



# *Washington State TSRP Newsletter*

Traffic Safety Resource Prosecutor Program

*September/October 2023 edition*

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# Who are your TSRP's ?

## What is a TSRP?

**Your TSRP's are Melanie Dane and Bradely Lane.**

Melanie is hosted by the Municipal Services Resource Center in Seattle, Washington. [The Municipal Research and Services Center](#) Ms. Dane has worked as a TSRP since 2021. Prior to that she was a Municipal Prosecutor in Snohomish County for over 18 years, served as a partner in her law firm, served as part-time appointed Judge for six years and served as a Judge Pro Tem. Melanie has trained, tried, and adjudicated DUI/Physical Control and impaired driving cases. More on her bio can be found at MRSC.

TSRPs are prosecutors who facilitate a coordinated, multidisciplinary approach to the prosecution of impaired driving and other traffic crimes. Traffic safety resource prosecutors (TSRPs) are typically current or former prosecutors who provide training, education, and technical support to traffic crimes prosecutors and law enforcement personnel throughout their States. Traffic crimes and safety issues include alcohol and/or drug impaired driving distracted driving, vehicular homicide, occupant restraint, and other highway safety issues. Each TSRP must assess the needs and demands unique to his or her own State and work in conjunction with many agencies to meet these needs. The National Highway Traffic Safety Administration, law enforcement agencies, judicial organizations, crime laboratories (including forensic toxicologists), medical examiners, local media, Governor's Highway Safety Offices' victim advocate groups, and resources available from the National District Attorneys Association's National Traffic Law Center should all be used to facilitate services to all prosecutors and law enforcement.

This year, the State Traffic Commission welcomed attorney Bradley Lane to the TSRP program. Bradley started his career with the Los Angeles DA's office and subsequently, the DC Public Defender Service where he worked full-time for their Forensic Practice Group litigating complex cases with various defense experts. He then worked with the felony division of a DC-area public defender before making the transition to the state-side of the lectern. For almost two years he served as a lead investigative counsel working with the Office of the Inspector General investigating fraud and the misappropriation of federal funds on Middle East relief projects. Wanting to focus more on the trial side of the discipline, he served as a Deputy District Attorney trying dozens of felony and misdemeanor cases from DUI's to Homicide. He trained cadets at the local law enforcement academy and trained new prosecutors on advanced trial techniques. Bradley then found his way to his current home in the Seattle area as a more senior Assistant City Prosecutor for the City of Seattle where he continued to try dozens of cases and take the lead on the more complicated impaired driving litigation for the trial team. He was then encouraged to join the Pierce County Prosecutor's office where he supervised their Felony General Crimes Trial Unit and carried the highest trial verdict

volume of 2022. To date, he has taken over 95 cases to verdict with about 40% of those being either felony or misdemeanor impaired driving cases. He's now happy to be back with the City of Seattle in the TSRP role. When he's not in the courtroom, he's a sponsored international trail runner and manages a partial ownership of a brewery on the Seattle waterfront.

Find us on the web:

<https://duienforcers.wildapricot.org>

# THE TSRP DUI BOOTCAMP IS BACK!!!!

Dear Prosecutors and Impaired driving partners,

We have been to Seattle, Spokane, Vancouver, Wenatchee, and we will be in Pasco in October. Come see us!



Our states' TSRP Program has been bringing the DUI Bootcamp to Prosecutors for over a decade. In 2020, the program was gearing up for another 5-day DUI Bootcamp. We all know how that turned out. From 2020 to 2022, bootcamp materials were posted to the TSRP website and webinars filled our screens.



Wenatchee Bootcamp, September 2023.



Enter fall of 2022 when a few WSP Troopers, a Snohomish County Prosecutor, a DRE, and a TSRP put their heads together to create our 2-day intensive Prosecutor DUI bootcamp. The faculty have lovingly termed this our "traveling roadshow."

Dedicated members of the WSP Breath test section, WSP DRE program, experienced Prosecutors, the TSRP program, along with the Seattle Police Department, have been traveling around the state teaching Prosecutors the art of the DUI trial and how officers identify, investigate, and ultimately determine whether a driver is impaired. To date we have trained over 70 Prosecutors in the state, many of whom are brand new to prosecution and need the skills to defend against the relentless DUI defense challenges.

