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Under the Influence of Alcohol Three Hours After Driving: The Constitutionality of the (a)(5) Amendment to Pennsylvania's DUI Statute*

I. Introduction

A motorist with a legal blood-alcohol content who shows no signs of intoxication may be convicted for driving under the influence of alcohol pursuant to a new Pennsylvania law.¹ In addition, proof that the motorist was not under the influence while driving is irrelevant because the new provision does not concern behavior while driving.² Two Pennsylvania trial courts recently have split on the first-impression issue of whether the new law is constitutional.³

Pennsylvania's Driving-Under-the-Influence (DUI) Statute was amended in December 1992 to add subsection (a)(5).⁴ The pre-

* The author notes that the use of parallel citations to Pennsylvania reporters is intended to facilitate further research of this topic.

1. 75 PA. CONS. STAT. ANN. § 3731 (Supp. 1995).

2. See *infra* notes 250-54 and accompanying text.

3. *Commonwealth v. Gumbert*, 44 Cumb. L.J. 186 (1994) (upholding the law as constitutional). *Contra* *Commonwealth v. Barud*, 143 Pitt. Legal J. 7 (1994) (declaring the law unconstitutional). The Pennsylvania Superior Court has since upheld the law in *Commonwealth v. Brehm*, 444 Pa. Super. Ct. 138, 663 A.2d 712 (1995), by affirming the decision of the common pleas court that the law is constitutional. *Id.*; see also *Commonwealth v. Rishel*, 441 Pa. Super. Ct. 584, 658 A.2d 352 (1995) (addressing the constitutionality of § 3731(a)(5) in part). The Pennsylvania Supreme Court will nevertheless address the same issue in the appeal of *Commonwealth v. Barud*, because statutory law provides for a direct appeal to the supreme court in any case when a law of the Commonwealth is ruled unconstitutional. 42 PA. CONS. STAT. ANN. § 722(7) (1975).

4. 75 PA. CONS. STAT. ANN. § 3731(a)(5). The section provides:

(a) A person shall not drive, operate or be in actual physical control of the movement of any vehicle:

(5) if the amount of alcohol by weight in the blood of a person is 0.10% or greater at the time of a chemical test of a sample of the person's breath, blood or urine, which sample is:

existing law of subsection (a)(4) prohibits a person from having a blood-alcohol content (BAC) by weight of 0.10% or greater *while driving*.⁵ The law became criticized as insufficient when developing case law suggested that BAC tests of blood samples drawn a significant time *after* driving were inconclusive in determining the person's BAC *while* driving.⁶ Subsection (a)(5) widens the scope of subsection (a)(4) by prohibiting a person from having a BAC of 0.10% by weight within three hours, or a reasonable additional time, *after driving*.⁷ Although the Pennsylvania legislature enacted subsection (a)(5) to settle the controversy of delayed blood-alcohol tests, the recent conflicting decisions on its constitutionality have sparked a new DUI testing controversy.⁸

On September 9, 1994, the Cumberland County Court of Common Pleas upheld the constitutionality of subsection (a)(5) in *Commonwealth v. Gumbert*.⁹ Only ten days later, the Allegheny County Court of Common Pleas struck down the provision as unconstitutional in *Commonwealth v. Barud*.¹⁰ In light of this divergence of authority, this Comment examines subsection (a)(5) and its constitutionality.

Part II of this Comment traces the apparent problems under Pennsylvania's pre-existing DUI law and suggests the problems did not warrant legislative action. Part III covers the enactment of subsection (a)(5) and examines its language. Part IV of this Comment analyzes the challenges to the constitutionality of

- (i) obtained within three hours after the person drove, operated or was in actual physical control of the vehicle; or
- (ii) if the circumstances of the incident prevent collecting the sample within three hours, obtained within a reasonable additional time after the person drove, operated or was in actual physical control of the vehicle.

Id.

5. 75 PA. CONS. STAT. ANN. § 3731(a)(4) (1982). Section 3731(a)(4) of the Pennsylvania Motor Vehicle Code provides:

- (a) A person shall not drive, operate or be in actual physical control of the movement of any vehicle:

* * *

- (4) while the amount of alcohol by weight in the blood of a person is 0.10% or greater.

Id.

6. See *Commonwealth v. Jarman*, 529 Pa. 92, 601 A.2d 1229 (1992); *Commonwealth v. Modaffare*, 529 Pa. 101, 601 A.2d 1233 (1992); *infra* part II.B.3.

7. 75 PA. CONS. STAT. ANN. § 3731(a)(5).

8. See *infra* part IV.

9. 44 Cumb. L.J. 186 (1994).

10. 143 Pitt. Legal J. 7 (1994).

subsection (a)(5). Part V discusses the pending appeal of *Commonwealth v. Barud* to the Pennsylvania Supreme Court¹¹ and evaluates how the supreme court will treat the issue. Although the challenges to section 3731(a)(5) have merit, this Comment concludes that the Pennsylvania Supreme Court will uphold the constitutionality of Pennsylvania Motor Vehicle Code section 3731(a)(5).

II. Development of Pennsylvania's Drunk Driving Law

A. Historical Background

Drunk driving laws reflect a state's duty to protect the public health, safety, and welfare through its police powers.¹² The state has broad powers to regulate the use of alcoholic beverages as related to safe and efficient functioning of the nation's highways.¹³ The duty, however, becomes increasingly difficult as the nation's drunk driving problem continues to rise to epidemic proportions.¹⁴ The Pennsylvania Supreme Court has even commented that the high number of alcohol-related accidents creates a societal problem "of frightening and epidemic dimensions."¹⁵

11. 143 Pitt. Legal J. 7 (1994), *appeal docketed*, No. 64 W.D. (Pa. Oct. 31, 1994).

12. *Commonwealth v. Mikulan*, 504 Pa. 244, 247-48, 470 A.2d 1339, 1340 (1983) (citing *Gambone v. Commonwealth*, 375 Pa. 547, 550-551, 101 A.2d 634 (1954)).

13. *Id.*

14. The *Mikulan* court quoted the United States Supreme Court's description of the epidemic in *South Dakota v. Neville*, 459 U.S. 553, 558-59 (1983):

The situation underlying this case — that of the drunk driver — occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court, although not having the daily contact with the problem that the state courts have, has repeatedly lamented the tragedy. See *Breithaupt v. Abram*, 352 US 432, 439, 1 L Ed 2d 448, 77 S Ct 408 [412] (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield"); *Tate v. Short*, 401 US 395, 401, 28 L Ed 2d 130, 91 S Ct 668 (1971) (Blackmun, J., concurring) (deploring "traffic irresponsibility and the frightful carnage it spews upon our highways"); *Perez v. Campbell*, 402 US 637, 657 and 672, 29 L Ed 2d 233, 91 S Ct 1704 [1715 and 1722] (1971) (Blackmun, J., concurring) ("The slaughter on the highways of this Nation exceeds the death toll of all our wars"); *Mackey v. Montrym*, 443 U.S. 1, 17-19, 61 L.Ed.2d. 321, 99 S Ct 2612 [2620-2621] (1979) (recognizing the "compelling interest in highway safety").

504 Pa. at 248-49, 470 A.2d at 1341.

15. *Mikulan*, 504 Pa. at 249, 470 A.2d at 1341. The supreme court noted the "grim" alcohol-related traffic accident statistics for 1982: "800 people killed in 684 traffic accidents; 19,499 people seriously injured in 12,508 accidents . . ." *Id.*

The Commonwealth began to enforce a drunk driving law as early as 1909.¹⁶ Although the early law simply prohibited operation of a motor vehicle while intoxicated,¹⁷ the statute was expanded in 1919 to preclude driving "while under the influence of intoxicating liquor or any narcotic or habit producing drug . . ."¹⁸ The drunk driving law remained virtually unchanged¹⁹ until 1976,²⁰ when the legislature redrafted the law to prohibit driving under the influence of alcohol to the extent that the driver is "incapable of safe driving."²¹

To convict a defendant under the 1976 law, the Commonwealth used BAC test results²² along with statutory presumptions that certain BAC levels implied intoxication.²³ Guilt beyond a reasonable doubt, however, remained difficult to prove without corroborating physical evidence.²⁴ Corroboration was vital because the BAC presumptions of intoxication alone, at times, had little effect on factfinders.²⁵ Even with the use of expert testimo-

16. Act of Apr. 27, 1909, ch. 9, 1909 Pa. Laws 265.

17. *Id.*

18. Act of June 30, 1919, ch. 23, 1919 Pa. Laws 678. Although the inclusion of controlled substance use was an important addition to the statute that is presently codified at 75 Pa. Cons. Stat. Ann. § 3731(a)(2), this Comment does not consider issues of controlled substance use under the Motor Vehicle Code.

19. The 1959 version of the law, however, added interesting categories of vehicles that fell under the scope of the statute: "It shall be unlawful for any person to operate a motor vehicle, tractor, streetcar or trackless trolley omnibus, while under the influence . . ." Act of Apr. 29, 1959, ch. 1037, 1959 Pa. Laws 58.

20. Act of June 17, 1976, Pa. Laws 162, § 1, *as amended*, Dec. 15, 1982, Pa. Laws 1268, § 9, effective in 30 days (codified as amended at 75 PA. CONS. STAT. ANN. § 3731 (1982)).

21. 75 PA. CONS. STAT. ANN. § 3731(a)(1) (1982). The paragraph specifically provided:

(a) A person shall not drive, operate or be in actual physical control of the movement of any motor vehicle while:

(1) under the influence of alcohol to a degree which renders the person incapable of safe driving.

Id.

22. *Id.* § 1547(c). The section permits results of chemical tests of breath, blood or urine to be admissible in evidence in § 3731 prosecutions.

23. *Id.* § 1547(d). A BAC test result of 0.05% or less creates a presumption that the person tested was not under the influence of alcohol. A result between 0.05% and 0.10% creates no presumption, and a result of 0.10% or greater creates a presumption that the person tested was under the influence of alcohol. *Id.*

24. Examples of corroborating physical evidence sufficient to determine intoxication are erratic driving, slurred speech, staggering gait, bloodshot eyes, and failure of field sobriety tests. *See, e.g., Commonwealth v. Hamme*, 400 Pa. Super. Ct. 537, 583 A.2d 1245 (1990); *Commonwealth v. McClellan*, 42 Cumb. L.J. 312, 318 (1993).

25. The Pennsylvania Superior Court in *Ackerman v. Delcomico*, 336 Pa. Super. Ct. 569, 577, 486 A.2d 410, 414 (1984), concluded: "Although the admission of the blood alcohol content has been condoned by this court . . . , we remain skeptical as to the value of this

ny explaining the effects of certain BAC levels on the body to a jury, the defense could rebut the BAC presumptions with expert testimony demonstrating that the person was capable of safe driving despite his or her BAC level.²⁶

The difficulty of proving guilt under the 1976 law, coupled with rising alcohol-related fatalities on Pennsylvania roadways,²⁷ demanded legislative action. The legislature responded by enacting Pennsylvania Motor Vehicle Code section 3731(a)(4).

B. The "Illegal Per Se" Law of Section 3731(a)(4)

In 1982, the General Assembly of Pennsylvania attempted to solve the drunk driving enforcement problem by adding²⁸ an "illegal per se"²⁹ law to the statute, thereby making it illegal to drive while having a BAC of 0.10%³⁰ or greater.³¹ Proof of the requisite BAC level alone is a violation of the statute, and the need for corroborating evidence or expert testimony seemingly was eliminated by the amendment. The per se law, however, was challenged in *Commonwealth v. Mikulan*.³²

evidence to the jury. Without explanation, the blood alcohol content has little meaning to factfinders" Furthermore, the Pennsylvania Supreme Court in *Commonwealth v. DiFrancesco*, 458 Pa. 188, 193 n.3, 329 A.2d 204, 207 n.3 (1975), noted that "[w]hat the statute refers to as a 'presumption' is, strictly speaking only a standardized permissible inference."

