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NCDD Journal

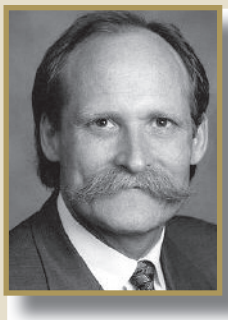
National College for DUI Defense

Editors: Edward Fiandach and Paul Burglin

Winter 2011

A MESSAGE FROM THE DEAN

By George L. Bianchi



It is with a spirit of camaraderie and pride that I hope to lead the NCDD as your Dean in 2011. Our bond together has always been our great strength. The prosecutorial and political forces we confront daily are powerful and demoralizing, but from one another we draw strength, share ideas, and renew our commitment to defending the rights of those arrested and unfairly presumed guilty of drunk driving.

Our new year began with the 2011 Winter Session in Mazatlan, Mexico on January 20-21, 2011. It was a warm and relaxing atmosphere of collegiality and friendship, and wonderful to see old timers Don Nichols, Peter Wold, and Dick Jensen---wonderful people who inspired so many of us in DUI defense work.

Plans are well underway for the 2011 Summer Session presented at Harvard Law School. We already have Roger Dodd's commitment for a presentation on Cross Examination and Steve Rickard will discuss Accident Reconstruction.

The NCDD now has a "badge" for you to use on your website. It is located in the Members Only section of our website (www.ncdd.com) and it will verify your membership in the College and your commitment to DUI/DWI defense. If you have any questions, contact Rhea.

Please give us your feedback and suggestions as we move forward in the upcoming year. We want to hear from you!

— *George*

Upcoming Seminars

April 14-16, 2011
Mastering Scientific Evidence — New Orleans, LA

July 28-30, 2011
Summer Session at Harvard — Cambridge, MA

Register now: www.ncdd.com

NCDD's headquarters are located in Montgomery, Alabama. The building is provided rent-free by Fellow Tommy Kirk and Executive Director Rhea Kirk.

SUPREME COURT TO DETERMINE WHETHER ACTUAL ANALYST REQUIRED IN COURT

NCDD WEIGHS IN WITH AMICUS BRIEF

The question pending before the United States Supreme Court in *Bullcoming v. State of New Mexico* (Docket No. 09-10876), is "[w]hether the Confrontation Clause permits the prosecution to introduce testimonial statements of a nontestifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements."

The NCDD, along with the National Association of Criminal Defense Lawyers (NACDL), has filed an amicus brief in *Bullcoming*. Contributing greatly to this brief were NCDD Regent Leonard R. Stamm (*Maryland*) and members Ronald L. Moore (*California*) and Justin J. McShane (*Pennsylvania*). The brief articulately describes the step-by-step process of gas chromatography blood-alcohol analysis and presents a compelling argument as to why cross-examination of the actual analyst---as opposed to a surrogate witness---is imperative under the Confrontation Clause.

Stanford Associate Law Professor Jeffrey L. Fisher, who brought and won the *Crawford* and *Melindez-Diaz* cases, is slated to handle oral argument for Petitioner, with a decision from the high Court anticipated in 2011.

E.D.'S CORNER

We certainly had a busy summer, fall, and winter with the Summer Session and Vegas seminars and the fantastic Winter Session in Mazatlan, Mexico! Dean Bianchi and his committee put together an interesting program and the El Cid Resort was a beautiful setting for the seminar and events. Now we are gearing up for MSE and the Summer Session. Don't forget to register to assure your place! If you have any questions, please call me. You can also access more information through the NCDD website: http://ncdd.com/sessionsandseminars.php

Speaking of the NCDD website…
Our new website is just about complete and I hope you have noticed all of the new features. You can modify your own bio and add your picture to the site so please visit the NCDD website soon! It will be a great tool for you to use in the future! We are also finalizing a "badge" you can use to link to the NCDD site. I will put final instructions on the listserver or you can call the office for help! Stay tuned!

Your 2011 NCDD dues and renewal forms need to be mailed or faxed by January 31. Please don't forget to send them in and make the deadline!

Until spring…

Best Regards,

— Rhea

Case Law Roundup

Confrontation Cases Post *Melendez-Diaz*

Breath Test Result Numbers and Maintenance Records Deemed Non-Testimonial

Settlemire v. State (2010) ___ S.W.3d ___, 2010 WL 2720590 (Tex. App.-Fort Worth)

The State introduced both the test result records and the maintenance records for an Intoxilyzer by using a technical supervisor uninvolved with the machine at the time of testing, but just at the time of trial. Defendant objected to the records on grounds of the basis of a violation of his confrontation rights. Seizing on footnote 1 of the Melendez-Diaz opinion, the Texas Court of Appeal held the records were non-testimonial. Note, however, that the supervisor's testimony was not used to establish authenticity of the sample or accuracy of the Intoxilyzer at the time of testing.

Breath Test Records Regarding Solution Certificate And Calibration/Maintenance Deemed Non-Testimonial

People v. Lent (2010) ___ N.Y.S.2d ___, 2010 WL 2802714 (N.Y.Sup.App.Term), 2010 N.Y. Slip Op. 20283

Certified copies of a simulator solution certification and the calibration/maintenance documentation in relation to a breath test instrument, offered as part of the foundational requirements for the admission of a blood alcohol test result, are admissible without the preparer of those records being available for cross-examination. The records are non-testimonial because they were created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial.

Retrograde Extrapolation

Directed Verdict Motion Properly Denied Even Though State's Expert Acknowledged That His Retrograde Extrapolation Opinion Lacked Reasonable Degree of Certainty

Steen v. Commonwealth (2010) ___ S.W.3d ___, 2010 WL 2976897 (Ky.App.)

A medical examiner's conclusion that Defendant's blood alcohol level was likely .10 or .11 at the time of driving, notwithstanding a blood test result of .07 percent, was sufficient to overcome a directed verdict motion even though he acknowledged his opinion was not based on a "reasonable degree of certainty."

