6633  
 cj@clevejohnson.com

It's **one thing** to **disable** a defendant's **car due to false positives**. That perhaps is the inconvenience one has to put up with for drinking and driving. It is **something else** entirely to throw a person in **jail** because of a false positive and prevent them from trying to show that the false positive was a false positive. Once again, they don't get the difference between **screening** devices and **evidential** ones. Their big solution is to follow up the Interlock with SCRAM. SCRAM, of course is just as bad, if not worse.

- §4510.46(C) **Notice requirements** upon violation. Court to send notice saying **all** of the **following**:
  - Have evidence of violation §4510.46(C)(1)
  - SCRAM required §4510.46(C)(2)
  - Court **may double** suspension §4510.46(C)(3)
  - **Whether** the **court** is **increasing** the suspension §4510.46(C)(4)
  - If w/I 60 days of end of suspension can **increase** suspension by **60 days**. §4510.46(C)(5)
  - **May appeal** w/I 14 days of receiving notice. §4510.46(C)(6)
  - BMV can't reinstate unless violation free for 60 days. §4510.46(C)(7)
- **Can't exceed statutory maximum** suspension time. §4510.46(E) **Except** can exceed if D not violation free for 60 days. §4510.46(E) last sentence.
- **§4511.19 OVI Offenses**
  - The third paragraph of R.C. 4511.19(G)(1)(a)(i) mirrors R.C. §4510.022 and reads as follows:  
If the court grants *unlimited* driving privileges to a first-time offender under section 4510.022 of the Revised Code, all penalties imposed upon the offender by the court under division (G)(1)(a)(i) of this section for the offense apply, except that the court shall suspend any mandatory or additional jail term imposed by the court under division (G)(1)(a)(i) of this section upon granting unlimited driving privileges in accordance with section 4510.022 of the Revised Code.
  - **First offense:**
    - **Look back** changed to **10 years**. [§4511.19(G)(1)(a) technically doesn't contain the look back language. It says except as otherwise provided and the other subsections have the look backs]

**CLEVE M. JOHNSON**

ATTORNEY AT LAW

495 S. High Street, Suite 400

Columbus, OH 43215-5058

(614) 299-8235

FAX (614) 358-6633

cj@clevejohnson.com

- **First offense** DLS changed from Class Five 6 months to 3 years to unclassified **1-3 years** §4511.19(G)(1)(a)(iv)
  - This can be reduced by up to half with an interlock under §4510.022(C)(2)(b)
- **Second offense:**
  - **Look back** changed to **10 years.** §4511.19(G)(1)(b)
  - **Second offense** DLS changed from Class Four 1-5 years to unclassified **1-7 years** §4511.19(G)(1)(b)(iv)
    - This can be reduced by up to half with an interlock under §4510.022(C)(2)(b)
- **Third offense:**
  - **Look back** changed to **10 years.** §4511.19(G)(1)(c)
  - **Third offense** DLS changed from Class Three 2-10 years to unclassified **2-12 years** §4511.19(G)(1)(c)(iv)
    - This can be reduced by up to half with an interlock under §4510.022(C)(2)(b)
- **Fourth offense:**
  - **Look back** changed to three or four priors w/i **10 years** or five or more within **20 years.** §4511.19(G)(1)(d)
  - **Fourth offense** DLS **unchanged** from Class two 3 years to life §4511.19(G)(1)(d)(iv)
    - Interlock reduction under §4510.022(C)(2)(b) not incorporated.
- **OMVUAC** §4511.19(H)
  - **Mandatory no jail** if get interlock.
  - **DLS** can be reduced by up to **half** with an interlock under §4510.022(C)(2)(b)

- **§4511.191 ALS**

- **Refusals**

- **First refusal unchanged.** Suspension length unchanged (1 year) §4511.191(B)(1)(a)

**CLEVE M. JOHNSON**  
 ATTORNEY AT LAW  
 495 S. High Street, Suite 400  
 Columbus, OH 43215-5058  
 (614) 299-8235  
 FAX (614) 358-6633  
 cj@clevejohnson.com