Earlier this month, our traveling roadshow faculty administered our comprehensive September Prosecutor Bootcamp in Wenatchee, WA, generously hosted by the East Wenatchee Police Department (fully funded by the State Traffic Commission). We cover several impaired driving training modules administered by State Patrol instructors, Seattle PD, and TSRPs Melanie Dane and Bradley Lane. We provided classroom instruction on the legal/trial aspects of admitting a breath test ticket, expert certification, direct examination of the state Breath Tech, voir dire philosophy and basics, the foundational aspects of admitting a Tox result at trial, the statutory and jurisprudential landscape governing impaired driving cases, breath tests, and blood draws. Props to this month's class of Bootcamp attendees for their attention and dedication to honing their craft!

Prosecutors in Washington, if you haven't attended yet, come on out to our October Bootcamp in Pasco, WA, next month. Register [here](#). This will be our last bootcamp event for the year. We will be bringing the DUI bootcamp back in 2024 with new material and new updates.

I want to thank the faculty who have dedicated so many hours and traveled 100's of miles, to our bootcamps across the state- all while managing full time daily responsibilities. And thank you to our hosts and awesome students!

## Washington State Toxicology News



# Toxicology

## Washington State Toxicology News

For more than 20-years, the State Toxicologist position has always been coupled with an existing position within the Washington State Patrol, such as the Forensic Laboratory Services Bureau Director for the Toxicology Laboratory Division Commander.

The Washington State Patrol has now been successful in creating a new, standalone State Toxicologist position. This position will fully focus on the technical and quality aspects of the Toxicology Laboratory Division and the Breath Test Program, and not additional operational aspects of either. This will include the training and certification of technical personnel, method development and validation, auditing and accreditation, and overall quality assurance.

Following a national search, the Forensic Investigations Council have appointed Ms. Amanda Black as the next State Toxicologist. This will be effective October 1, 2023.

Ms. Black has worked with the Washington State Patrol for over 16-years, with 11-years of service as the Quality Assurance Manager for the Toxicology Laboratory Division and/or the Breath Test Program. Ms. Black is well-versed in various accreditation program requirements, method development and validation procedures, and training of technical personnel – all of which will ensure her success as the new State Toxicologist.

With thanks,

**Dr. Fiona J. Couper, Director**  
Forensic Laboratory Services Bureau  
Washington State Patrol

## More Toxicology News....

### A BRAND-NEW LABORATORY

By the end of the year, the state Toxicology Lab hopes to be testing samples just like they already are in Seattle. The focus will be on testing backlogged cases. **The Federal Way lab** is now in its “infancy,” said Capron in a report from the [Auburn Reporter](#). The first step is validating and verifying the instruments ahead of an accreditation visit in the next few months.

The lab will start by taking half the staff of the Seattle lab, six scientists, and bringing them to Federal Way. They hope that coincides with three new scientists who will be joining the team in late 2023. The division will still be looking to fill another seven vacant scientist jobs at either lab, with the goal of eventually maxing out those 22 total positions. The training from hire to being authorized to take on an active full case load is between 12-18 months.

This is NOT an easy job. The request for testing on DUI alcohol and DUI drug cases has nearly doubled between 2012 to 2022. The number of scientists has not. Thus, creating the perfect storm of backlog that frustrates our purpose of combatting impaired driving. There is no blame game here, except to point the fingers at those who choose to drive high.

**Prosecutors**, please work with your scientists when you have a drug DUI case. You need to have a conversation about how and what they can testify about as it pertains to the particular test. Make contact before you call them to the stand so you are assured you can lay the proper foundation.

**Never go to trial without talking to your witness. Remember they are nervous too!**

**BE KIND, ORGANIZED, AND RESPECTFUL OF EACH OTHERS TIME.**

Please notify the laboratory at [toxlab@wsp.wa.gov](mailto:toxlab@wsp.wa.gov) if/when cases become adjudicated and no longer need toxicology testing. This allows the laboratory to focus resources on active cases. There is no sense in the lab testing a case that has resolved. The lab has no way to know whether the case is resolved unless you tell them. Prosecutors, please, let the lab know if you no longer need the results.