Fourth Amendment

Three Air Fresheners Hanging From Rearview Mirror Insufficient Basis For Detention Absent Some Indication Objects Materially Interfered With Driver's Vision

Commonwealth v. Anthony - 2010 WL 2804337 (Pa.Super.)

In Commonwealth v. Felty, 662 A.2d 1102 (Pa.Super.1995), and *Commonwealth v. Benton*, 655 A.2d 1030 (Pa.Super.1995) the court dealt with the issue of determining when a traffic stop can be conducted based on items hanging from a driver's rearview mirror. Those cases held that a stop is valid only when the officer's observations suggest that the objects "materially obstruct, obscure or impair the driver's vision through the front windshield."

In this case, the trooper never made detailed observations of the three air fresheners hanging from the rearview mirror and did not allege that they were materially obscuring or obstructing the driver's vision. Since that is required in traffic stops of this nature, the court reversed and the defendant was discharged.

Turn Signal Statute Must Give Fair Notice As To When Use Of Turn Signal Is Required (Merging Lanes Case)

Burton v. Idaho Dept. of Transportation - 2010 WL 3529453 (Idaho App. 2010)

Appellant did not use her turn signal indicator when her lane of travel merged with an adjacent lane. She was subsequently stopped for failure to signal before moving "right or left upon the highway" in violation of Idaho Code § 49-808(1). No evidence was presented of signage or other indicator that one lane was ending and another surviving.

At an administrative hearing officer concerning the suspension of her license for driving with an excessive amount of alcohol, appellant contended that I.C. § 49-808(1) is void for vagueness "as applied" because it did not give fair notice that a turn signal is required when two lanes merge and does not establish minimal guidelines for uniformity in enforcement.

I.C. § 49-808(1), states: "No person shall turn a vehicle onto a highway or move a vehicle right or left upon a highway or merge onto or exit from a highway unless and until the movement can be made with reasonable safety nor without giving an appropriate signal."

Due process requires that all "be informed as to what the State commands or forbids" and that "men of common intelligence" not be forced to guess at the meaning of the criminal law. *Smith v. Goguen,* 415 U.S. 566, 574 (1974); *State v. Cobb,* 969 P.2d 244, 246 (1998). Accordingly, the void-for-vagueness doctrine, premised upon the Due Process Clause of the 14th Amendment, requires that a statute defining criminal conduct or imposing civil sanctions be worded with sufficient clarity and definiteness that ordinary people can understand what conduct is prohibited, and the statute must be worded in a manner that does not allow arbitrary and discriminatory enforcement. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 497-99 (1982); *State v. Korsen,* 69 P.3d 126, 131 (2003). Thus, a statute may be void for vagueness if it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes or if it fails to establish minimal guidelines to govern law enforcement or others who must enforce the statute. *Korsen,* 69 P.3d at 132.

The statute does not clearly indicate that a signal is required when two lanes merge with neither lane clearly ending or clearly continuing. This situation differs significantly from that where one of two lanes ends and the other continues. When there is no basis to discern that one lane is terminating and the other surviving, but rather the two blend into a single lane, it is not clear that the continued forward movement of a vehicle from either of the two lanes into the emerging lane constitutes a "move ... right or left" that is subject to the Section 49-808(1) signal requirement.

This vagueness in application occurs because the statute does not specify how much or what type of movement to the left or right is necessary to trigger the duty to signal. Admittedly, a very literal interpretation of the statute might lead to a conclusion that a signal is required when two lanes simply merge because a driver in either lane must move the steering wheel at least slightly in order to steer into the emerging lane. But the statute cannot reasonably be given an utterly literal application to *every type of side-to-side movement, for a vehicle literally moves to the left or the right when a driver weaves a bit within his or her lane or simply negotiates a bend in the road, but no one would contend that a signal is required in those instances*.

It is simply not apparent from the language of Section 49-808(1) whether a signal is required when two lanes blend into one. Persons of ordinary intelligence can only guess at the statute's directive in this circumstance. Therefore, the statute is unconstitutionally vague as applied to Burton's conduct.

Activation of Police Lights Behind Parked Vehicle Not A Seizure

Tahiri-Amine v. Commonwealth ___ S.E.2d ___, 2010 WL 2998754 (Va.App.)

While investigating a call of shots fired, officer sees a vehicle pull to the curb and stop. He activates his lights and approaches. Defendant asked several questions by police including a request for his driver's license. *Held*: A consentual encounter only and not a seizure. (The decision is contrary to a number of other cases holding that the activation of emergency lights constitutes a detention, e.g., *People v. Luedemann* 222 Ill.2d 530).

Totality of Circumstances Must Be Considered In Evaluating Stop Based On Weaving

Dods v. Wyoming (2010) ___ P.3d ___, 2010 WL 3895733 (Wyo.), 2010 WY 133

"While it might not be reasonable to expect a driver to avoid even the slightest deviation from a lane over an extended distance, it may be reasonable to expect drivers to avoid a sudden, significant deviation from the lane or a sudden, over-compensating return back, absent physical obstacles, mechanical difficulty, or other uncontrollable circumstances." Trial courts must consider all of the surrounding circumstances in ruling on a motion to suppress evidence.

Establishment Clause Bars Delegation of Police Power by Religious College, Making Detention Of Motorist Unlawful and Triggering Exclusionary Rule

State v. Yencer - 2010 WL 3220099 (N.C.App. 2010)

Evidence showed that officers of the Davidson College Police are commissioned pursuant to N.C. Gen. Stat. § 74G (2009).

Under N.C. Gen. Stat. § 74G-2(a), "[a]s part of the Campus Police Program, the Attorney General is given the authority to certify a private, nonprofit institution of higher education ... as a campus police agency and to commission an individual as a campus police officer." Members of the Davidson College Police Department were commissioned pursuant to this authority. Davidson College was shown to be affiliated with the Presbyterian Church of the United States of America, and the trial court considered Davidson's statement of purpose and testimony regarding the college's voluntary relationship with the Presbyterian Church and religion-based requirements for students.