- **Second refusal/conviction** look back changed to **10 years**.  
Suspension length unchanged (2 years) §4511.191(B)(1)(b)
- **Third refusal/conviction** look back changed to **10 years**.  
Suspension length unchanged (3 years) §4511.191(B)(1)(c)
- **4+ refusals/convictions** look back changed to **10 years**.  
Suspension length unchanged (5 years) §4511.191(B)(1)(d)
- **Positive Tests**
  - **First positive test unchanged.** Suspension length unchanged (90 days) §4511.191(C)(1)(a)
  - **Second positive test/conviction** look back changed to **10 years**. Suspension length unchanged (1 year) §4511.191(C)(1)(b)
  - **Third positive test/conviction** look back changed to **10 years**. Suspension length unchanged (2 years) §4511.191(C)(1)(c)
  - **4+ positive test/conviction** look back changed to **10 years**. Suspension length unchanged (3 years) §4511.191(C)(1)(d)
- **No unlimited** privileges available **pre-trial** under the **ALS**.

§4510.022(A)(1) provides that: "A *first-time offender* may file a petition for unlimited driving privileges with a certified ignition interlock device during the period of suspension imposed for an OVI offense in the same manner and in the same venue as the person is permitted to apply for limited driving privileges." *Id.*, (emphasis added).

§4510.022(B) provides that a: "First-time offender" means a person whose driver's license or commercial driver's license or permit or nonresident operating privilege has been suspended *for being convicted of, or pleading guilty to, an OVI offense.*" *Id.*, (emphasis added).

So someone **under an ALS** is **not a first offender** because there has been **no plea or conviction**. Thus or **unlimited** privileges are **not allowed**.

- Here's a **possible work around**. I am thinking that a judge who would be willing to do unlimited driving in the first place would probably be cooperative before a plea as well. An exception to this would be a judge that wants to punish as much as possible those who won't pled and make it as attractive as possible for those who will.

What could be done would be to get a **stay** of the ALS, impose a **public safety** suspension and grant **unlimited** driving with an interlock on that. We already have a judge that will do this now under existing law.

**CLEVE M. JOHNSON**

ATTORNEY AT LAW  
495 S. High Street, Suite 400  
Columbus, OH 43215-5058  
(614) 299-8235  
FAX (614) 358-6633  
cj@clevejohnson.com

- **§4511.193**
  - **Immobilization/Forfeiture** look backs changed to **10 years**
- **§4511.195**
  - **License Plates** look backs changed to **10 years**
- Uncodified provision says public safety to study and report number of drunk driving accidents and deaths, and the recidivism rate for OVI offenses and report not later than 48 months.

**CLEVE M. JOHNSON**

ATTORNEY AT LAW

495 S. High Street, Suite 400

Columbus, OH 43215-5058

(614) 299-8235

FAX (614) 358-6633

[cj@clevejohnson.com](mailto:cj@clevejohnson.com)

## APPENDIX





# LifeSafer Interlock of Ohio

## Client Event Log Summary

Name:  
Address:

DOB:  
Drivers License:  
Odometer:  
Program Type:

Client Comments:

Technician Comments:

Log Begin Date: 2/28/2009 11:59:55 AM  
Log End Date: 3/28/2009 11:13:35 AM  
Date Downloaded: 3/28/2009  
Total Log Events: 999  
Device Serial #: FC044021  
Relay Serial #: FR056540

### BrAC tests above warn, below fail

3/25/2009 2:30:57 PM Wednesday  
3/26/2009 12:00:01 AM Thursday  
3/26/2009 5:45:01 AM Thursday  
3/26/2009 5:45:01 AM Thursday  
3/26/2009 5:45:18 AM Thursday  
3/26/2009 5:53:07 AM Thursday  
3/26/2009 5:53:35 AM Thursday