**Subpoenas:** Subpoenas should be sent to [toxlab@wsp.wa.gov](mailto:toxlab@wsp.wa.gov). The subject line must contain the Toxicology case number ( ST #) and without that ST number, your subpoena is likely to be round-filed—if you don't know what that means, *ask*. You need to put the name of each scientist you are subpoenaing for that case ( it should be just the reviewing or issuing scientist) along with the trial or motion date within the subject line. This streamlined process will allow the receiver of the subpoena to quickly email it to the correct scientist without having to open the email and figure out where it goes. This saves time and is courteous.

Our time is precious. We are all overworked and most of us are working understaffed. Anything we as Prosecutors can do to lighten their load is appreciated.

## MORE GREAT NEWS!



**Toxicologist testimony! *State v. Samantha Hall-Haught—Div I, 2023.***  
**Congratulations Island County Prosecutor's Office.**

It is no secret that the requests for drug testing for impaired driving cases have risen exponentially faster than our state resources can manage. This has led to a log jam of cases and delays. And then came two Court of Appeals decisions which further complicated impaired driving prosecutions, [Wiggins](#) and [Denton](#).

Post *Wiggins*, prosecutors have been subpoenaing, sometimes out of fear, every forensic scientist who ran any test on the case. The *Wiggins* holding is extremely narrow and fact specific. Nevertheless, some judges read *Wiggins* as every scientist must appear-so, prosecutors have been at the mercy of the court. Others continue to apply the *Lui test* and our reviewing and issuing scientists continue to testify to their own independent opinions based on the underlying data.

[State v. Lui](#) allows expert witnesses to rely upon technical data prepared by others when reaching their own conclusions, without requiring each laboratory technician to take the witness stand. This case applies to all experts and does not exclude toxicologists. This test does not permit “a laboratory supervisor to parrot the conclusions of his or her subordinates”; instead, it permits “expert witnesses to rely on technical data prepared by others when reaching their own conclusions, without requiring each laboratory technician to take the witness stand.” Lui, 179 Wn.2d at 483. While the testimony of technicians “may be desirable, . . . the question is whether it is constitutionally required.” Lui,

179 Wn.2d at 480. “[A] break in the chain of custody might detract from the credibility of an expert analysis of some piece of evidence, [**but**] this break in the chain does not violate the confrontation clause.” Lui, 179 Wn.2d at 479. *Thus, only the “ultimate expert analysis, and not the lab work that leads into that analysis,” is subject to the confrontation clause requirement. Lui, 179 Wn.2d at 490. ( emphasis added)*

\*\*This last sentence is extremely important in blood draw cases. This is the basis for why you do not need to call each scientist who performed the lab work. It is the ultimate expert opinion you want, not testimony of each step along the way.

Now enter [State v. Samantha Hall-Haught](#)- Division one opinion-- currently unpublished. Division one has now distinguished their ruling in *Wiggins* and held that the supervising scientist’s testimony regarding THC in a vehicular assault case was admissible, despite the fact she was not the analyzing scientist. The distinguishing factors were that Toxicologist Harris specifically testified that she “came to [her] own independent conclusion” following her review of all the data in the file. Thus, Harris was not merely “parrot[ing] the conclusions” of her subordinates, which is not permitted by the confrontation clause.” Lui, 179 Wn.2d at 483. Instead, she was “rely[ing] on technical data prepared by others when reaching [her] own conclusions,” which is permitted without the testimony of each analyst. Lui, 179 Wn.2d at 483.

Because she testified that she came to her own opinion only after looking at the entire file and testified to her own opinion her testimony did not violate the confrontation clause. If you have not yet read this case, you should do so. A motion to publish has been made.

There is hope that this case will be published. This case makes it clear that the *Wiggins* opinion did not stand for a blanket reversal of *State v. Lui* as it relates to Toxicologist testimony in impaired driving cases. The experts must still form their own conclusions and our experts have historically done so by reviewing the lab work and data from scientists in the lab.

\*\*Cases provided in hyperlinks.