To determine whether the delegation of state police power to Davidson College under § 74G violated the Establishment Clause of the First Amendment, there is the three-pronged analysis undertaken in *Lemon v. Kurtzman*, 403 U.S. 602, (1971), referred to as the *Lemon* test. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an *excessive government entanglement* with religion." Id. at 612-13. A statute is unconstitutional if it fails to meet the requirements of any prong of the Lemon test. *Edwards v. Aguillard, 482 U.S. 578, 583, (1987).* Here, neither of the first two prongs is at issue. The question raised on appeal is whether the delegation of state police power to Davidson College, pursuant to § 74G, runs afoul of the Establishment Clause by fostering an excessive government entanglement with religion. *Lemon,* 403 U.S. at 613. See also, *State v. Pendleton, 451 S.E.2d 274 (1994)*, and *State v. Jordan, 574 S.E.2d 166 (2002)*.

In Pendleton, the Supreme Court held that § 74 unconstitutionally delegated state police power to a religious institution, Campbell University. *Pendleton,* at 281. Specifically, the Court noted that Campbell University's mission was to "[p]rovide students with the option of a Christian world view". *Id.,* at 279-80. The Court also referenced Campbell University's requirement that all undergraduates take at least one Judeo-Christian religion course, and its statement that it "is a Baptist university" whose purpose: "arises out of three basic theological and Biblical presuppositions" *Id.,* at 281.

Similarly, in *Jordan*, the defendant was charged with DWI by an officer with the Pfeiffer University Police Department. *Jordan,* at 167. The Court held that § 74E unconstitutionally delegated state police power to a religious institution, Pfeiffer University. The Jordan Court noted the school's strong affiliation with the United Methodist Church, its requirement that at least six of its forty-four trustees be church members, and Pfeiffer's mission to be "a 'model church related institution preparing servant leaders for life long learning[.]'" *Id,* at 153-54.

The Court was bound by the analysis in *Pendleton* and *Jordan,* and concluded that Davidson College is a religious institution for the purposes of the Establishment Clause. Accordingly, the delegation of police power to Davidson College, pursuant to § 74G, is an unconstitutional delegation of "an important discretionary governmental power" to a religious institution in the context of the First Amendment. *Pendleton,* at 279.

Like the colleges in *Tilton* "with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education," Davidson College is primarily an educational institution with well-established principles of academic freedom and religious tolerance. *Id.*, at 687. Davidson College's mission is not religious indoctrination but rather to "assist students in developing humane instincts and disciplined and creative minds for lives of leadership and service." Nonetheless, the Court was constrained by *Pendleton* and *Jordan*, and the Court reversed based on the precedent laid out in those two binding cases.

Chemical Test Refusal

Jury Must Find Defendant Refused Chemical Testing Before It May Infer a Consciousness of Guilt --- No Right To Consciousness Of Innocence Instruction Based On No Refusal.

State v. Seekins - 2010 WL 3001394 (Conn.App. 2010)

Defendant refused to submit to a chemical test without an attorney present. He was then given the opportunity to call an attorney but was unable to reach him. He was then served with a "refusal" order. Within two hours of the driving, Defendant expressed his willingness to submit to testing but was told it was too late.

The Court's jury instruction regarding "consciousness of guilt" was affirmed because it properly required the jury to find that the defendant had refused the test before the jury could draw an inference. Its denial of Defendant's request for a "consciousness of innocence" instruction was also affirmed because the alleged willingness to submit to chemical testing purportedly does not support a recognized legal defense.

The court repeatedly has refused to apply the consciousness of innocence principle to jury instructions regarding a consciousness of guilt. In *State v. Holley,* 90 Conn.App. 350, 364-66, the trial court refused to give a consciousness of innocence instruction because the defendant voluntarily turned himself into the police after he fled the scene of the crime. In *State v. Timmons,* 7 Conn.App. 457, 464 (1986), a similar argument was made and rejected. The court concluded that the surrender after flight of an accused is a factual argument that may be made in summation but does not support a theory of defense after flight, from which, as a matter of law, an inference of innocence may be drawn by the jury. *Id.*, at 466. Accordingly, the defendant was not entitled to the theory of defense instruction that he sought because he did not assert a recognized legal defense at trial.

Timely Rescission of Refusal Vitiates License Suspension

McIntosh v. State - 2010 WL 3273500 (Kan. 2010)

Officer Weber arrested Defendant for DUI. Upon arrival at the jail, Weber proceeded to give Defendant the implied consent admonishment. Defendant refused testing and was escorted to the booking area for processing while Weber took approximately 20-30 minutes to complete the Notice of Suspension (form DC-27). From the receiving room, Weber could not see Defendant in the booking area. When the paperwork was completed, Weber personally served McIntosh with the refusal form. At that time, Defendant advised Weber that he wanted to take the breath test, but Weber would not administer it because he believed that Defendant had been given ample opportunity to take the test earlier.

Both parties argued that the factors governing a rescission of a test refusal set forth in *Standish v. Department of Revenue,* 235 Kan. 900 (1984), were controlling. Though observing that "there is nothing within the statute [K.S.A. 8-1001] regarding the right of a person so arrested to change his mind and 'rescind' a refusal[,]" the Standish Court declared:

> "A refusal to submit to the test, on the other hand, invokes serious consequences for the person arrested. The administration of the test should be encouraged and the person arrested should be given every reasonable opportunity to submit to it. For this reason, an initial refusal may be rescinded, and if rescinded in accordance with the following rules, cures the prior refusal. To be effective, the subsequent consent must be made:
>
> (1) within a very short and reasonable time after the prior first refusal;
> (2) when a test administered upon the subsequent consent would still be accurate;
> (3) when testing equipment is still readily available;
> (4) when honoring the request will result in no substantial inconvenience to the police; and

(5) when the individual requesting the test has been in the custody of the arresting officer and under observation for the whole time since arrest." 235 Kan. at 902-03.

KDR contended that the test request was not made within a very short and reasonable time after the initial refusal and that Defendant was not in the custody of the arresting officer [Weber], and under his observation for the whole time between arrest and the rescinded refusal/test request.