Engine Off  
Date Change  
BrAC reading: 0.022  
\*\* WARN BrAC  
Engine On  
Retest Requested  
BrAC reading: 0.002

### BrAC tests at the fail level or higher

3/11/2009 5:38:01 PM Wednesday  
3/12/2009 Thursday  
3/12/2009 5:09:09 AM Thursday  
3/12/2009 5:09:16 AM Thursday  
3/12/2009 5:09:16 AM Thursday  
3/12/2009 5:10:54 AM Thursday  
3/12/2009 5:15:17 AM Thursday

Engine Off  
Date Change  
BrAC reading: 0.094  
\*\* FAILED BrAC  
VIOLATION, High BrAC  
Blow Timeout  
BrAC reading: 0.000

*Client can't explain  
High BrAC  
JH*

### High BrAC violations

3/12/2009 Thursday  
3/12/2009 5:09:09 AM Thursday  
3/12/2009 5:09:16 AM Thursday  
3/12/2009 5:09:16 AM Thursday  
3/12/2009 5:10:54 AM Thursday  
3/12/2009 5:15:17 AM Thursday  
3/12/2009 5:15:29 AM Thursday

Date Change  
BrAC reading: 0.094  
FAILED BrAC  
\*\* VIOLATION, High BrAC  
Blow Timeout  
BrAC reading: 0.000  
Engine On

### Start violations

None

### Retest violations

None

### Lockout violations

None

### Power disconnects

None

### Disconnect violations

None

### Too many fails violations

Event log summary for: Stephen Moats

Page: 1



## THE SPECIAL CASE OF CDL SCHOOL BUS DRIVERS

Under 3327.10.(F)(2)

“The owner of a school bus or motor van shall **not permit** a person to **operate** the **school bus** or motor van for **six years after** the date on which the person pleads guilty to or is **convicted** of a violation of section 4511.19 of the Revised Code or a substantially equivalent municipal ordinance.”

**It gets harsher.** §3327.10.(F)(3) also requires that school bus owners comply with the rules of the state board of education:

**OAC 3301-83-06(F)(2) eff. 7/1/12** [which is **incorporated** by §3327.10.(F)(3)]:

(2) Completion of semi-annual driver record checks through the Ohio department of education for which records shall be maintained by the employer and/or school district for a minimum of six years. Drivers with any of the following shall be disqualified from operating a vehicle:

(a) **More than six points** during the past two years;(b) A conviction of driving while under the influence of alcohol and/or a controlled substance during the past six years;

(c) **Two (or more) serious traffic violations**, as defined in divisions (D)(D)(1) to (D)(D)(7) of section 4506.01 of the Revised Code, during the past two years; or

(d) Any **railroad crossing violation** during the past year as evidenced by a conviction, video, or a report by a railroad official.

~~(e) For qualified drivers actively employed prior to August 1, 2007, convictions for offenses described in paragraph (F)(2)(b) of this rule prior to August 1, 2005, shall not be considered, and convictions for offenses described in paragraph (F)(2)(c) or (F)(2)(d) of this rule prior to August 1, 2007, shall not be considered.~~

~~(f) (e) Nothing in paragraph (B) of this rule shall limit any district or employer from adopting more stringent qualification~~

Under OAC §3301-83-23 [Effective 7/1/2012] certain offenses require termination including:

OAC §3301-83-23 (A)(6)(g) “**Major motor vehicle offenses**,” which means a violation of sections **4511.19** (operating a motor vehicle under the influence), **4511.20 (RECKLESS operation)**, **4510.11 (driving under suspension)**, **4510.14 (driving under OVI suspension)**, or **4511.194 (physical control while under the influence)** of the Revised Code; that occurred either within **six years** prior to the date of the current application for a position as student transportation driver, or for a current employee, within six years prior to the date of the current records check.