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### **WSP welcomes three new Breath Test Technicians!**

Welcome to Zach Riviere, who will be the BAC Tech in Olympia, Kim Young, who will be the BAC Tech in Bellingham, and Brianna Jaramillo the BAC Tech with Seattle/King County, are the most recent additions to the Impaired Driving Section. They bring enthusiasm and a forensic science background. They began their journey in the Impaired Driving Section on July 17, 2023, and will soon be certified as Breath Test Technicians. Kim and Zach both have a forensics science background which brings another level of expertise to the breath test section. Prosecutors should highlight this unique background when calling them as witnesses in your case. They are eager to get to work providing quality service to our customers.

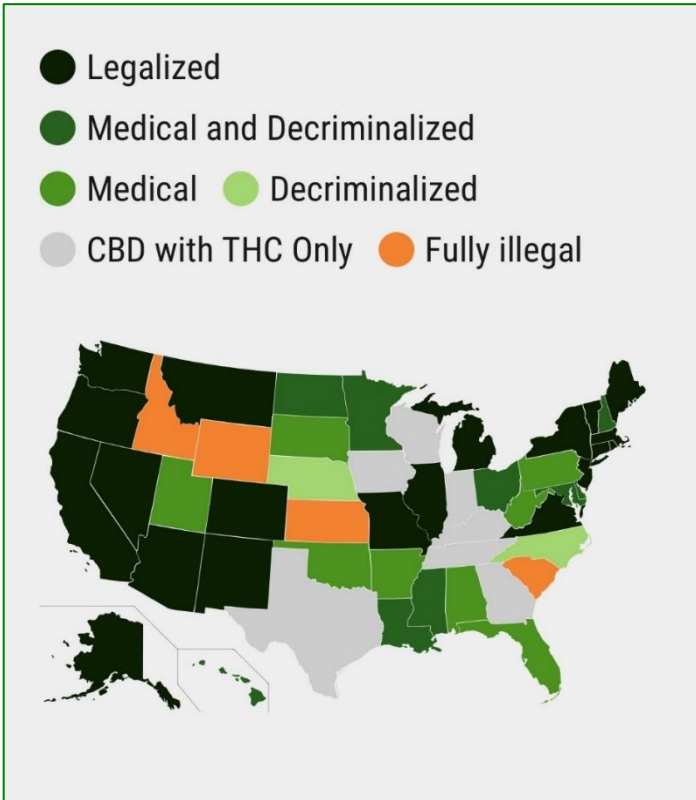
Prosecutors in these regions, get to know your new peeps! They are eager to get started.

# THE STATE OF CANNABIS IN WASHINGTON AND THE UNITED STATES

## House Bill 1772

In the 2023 legislative session, HB 1772 passed and makes clear it illegal to manufacture, import, offer, or sell in Washington a consumable product that contains cannabis or any form of THC in combination with beer, wine, spirits, or any other type of liquor in the same product.

Some states are allowing THC infused alcohol to be manufactured and sold. This highly toxic combination will not be sold in Washington thanks to Representatives Waters, Orwall, Christian, Sandlin, Cheney, McClintock, Farivar, Timmons, Leavitt, Senn, Rule, Schmidt, and Pollet drafted and got HB 1772 passed.



### Cannabis Impairment Quick Assessment

Document Observations of MENTAL & PHYSICAL Impairment

EYES	MUSCLES	ODOR
<b>Bloodshot eyes, Lack of Convergence, Dilated Pupils<sup>(6)</sup>, No HGN</b> (when cannabis alone) <i>(6)Possibly normal</i>	<b>Tremors</b> Observed in extremities, upper torso, and eyelids (closed eyes)	<b>Smell</b> Burnt marijuana, additive flavor for vaping, and maybe for edibles

**Indica:** Produces a “stoned” feeling. Physically and mentally relaxing. Centered on the body. Enhances sensations of taste, touch, and sound.

**Sativa:** Produces the “high” feeling (energetic). Less overpowering than the Indica “stoned.” Less likely to produce drowsiness. High described as cerebral, energetic, creative, giggly, and/or psychedelic.

**Psychophysical Tests:** Generally slow performance, muscle tremors, especially in legs and arms.

**Information processing:** Likely diminished. May forget certain parts of instructions. Likened to attention deficit disorder, cognitive impairment.