KDR points to *Lund v. Hjelle,* 224 N.W.2d 552 (N.D.1974) because it is cited by *Standish*, which said the post-refusal test request must be "made within a reasonable time after the prior first refusal." *Id.,* at 557. In contrast, *Standish* requires the subsequent consent to be "within a very short and reasonable time after the prior first refusal." 235 Kan. at 903. Likewise, Lund required that the requesting individual "has been in police custody and under observation for the whole time since his arrest." *Id.,* at 557. In contrast, *Standish* replaced "in police custody" with "in the custody of the arresting officer." *Id.,* at 903. Therfore, KDR argues that the time elapse of approximately 30 minutes between McIntosh's test refusal and subsequent request to take the test was outside the "very short" time requirement in *Standish*. In support, KDR singles out the sentence in *Standish* that reads: "This, under the rules laid down above, was too late." 235 Kan. at 903. Then, the KDR asserts that the time period in *Standish* was from "15-30 minutes." *Id.,* at 901. The apparent suggestion is that if 15 to 30 minutes was too late in *Standish,* then 30 minutes must be untimely.

The *Standish* analysis does not clarify whether the subsequent request was too late under the first rule, either because the elapsed time between refusal and rescission was not a very short time or was not a reasonable time, or whether the request came too late under the fourth rule because honoring the request would have resulted in substantial inconvenience for the police. The analysis emphasizes that the officer had left the jail and returned to his other duties and declares that the "arresting officer need not sit and wait for the person to change his or her mind, and thus neglect other duties." *Id.,* at 903. Following that, it's unlikely *Standish* intended to create a bright-line rule that 30 minutes is not a very short time, which cannot be cured. Rather, the focus should be on the particular circumstances of a case, including a look at what is transpiring.

Here, the time frame is more akin to the scenario in *State v. Gray,* 18 P.3d 962 (2001). In *Gray*, the arresting officer gave the implied consent advisory and asked Gray to take a breath test. Gray responded that he did not have his glasses with him, that he could not understand the form, and that he wanted to speak with an attorney. The officer advised Gray that he could not consult with an attorney. Gray reiterated that he wanted to speak to an attorney and opined that because he could not read the form, he should not have to take the test. "The meeting between the officer and Gray took about 35 minutes." Id. The officer determined that Gray's actions constituted a refusal and marked the DC-27 accordingly. When the form was served on Gray, he immediately said he would take the test, but the officer would not allow the test.

On appeal, the court found the facts of that case clearly met each of the *Standish* elements. With respect to the timeliness rule, *Gray* stated that "the subsequent consent was given within a minute or less of when the officer checked the 'refusal' box on the consent form." *Id.,* at 965. Here, McIntosh's consent came immediately upon being served with that form. Accordingly, Defendant's rescission was timely under the *Standish* standards.

Defendant was in the custody of jail personnel the entire time. It is not unreasonable to impute to the arresting officer the jailers' observational knowledge, *i.e.,* that McIntosh was not drinking alcohol during booking. Cf. *State v. Bieker,* 35 Kan.App.2d 427, 435, (2006) (an officer's reasonable suspicion to detain may be based upon the collective knowledge of all officers involved). Accordingly, the circumstances in this case conformed to the custody and observation requirements for a valid rescission. Hence, the district court did not err in finding that McIntosh's rescission of his refusal of a breath test met the *Standish* requirements; that McIntosh's subsequent consent to testing was valid; that the arresting officer should not have refused to allow the testing; and that KDR's suspension of McIntosh's driver's license was invalid.

Chemical Test Refusal Consequences Must Be In Language Motorist Understands

State v. Marquez - 2010 WL 2719851 (N.J.)

The Court determined that reading the standard chemical test admonition to motorists in a language they do not speak is akin to not reading the statement at all, and defies the legislative goal of encouraging motorists arrested on suspicion of drunk driving to submit to a chemical test. Therefore, defendant's conviction for refusal to submit was reversed.

Criminal Procedure

"One Act, One Crime" Rule Precludes Conviction For Both DWI and Hit-Run

State v. Hitchcock (2010) – Unpublished Opinion - 2010 WL 4068765 (Minn.App.)

Many states have a rule similar to Minnesota's, stating that, "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses." Minn.Stat. § 609.035(1) (Supp. 2007). If a person is charged with multiple offenses, a court must determine whether the offenses "resulted from a single behavioral incident," in which event multiple punishment is prohibited. This is often referred to as the "one act, one crime" rule.

Here, the driver was convicted of both DWI causing bodily injury and leaving the scene of an accident resulting in bodily injury. Observing that both offenses occurred at substantially the same time and place (thus amounting to a single behavioral incident), it was held that the defendant could only be sentenced on the greater of the two offenses and that the conviction on the lesser offense must be vacated.

Evidence

SCRAM Device Sufficiently Reliable In Scientific Community

People v. Dorcent (2010) ___N.Y.S.2d ___, 2010 WL 4187404 (N.Y.City Crim.Ct.), 2010 N.Y. Slip Op. 20430

"This court finds that the SCRAM device and technology is sufficiently reliable and generally accepted in the scientific community and satisfies the *Frye* standard for admission of evidence under New York law."

SCRAM stands for Secure Continuous Remote Alcohol Monitoring. The device is being used more and more frequently by Courts to detect alcohol consumption by probationers and persons released from custody while charges are pending against them.

Even Commonly Used Instruments Require Foundational Showing

State v. Bashaw (2010) 169 Wash.2d 133, 234 P.3d 195

Even measuring devices "commonly used by law enforcement" like a "rolling wheel measurer you can zero out and roll along ahead of you and it counts out feet" require authentication, *i.e.*, prima facie evidence "that the device is functioning properly and produced accurate results." Even though electronic instruments differ from a standard rolling wheel measurement device in complexity, the same foundational showing---that of producing accurate results---is required. Failure to meet that *prima facie* requirement means admission of the distance measurement is barred. (This was a drug sales case with an enhancement for committing the offense within a specified distance of school grounds).

Reversible Error To Admit HGN Where Standardized Procedure Not Followed

State v. Ingram (2010) --- P.3d ----, 2010 WL 4629061 (Or.App.)