26. Edwin W. Tompkins III, *The New Pennsylvania Drunk Driving Law: Last Call for the One-for-the-Road Era*, 87 DICK. L. REV. 805 (1983).

27. Alcohol-related fatal accidents in Pennsylvania increased one hundred and fifty-four percent in the ten years leading up the 1982 drunk driving law amendment. *Id.* at 805.

28. The new law did not repeal the prior standard, *see supra* note 21, but rather created an additional, alternative standard for conviction under the statute.

29. An "illegal per se" law creates a crime that can be proven solely through objective scientific criteria. *See People v. Cancel*, 520 N.Y.S.2d 509, 512 (N.Y. Crim. Ct. 1987). The prosecution need only show that the defendant had a BAC of 0.10% or greater while driving to prove the defendant guilty of driving under the influence of alcohol pursuant to 75 PA. CONS. STAT. ANN. § 3731(a)(4) (1982). *Commonwealth v. Mikulan*, 504 Pa. 244, 256, 470 A.2d 1339, 1343 (1983).

30. The *Mikulan* opinion suggested that a 1979 United States Department of Transportation issue paper entitled "Alcohol Countermeasures Illegal Per Se and Preliminary Breath Testing" influenced passage of this law. *Mikulan*, 504 Pa. at 250, 470 A.2d at 1341-42. The paper recommended enactment of "illegal per se laws" prohibiting driving with a BAC level of 0.10% or greater. *Id.* The 0.10% figure as the unsafe BAC level for driving seems to have been derived from a 1960 House of Delegates of the American Medical Association policy statement. *Id.* at 250-51, 470 A.2d at 1342.

31. Act of June 17, 1976, Pa. Laws 162, § 1, *as amended*, Dec. 15, 1982, Pa. Laws 1268, § 9, effective in 30 days (codified as amended at 75 PA. CONS. STAT. ANN. § 3731 (1982)).

32. 504 Pa. 244, 470 A.2d 1339 (1983).

1. *Constitutionality Challenge to Section 3731(a)(4)*.— In *Commonwealth v. Mikulan*, the Commonwealth charged the defendant with driving while his BAC was over 0.10% pursuant to Pennsylvania Motor Vehicle Code section 3731(a)(4).³³ The Court of Common Pleas granted the defendant's motion to dismiss the information and declared section 3731(a)(4) unconstitutional under the void-for-vagueness doctrine.³⁴ The Commonwealth filed a direct appeal to the Pennsylvania Supreme Court.³⁵ The supreme court reversed the decision and upheld the constitutionality of section 3731(a)(4).³⁶

The Pennsylvania Supreme Court in *Mikulan* began its review by noting the heavy burden of persuasion on the moving party in challenging the constitutionality of a legislative act.³⁷ Writing for the court, Justice Rolf Larsen noted that the court would not declare legislation unconstitutional unless it "clearly, palpably and plainly" violates the constitution.³⁸ The defendant challenged section 3731(a)(4) under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which protects individuals against arbitrary state action.³⁹ Specifically, the void-for-vagueness doctrine requires that "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."⁴⁰

33. *Id.* at 246, 470 A.2d at 1340. The Commonwealth brought the § 3731(a)(4) charge on April 4, 1983, less than two months after the statute provision became effective. *Id.*

34. Coincidentally, the same Allegheny County Court of Common Pleas that here declared subsection (a)(4) unconstitutional would later declare subsection (a)(5) unconstitutional as well. Visiting Senior Judge John J. Brodley presided over the *Mikulan* case, while Judge Walter R. Little would later strike down subsection (a)(5) in *Commonwealth v. Barud*, 143 Pitt. Legal J. 7 (1994).

35. Counsel filed the direct appeal pursuant to 42 PA. CONS. STAT. ANN. § 722(7), which allows direct appeals from orders of courts of common pleas declaring a statute of the Commonwealth invalid as repugnant to the Constitution of the United States or of the Commonwealth. *Mikulan*, 504 Pa. at 247, 470 A.2d at 1340 n.5.

36. The arguments and analysis of the void-for-vagueness doctrine presented in *Mikulan* are reviewed here in some detail because the analysis of § 3731(a)(5) involves the same general challenges. See *infra* part IV.

37. *Mikulan*, 504 Pa. at 247, 470 A.2d at 1340 (citing *Snider v. Thornburgh*, 496 Pa. 159, 166, 436 A.2d 593, 596 (1981); *Commonwealth v. Barnes & Tucker Co.*, 472 Pa. 115, 123, 371 A.2d 461, 465 (1977), *appeal dismissed*, 434 U.S. 807 (1977)).

38. *Id.* (citing *Snider*, 496 Pa. at 166, 436 A.2d at 596).

39. *Id.* at 250, 470 A.2d at 1342.

40. *Id.* at 251, 470 A.2d at 1342 (quoting *Kolender v. Lawson*, 461 U.S. 352, 355 (1983)).

The doctrine primarily requires that legislation establish minimal guidelines to govern law enforcement.⁴¹

The supreme court found that the defendant did not meet his burden of showing that section 3731(a)(4) was unconstitutionally vague because he could not prove that an ordinary person does not have fair notice of prohibited conduct under the statute or that the section encourages arbitrary enforcement.⁴² The court dismissed as "overtly technical and misperceive[d]" the defendant's fair notice argument that a person cannot contemplate forbidden conduct under the section because one does not know when one's BAC reaches 0.10%.⁴³ Finally, the court disposed of any argument that the section allows for arbitrary and erratic enforcement by concluding that the section limits discretion by requiring a specific BAC reading.⁴⁴

The supreme court in *Mikulan* reversed the trial court decision and held section 3731(a)(4) constitutional.⁴⁵ Although subsection (a)(4) survived its void-for-vagueness constitutionality challenge, subsequent judicial interpretations of the law created a more formidable challenge to its validity.

2. *Extrapolation Burden of Section 3731(a)(4).*— Neither section 3731(a)(4) nor its companion section governing chemical testing, section 1547, provide any requisite time frame within which blood-alcohol tests must be administered.⁴⁶ Although section 3731(a)(4) does not require proof of impairment while driving, it does require proof that the suspect's BAC was 0.10% or greater while driving.⁴⁷ While a BAC test result of 0.10% or greater taken a short time after driving creates a strong inference of guilt under section 3731(a)(4), the inference weakens when significant time lapses between vehicle operation and chemical testing.⁴⁸

41. *Id.* (quoting *Kolender*, 461 U.S. at 355). Without such guidelines, the executive and judicial branches of government may be susceptible to personal predilections. *Id.* at 251, 470 A.2d at 1342-43.

42. *Mikulan*, at 252-53, 470 A.2d at 1343.

43. *Id.* at 252, 470 A.2d at 1343. Conversely, the *Mikulan* court found, "The legislature has squarely, and fairly, placed the risk of erroneous judgment of alcohol consumption on the person who has the choice, the drinking driver . . ." *Id.* at 255, 470 A.2d at 1344.

44. *Id.* at 253 n.8, 470 A.2d at 1343 n.8.

45. *Id.* at 262, 470 A.2d at 1348.

46. For the text of §§ 3731(a)(4) and 1547(d), see *supra* notes 5 and 23, respectively.

47. See *supra* note 29 and accompanying text.

48. *Commonwealth v. Jarman*, 529 Pa. 92, 96, 601 A.2d 1229, 1230-31 (1992).

Defendants have argued to no avail that such delayed BAC test results are irrelevant to BAC levels while driving and should not be admissible.⁴⁹ The courts have deemed delayed test results admissible, but the results carry less weight for the factfinder than test results obtained at a time more reflective of a person's BAC while driving.⁵⁰ Thus, prosecutors seek to use expert testimony to extrapolate or "relate back" subsequent BAC test results in order to determine conclusively a person's BAC while driving.⁵¹

In *Commonwealth v. Gonzalez*,⁵² the Pennsylvania Supreme Court addressed whether blood test results showing a BAC of 0.09% obtained three hours after an accident were admissible and whether expert extrapolation testimony relating the test results back to the time of driving was admissible.⁵³ The supreme court ruled that the delayed blood test results were relevant and admissible to the charges under Motor Vehicle Code sections 3731(a)(1) and 3731(a)(4).⁵⁴ At trial, the prosecution presented expert extrapolation testimony that the defendant's BAC level may have been as high as 0.125% at the time of the violation.⁵⁵ The

49. See, e.g., *Commonwealth v. Tylwalk*, 258 Pa. Super. Ct. 506, 393 A.2d 473 (1978) (holding that a four and one-half hour delay between vehicle operation and the administration of a blood-alcohol test affected the weight but not the evidence of the blood test results); *Commonwealth v. Trefry*, 249 Pa. Super. Ct. 117, 375 A.2d 786 (1977) (holding that a one and one-half hour delay between vehicle operation and the administration of a blood-alcohol test did not render the results inadmissible in a driving-under-the-influence charge).

50. John D. LaRocca, *Recent Case*, 62 TEMP. L.Q. 757 n.3 (1989).

51. The following excerpt provides a brief explanation of "relating back" and how it is used in DUI prosecutions:

"Relating back" or "extrapolation" evidence is typically introduced in the form of expert testimony. See E. CLEARY, *MCCORMICK ON EVIDENCE*, § 205, at 616 (3d ed. 1984) (expert testimony ordinarily required to establish that operator's measured blood alcohol content ("BAC") indicates intoxication during period in issue). Extrapolation is the process of projecting data, by using inferences, into an unknown area and thus achieving a conjectural knowledge of the unknown. *NEW WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE* 349 (1981). The expert applies several factors to the operator's blood alcohol test results . . . to estimate the operator's BAC at the time of vehicle operation These factors typically include the rate of alcohol absorption and evaporation, the lapse of time between the testing and operation of the vehicle, and the lapse of time between the operator's last drink and the operation of the vehicle.

Id. at 757 n.3.

52. 519 Pa. 116, 546 A.2d 26 (1988).

53. *Id.*

54. For the text of §§ 3731(a)(1) and 3731(a)(4), see *supra* notes 21 and 5.

55. *Gonzalez*, 519 Pa. at 134, 546 A.2d at 35.

court found this evidence too speculative and ruled it inadmissible with respect to the section 3731(a)(4) charge.⁵⁶

The *Gonzalez* holding inferred that the Commonwealth needed accurate extrapolation evidence to prove a section 3731(a)(4) violation when the person registered a BAC of less than 0.10% a significant time after driving.⁵⁷ Producing detailed extrapolation testimony under 3731(a)(4) burdened the Commonwealth since the factors vital to calculate an accurate extrapolation⁵⁸ usually lie solely with the defendant.⁵⁹ This burden made section 3731(a)(4) convictions difficult under facts similar to those in *Gonzalez*. In addition, both *Commonwealth v. Jarman*⁶⁰ and *Commonwealth v. Modaffare*⁶¹ appeared to increase the weight of the prosecution's burden even further.