**Modified Romberg Balance:** Distorted internal clock. Eyelid Tremors.

<b>Impairment Peak:</b> 0–30 mins	Impairment may last up to 24 hours, without awareness effects.
<b>High Experience:</b> 2–	

ONSET OF EFFECTS DIFFERS DEPENDING ON MANNER OF INGESTION

## DID YOU KNOW...

907 people have died in Washington since 2012 in crashes involving delta-9 THC positive drivers--**nearly 1 in every 5 traffic deaths**. Poly-Drug drivers are the most common type of impaired driver involved in fatal crashes. **Nearly 3 of every 4 delta-9 THC positive** drivers were also positive for other drugs and/or alcohol. Since 2012, drivers who had consumed multiple drugs became more prevalent than fatal crash-involved drivers who had consumed only alcohol or were positive for just one drug. For more information, read the [WTSC report on Cannabis involved Fatal Crashes](#).

The [AAA Foundation for Traffic Safety](#) showed that fatal crashes involving marijuana doubled after marijuana was legalized and commercialized in Washington State.

In 2018, the WTSC released a report titled, "Marijuana Use, Alcohol Use, and Driving in Washington."

Some of the highlights include:

- *Nearly one in five daytime drivers may be under the influence of marijuana, up from less than one in 10 drivers prior to the implementation of marijuana retail sales.*
- ***Poly-drug is now the most common type of impairment among drivers in fatal crashes.***
- *Alcohol and THC combined is the most common poly-drug combination.*
- *39.1% percent of drivers who have used marijuana in the previous year admit to driving within three hours of marijuana use.*
- *More than half (53 percent) of drivers ages 15-20 believe marijuana use made their driving better.*

[Washington Traffic Safety Commission, 2018](#)

COVID DID NOT HELP OUR DUI EPIDEMIC.

[A 2019-2020 NHTSA-funded study](#) found a significant increase in the prevalence of drugs detected in blood among seriously and fatally injured drivers, from 50.8% before the pandemic to 64.7% and 61.4%, during the two pandemic periods studied. For more information, the study is above.

### Indicators of Cannabis impairment:

In cannabis-only DRE cases, the most reliable impairment indicators included,

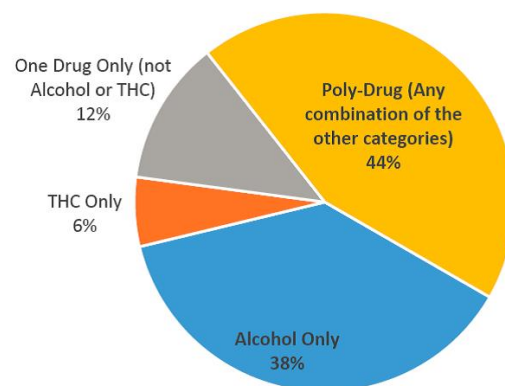
- elevated pulse,
- dilated pupils,
- lack of convergence (LOC),
- rebound dilation,
- and documented impairment in 2 of 4 psychophysical tasks, (one leg stand [OLS], walk and turn [WAT], finger to nose [FTN], Modified Romberg Balance [MRB]).

Other indicators include,

- Bloodshot eyes
- Body tremors
- Disoriented
- Odor of marijuana
- Relaxed inhibitions

"Combined observations on psychophysical and eye exams produced the best cannabis-impairment indicators." [San Diego 302 Study](#).

Alcohol and Poly-Drug Use in Fatal Crash Involved Drivers, 2008-2016





## LAST SESSION HB 1582 NO RIGHT ON RED

### WILL WE SEE IT AGAIN?

**HB 1582** was first introduced to the House floor in late January 2023. It aims to increase safety for pedestrians at certain public locations. It did not pass out of committee, but it is likely not going away. Here's what to know about Washington's bill. It would prohibit a driver at a red signal from taking a right on red in certain areas such as: Elementary or secondary school, Childcare center, Public park or playground, Recreation center or facility, Library Public transit center, Hospital, Senior center other facilities "with high levels of pedestrian traffic as determined by the appropriate local jurisdiction or the department of transportation".

Data from 2022 released by the ***Governors Highway Safety Association*** reveals pedestrian deaths hit a 40-year peak in 2021. Proponents of banning right turns on red point to data revealing decreases in traffic-related collisions. For instance, a ***2022 study from the District Department of Transportation*** examined how drivers responded to no-turn-on-red signage, also called NTOR laws, at 100 intersections in Washington, D.C. Researchers concluded that collisions between vehicles dropped by 97%. There was also a 92% reduction in drivers who failed to yield to pedestrians at a red light.