HGN inadmissible where officer deviates from standardized procedures by holding stylus 6-8 inches above the eye, fails to administer the requisite number of passes, and changes the speed of the stimulus. Finding that HGN is scientifically based, the Court

determined that the potential for such evidence to exert influence on a jury is manifest. Thus, it was reversible error to admit the evidence even though the Court gave a jury instruction on weight.

Negligent Destruction of Video Tape Does Not Trigger Exclusion of Testimonial Evidence

Prins v. Director of Revenue (2010) --- S.W.3d ----, 2010 WL 4607404 (Mo.App. W.D.)

Administrative hearing officer improperly excluded evidence of defendant's stop and arrest where police negligently destroyed video tape of it. *Held*: Exclusion of evidence based upon "spoliation " doctrine is only proper where fraud or deceit are involved in the loss of evidence.

Jury Instructions

Jury Must Find Defendant Refused Chemical Testing Before It May Infer A Consciousness of Guilt --- No Right To Consciousness Of Innocence Instruction Based On No Refusal

State v. Seekins - 2010 WL 3001394 (Conn.App. 2010)

Defendant refused to submit to a chemical test without an attorney present. He was then given the opportunity to call an attorney but was unable to reach him. He was then served with a "refusal" order. Within two hours of the driving, Defendant expressed his willingness to submit to testing but was told it was too late.

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Vehicle "Operation" Requires Physical Control And Ability

State v. Christiansen - 2010 WL 3555796 (Mont.), 2010 MT 197

On the element of "operation" of a motor vehicle, the proper jury instruction is:

"[T]he Defendant is in actual physical control of a motor vehicle if the Defendant is not a passenger and is in a position to, and has the ability to, operate the vehicle in question."

Attorney Terry Wapner of Fresno, California, proudly displays a marlin he caught during the Winter Session Seminar in Mazatlan, Mexico last month. The fish was cooked to perfection that evening and enjoyed by many of the attendees!

Defending DUI Charges in Federal Court

By Adam Gasner [1]

Lawyers specializing in DUI/DWI defense should be prepared to handle such cases in federal court. There are many similarities but some important distinctions.

What cases are filed in federal court and what law applies?

Drunk driving cases are filed in federal court when the offense occurs on federal property. If it occurred on land administered by the National Park Service, it is the *substantive* law of the State surrounding the park that applies (the State law is assimilated under the Assimilative Crimes Act). If the incident happened on any other federal property, the Code of Federal Regulations (CFR) provides the *substantive* law. Federal rules of procedure and evidence control the judicial proceeding in both instances.

Non-injury drunk driving cases are Class B misdemeanors in federal court, no matter how many prior convictions the accused has suffered. This is important for two reasons. First, the speedy trial act does not apply (i.e., the case need not be tried within 70 days of the initial appearance). Secondly, the offense is deemed presumptively petty and there is no right to a jury trial. *Blanton v. North Las Vegas* (1989) 489 U.S. 538.[2]

Who prosecutes the case?

The United States Attorney's Office prosecutes all cases in federal court. The DUI's are often handled by a team of law clerks supervised by an Assistant United States Attorney. Unlike many state court prosecutors, these attorneys and law clerks are very responsive to discovery requests. Federal prosecutors often use certified law students to prosecuted drunk driving cases, and they often lack experience in field sobriety testing and chemical test issues.

Who presides over the case?

Generally, a Magistrate Judge will be assigned the case and will keep it all the way through possible trial and sentencing. Consent is no longer required for a magistrate to preside over a misdemeanor drunk driving case under the *Federal Courts Improvement Act of 1996*.

When a person is arrested for a federal DUI they are issued a notice to appear in federal court before a federal magistrate judge, who has been randomly assigned to hear the case. The way the assignment of cases process works in most jurisdictions is each month a particular magistrate judge is assigned to be the "duty" judge. These assignments are published, usually months in advance. If a calendar conflict arises, generally an e-mail to the prosecutor and the clerk of the judge assigned the case along with a reason for the conflict and a suggested new date will suffice.

The initial appearance

The defendant must be personally present at the first court appearance in federal court, unless waived by (a) a written waiver of personal appearance signed by the defendant *and* his attorney; (b) defendant affirms in the written waiver that he has received a copy of the indictment or information and that his plea is not guilty; and (c) the Court accepts the waiver. Fed. R. Crim. Proc. 10(b) and 43(b)(2).

Federal courtrooms usually start on time, with the clerk calling the docket in the order that the defendants appear on the calendar.

Usually the defendant in a federal DUI is released on his promise to appear. The Court may enter terms of release that could include not leaving the jurisdiction without prior approval of the court. Know the boundaries of your federal jurisdiction and indicate to the court if there are needs for the client to travel outside those borders. It is much easier to deal with that limitation at the initial appearance than creating a request and preparing an Order each time the client needs to travel.

The Court will generally set a "status conference" in about 30-60 days time, and then direct the client to report to the federal marshal's office for processing. This is similar to being booked in state court, where pictures and finger-prints will be taken.

Settlement Agreements

Federal prosecutors typically provide the defense with a proposed plea agreement early on. It will look similar to what a state court plea-bargain will look like in your jurisdiction: a number of years of probation, a number of custody days, a DUI school, and a fine. In federal cases all custody time is in federal prison as opposed to jail, unless time in a half-way house or electronic home detention is authorized. There are no mandatory terms of probation or mandatory minimum sentences in for misdemeanor DUI convictions, and the terms of probation are generally negotiable.

It is important to note when negotiating and entering a plea agreement with the prosecutor that the agreement is usually just a non-binding recommendation without recourse if the judge or magistrate decides to not follow it. In other words, if the Court decides on a more serious punishment the client cannot withdraw his plea! One way to avoid this dilemma is to insist upon a Rule 11(C)(1)(c) plea agreement, which allows for the plea withdraw if the Court rejects the recommended sentence.

Sentencing and Probation

Part of the sentencing process is a probation interview for the purpose of preparing a pre-sentence report. The client will have to fill out a long form for the probation officer and then have a meeting at the probation department which is often followed by a home visit. The process is far more arduous than what is involved in your typical state court action.