In *Commonwealth v. Jarman*, the Pennsylvania Supreme Court considered whether a blood-alcohol test result of 0.114% taken one hour after vehicle operation was sufficient to sustain a conviction under section 3731(a)(4).⁶² Writing for the majority, Justice John P. Flaherty⁶³ first set forth the standard that the evidence must be viewed in the light most favorable to the Commonwealth as the verdict winner.⁶⁴ The defendant relied upon *Gonzalez* to argue that the Commonwealth's expert testimony on extrapolation was "sufficiently ambiguous" as to force the jury to speculate on the issue of the defendant's BAC while driving.⁶⁵

56. *Id.* Conversely, the supreme court found that the same expert testimony was relevant and admissible to the § 3731(a)(1) inquiry of whether the defendant was driving under the influence of alcohol to a degree which rendered him incapable of safe driving. *Id.*

57. *LaRocca*, *supra* note 50, at 765 n.43.

58. Such factors include time and content of the defendant's last meal, and the time and amount of consumed alcoholic beverages. *Id.* at 757 n.3.

59. *Id.* at 766 n.53 (citing *State v. Sutliff*, 547 P.2d 1128, 1130 (Idaho 1976)).

60. 529 Pa. 92, 601 A.2d 1229 (1992).

61. 529 Pa. 101, 601 A.2d 1233 (1992).

62. *Jarman*, 529 Pa. at 94, 601 A.2d at 1230. The Commonwealth also charged the defendant under § 3731(a)(1), but the trial court acquitted the defendant of this charge. *Id.* The trial court convicted the defendant pursuant to § 3731(a)(4), and the Pennsylvania Superior Court affirmed the conviction at 398 Pa. Super. Ct. 645, 573 A.2d 620 (1992). *Id.* at 92, 601 A.2d at 1229.

63. In light of Justice Flaherty's dissent in *Commonwealth v. Mikulan*, 504 Pa. 244, 270, 470 A.2d 1339, 1352 (1983) (Flaherty, J., dissenting) (arguing against the constitutionality of § 3731(a)(4) under the void-for-vagueness doctrine), it is appropriate that he write the two decisions that caused the legislature to amend its driving-under-the-influence law.

64. *Jarman*, 529 Pa. at 94, 601 A.2d at 1230 (citing *Commonwealth v. Hughes*, 521 Pa. 423, 430, 555 A.2d 1264, 1267 (1989)).

65. *Id.* at 95, 601 A.2d at 1340.

The Commonwealth expert in *Jarman* testified that the peak alcohol level is crucial to extrapolation: “[A] person’s blood-alcohol level fluctuates with the passage of time, such that the level gradually rises after drinks have been consumed until a peak is reached roughly sixty to ninety minutes after drinking has ceased, and that, thereafter, the level slowly declines.”⁶⁶ The Commonwealth failed to show whether the defendant’s 0.114% BAC level was rising or falling at the time of the test one hour after driving.⁶⁷ Consequently, the court found that the expert could not offer an opinion as to whether defendant’s BAC was 0.10% or greater while driving.⁶⁸ Lacking any meaningful extrapolation, the evidence forced the jury to speculate on the defendant’s BAC level while driving.⁶⁹ As a result, the supreme court agreed with the defendant that the evidence was insufficient, even when viewed most favorably for the Commonwealth, and reversed the conviction.⁷⁰

The Pennsylvania Supreme Court used the *Jarman* decision to exploit the inherent limits of Pennsylvania’s DUI statute and the subsequent difficulty of extrapolating the peak blood-alcohol content of a person in borderline DUI cases. Unlike other states’ drunk driving statutes,⁷¹ the scope of Pennsylvania’s DUI was limited strictly to one’s blood-alcohol content *while* driving. The *Jarman* court noted that the plain language of the statute constrained the court’s application of the law and deferred to the legislature any argument to change the law.⁷²

66. *Id.* at 96, 601 A.2d at 1231. The expert witness was the director of the hospital laboratory where the defendant’s blood test was performed, and his testimony was uncontradicted. *Id.*

67. The defendant testified that he finished the last of his four or five beers in a bar at 9:00 p.m. on the night in question just prior to departing in his vehicle. *Id.* at 96, 601 A.2d at 1231. Based upon the testimony of the Commonwealth’s expert witness, the defendant concluded that his blood-alcohol level likely peaked sometime after he was stopped, perhaps even after the blood test was done. *Id.* at 97, 601 A.2d at 1231. He argued that since his BAC was 0.114% and rising one hour after driving, it likely was less than 0.10% while driving. *Id.* The Commonwealth’s expert witness corroborated this testimony. *Id.*

68. *Id.*

69. *Jarman*, 529 Pa. at 97, 601 A.2d 1231. It is well-settled law that a criminal conviction cannot be based upon mere speculation or conjecture. *Commonwealth v. Holzer*, 480 Pa. 93, 98, 389 A.2d 101, 104 (1978).

70. *Id.* at 97, 601 A.2d at 1231.

71. Justice Flaherty referred to the New York case of *People v. Mertz*, 497 N.E.2d 657 (N.Y. 1986), which cited various state statutes on drunk driving. *Jarman*, 529 Pa. at 95, 601 A.2d at 1230.

72. *Jarman*, 529 Pa. at 95 n.1, 601 A.2d at 1230 n.1.

The Pennsylvania Supreme Court applied its rationale in *Jarman* in a similar case, *Commonwealth v. Modaffare*.⁷³ The supreme court considered whether a BAC test result of 0.108% from a blood sample drawn one hour and fifty minutes after the defendant's accident provided sufficient evidence for conviction under section 3731(a)(4).⁷⁴ Although the Commonwealth's expert witness opined that the defendant's BAC level probably was declining at the time of the blood test, he testified under cross-examination that the BAC level may have peaked between the time of the accident and the time when the blood sample was drawn.⁷⁵ As a result, the expert was not able to offer any opinion as to whether the defendant's BAC was 0.10% or greater at the time of the accident.⁷⁶ Following its reasoning under the *Jarman* decision, the supreme court in *Modaffare* deemed the evidence insufficient and reversed the conviction.⁷⁷

Jarman and *Modaffare* simply represent borderline cases in which the Commonwealth could not prove the defendant's guilt under section 3731(a)(4) beyond a reasonable doubt. The *Jarman* and *Modaffare* decisions, however, created doubt about the enforceability of section 3731(a)(4) and fostered a false need for legislative action.

3. *The Overreaction to Jarman and Modaffare.*— *Commonwealth v. Jarman* and *Commonwealth v. Modaffare* were borderline section 3731(a)(4) cases in which the defendants registered BAC levels of 0.114% and 0.108%, respectively, a significant time period after driving.⁷⁸ The Commonwealth could not obtain section 3731(a)(4) convictions in those cases because the factual evidence was insufficient, not because the statute is unworkable.⁷⁹ Simply

73. 529 Pa. 101, 601 A.2d 1233 (1992). Both *Jarman* and *Modaffare* were decided on January 22, 1992.

74. *Id.* at 103, 601 A.2d at 1234. Like defendant *Jarman*, defendant *Modaffare* was originally charged under both sections 3731(a)(1) and 3731(a)(4), acquitted on the (a)(1) charge at trial, and convicted of the (a)(4) charge. *Id.*

75. *Id.* at 105, 601 A.2d at 1235.

76. *Id.*

77. *Id.* at 107, 601 A.2d at 1236.

78. *Jarman*, 529 Pa. at 94, 601 A.2d at 1230; *Modaffare*, 529 Pa. at 103, 601 A.2d at 1234.

79. For example, the problem would lie with the statute if the defendants in *Jarman* and *Modaffare* had escaped conviction under facts that clearly supported guilt beyond a reasonable doubt.

because the facts of *Jarman* and *Modaffare* demanded extrapolation⁸⁰ by the Commonwealth does not mean all section 3731(a)(4) prosecutions require extrapolation. Subsequent case law correctly interprets *Jarman* and *Modaffare* as narrow fact-based holdings that did not warrant legislative action.

The Pennsylvania Superior Court interpreted the reasoning of *Jarman* in *Commonwealth v. Osborne*.⁸¹ The *Osborne* court recalled the supreme court's reasoning in *Jarman* that significantly high BAC test results taken shortly after vehicle operation created a strong inference of guilt, but delayed BAC test results that barely exceeded 0.10% weaken the inference of guilt.⁸² The superior court then related this inference to the need for extrapolation.⁸³ Since the supreme court failed to establish criteria for determining "significantly high" BAC levels and "timely" tests, the superior court reasoned that "the stronger the inference of guilt, the less significant is the necessity for relating back. Conversely, the weaker the inference of guilt, the more vital is the necessity for evidence of relating back an accused's BAC test result to the time of driving."⁸⁴ Although this finding created only a very broad guideline, *Osborne* proposed that the Commonwealth need not always present extrapolation evidence to obtain section 3731(a)(4) convictions.⁸⁵

The superior court followed its *Osborne* precedent in subsequent rulings to determine whether the Commonwealth needed expert extrapolation evidence to sustain section 3731(a)(4)

80. Extrapolation as used here is the science of relating back subsequent BAC test result levels to determine the driver's BAC while driving. *See supra* note 51.

81. 414 Pa. Super. Ct. 124, 606 A.2d 529 (1992).

82. *Jarman*, 529 Pa. at 96, 601 A.2d at 1231. The supreme court in *Jarman* specifically found:

In cases where test results show levels of alcohol significantly above 0.10% and where blood samples have been obtained soon after suspects have been stopped, there is a very strong inference that blood alcohol levels were in the prohibited range while driving. However, where . . . the blood test result barely exceeded the 0.10% level and the lapse of time between driving and the taking of the blood sample was not insignificant, the inference of guilt is weakened.

Id.

83. *Osborne*, 414 Pa. Super. Ct. at 128, 606 A.2d at 531.

84. *Id.*

85. Under the specific facts of *Osborne*, the court reversed the defendant's conviction, holding that a BAC test result of 0.1488% taken fifty minutes after driving was insufficient evidence without extrapolation by the Commonwealth. *Id.* The superior court did not infer guilt because it found the fifty-minute delay significant and the 0.1488% BAC not significantly high as to infer a 0.10% BAC while driving. *Id.*

convictions under varied fact scenarios. In *Commonwealth v. Siith*⁸⁶ and *Commonwealth v. Proctor*,⁸⁷ the superior court found that the respective facts of the cases required extrapolation by the Commonwealth to sustain the convictions. In *Commonwealth v. Kasunic*,⁸⁸ *Commonwealth v. Loeper*,⁸⁹ and *Commonwealth v. Mukina*,⁹⁰ however, the Commonwealth did not need to extrapolate test results to sustain convictions because the respective facts satisfied the inference of guilt established in *Osborne*. This line of cases demonstrates that the judiciary has distinguished the potentially misleading holdings of *Jarman* and *Modaffare* by necessitating extrapolation only when required by the facts of the case.

Critics of this case-by-case determination of whether the facts demand extrapolation maintain that requiring the Commonwealth to offer accurate extrapolation testimony in any case in which guilt is not obvious overly burdens the prosecution.⁹¹ In his dissent to *Jarman*, Pennsylvania Supreme Court Justice Ralph J. Cappy expressed his view that such case-by-case review of every conviction similar to *Jarman* will prove section 3731(a)(4) a "virtually unenforceable and unworkable law."⁹² The judiciary, however, settled this argument in the recent Pennsylvania Supreme Court case of *Commonwealth v. Yarger*.⁹³

In *Yarger*, the supreme court squarely addressed the issue of whether the precedent set by *Jarman* and *Modaffare* required the Commonwealth to present expert extrapolation testimony to establish that a driver had a BAC of 0.10% or greater while

86. 434 Pa. Super. Ct. 501, 644 A.2d 193 (1994) (requiring Commonwealth expert testimony to extrapolate a 0.12% BAC test result taken forty minutes after driving).