OAC §3301-83-23 (B) No **provider of school transportation services shall employ** an applicant upon learning that he/she has pled guilty to, been found guilty by a jury or court of, or convicted of any violation of a non-rehabilitative offense as listed in paragraph (A)(6) of this rule. In addition, the district **shall**

**release** an employee from employment upon learning that he/she has **pled guilty to, been found guilty** by a jury or court of, or convicted of any violation of a non-rehabilitative offense as listed in paragraph (A)(6) of this rule.

---

### **SOME ARGUMENTS THAT MAY BE HELPFUL IF THE LAW ON INTERLOCK HEARINGS ARE SIMILAR TO PROBATION VIOLATIONS**

While the rules of evidence do not apply in probation hearings, that does not mean that evidence is unnecessary or that other constitutional protections do not apply. The Franklin County Court of Appeals has held that it is error for courts to just assume that alleged scientific evidence is correct even in a revocation hearing. The defendant still has constitutional rights such as the right to due process and to confront witnesses. In *City of Columbus v. Lacy*, 46 Ohio App.3d 161, 546 N.E.2d 445, (10<sup>th</sup> District, 1988), the court reversed the trial court for basing its decision on a urinalysis result which was relied upon without any foundation and without affording the defendant's right to confrontation "...the record is totally devoid of evidence which would permit a finding of good cause sufficient to overcome defendant's conditional right to confront and cross-examine adverse witnesses regarding the urinalysis reports." *Id.*, 46 Ohio App.3d 161, 165; 546 N.E.2d 445, 449.

The constitutional protections cited in *Lacy* are not just state based. *Lacy* also cited the United States Supreme Court's decisions in *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 and *Morrissey v. Brewer* [1972], 408 U.S. 471, 489, 92 S.Ct. 2593, 2604, 33 L.Ed.2d 484 which demonstrate a federal constitutional basis as well. If anything, the confrontation rights are even stronger now than they were at the time of *Lacey* in light of the United States Supreme Court's recent line of cases increasing the defendant's confrontation rights. See, for example, *Crawford vs. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314, (U.S.Mass. Jun 25,

2009); and *Bullcoming v. New Mexico*, --- U.S. ----, 131 S.Ct. 2705, 180 L.Ed.2d 610, (U.S.N.M. Jun 23, 2011).

If the government is contending that science establishes a violation, then the scientist making the claim must be made available for cross. If the nature of the accusation is scientific, then a scientist must be confronted. If the witness to be confronted lacks scientific credentials then the accusation cannot be based upon science. Otherwise, while there might be confrontation there would not be confrontation of the scientist accuser.

The Ohio Supreme Court has also rejected reliance upon devices that have not been proven scientifically acceptable in probation matters. See *In re D.S.*, 111 Ohio St.3d 361, 856 N.E.2d 921 (Ohio,2006) where the court reversed a lower court order that made passing a polygraph a condition of a juvenile offender's probation. Now it might be argued at this point that the polygraph is different because the polygraph has never been proven reliable. Note, however, that the same can be said of the SCRAM. The polygraph didn't start out as being presumed reliable with the burden placed upon the defense to prove it unreliable. It is the accuser's burden to prove scientific reliability. That is the way it should work for the SCRAM as well.

The court in *In re D.S.* also did not just say common sense tells us that galvanic skin response (the theory behind the polygraph) is a real scientific phenomenon. It's not like psychics or Tarot cards. Therefore we're going to rely on it without proof that it reliably implements the legitimate scientific principles involved.

---



## MISCELLANEOUS TECHNICAL SOURCES AND NOTES

### Items that may cause false positives:

Mouthwash according to interlock provider:

<http://www.ignitioninterlockhelp.com/blog/happens-false-positive-test-result-ignition-interlock-device/>

Chewing Tobacco

Acetone A.W. Jones (diabetics)

[https://www.astm.org/DIGITAL\\_LIBRARY/JOURNALS/FORENSIC/PAGES/JFS13851J.htm](https://www.astm.org/DIGITAL_LIBRARY/JOURNALS/FORENSIC/PAGES/JFS13851J.htm)