The Probation Department usually requests the client to sign a number of releases allowing them to get work, medical and financial information. Do not readily consent to it unless the client is unconcerned about the requesting and/or release of such information. Most probation officers are satisfied if the client provides this information to them.

Prepare your client for the probation interview and attend the interview with the client. Both with respect to the form and the interview process, it is important to counsel the client on the importance of accepting responsibility and expressing remorse. He or she should also be forewarned to avoid the use of illicit drugs as they will be asked about drug use and likely drug tested.

The Probation Officer will produce two reports. One will be available 35 days before sentencing, and counsel should review it and provide any corrections or arguments that are appropriate. The probation officer will incorporate your comments and corrections and provide a final report 10 days before sentencing. This report will have the sentencing recommendation.

After the substantive terms of probation are complete (e.g., the home detention, the DUI class, the payment of fines), the federal courts are amenable to a request for early termination of probation.

Conclusion

Don't be afraid to take a federal drunk driving case---the fee you can command is generally higher than a state court case, and the process can be a refreshing change of atmosphere and pace. Just be ready for the procedural and substantive distinctions!

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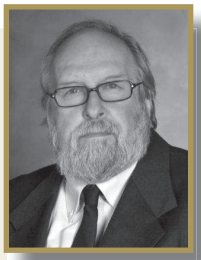
[1] Adam G. Gasner belongs to the NCDD and practices criminal defense in San Francisco, California.

[2] This presumption may be rebutted if the accused "can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration [six months], are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." *Blanton*, at 542.

Marijuana In DUI/DWI Cases
— A Difficult Burden Of Proof

By Manny Daskal



Does smoking marijuana cause the tongue to turn green?

Police officers often assert to having picked up the odor of marijuana emanating from within a vehicle, and then further claim that the driver had a green tongue. However, there is nothing in the scientific literature establishing a connection between marijuana inhalation and a green tongue.

Although the 2007 DRE student manual and DRE instructor manual reference "green coating" on the tongue in the Cannabis chapter, both appear to acknowledge the lack of any confirmatory proof on this point. The student manual uses the word "may," stating that "[o]ther characteristic indicators may include an odor of marijuana in the subject's vehicle or on the subject's breath, marijuana debris in the mouth, green coating on the subject's tongue, and reddening of the conjunctiva." (Session XXI, Page 2). The instructor manual refers to a "[p]ossible green coating on the tongue." (Session XXI, Page 6). Additionally, next to bullet "c" in the instructor manual under the "instructor notes" section, reads the following: "Point out that there are no known studies that confirm marijuana causing a green coating on the tongue." (Session XXI, Page 6). So even though both manuals reference the purported green tongue, NHTSA/IACP agrees that there are no published studies to support this claim.

A Utah case, *State v. Hechtle* (2004) 89 P.3rd 185, citing *State v. Wheeler* (2000) 2000WL 646511(Wash.App. Div.2) (an unpublished case from Washington), held that the government had to support the reliability of the trooper's concern regarding the condition of defendant's tongue.

Another issue in marijuana DUI/DWI cases concerns the usefulness of SFSTs since the tests were designed for alcohol impairment issues. There is a dearth of material on this point.

One researcher, Papafotiou in Australia, has published twice on this issue, once in a paper and once in a monograph. She believes that the HGN test is not a reliable indicator of marijuana/THC impairment, but that the OLS and WAT are because balance is an important indicator according to her research. She also states that there are no other studies on this issue (at least to 2004). She neglected to note that the police surgeons in Strathclyde, U.K., in a study published in 2002, didn't think the SFSTs were valid indicators of impairment after observing police testing of dosed subjects.

There is then the issue of the blood or urine sample and what conclusions may be drawn from the analysis of these samples. THC in urine is not a reliable indicator of present use or impairment. The 2006 S.O.F.T Guidelines state that "it must be emphasized that neither qualitative nor quantitative analysis of urine permits an evaluation of the effect of the drug or chemical on human behavior." THC in blood is where the forensic battle lines have been drawn. States that have a presence of metabolite at any level are punishing the unimpaired along with the impaired. The mere presence of THC or other metabolite is not an indicator that one is under the influence or impaired, whichever term of art that particular state employs.

To comprehend the morass related to marijuana DUI prosecutions, one must first understand the primary metabolites. The psychoactive metabolite is commonly referred to as THC and notated as Delta-9-THC. The main secondary metabolite of THC is 11-nor-9-Carboxy-THC. This latter metabolite is not psychoactive. Some scientists believe that the Carboxy THC level is meaningless.

Part of the problem in trying to deal with marijuana for law enforcement purposes is the difference between alcohol and marijuana in absorption and elimination based on solubility. The alcohol model is the model scientists and politicians have tried to superimpose upon marijuana. However, unlike alcohol, marijuana is not water soluble which hinders its being processed and eliminated from the body. Marijuana and its constituent metabolites are much slower in being metabolized and then eliminated from the body. The issue has created a number of attempts by researchers to attach a numeri-

cal (per se) value similar to the moving target in alcohol where the numerical per se value has changed with political pressure. Marijuana clearly is a target of the political vagaries of the times.

Often, one receives as part of the criminal discovery packet a presumptive test result showing positive for THC at some nanogram measured amount. The attorney, at this point, presumes there was marijuana in the defendant's system at some measured quantity. A nanogram is a billionth of a gram or 1/1,000,000,000 of a gram. For those metrically challenged, a gram is 1/28th of an ounce. Some states have determined that any measureable amount of THC violates the law. This is contrary to scientific studies that say metabolites of marijuana can be present for many days after total abstention.

Currently there are 15 states with *per se* DUID laws. Within this group there are variances such as Nevada and Ohio's laws which can result in conviction for the presence of THC-COOH (carboxy, the inactive metabolite) in urine. Remember, this is contrary to the SOFT guidelines. The limits in those 2 states are 2ng of THC or 15ng THC-COOH. Michigan has just changed from any metabolite to acknowledging that the carboxy metabolite is not psychoactive and therefore does not cause impairment. However, Michigan still holds that any amount of the Delta-9 metabolite is a *per se* violation.