87. 425 Pa. Super. Ct. 527, 625 A.2d 1221 (1993) (holding evidence of a 0.179% BAC taken approximately two hours after driving is insufficient to support a § 3731(a)(4) conviction without expert extrapolation by the Commonwealth).

88. 423 Pa. Super. Ct. 112, 620 A.2d 525 (1993) (finding the Commonwealth was not required to extrapolate a BAC test result of 0.21% taken fifty minutes after the defendant ceased driving).

89. 423 Pa. Super. Ct. 32, 620 A.2d 25 (1993) (holding that a BAC test result of 0.14% taken two hours after driving did not require extrapolation because the additional physical evidence of the defendant's slurred speech and unsteady gait was sufficient for conviction).

90. 422 Pa. Super. Ct. 455, 619 A.2d 766 (1993) (holding extrapolation by Commonwealth unnecessary when a BAC test result of 0.204% was taken one hour after arrest).

91. See *Jarman*, 529 Pa. at 100, 601 A.2d at 1233 (Cappy, J., dissenting).

92. *Id.*

93. 538 Pa. 329, 648 A.2d 529 (1994).

driving.⁹⁴ The supreme court agreed with Justice Cappy's earlier assertion in *Jarman* that case-by-case review would overly burden the Commonwealth and prove section 3731(a)(4) unworkable.⁹⁵ The court held that the Commonwealth is not required to present expert testimony to relate back BAC test results to the time of driving.⁹⁶ Once the Commonwealth has established that the driver's BAC was 0.10% or greater, the prosecution has made a prima facie case under section 3731(a)(4).⁹⁷ The defendant can then introduce expert testimony to rebut the prima facie evidence, and the Commonwealth may then present its own expert witness.⁹⁸ The *Yarger* decision helps to clarify the problems of extrapolation in *Jarman* and *Modaffare* and proves section 3731(a)(4) a viable and sufficient DUI law.

Commonwealth v. Yarger demonstrates that legislative action in response to *Jarman* and *Modaffare* was unnecessary. The unease created by *Jarman* and *Modaffare*, however, caused a knee-jerk reaction by the Pennsylvania legislature before the case law could fully develop. The General Assembly responded prematurely to *Jarman* and *Modaffare* and quickly enacted section 3731(a)(5) in December of 1992.

III. Enactment of Section 3731(a)(5)

The General Assembly added section 3731(a)(5) to Pennsylvania's DUI statute to help alleviate the Commonwealth's burden under subsection (a)(4) when delayed blood tests produced borderline results.⁹⁹ The new subsection prohibits driving by a person whose BAC is 0.10% or greater at the time of a chemical test of a sample taken within three hours, or a reasonable additional time, of driving.¹⁰⁰ The new amendment has caused changes in both the structure and philosophy of Pennsylvania's DUI statute.

The legislature altered the mechanical structure of subsection (a) to compensate the language and intent of paragraph (5). Prior to the amendment, the premise of subsection (a) contained the word "while," because paragraphs (1) through (4) all prohibited

94. *Id.* at 331, 648 A.2d at 531.

95. *Id.* at 334-35, 648 A.2d at 531.

96. *Id.*

97. *Id.*

98. *Yarger*, 538 Pa. at 334-35, 648 A.2d at 531.

99. See PA. HOUSE LEGIS J., Nov. 17, 1992, at 1853.

100. For the complete text of subsection (a)(5), see *supra* note 4.

certain behavior "while" driving.¹⁰¹ Because paragraph (5) contains an offense not related to behavior while driving, the "while" was removed from subsection (a) and inserted at the beginning of each of the paragraphs (1) through (4). This mechanical change evidences the change in philosophy that driving "while" under the influence is no longer the only offense under section 3731(a). Subsection (a)(1) was added along with subsection (a)(5) to provide an affirmative defense to the new provision under (a)(5).¹⁰² The accused may defend on the grounds that he or she consumed alcohol after the last instance of driving, and his or her BAC would not have exceeded 0.10% but for such consumption.¹⁰³

The General Assembly chose to limit the reach of section 3731(a)(5) to BAC tests results of samples taken within three hours after driving.¹⁰⁴ The rationale behind selecting three hours as the operative time frame lacks legislative explanation,¹⁰⁵ but it appears to represent a compromise position between the two- and four-hour provisions selected by other states.¹⁰⁶ The legislature added a second clause to the provision which extends the three-hour period to a "reasonable additional time" when circumstances prevent collection of the sample within the provided three hours.¹⁰⁷ The clause most likely applies when a serious accident has occurred and the driver is hospitalized, or when the suspect leaves the accident scene and is apprehended some time later. Prosecutors likely will test the boundaries, however, of what circumstances justifiably prevent the taking of a sample within three hours.

The General Assembly amended Pennsylvania's DUI statute by enacting subsections (a)(5) and (a)(1) on December 18, 1992

101. The prior subsection (a) stated:

(a) A person shall not drive, operate or be in actual physical control of the movement of any motor vehicle *while* . . .

75 PA. CONS. STAT. ANN. § 3731(a) (1982) (emphasis added).

102. 75 PA. CONS. STAT. ANN. § 3731(a)(1) (Supp. 1995).

103. *Id.*

104. *Id.* § 3731(a)(5)(i).

105. There seems to be no evidence in the legislative records that the Assembly heard any offerings of scientific evidence to support election of the three-hour time period, i.e., how the three-hour time period relates to one's blood-alcohol content while driving. See PA. HOUSE LEGIS. J., Nov. 17, 1992, at 1853.

106. See, e.g., ARIZ. REV. STAT. ANN. § 28-692 91989) (providing a two-hour time period); ALASKA STAT. § 28.35.030(a)(2) (1988) (providing a four-hour time period).

107. 75 PA. CONS. STAT. ANN. § 3731 (a)(5)(ii).

and making them effective 60 days thereafter.¹⁰⁸ Although the legislature intended to settle the controversy of delayed blood-alcohol test results, two Pennsylvania trial courts recently have split on whether the amendment is constitutional.

IV. Constitutionality of Section 3731(a)(5)

In 1994, one year after section 3731(a)(5) took effect, two Pennsylvania courts of common pleas rendered conflicting decisions in challenges to the constitutionality of section 3731(a)(5). The Cumberland County Court upheld the constitutionality of the provision in *Commonwealth v. Gumbert*.¹⁰⁹ Ten days later, the Allegheny County Court ruled against the constitutionality of section 3731(a)(5) in *Commonwealth v. Barud*.¹¹⁰ The Pennsylvania Superior Court upheld the law almost a year later in *Commonwealth v. Brehm*.¹¹¹ The contradictory decisions reflect the controversy surrounding section 3731(a)(5) of the Pennsylvania Motor Vehicle Code.

The Cumberland County Court of Common Pleas considered the novel issue of the constitutionality of section 3731(a)(5) in *Commonwealth v. Gumbert*.¹¹² In *Gumbert*, the Commonwealth charged the defendant with violating section 3731(a), paragraphs (1), (4), and (5)¹¹³ on January 22, 1994.¹¹⁴ A test of the defendant's blood sample taken approximately one hour after his arrest revealed a BAC level by weight of 0.29%.¹¹⁵ The defendant moved to dismiss the charges, challenging the constitutionality of section 3731(a)(5).¹¹⁶

The defendant first contended that subsection (a)(5) violates Fourteenth Amendment due process rights¹¹⁷ because it is uncon-

108. *Id.* § 3731.

109. 44 Cumb. L.J. 186 (1994).

110. 143 Pitt. Legal J. 7 (1994).

111. 144 Pa. Super. Ct. 138, 663 A.2d 712 (1995); *see also* *Commonwealth v. Rishel*, 441 Pa. Super. Ct. 584, 658 A.2d 352 (1995) (addressing the constitutionality of § 3731(a)(5) in part).

112. 44 Cumb. L.J. 186 (1994).

113. For the respective text of these paragraphs, see *supra* notes 21, 5 and 4.

114. *Gumbert*, 44 Cumb. L.J. at 187.

115. *Id.* at 188.

116. *Id.* at 186.

117. The Fourteenth Amendment to the United States Constitution states in part that "no state shall deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV, § 1.

stitutionally vague.¹¹⁸ The defendant next claimed that subsection (a)(5) violates due process because it does not bear a real and substantial relationship to the statute's intended goal of keeping roadways safe.¹¹⁹ Lastly, the defendant claimed the amendment violates due process by creating an illegal presumption of driving-under-the-influence.¹²⁰

Since the Cumberland County Court uncovered no Pennsylvania appellate cases on-point, the court relied upon related Pennsylvania cases and persuasive authority from other states that have considered similar provisions.¹²¹ The Honorable J. Wesley Oler, Jr. found that the subsection withstood each of the defendant's challenges and upheld the constitutionality of section 3731(a)(5).¹²² Consequently, the superior court in *Brehm* considered the same constitutional challenges and reached the same conclusions as *Gumbert* on each issue.¹²³

The Allegheny Court of Common Pleas confronted the same constitutional issues in *Commonwealth v. Barud*.¹²⁴ The Commonwealth charged defendant Barud under Motor Vehicle Code sections 3731(a)(1) and 3731(a)(5) on December 15, 1993.¹²⁵ The defendant moved to dismiss the subsection (a)(5) charge on constitutional grounds, presenting relatively the same challenges as defendant *Gumbert*.¹²⁶ Lacking appellate authority, the Allegheny County Court relied on practical, common-sense analysis. In striking contrast to the *Gumbert* opinion, the Honorable Walter R. Little struck down the (a)(5) provision as unconstitutional in a strongly worded opinion.

The Cumberland County Court and the Pennsylvania Superior Court reached different conclusions than the Allegheny County

118. *Gumbert*, 44 Cumb. L.J. at 189.

119. *Id.*

120. *Id.* at 189-90.

121. *Id.* at 191.

122. *Id.* at 202.

123. *Commonwealth v. Brehm*, 444 Pa. Super. Ct. 138, 663 A.2d 712 (1995). The superior court does not cite *Gumbert*, rather it comes to the same conclusions as *Gumbert*. Due to these similarities, the superior court's findings in *Brehm* are discussed in this Comment as part of the analysis of *Gumbert*.

124. 143 Pitt. Legal J. 7 (1994).

125. *Id.* at 8. The Commonwealth also charged the defendant with a summary offense under Motor Vehicle Code § 3323, governing stop signs and yield signs.

126. *Id.* at 12-13. Defendant Barud actually brought a myriad of individual claims, which the court roughly grouped together in its general discussion of the constitutionality of subsection (a)(5).

Court based upon their analysis of the three fundamental challenges to the constitutionality of section 3731(a)(5). These challenges include: (1) that subsection (a)(5) is void for vagueness; (2) that it lacks a substantial relationship to legislative goals; and (3) that the subsection creates an illegal presumption of guilt.