Energy Drinks

Menthol cigarettes

Sweets (sugar and yeast)

Spicy Foods (methane from stomach) according to an interlock provider:

<http://www.ignitioninterlockhelp.com/blog/happens-false-positive-test-result-ignition-interlock-device/>

Yeasty foods. Cinnamon rolls, doughnuts, pizza dough

[https://en.wikipedia.org/wiki/Ignition\\_interlock\\_device](https://en.wikipedia.org/wiki/Ignition_interlock_device)

<http://www.leyba-defense.com/possible-false-positives-when-using-an-ignition-interlock-device/>

Journal Article energy drinks and false positives: [https://oup.silverchair-cdn.com/oup/backfile/Content\\_public/Journal/jat/33/3/10.1093/jat/33.3.167/2/33-3-](https://oup.silverchair-cdn.com/oup/backfile/Content_public/Journal/jat/33/3/10.1093/jat/33.3.167/2/33-3-167.pdf?Expires=1488505512&Signature=F~wUouzrfsWrKuEdCaOKZs4bNSQ86Qm3oIcqBbhQIUB7FiDr2Kt8RRnVoEHZiHzQmgcwlAhyiCWpaBwacJXjOFDI-QMoGaP23y691bWdSz6iUiNylTwLObHvZwWPSYN1ro-LevPseZ~VGjYLAIOEM5XkNtecXGdkjE9hVOOORkXO4W6hE2icqsJj-G2XkMgYjaPXrmVKMwwkytFPzBpcgnsMulzmTdWarQ-qaKjUlSw78ZNT3sSpCWK-OEO8k9ERmtTQJM5YK3kk41-hmUPEAUpngQPVCwhSRMM7XqLnka10HGyYJE5~-gAHYAV13BiolPDT2LYE6zt3rlRCgctPg_&Key-Pair-Id=APKAIUCZBIA4LVPAVW3Q)

[167.pdf?Expires=1488505512&Signature=F~wUouzrfsWrKuEdCaOKZs4bNSQ86Qm3oIcqBbhQIUB7FiDr2Kt8RRnVoEHZiHzQmgcwlAhyiCWpaBwacJXjOFDI-QMoGaP23y691bWdSz6iUiNylTwLObHvZwWPSYN1ro-LevPseZ~VGjYLAIOEM5XkNtecXGdkjE9hVOOORkXO4W6hE2icqsJj-G2XkMgYjaPXrmVKMwwkytFPzBpcgnsMulzmTdWarQ-qaKjUlSw78ZNT3sSpCWK-OEO8k9ERmtTQJM5YK3kk41-hmUPEAUpngQPVCwhSRMM7XqLnka10HGyYJE5~-gAHYAV13BiolPDT2LYE6zt3rlRCgctPg\\_&Key-Pair-Id=APKAIUCZBIA4LVPAVW3Q](https://oup.silverchair-cdn.com/oup/backfile/Content_public/Journal/jat/33/3/10.1093/jat/33.3.167/2/33-3-167.pdf?Expires=1488505512&Signature=F~wUouzrfsWrKuEdCaOKZs4bNSQ86Qm3oIcqBbhQIUB7FiDr2Kt8RRnVoEHZiHzQmgcwlAhyiCWpaBwacJXjOFDI-QMoGaP23y691bWdSz6iUiNylTwLObHvZwWPSYN1ro-LevPseZ~VGjYLAIOEM5XkNtecXGdkjE9hVOOORkXO4W6hE2icqsJj-G2XkMgYjaPXrmVKMwwkytFPzBpcgnsMulzmTdWarQ-qaKjUlSw78ZNT3sSpCWK-OEO8k9ERmtTQJM5YK3kk41-hmUPEAUpngQPVCwhSRMM7XqLnka10HGyYJE5~-gAHYAV13BiolPDT2LYE6zt3rlRCgctPg_&Key-Pair-Id=APKAIUCZBIA4LVPAVW3Q)