What's really interesting about marijuana *per se* limits, as opposed to alcohol *per se* limits, is that the forensic scientists cannot reach a conclusion as to what amount of THC is consistent with impairment. There are so many compounding factors that the task of establishing impairment numerically probably cannot reach resolution without someone waving a magic wand.

Most recently there are two studies of note. One is by Karschner and Heustis, Addiction (October 5, 2009) that found THC present in chronic users after seven days of abstinence. This is in direct contradiction to the prevailing thought regarding THC. What makes this credible is that it's by Heustis who was a pioneer in the field of developing a model to determine when marijuana was last ingested. However, her latest study found that "[s]ubstantial whole blood concentrations persist multiple days after drug discontinuation in heavy chronic cannabis users."

This newer work regarding heavier use of marijuana replaces some of the earlier results in Heustis I and II. These Heustis studies were an attempt to put a numeric (*per se*) model together. Heustis I depended on THC concentration only and Heustis II depended on the ratio of THC to THCA (carboxy)---both were derived from plasma cannabinoid concentrations. She did another study in 2005, combining her two models. She felt that her past studies were valid and were capable of predicting time of past use. She felt Heustis II was less prone to error than Heustis I. As stated earlier, Heustis working with Karschner has now realized the problem with her earlier studies-- chronic users of marijuana.

The second study of note, a 2008 study by Tonnes, Raemakers, et al., further muddies the longstanding view of marijuana consumption and the length of time from smoking, as espoused in the late 90s and early 00's by Heustis and others in the field. (Although, as cited above, Heustis more recently, has published the findings that challenge her earlier works). Tonnes and Raemakers found that an acute THC dose of 500 micrograms/kg produces impairment of critical tracking, divided attention and motor impulse control in occasional cannabis users but only motor impulse control loss in heavy cannabis users at high concentrations.

The Tonnes, Raemakers study found, that at the least, further research is required in monitoring heavy cannabinoid users after short and long term abstinence. Heavy users might display cannabinoid concentrations in sober phases that "resemble concentrations found in occasional users after acute cannabis use." Comparison of Cannabinoid Pharmacokinetic Properties JAT Vol. 32.

Contrary to alcohol related studies, several studies over the years (see DOT and UK studies) have concluded that marijuana use makes one a better driver because of compensatory mechanisms. The 1999 DOT study concluded that THC ingested from smoke inhalation "merely broadens the range of reactions that might be expected to occur in real life. That range has not been shown to extend into the area that can rightfully be regarded as dangerous or an obviously unacceptable threat to public safety. Alcohol present in blood concentrations around the legal limit (0.10 g/dl) in most American States is more impairing than anything subjects have shown after THC alone in our studies." In 2000, a study out of the U.K found that while driving performance was influenced by consumption of larger doses of marijuana in both simulation and road driving situations. They concluded, "Whereas these results indicate a 'change' from normal conditions, they do not necessarily reflect 'impairment' in terms of performance effectiveness since few studies report increased accident risk."

Some recent studies have concluded otherwise. One study out of Iowa noted that "stoned" drivers slowed down in a compensatory move when distracted, though no other changes in driving performance were found. The Iowa researchers concluded that marijuana and driving is dangerous because drivers are often conversing with friends in the car, listening to music, talking on the cell phone and/or text messaging others. Therein lies the trouble with marijuana DUI/DWI prosecutions---it's difficult to prove that inattentive driving was caused by marijuana use.

In Cannabis and Cannabinoids (2002) edited by Grotenhermen and Russo, at p. 322, the author of the section (Chesher) found that "[t]he results to date of crash culpability studies have failed to demonstrate that drivers with cannabinoids in the blood are significantly more likely than drug-free drivers to be culpable in road crashes". Chesher does note that a series of Australian studies by Drummer find a higher correlation. Drummer, in fact, found a higher correlation to higher accident risk above the 5ng/ml level with this being an indicator of recent ingestion. Below 5ng/ml there is less risk than drug-free drivers. (Emphasis added).

The problem with studies attempting to draw a causal link between marijuana use and car accidents is that they are working backward, from point to impact, so to speak. They have an automobile accident, they find marijuana present at some level in the person, and simply assume that marijuana is a causal factor.

It becomes a much more difficult challenge for the defense when the evidence shows the combination of alcohol and marijuana consumption. Prosecutors refer to this as "alcohol with pot on board." The studies show that there can be an exponentially impairing effect when alcohol and cannabis are combined:

"Experimental studies have shown alcohol and THC combined can produce severe performance impairment even when given at low doses. The combined effect of alcohol and cannabis on performance and crash risk appeared additive in nature, i.e. the effects of alcohol and cannabis combined were always comparable to the sum of the effects of alcohol and THC when given alone." Ramaekers et al. 2004. "Dose related risk of motor vehicle crashes after cannabis use." Drug and Alcohol Dependence 73: 109-119.

1999 DOT study HS 808 939

Marijuana, Alcohol and
Actual Driving Performance
July 1999

UK Department of Environment, Transport and the Regions (Road Safety Division). 2000. Cannabis and Driving: A Review of the Literature and Commentary. Crowthorne, Berks: TRL Limited.
Raemakers et al. Cognition and motor control as a function of delta-9 THC concentration in serum and oral fluid: limits of impairment. Drug and Alcohol Dependence 8 pp. 114-122.

Drummer, et al., The involvement of drugs in drivers of motor vehicles killed in Australian road traffic crashes," Accident Analysis and Prevention 36(2) March 2004, pp. 239-248

NCDD Journal Submissions

NCDD welcomes contributions to the Journal from its members.

Feature Articles: 900 - 1200 words

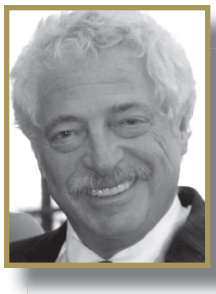
Trial Tips: 200 - 300 words

E-mail submissions and comments to burglin@msn.com.