A. *The Void-for-Vagueness Doctrine*

The defendants in *Gumbert*, *Barud*, and *Brehm* challenged section 3731(a)(5) as being unconstitutionally vague.¹²⁷ *Gumbert* sets forth that a valid penal statute must satisfy the void-for-vagueness test of *Kolender v. Lawson*¹²⁸ to withstand a constitutional challenge.¹²⁹ The test requires that the statute define the criminal offense with sufficient definiteness such that ordinary people can understand what conduct is being prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.¹³⁰ The test has been more simply defined as a "rough idea of fairness"¹³¹ or a requirement that statutes establish "minimal guidelines to govern law enforcement."¹³²

1. *Commonwealth v. Gumbert*.— In arguing that section 3731(a)(5) is unconstitutionally vague, the defendant in *Gumbert* first distinguished *Commonwealth v. Mikulan*,¹³³ in which the supreme court found that section 3731(a)(4) is not vague partly because ample scientific literature and blood-alcohol ratio charts are available to warn drivers of BAC levels approaching the illegal limit.¹³⁴ Such definite guidelines, however, are not available to warn drivers of *when* their BAC levels may approach the 0.10% limit in response to section 3731(a)(5).¹³⁵ These guidelines cannot be established, the defendant argued, because scientific evidence

127. *Gumbert*, 44 Cumb. L.J., at 189; *Barud*, 143 Pitt. Legal J. at 13; *Brehm*, 444 Pa. Super. Ct. at 150, 663 A.2d at 718.

128. 461 U.S. 352 (1983).

129. *Gumbert*, 44 Cumb. L.J. at 191 (citing *Kolender*, 461 U.S. at 357).

130. *Id.*

131. *Id.* (quoting *Commonwealth v. DeFrancesco*, 481 Pa. 595, 608, 393 A.2d 321, 327 (1978) (quoting *Colten v. Kentucky*, 407 U.S. 104, 110 (1972))).

132. *Id.* (quoting *Commonwealth v. Mikulan*, 504 Pa. 244, 251, 470 A.2d 1339, 1342 (1983) (quoting *Kolender*, 461 U.S. at 358)).

133. 504 Pa. 244, 470 A.2d 1339 (1983).

134. Brief in Support of Defendant's Motion to dismiss the Charge of 75 PA. CONS. STAT. ANN. § 3731(a)(5) at 11, *Commonwealth v. Gumbert*, 44 Cumb. L.J. 186 (1994) [hereinafter Defendant's Brief] (citing *Mikulan*, 504 Pa. at 255, 470 A.2d at 1344-45).

135. *Id.*

shows that individual peak blood-alcohol levels can vary significantly depending on physical and social characteristics.¹³⁶ The defendant concluded that the statute burdens individuals with the "almost insurmountable task" of determining their BAC level for a three-hour period after consuming alcohol.¹³⁷

The Cumberland County Court of Common Pleas evaluated this challenge by considering similar challenges raised in cases from other states. The court first considered *State v. Martin*,¹³⁸ in which the Arizona Court of Appeals held that a statute¹³⁹ analogous to Pennsylvania Motor Vehicle Code section 3731(a)(5) withstood the void-for-vagueness challenge.¹⁴⁰ The *Gumbert* court noted that the Arizona court did not find the statute in question vague because the provision "establish[es] a specific, objective criterion of a predefined BAC with which to compare an individual's BAC."¹⁴¹ The *Gumbert* court then noted that the Arizona court found that the law also provides fair notice to the drinking driver that blood-alcohol testing may take place some time after driving, and a BAC over the legal limit within that time constitutes a violation.¹⁴² The *Gumbert* court concluded its summary of *Martin* by noting that the Arizona court found that the guideline calling for testing within two hours of driving supplied specific and objective guidelines to both potential offenders and law enforcement officers.¹⁴³

The *Gumbert* court next relied on the North Dakota Supreme Court case of *City of Fargo v. Stensland*,¹⁴⁴ which also considered a statute¹⁴⁵ similar to section 3731(a)(5).¹⁴⁶ The court in *City of Fargo* concluded that, although drivers who are under the legal

136. *Id.* at 12-13.

137. *Id.* at 11.

138. 847 P.2d 619 (Ariz. Ct. App. 1992).

139. ARIZ. REV. STAT. ANN. § 28-692(A)(2) (1989) (prohibiting driving with a blood-alcohol content of 0.10% or greater as measured by a test sample taken within two hours of operating a motor vehicle).

140. *Gumbert*, 44 Cumb. L.J. at 192 (citing *Martin*, 847 P.2d at 619).

141. *Id.* (quoting *Martin*, 847 P.2d at 623).

142. *Id.* (quoting *Martin*, 847 P.2d at 623).

143. *Id.* (quoting *Martin*, 847 P.2d at 623). *Gumbert* also referred to the New York case of *People v. Lebron*, 501 N.Y.S.2d 975, 977 (N.Y. App. Div. 1986), for support of the same basic principles presented in *Martin*. *Id.* at 193.

144. 492 N.W.2d 591 (N.D. 1992).

145. N.D. CENT. CODE § 39-20-07(3) (1990) (prohibiting driving with a 0.10% BAC within two hours after driving).

146. *Gumbert*, 44 Cumb. L.J. at 193.

BAC limit while driving may be convicted under such provisions, "[t]he precise blood-alcohol content at the time of operation or control is not an element of the per se offense."¹⁴⁷ As noted by the court in *Gumbert*, the North Dakota Supreme Court found that legislatures pass such laws because they believe that a person who reaches an illegal BAC within two hours of driving poses an unreasonable risk to public safety, not because they believe the person had a specific illegal BAC level while driving.¹⁴⁸

The *Gumbert* court concluded its analysis of the vagueness challenge to section 3731(a)(5) by analogizing the Pennsylvania Supreme Court analysis of section 3731(a)(4).¹⁴⁹ The court agreed with the supreme court's assessment in *Commonwealth v. Mikulan*¹⁵⁰ that "the risk of erroneous judgment of alcohol consumption" should be placed on the drinking driver.¹⁵¹ Furthermore, as the court in *Mikulan* attested, charts are widely available to inform the driver of how much alcohol he or she can consume before reaching a BAC of 0.10%.¹⁵² Thus, the *Gumbert* court held that section 3731(a)(5) is not unconstitutionally vague because it does not encourage arbitrary enforcement¹⁵³ and drivers who drink have fair notice of the prohibited conduct.¹⁵⁴ The superior court applied a similar rationale in *Commonwealth v. Brehm* and also found that the law was not unconstitutionally vague,¹⁵⁵ but the Allegheny Court of Common Pleas reached the opposite conclusion in *Commonwealth v. Barud*.¹⁵⁶

2. *Commonwealth v. Barud*.— In *Commonwealth v. Barud*, the Allegheny Court of Common Pleas held that section 3731(a)(5)

147. *Id.* (quoting *City of Fargo*, 492 N.W.2d at 594).

148. *Id.* (quoting *City of Fargo*, 492 N.W.2d at 594-95).

149. *Id.* at 194.

150. 504 Pa. 244, 470 A.2d 1339 (1983).

151. *Gumbert*, 44 Cumb. L.J. at 195 (quoting *Mikulan*, 504 Pa. at 255, 470 A.2d at 1344).

152. *Id.* at 195-96 (citing *Mikulan*, 504 Pa. at 255, 470 A.2d at 1343-44).

153. *Gumbert* also relied on *Mikulan* to show that § 3731(a)(5) does not encourage arbitrary and discriminatory enforcement under the second prong of the *Kolender* test. The supreme court in *Mikulan* succinctly disposed of the challenge in one footnote: "There is no room for the argument that [s]ection 3731(a)(4) encourages arbitrary and erratic enforcement. Not only is the discretion of policemen, judges and juries limited by ascertainable standards, law enforcement discretion is completely eliminated by this statutory scheme once the blood alcohol content is determined." *Id.* at 195 (quoting *Mikulan*, 504 Pa. at 253 n.8, 470 A.2d at 1343 n.8).

154. *Id.* at 196.

155. *Commonwealth v. Brehm*, 444 Pa. Super. Ct. 138, 663 A.2d 712 (1995).

156. 143 Pitt. Legal J. 7 (1994).

is unconstitutionally vague because the average person cannot reasonably understand what conduct the section prohibits.¹⁵⁷ Despite the lack of binding Pennsylvania authority, *Barud* reaches its conclusion without citing or distinguishing persuasive authority from sister states.¹⁵⁸ Rather, Judge Little relied on scientific evidence and common sense arguments to support his assessment of the issue of vagueness.¹⁵⁹

In reaching this conclusion, the *Barud* court stated that section 3731(a)(5) "chooses to ignore the science of toxicology."¹⁶⁰ The court reasoned that physical facts such as absorption and dissipation rates of alcohol in the body vary among individuals and circumstances, making it impossible for a person to understand when his or her BAC will reach 0.10%.¹⁶¹ The fact that peak BAC levels vary widely among individuals lead Judge Little to ask these common sense questions: "How is a citizen to know when their lawful action (drinking and driving) ripens into criminal conduct? How can one predict when and whether a 0.10% alcohol level will be reached within three hours of driving?"¹⁶²

These questions prompted the *Barud* court to find section 3731(a)(5) unconstitutionally overbroad.¹⁶³ A statute is overbroad if its language prohibits constitutionally protected conduct.¹⁶⁴ The *Barud* court determined that section 3731(a)(5) is overbroad because it deprives individuals of constitutionally protected interests,¹⁶⁵ apparently referring to the right to consume alcohol and the right to drive.¹⁶⁶

3. *Analysis of the Void-for-Vagueness Arguments.*— The Cumberland and Allegheny County Courts of Common Pleas utilized different methods of analysis to assess the void-for-

157. *Id.* at 18-19.

158. *Id.*

159. *Id.*

160. *Id.* at 18.

161. *Barud*, 143 Pitt. Legal J. at 18.

162. *Id.* at 19.

163. *Id.*

164. *Id.* (citing *Gumbert*, but the superior court addressed and rejected the overbreadth challenge in *Commonwealth v. Brehm*, 444 Pa. Super. Ct. 138, 148, 663 A.2d 712, 717 (1995)).

165. *Id.*

166. This challenge was not raised in *Gumbert*, but the superior court addressed and rejected the overbreadth challenge in *Commonwealth v. Brehm*, 444 Pa. Super. Ct. 138, 148, 663 A.2d 712, 717 (1995).

vagueness challenge to section 3731(a)(5). Whereas the Allegheny County Court in *Barud* relied mainly on scientific evidence in holding the section unconstitutionally vague,¹⁶⁷ the Cumberland County Court in *Gumbert* refused to dwell on toxicology or related questions because it deemed such issues irrelevant. Since the law prohibits driving after a person has consumed enough alcohol to reach a BAC of 0.10% (as determined by available charts) anytime within three hours of driving, *Gumbert* found that people run the risk of erroneous judgment if they choose to drive after drinking.¹⁶⁸ Although *Gumbert* is correct that prohibiting a BAC of 0.10% within three hours of driving does provide an objective criterion, it is questionable whether an ordinary person can understand how to avoid culpability under this criterion.

The underlying confusion surrounding the vagueness doctrine concerns whether the standard of "sufficiently defining prohibited conduct" requires only that the statute proscribe an objective criterion, or whether it also requires an understanding by an ordinary person of how to avoid culpability. The Pennsylvania Supreme Court in *Commonwealth v. Mikulan* considered this issue and determined that "the requisite culpability for a violation of section 3731 . . . will be established where the Commonwealth demonstrates that the defendant knew, or should have known, that he or she (1) was driving, operating or physically controlling the movement of the vehicle, and (2) consumed alcoholic beverages prior to driving."¹⁶⁹ Since the only culpability required under section 3731 is that the defendant knew he or she consumed alcohol before driving, toxicology reports of peak BAC levels are inapposite to the vagueness challenge. The supreme court in *Mikulan* infers that, to avoid culpability, an individual should not drink before driving.¹⁷⁰ Thus, the objective criteria laid out in section 3731(a)(5) sufficiently define the prohibited conduct as required by *Kolender v. Lawson*.¹⁷¹

167. *Barud*, 143 Pitt. Legal J. at 18.