(NCDD reserves the right to edit submissions)

NCDD WEBSITE NOW A PLETHORA OF RESOURCES AND HELP

By Barry Simons



Editor's Note: Though Barry Simons does not mention it himself, for the past four years he has been the driving force behind the evolution of the NCDD website and the incredible new features discussed herein. Barry is a former Dean and now a Fellow of the NCDD, with his law practice based in Orange County, California. Many thanks Barry!

The NCDD has designed a vastly improved website with trememdous resources for both you and the public.[1] NCDD forms have been digitized for easy on-line submission and e-commerce has been added to facilitate payment of dues, seminar registration and "Members Only" pricing for your purchases from the NCDD Store.

Login: Go to www.ncdd.com and log in as a member by entering your e-mail/username in the login box and entering your password. This can be done on either the left-hand navigational panel or from the upper right-hand corner of the homepage. Your new NCDD user name is your e-mail address. All Members will receive an e-mail with a temporary password and complete log-in instructions. If you have not updated Rhea Kirk with your current e-mail, do so now. If you forget your password simply hit the "forgot password" link and your password will be e-mailed to you.

Just login once on the home page and you will have access to all functions on the " Member's Only" side of the website. When you first log on, you will be sent to "Your Account." From this page, you can directly add a link between your web site and the NCDD site by downloading an "NCDD " Members Badge". We strongly urge you to link to NCDD. You can also access both the Public Blog and Member's Blog and post blogs of interest to NCDD Members and the public.

Edit Your Details: You can edit your own details on our website by clicking " Your Details" in the Members-Only section of the "Navigation Box." The web site permits you to post your photograph and a brief statement directly on the site through this function.

Find an Attorney: The "Find an Attorney" function has been stepped up. Each attorney's listing has five icons which enables the public to get the attorneys phone and fax numbers; e-mail the attorney directly; go directly to the attorney's web site; view bio statement submitted by the attorney; and directly request an appointment with the attorney.

DUI Resources Links: Here you will find links to helpful scientific, legal and practical websites concerning DUI defense. The resource links section is an ongoing collective endeavor which will hopefully involve the entire membership of the college. You are personally invited to submit your favorite DUI related links for inclusion in this resource to Rhea or Danielle with the proper URL and a description of the website you wish to submit.

DUI Practice and Scientific Transcripts: This section houses actual transcripts of direct and cross examination of prosecution and defense expert witnesses in cases involving important issues of forensic toxicology. These transcripts exhibit some of the finest work among us and will help you better understand the science of DUI and the art of advocacy. This section also includes transcripts demonstrating skilled attorneys conducting cross examinations of police officers in actual DUI trials. Exemplars of both opening and closing statements will also be included. If you have a transcript which you wish to submit for inclusion in this "Members Only" section of our web site please forward them to your State Delegate.

Virtual Forensic Library: The Virtual Forensic Library has undergone a complete metamorphosis. The college is in the process of uploading over 2000 published peer-reviewed scientific articles relating to DUI defense. In the past, the college could only provide its members with the first page of any article in the library.[2] We are pleased to announce that the full and complete articles are now available for your viewing and review . This is how it works:

1. Click on Virtual Forensic Library
2. Agree to Terms of Use
3. Click Forensic Library
4. Select area of interest - ie. "*Alcohol Testing*"; refine your search, *e.g., "Breath Testing"; "Absorptive Phase Testing". Then select pdf. of Article e.g., "Accuracy and Precision of Breath Alcohol Measurements for Subjects in The Absorptive State"*
5. To view the Article, double left click on it's title. (You will be allowed to download and print articles that are not copyrighted and all government publications)
6. To obtain METADATA on the Article, click the "Metadata" icon in the middle of the navigation bar and then single left click the title of the Article. This field will allow you to read and add comments about the Article; review an abstract of the Article; obtain citation information and link to the Copyright Clearinghouse to obtain a fully authenticated copy of the Article.

Fellow Phil Price was responsible for obtaining and digitizing Dr. Richard Jensen's Forensic Library and will be spearheading efforts to engage our Members in a special project to rate and comment Articles in the Library.

If you have an Article of interest which is not in the Virtual Library, please forward it to your State Delegate.

Brief Bank: NCDD's Brief Bank is broken down into two major categories: (1) Issue Specific Motions and Briefs and (2) State Specific Motions & Briefs. We are in the process of putting the meat on the bones for this incredible resource. To see the power and potential of this resource, click through the available materials posted by the State Delegates from Connecticut, Illinois,[3] Iowa, Pennsylvania, New Jersey, Tennessee, Utah and Washington. This is your resource---each and every Member of the College needs to participate in this effort to share the collective wisdom, talent and creativity this extraordinary group! Take the time to review your work and then send your best work to your State Delegate.

NCDD Forum: The NCDD Forum is the newest addition to the Web Site. It will be broken down into topics of interest and will be the place to discuss issues and store information on specific subjects by topic to enable easy access to information without having to repost the same questions on the list serve.. The topics will include: DUI Case of the Day; Persuasion; Individual Forums on each and every breath test device; Entry into Canada; you name it, the sky is the limit. George Flowers of Georgia will be the coordinator of the Forum. If you wish to add a Forum and or Moderate a Forum, contact George.

Our web site is a work in progress. Thanks to Gary Trichter for his work with Lawinfo to get the site started and to Ron Moore for his dedication and ingenuity. Without Ron, the visions held for NCDD.com would have remained a total blur.
Finally, my thanks to NCDD for being the kind of organization that made me want to make the effort.

— *Barry T. Simons*, Fellow

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[1] A great deal of gratitude is owed to Rhea Kirk and Danielle for their many hours spent on this endeavor. A special thanks is also owed to Justin Norton of Digital Creations for taking our website to a new level in both appearance and function. Further suggestions and comments should be directed to Regent and Chairman of the Website Committee, William Kirk.
[2] Thanks to the efforts of Regent William Kirk and Copyright expert Alex Modelski.
[3] Special thanks to Regent Don Ramsell for his efforts in encouraging participation in the Brief Bank