168. *Commonwealth v. Gumbert*, 44 Cumb. L.J. 186, 195-96 (1994).

169. *Commonwealth v. Mikulan*, 504 Pa. 244, 260, 470 A.2d 1339, 1347 (1983).

170. *Id.* at 255, 470 A.2d at 1344.

171. 461 U.S. 352 (1983). The test requires that the statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is being prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Id.*

Neither *Gumbert* nor *Barud* seem to fully consider whether, under *Kolender*, the three-hour period defined by section 3731(a)(5) is overly broad because it encourages arbitrary enforcement. While an argument could be made that the time frame allows a law enforcement officer the luxury of conducting the BAC test whenever it is most convenient for the officer or most incriminating for the defendant, the three-hour window afforded to the officer does not promote overly broad discretion. Rather, it creates an objective standard that enforcement officers must follow. Section 3731(a)(5), thus, does not encourage arbitrary enforcement.

The final challenge on the issue of vagueness was that section 3731 prohibits constitutionally protected conduct.¹⁷² The court in *Barud* supported this argument but provided no authority for the inference that drinking any amount of alcohol before driving is a constitutional right. On the contrary, the Pennsylvania Supreme Court has held "there is no constitutional, statutory or common law right to the consumption of ANY quantity of alcohol before driving"¹⁷³ Thus, despite the court's analysis in *Barud*, section 3731(a)(5) withstands the overbreadth challenge.

Perhaps the strongest argument against the new subsection, however, is that it lacks the required rational relationship to the statute's legislative intent. Both *Gumbert* and *Barud* considered this challenge and again reached opposite conclusions.

B. *The Real and Substantial Relationship Test*

A second challenge to section 3731(a)(5) is that the provision does not bear a real and substantial relationship to the allowable purpose for which it was enacted.¹⁷⁴ The well-documented legislative goal of state DUI laws is to keep our roadways safe by preventing people who are under the influence of alcohol from

172. *Commonwealth v. Barud*, 143 Pitt. Legal J. 7, 18 (1994) (citing *Commonwealth v. Stenback*, 356 Pa. Super. Ct. 5, 514 A.2d 114 (1986), *appeal denied*, 517 Pa. 589, 534 A.2d 769 (1987)).

173. *Commonwealth v. Mikulan*, 504 Pa. 244, 470 A.2d 1339, 1344 (1983).

174. Defendants bring this challenge pursuant to article I, § 2 of the Pennsylvania Constitution, which provides:

All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such a manner as they think proper.

PA. CONST. art. I, § 2.

driving.¹⁷⁵ The Cumberland County Court and the Pennsylvania Superior Court have split with the Allegheny County Court on whether section 3731(a)(5) has a real and substantial relationship to the accomplishment of this goal.¹⁷⁶

1. Commonwealth v. Gumbert.— The Cumberland County Court of Common Pleas in *Commonwealth v. Gumbert*¹⁷⁷ relied on the applicable California case of *People v. Schrieber*¹⁷⁸ to support its conclusion that section 3731(a)(5) legitimately furthers the goal of Pennsylvania's DUI statute.¹⁷⁹ In *Schrieber*, the California Court of Appeals evaluated a statute analogous to section 3731(a)(5).¹⁸⁰ The court concluded that a person endangers the safety of others if he consumes enough alcohol that his BAC level may ultimately reach 0.10% and then attempts to drive home before actually reaching that level.¹⁸¹ The *Gumbert* court concurred with *Schrieber* and found that "[t]o allow a person to drive after consuming sufficient alcohol to, at some point within

175. For descriptive language of the drunk-driving problem and the legislative goals of DUI laws, see *supra* notes 14, 15 and accompanying text.

176. Preliminarily, it is important to reiterate that states have broad police power to enforce alcohol restrictions in an effort to keep public roadways safe. See *Mikulan*, 504 Pa. at 247-48, 470 A.2d at 1340. The Pennsylvania legislature's present exercise of this power, however, is easily misinterpreted when considering a quote from the Pennsylvania Supreme Court in *Commonwealth v. Mikulan*. *Id.* The supreme court recognized that "there is little doubt that the legislature could, if it chooses, prohibit driving within a certain reasonable time after drinking any amount of alcohol." *Id.* at 254, 470 A.2d at 1344. The General Assembly, however, has not chosen to implement any such restriction; it is perfectly legal to consume a certain amount of alcohol before operating a motor vehicle in the state of Pennsylvania. Arguments for the constitutionality of subsection (a)(5) based on the inference that the legislature could prohibit drinking and driving entirely are not persuasive because the legislature clearly has decided not to do so.

177. 44 Cumb. L.J. 186 91994).

178. 119 Cal. Rptr. 812 (Cal. Ct. App. 1975).

179. *Gumbert*, 44 Cumb. L.J. at 199. (citing *Schrieber*, 119 Cal. Rptr. at 812).

180. *Id.*

181. *Gumbert* quoted the following hypothetical from *Schrieber*:

To accept defendant's thesis that in the ordinary course of events defendant may not be inebriated at the time of driving, but inebriated at the time of the taking of the test, we would necessarily be required to presume that an automobile driver would hurriedly gulp down, as in this instance he would have to have done, eight drinks, jump in his car and hope to reach his destination before he became intoxicated. This variety of Russian roulette leaves a very small margin for error, inasmuch as medical studies demonstrate that the majority of ingested alcohol is absorbed by the body within 15 to 20 minutes and that the brain, requiring as it does a large blood supply, is one of the first organs of the body affected.

Gumbert, 44 Cumb. L.J. at 199 (quoting *Schrieber*, 119 Cal. Rptr. at 814).

three hours [of driving], raise his or her BAC to .10%, would, in the words of the California court, be playing Russian Roulette with the lives of others on the roadways of the Commonwealth."¹⁸² Again, the superior court in *Commonwealth v. Brehm* agreed with the conclusion of the *Gumbert* court,¹⁸³ while the Allegheny County Court in *Commonwealth v. Barud* reached a different conclusion.¹⁸⁴

2. *Commonwealth v. Barud*.— The Allegheny County Court of Common Pleas in *Commonwealth v. Barud* concluded that section 3731(a)(5) does not bear a substantial relationship to the legislative goal of safe roadways.¹⁸⁵ The court reasoned that, under the new provision, "whether or not a person was impaired from alcohol consumption at the time of driving or what that person's blood alcohol content was while driving is totally irrelevant."¹⁸⁶ The court opined that the real goal in enacting subsection (a)(5) was to relieve the prosecution of its burden of proof as enunciated by the Pennsylvania Supreme Court in *Commonwealth v. Jarman*¹⁸⁷ and *Commonwealth v. Modaffare*.¹⁸⁸ As a result, Judge Little found that section 3731(a)(5) was unconstitutional because its goal of securing easier convictions does not substantially relate to the statutory goal of safe roadways.¹⁸⁹

3. *Analysis of the Substantial Relationship Arguments*.— *Commonwealth v. Gumbert*¹⁹⁰ relies predominately on the California Court of Appeals' decision in *People v. Schrieber*¹⁹¹ to conclude that section 3731(a)(5) bears a real and substantial relationship to the legislative goal of safe roadways.¹⁹² The *Schrieber* court, however, based its reasoning in part on an extreme hypothetical, quoted by *Gumbert*, in which a person would "hurriedly gulp down" a large quantity of alcohol and "jump in his car and hope to reach his destination before he became intoxicat-

182. *Id.* (quoting *Schrieber*, 119 Cal. Rptr. at 814).

183. *Commonwealth v. Brehm*, 444 Pa. Super. Ct. 138, 147, 663 A.2d 712, 717 (1995).

184. 143 Pitt. Legal J. 7, 17 (1994).

185. *Id.*

186. *Id.* at 16.

187. 529 Pa. 92, 601 A.2d 1229 (1992).

188. 529 Pa. 101, 601 A.2d 1233 (1992).

189. *Barud*, 143 Pitt. Legal J. at 16-17.

190. 944 Cumb. L.J. 186 (1994).

191. 119 Cal. Rptr. 812 (Cal. Ct. App. 1975).

192. *Gumbert*, 44 Cumb. L.J. at 199 (citing *Schrieber*, 119 Cal. Rptr. at 814).

ed.”¹⁹³ A more plausible hypothetical is a situation in which a person drives to a local restaurant and consumes his meal and four beers in an hour before driving the five minutes back to his residence. The person in each hypothetical could be convicted under 3731(a)(5), but society’s interest in punishing the more common occurrence of the second hypothetical is debatable.

Certainly, one who consumes large quantities of alcohol on an empty stomach before undertaking a half-hour drive seems to pose a safety risk.¹⁹⁴ That person is also likely to show physical and chemical evidence of intoxication that would support a DUI conviction under sections 3731(a)(1) and 3731(a)(4). The real possibility that the person in the second hypothetical could be convicted only under section 3731(a)(5) of the statute, however, arouses suspicion that the provision’s relationship to the legislative goals of the statute is not as substantial as it may appear at face value. *Commonwealth v. Barud*¹⁹⁵ offers the alternative conclusion that the real goal of section 3731(a)(5) is to ease the prosecution’s burden of proof under the statute.¹⁹⁶

The decisions in *Commonwealth v. Jarman*¹⁹⁷ and *Commonwealth v. Modaffare*¹⁹⁸ certainly influenced the enactment of subsection (a)(5).¹⁹⁹ It is uncertain, however, whether the Assembly enacted subsection (a)(5) in response to those two Pennsylvania Supreme Court cases in order to ease the prosecution’s burden or to punish dangerous behavior not previously covered by the statute.

The *Jarman* opinion seems to suggest that subsection (a)(5) was enacted to make convictions easier to obtain. One passage in particular seems to suggest that the legislature should draft a law to make convictions easier under the then-existing DUI statute:

Arguably, statutes such as [those passed by other states making it illegal to drive with a BAC of 0.10% or greater as measured within a certain time after driving] may be more responsive to societal concerns about drunk driving, *making it easier to obtain*

193. *Id.* (quoting *Schrieber*, 119 Cal. Rptr. at 814).

194. This seems to be an instance where the *Schrieber* court’s hypothesis that intoxication could take place as early as 15 minutes after consumption would hold true. *See supra* note 181.

195. 143 Pitt. Legal J. 7 (1994).

196. *Id.* at 16-17.

197. 529 Pa. 92, 601 A.2d 1229 (1992).

198. 529 Pa. 101, 601 A.2d 1233 (1992).

199. *Barud*, 143 Pitt. Legal J. at 16.

convictions. Such arguments could properly be addressed to our legislature, rather than to this Court, for we are constrained to apply the plain language of the existing statute.²⁰⁰

Moreover, the rather brief floor discussion by the Pennsylvania General Assembly regarding passage of section 3731(a)(5)²⁰¹ supports the argument that section 3731(a)(5) was enacted to make DUI convictions easier under state law. Indeed, Pennsylvania State House Representative Kevin Blaum described the proposed subsection (a)(5) as “an agreed-upon amendment” worked on by the House Judiciary Committee and the District Attorneys Association which will “correct some court cases . . . which have damaged the DUI [laws of Pennsylvania].”²⁰² The same legislative records lack any discussion or expert testimony of whether a person with a BAC of 0.10% within three hours after driving endangers the safety of others on state roadways.²⁰³

Even if the General Assembly enacted subsection (a)(5) solely to ease the prosecution’s burden of proof in DUI proceedings, the provision is still constitutional under the substantial relationship test as long as it also furthers the intended goal of section 3731.²⁰⁴ The amendment arguably protects motorists because it keeps people who have been drinking from then driving.²⁰⁵ The societal concerns of a person’s BAC three hours after driving, however, are likely minor without scientific evidence showing how one’s BAC within three hours after driving relates to the time of driving. Unlike the abundant scientific support for subsection (a)(4) that a person over 0.10% BAC is intoxicated,²⁰⁶ there is not such scientific evidence to support subsection (a)(5). With no legislative intent other than ease of prosecution, the (a)(5) amendment does not bear a real and substantial relationship to the goals of preventing driving under the influence.

200. *Jarman*, 529 Pa. at 95 n.1, 601 A.2d at 1230 n.1 (emphasis added).

201. PA. HOUSE LEGIS. J., Nov. 17, 1992, at 1853.

202. *Id.*

203. *Id.*

204. For descriptive language of the drunk-driving problem and the legislative goals of DUI laws, see *supra* notes 14, 15 and accompanying text.

205. In *Commonwealth v. Mikulan*, the Pennsylvania Supreme Court first established that an average person with a 0.10% BAC was intoxicated, and then had no problem concluding that the “chilling effect” subsection (a)(4) had on a person’s “‘right’ to drink to the cutting edge of sobriety” was a restriction well within the statute’s legislative goals. *Commonwealth v. Mikulan*, 504 Pa. 244, 254, 470 A.2d, 1339, 1344 (1983).

206. See *id.* at 250, 470 a.2d at 1342.

A constitutional analysis similar to that of the rational relationship test is the inquiry of whether a law creates an illegal presumption of guilt. The analysis now shifts from legislative goals and intent to how legislative action affects treatment of the defendant. Once again, the Cumberland and Allegheny County Courts of Common Pleas have split on whether section 3731(a)(5) creates an illegal presumption of guilt,²⁰⁷ and again, the superior court has sided with the conclusion drawn by the Cumberland County Court in *Commonwealth v. Gumbert*.²⁰⁸

C. *Illegal Statutory Presumptions*

The third major challenge to the constitutionality of section 3731(a)(5) is that the provision violates the defendant's due process rights by creating an illegal presumption of law.²⁰⁹ A presumption is a rule by which a known fact gives rise to the existence of an unknown, but "presumed" fact.²¹⁰ Although presumptions help legislatures and courts operate efficiently,²¹¹ presumptions in criminal cases may not reduce the prosecution's burden of proving every element of the offense charged against the defendant beyond a reasonable doubt.²¹² Presumptions that shift the burden of persuasion to the defendant to disprove his or her guilt are invalid because they reduce the prosecution's burden.²¹³ Likewise, presumptions that prohibit the defendant from presenting evidence in his or her favor are also invalid.²¹⁴

The United States Supreme Court in *County Court of Ulster County v. Allen*²¹⁵ drew an important distinction between permissive and mandatory presumptions. Permissive presumptions permit, but do not require, a factfinder to infer a presumed fact from the

207. Compare *Commonwealth v. Gumbert*, 44 Cumb. L.J. 186, 199 (1994) with *Commonwealth v. Barud*, 143 Pitt. Legal J. 7, 18 (1994).

208. See *Commonwealth v. Brehm*, 444 Pa. Super. Ct. 138, 150, 663 a.2d 712, 718 (1995); see also *Commonwealth v. Rishel*, 441 Pa. Super. Ct. 584, 658 A.2d 352 (1995).

209. *Gumbert*, 44 Cumb. L.J. at 199.

210. Jennifer L. Pariser, Note, *In Vino Veritas: The Truth About Blood Alcohol Presumptions in State Drunk Driving Law*, 64 N.Y.U. L. REV. 141, 153 (1989).

211. Presumptions aid the legislature and judiciary when there is high probability that the known fact will result in the presumed fact, but proving the presumed fact directly is difficult and time consuming. *Id.* at 155.

212. *Id.* at 156 (citing *In re Winship*, 397 U.S. 358 (1970)).

213. *Id.* (citing *Sandstrom v. Montana*, 442 U.S. 510 (1979)).

214. *Id.* (citing *Sandstrom*, 442 U.S. at 523-34).

215. 442 U.S. 140 (1979).

proof of a related known fact.²¹⁶ The defendant does not necessarily have to rebut a permissive presumption, because the factfinder can attribute whatever weight it wishes to the inference.²¹⁷ A mandatory presumption, however, requires the factfinder to find that the presumed fact is true upon proof of the known fact.²¹⁸ If the presumed fact requires the defendant to disprove his or her guilt, the prosecution's burden has been reduced and the presumption is illegal.²¹⁹

I. Commonwealth v. Gumbert.— The defendant in the Cumberland County case of *Commonwealth v. Gumbert*²²⁰ argued that subsection (a)(5) creates an illegal mandatory presumption.²²¹ According to the defendant's argument, the known fact is that the defendant had a 0.10% BAC within three hours after driving.²²² The alleged presumed fact is that the defendant had a 0.10% or greater BAC while driving.²²³ The presumption allegedly is mandatory because the statute defines that proof of the known fact alone mandates a conviction under section 3731(a)(5).²²⁴ The presumption is illegal, the defendant argued, because it allows conviction without requiring the Commonwealth to carry its burden of proving the presumed fact that the accused was driving while under the influence of alcohol.²²⁵

The Cumberland County Court of Common Pleas in *Gumbert* relied on persuasive authority of sister states and held that section 3731(a)(5) did not create any mandatory presumptions of law.²²⁶ The *Gumbert* court relied on *State v. Martin*,²²⁷ in which the Arizona Court of Appeals held that a statute analogous to section 3731(a)(5) defines the essential elements of the crime and does not create a mandatory presumption.²²⁸ The *Gumbert* court conclud-

216. Pariser, *supra* note 210, at 158 (citing *Ulster County*, 442 U.S. at 157).

217. *Id.* (citing *Ulster County*, 442 U.S. at 157).

218. *Id.* at 159 (citing *Ulster County*, 442 U.S. at 157).

219. *Id.* (citing *Ulster County*, 442 U.S. at 157).

220. 44 Cumb. L.J. 186 (1994).

221. *Id.* at 199.

222. Defendant's Brief, *supra* note 134, at 26.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Gumbert*, 44 Cumb. L.J. at 202.

227. 847 P.2d 619 (Ariz. App. Ct. 1992).

228. *Gumbert*, 44 Cumb. L.J. at 201 (quoting *Martin*, 847 P.2d at 624). The Arizona court found "[t]he essential element of [the Arizona provision] is having a BAC of 0.10

ed that driving with a certain BAC level is not an element of the offense.²²⁹

The *Gumbert* court then analyzed the affirmative defense offered under section 3731(a)(1),²³⁰ which permits a defendant to prove that alcohol consumed after driving raised his or her BAC level above 0.10%. The court compared the defense to an Arizona affirmative defense provision,²³¹ and noted that in *Cacavas v. Bowen*,²³² the Arizona Court of Appeals held that the affirmative defense provision of a law similar to section 3731(a)(5) did not "establish an essential element of the crime and then place the burden of disproving that defined element on the accused."²³³ The *Gumbert* court relied on that decision in finding that sections 3731(a)(5) and 3731(a)(1) do not shift the prosecution's burden of proof to the defendant.²³⁴ The Pennsylvania Superior Court in *Commonwealth v. Brehm* also relied on *Cacavas v. Bowen* in finding that the new law did not shift the prosecution's burden of proof.²³⁵

2. *Commonwealth v. Barud*.— The Allegheny Court of Common Pleas in *Commonwealth v. Barud*²³⁶ agreed with *Gumbert* that section 3731(a)(5) does not create the mandatory presumption of a 0.10% or greater BAC while driving.²³⁷ The court in *Barud* concluded, however, that section 3731(a)(5) creates an illegal presumption by eliminating any defense that the accused

percent within two hours of driving . . . [T]he state must still prove beyond a reasonable doubt that defendant's [BAC] was 0.10 or more within two hours of driving." *Id.* (quoting *Martin*, 847 P.2d at 624).

229. *Id.*

230. This section provides:

it shall be a defense to a prosecution under subsection (a)(5) if the person proves by a preponderance of the evidence that the person consumed alcohol after the last instance in which he drove, operated or was in actual physical control of the vehicle and that the amount of alcohol by weight in his blood would not have exceeded 0.10% at the time of the test but for such consumption.

75 PA. CONS. STAT. ANN. § 3731(a)(1).

231. ARIZ. REV. STAT. ANN. § 28-692(B) (1989).

232. 811 P.2d 366 (Ariz. Ct. App. 1991).

233. *Gumbert*, 44 Cumb. L.J. at 200 (quoting *Cacavas*, 811 P.2d at 368).

234. *Id.* at 200-01. *Gumbert* also relied on the Minnesota case of *State v. Chirpich*, 392 N.W.2d 34 (Minn. Ct. App. 1986), for similar support. *Gumbert*, 44 Cumb. L.J. at 201.

235. *Commonwealth v. Brehm*, 444 Pa. Super. Ct. 138, 150, 663 A.2d 712, 717-18 (1995); see also *Commonwealth v. Rishel*, 441 Pa. Super. Ct. 584, 658 A.2d 352 (1995).

236. 143 Pitt. Legal J. 7 (1994).

237. *Id.* at 17. The statute "does *not* establish a presumption that a person's blood alcohol content was over 0.10% at the time of driving based on a later reading." *Id.*

was not under the influence while driving, thus alleviating the prosecution's burden of proof under the statute.²³⁸

Although subsection (a)(1) provides a possible affirmative defense to subsection (a)(5), the *Barud* court concluded that subsection (a)(1) further evidences the elimination of any defense related to driving.²³⁹ Under the pre-existing subsections (a)(1) and (a)(4)²⁴⁰ of the DUI statute, the *Barud* court noted, the accused had the opportunity to present a defense through factual evidence and expert testimony that he or she was not under the influence while driving.²⁴¹ That opportunity, however, is not available under subsection (a)(5). Section 3731(a)(1) does not provide any legitimate defense related to driving, but rather permits a defense that alcohol consumed after driving caused the defendant's BAC to rise to 0.10% or greater.²⁴² Without a legitimate defense for the accused to prove innocence under section 3731(a)(5), the *Barud* court concluded that the section alleviates the Commonwealth's burden and creates an illegal mandatory presumption of guilt.²⁴³

3. *Analysis of the Illegal Presumption Arguments.*— Although *Gumbert* relies on *Cacavas v. Bowen*²⁴⁴ to analogize an affirmative defense provision similar to subsection (a)(1),²⁴⁵ the Arizona provision does not appear analogous because, unlike subsection (a)(1), it clearly provides a defense related to driving.²⁴⁶ A defendant subject to the Arizona provision can use factual evidence and expert testimony to assess that he or she was not under the influence of alcohol while driving.²⁴⁷ This defense is not available under Pennsylvania Motor Vehicle Code section 3731(a)(1). Consequently, the *Gumbert* analysis of section 3731(a)(1) is not conclusive of whether section 3731(a)(5) unconstitutionally shifts the burden of proof to the defendant.

238. *Id.* at 18.

239. *Id.*

240. For text of subsections (a)(1) and (a)(4), see *supra* notes 21 and 5.

241. *Barud*, 143 Pitt. Legal J. at 18.

242. *Id.*

243. *Id.*

244. 811 P.2d 366 (Ariz. Ct. App. 1991).

245. *Commonwealth v. Gumbert*, 44 Cumb. L.J. 186, 200 (1994).

246. ARIZ. REV. STAT. ANN. § 28-692(B). The section provides an affirmative defense "if the person did not have an alcohol concentration of 0.10 or more at the time of driving" *Id.* (emphasis added).

247. *Id.*

To determine whether section 3731(a)(5) wrongfully shifts the burden to the defendant, the burden must first be defined. To sustain a conviction pursuant to section 3731(a)(5), the prosecution must prove the defendant, (1) operated or controlled a motor vehicle, and (2) had a BAC of 0.10% within three hours after driving.²⁴⁸ These essential elements of the offense do not require the prosecution to prove the accused had a certain BAC level while driving. Since the offense does not include this burden, there can be no shifting of the burden to the defendant.

Although technically section 3731(a)(5) defines a new offense rather than creates a mandatory presumption of driving under the influence of alcohol,²⁴⁹ the new offense necessarily begs the question of why subsection (a)(5) criminalizes behavior not directly associated with driving. This inquiry inevitably returns the focus of analysis to the relationship between the offense and the statute's legislative intent as discussed in Part IV.B of this Comment. The subsection appears constitutional after an analysis of illegal statutory presumptions, but only to the extent that the subsection is shown to be rationally related to the goals of the statute.

4. *The Post-Driving "Guzzle" Defense of Subsection (a)(1).*—

The new offense defined in section 3731(a)(5) inherently eliminates the defense that the defendant did not have the requisite 0.10% BAC while driving.²⁵⁰ The affirmative defense of section 3731(a)(1) provides little solace because it does not relate to the time of driving.²⁵¹ Section 3731(a)(1) applies only if the defendant consumed alcohol after driving and can prove that the later consumption, as opposed to alcohol consumed before driving, caused the illegal BAC level.²⁵²

Since section 3731(a)(1) provides the only substantive defense to section 3731(a)(5), drivers who believe they have a legal BAC while driving, but who suspect their BAC may rise above 0.10% at a later point, are seemingly encouraged to consume large quantities of alcohol if pulled over. Since the driver has no chance of proving he was not driving under the influence his or her only way of

248. 75 PA. CONS. STAT. ANN. § 3731(a)(5).

249. *Gumbert*, 44 Cumb. L.J. at 200-01.

250. *Commonwealth v. Barud*, 143 Pitt. Legal J. 7, 18 (1994).

251. *Id.*

252. 75 PA. CONS. STAT. ANN. § 3731(a)(1) (Supp. 1995). For the text of subsection (a)(1), see *supra* note 230.

proving innocence is to try to utilize section 3731(a)(1). Joseph E. Vogrin, defense attorney for defendant Barud summarized this anomaly: "If a driver gets out of the car after a stop and guzzles a beer, he is allowed to prove he was under 0.10 two minutes earlier. A driver who doesn't guzzle the beer doesn't have that defense. It makes no sense."²⁵³

The challenges to the constitutionality of section 3731(a)(5) ultimately will be decided by the Pennsylvania Supreme Court. The supreme court recently took jurisdiction over the issue in light of the *Commonwealth v. Barud* holding that section 3731(a)(5) is unconstitutional.²⁵⁴ Whatever the decision, the supreme court ruling will have a profound effect on Pennsylvania DUI Practice.

V. The Future of Section 3731(a)(5)

A. Treatment by the Pennsylvania Supreme Court

1. *The Pending Appeal.*— On October 20, 1994, Judge Walter R. Little denied the Commonwealth's motion to stay his *Commonwealth v. Barud*²⁵⁵ decision, which held section 3731(a)(5) unconstitutional.²⁵⁶ The Commonwealth then appealed the *Barud* decision to the Pennsylvania Supreme Court,²⁵⁷ requesting it stay the holding and take jurisdiction over the issue.²⁵⁸ The Pennsylvania Supreme Court took jurisdiction over the matter on October 31, 1994,²⁵⁹ and granted the motion to stay the lower court order on January 5, 1995.²⁶⁰

The Pennsylvania Supreme Court's stay of *Commonwealth v. Barud* means that defense counsel may not cite the decision as

253. Mary Ellen Fox, *Delayed DUI Testing Under Fire: "Three-Hour" Rule Struck Down; High Court Asked To Hear Case*, PA. L. WKLY., Oct. 31, 1994, at 23.

254. *Commonwealth v. Barud*, 143 Pitt. Legal J. 7 (1994), *appeal docketed*, No. 64 W.D. (Pa. Oct. 31, 1994).

255. 143 Pitt. Legal J. 7 (1994).

256. Fox, *supra* note 253, at 1, 23.

257. The Commonwealth filed the direct appeal pursuant to 42 PA. CONS. STAT. ANN. § 722(7) (1975), which allows direct appeals from courts of common pleas orders declaring a statute of the Commonwealth invalid as repugnant to the Constitution of the United States or of the Commonwealth. *Commonwealth v. Mikulan*, 504 Pa. 244, 247 n.5, 470 A.2d 1339, 1340 n.5 (1983).

258. Fox, *supra* note 253, at 1.

259. *Commonwealth v. Barud*, 143 Pitt. Legal J. 7 (1994), *appeal docketed*, No. 64 W.D. (Pa. Oct. 31, 1994).

260. *Commonwealth v. Rishel*, 441 Pa. Super. Ct. 584, 589 n.3, 658 A.2d 352, 354 n.3 (1995).

authority for the argument that section 3731(a)(5) is unconstitutional. The immediate confusion resulting from the *Barud* decision justifies supreme court interference to consider the merits of the holding. The confusion is heightened in Allegheny County, where *Barud* was decided, since two other judges in the county had previously upheld the constitutionality of section 3731(a)(5).²⁶¹

2. *Supreme Court Analysis.*— Having stayed the *Barud* holding, the Pennsylvania Supreme Court must now decide the substantive constitutionality issue. Although the Supreme Court decided *Commonwealth v. Mikulan*,²⁶² in 1983, the case remains a useful analogy of how the court may hold. The *Mikulan* court upheld the constitutionality of section 3731(a)(4), which criminalized driving with a blood-alcohol content of 0.10% or greater.²⁶³

The supreme court in *Mikulan* noted in detail the broad state police power in regulating highway safety, especially when alcoholic beverages are involved.²⁶⁴ The court also described at length the deaths caused by drunk drivers on state highways.²⁶⁵ The strong deference given by the court to the Pennsylvania legislature in matters concerning drunk driving suggests the Pennsylvania Supreme Court will uphold section 3731(a)(5). Societal outcries and concerns over drunk driving accidents and fatalities likely will overshadow arguments that section(a)(5) does not rationally relate to these concerns.²⁶⁶

The Pennsylvania Supreme Court may find further support for section 3731(a)(5) from states that have upheld similar provisions. In *Commonwealth v. Gumbert*,²⁶⁷ the Cumberland County Court of Common Pleas demonstrated that other states have upheld similar provisions.²⁶⁸ Such reliance on persuasive authority from other states likely will influence the supreme court more than the analysis in *Commonwealth v. Barud*, in which the Allegheny County Court of Common Pleas declared section 3731(a)(5) unconstitutional without citing any authority. Despite this lack of

261. Fox, *supra* note 253, at 1.

262. 504 Pa. 240, 470 A.2d 1339 (1983).

263. *Id.*

264. *Id.* at 247-48, 470 A.2d at 1340-41.

265. *Id.* at 248-49, 470 A.2d at 1340-41.

266. *See supra* part IV.B.

267. 44 Cumb. L.J. 186 (1994).

268. *Id.* Arizona, North Dakota, New York, California, and Minnesota are the five states cited for comparison in *Gumbert*. *Id.*

authority, closer analysis of Judge Little's opinion proves it meritorious on a common sense level. Yet, if the supreme court considers both cases in its analysis, it likely will find the analytical approach of Judge Oler in *Gumbert* more persuasive from a legal analysis viewpoint than Judge Little's narrative in *Barud*. The analysis in *Gumbert* is further bolstered by the Pennsylvania Superior Court's decision in *Commonwealth v. Brehm*, which upholds the law with similar analysis.

Further evidence that the Pennsylvania Supreme Court will uphold section 3731(a)(5) appears in *Commonwealth v. Jarman*.²⁶⁹ The supreme court opinion seems to rally support for the type of legislative action that resulted in the passage of the (a)(5) amendment.²⁷⁰ In reversing a section 3731(a)(4) conviction, the supreme court noted that other states employ statutes that would support a conviction under the facts of *Jarman*.²⁷¹ Since the limited plain language of the Pennsylvania statute constrained the court in its decision, the court instructed that arguments for a statute that made convictions easier should be addressed to the legislature.²⁷² It is doubtful the supreme court would strike down a law it appeared to endorse in its own recent decision.

In light of its recent ruling in *Commonwealth v. Yarger*,²⁷³ however, the supreme court may determine that section 3731(a)(5) unfairly limits defense rights in DUI prosecution. Although the court in *Yarger* held that the Commonwealth need not extrapolate subsequent BAC test results back to the time of driving, the court also noted that the defendant had a right to offer evidence that he or she had a legal BAC while driving.²⁷⁴ Even Pennsylvania Supreme Court Justice Ralph J. Cappy, who dissented in *Jarman* and *Modaffare*, recognized that the defendant had a right to a defense related to the time of driving.²⁷⁵ Whether this recognized right to defend is strong enough to strike down legislative action concerning tougher DUI laws, however, is doubtful. The Pennsylvania Supreme Court likely will uphold the constitutionality of

269. 529 Pa. 92, 601 A.2d 1229 (1992).

270. *Id.* at 95, 601 A.2d at 1230.

271. *Id.*

272. *Id.* at 95 n.1, 601 A.2d at 1230 n.1.

273. 538 Pa. 329, 648 A.2d 529 (1994).

274. *Id.* at 335, 648 A.2d at 531.

275. *Commonwealth v. Jarman*, 529 Pa. 92, 98, 601 A.2d 1229, 1231 (1992) (Cappy, J., dissenting).

section 3731(a)(5) in deference to the state's broad police powers in regulation of drinking and driving on state roadways.²⁷⁶

VI. Conclusion

The latest amendment to Pennsylvania's DUI statute prohibits a person from having a blood-alcohol content of 0.10% by weight within three hours, or a reasonable additional time, after driving.²⁷⁷ The Pennsylvania legislature enacted section 3731(a)(5) to solve the apparent extrapolation problems created in *Commonwealth v. Jarman*²⁷⁸ and *Commonwealth v. Modaffare*.²⁷⁹ Subsequent case law, however, has proven that the legislature acted prematurely in amending the statute.²⁸⁰ Recent case law has demonstrated that the pre-existing DUI statute was both viable and sufficient.²⁸¹

The constitutionality of Pennsylvania Motor Vehicle Code section 3731(a)(5) has been challenged in recent trial court cases.²⁸² The challenges propose that subsection (a)(5) is void-for-vagueness, lacks a substantial relationship to legislative goals, and creates an illegal presumption of guilt.²⁸³ In light of the divergent authority at the trial court level, the Pennsylvania Supreme Court will hear the issue.²⁸⁴ Although the challenges have merit, the supreme court likely will uphold the constitutionality of section 3731(a)(5) in deference to the state's broad police powers in regulation of drinking and driving on state roadways.

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276. See *supra* notes 12, 13 and accompanying text.

277. 75 PA. CONS. STAT. ANN. § 3731(a)(5) (Supp. 1994).

278. 529 Pa. 92, 601 A.2d 1229 (1992).

279. 529 Pa. 101, 601 A.2d 1233 (1992).

280. See *supra* notes 79-96 and accompanying text.

281. See *supra* note 91-96 and accompanying text.

282. See *supra* part IV.

283. See *supra* part IV.

284. See *supra* text accompanying notes 255-61.