San Francisco also did a ***study*** evaluation of "right on red". Findings from a before and after the study reveal that No Turn on Red (NTOR) restrictions can keep crosswalks clear and reduce close calls on major intersections.

From 2018-2022, the number of pedestrian fatalities increased over that period, rising 32.0% from 103 in 2018 to 136 in 2022. So, is Washington next to pass NTOR laws? Stay tuned this legislative session for traffic bills aimed at protecting all road users.

## MORE ON THE LEGISLATIVE SESSION 2023

### **HB 1104/ SB 1493/SB 5032: Deferred Prosecutions, DOSA, 15-year lookback, and felony score.**

These bills are similar in nature. The DP bill would permit a defendant who enters a DP on their first in lifetime DUI/PC to petition the court for a second deferred prosecution, in time, and revoking the first one if the Defendant is still subject to the first DP when petitioning for a second. Under both circumstances, the Defendant would have to qualify for a deferred prosecution. Further, this bill would have added DUI/PC to the list of misdemeanors which could be counted against a subject's felony offender score when determining the defendant's standard range for felony impaired driving offenses. SB 5032 would have extended the felony DUI lookback period from 10-years to 15-years. Further, it would have added felony DUI or felony Physical Control to the list of offenses for which a defendant could be eligible for the Drug Offender Sentencing Alternative (DOSA). SB 1493 would have also counted as one point under the SRA against the defendant's offender score.

These bills did not pass but they are likely to be seen again in the 2023-24 session in various forms. Bills to strengthen impaired driving laws are more crucial than ever in light of the number of people who continue to make the selfish choice to drive impaired.

### **HB 1112 – Criminalizing negligent driving with a vulnerable user victim.**

It is a gross misdemeanor (364/\$5000) of Negligent Driving with a Vulnerable User Victim in the first degree, if the person operates a vehicle in a manner that is negligent and endangers or is likely to endanger any person or property, and *proximately causes* the death of a vulnerable user of a public way. Among the more notable definitions of, “vulnerable user of a public way” is a pedestrian, a person on a tractor, person on horseback, and various types of cyclists. This law goes into effect in January of 2025.

### **HB 1319 – Mandatory collision reporting to DOL.**

This bill amends RCW 46.52.70 to change law enforcement’s mandatory collision reporting requirements from those involving “serious injury” to those involving “substantial bodily injury.”

- "Substantial bodily harm" is defined by applying the same definition to the term that applies when the term is used in the criteria that must be met for a person to be guilty of vehicular assault.

### **SB 5081 – Expanding victims’ rights notification requirements for DOC on Vehicular homicides.**

This bill requires DOC to notify a victim’s family of the release of a convict for vehicular homicide 30-days prior to release. This bill was signed by the governor and went into effect in July 2023.

### **SB 5347 – Expanding treatment providers’ access to DOL abstracts of driving records.**

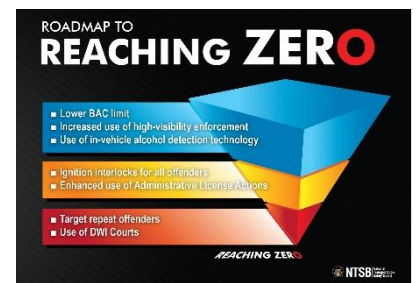
This bill amends RCW 46.52.130 to add probation officers, probation clerks, and treatment providers as individuals authorized to request a driver’s DOL driving record abstract. This bill was signed by the governor and went into effect in July 2023.

### **SB 5352 – Vehicle pursuits**

This bill amended RCW 10.16.060 to permit police pursuits where 1) a pursuing officer has reasonable suspicion to believe that a person in the vehicle has committed or is committing a violent offense, a sex offense, a vehicular assault offense, a domestic violence assault offense, an escape, or a DUI offense; 2) the pursuit is necessary in identifying/apprehending the driver; or 3) the driver poses a “serious risk of harm” to others. Further, the bill amended some of the language around a pursuing officer seeking authorization to allow for a greater level of discretion. This bill was signed by the governor and went into effect in July 2023.

### **SB 5002-reducing the state per se BAC level to .05.**

This bill would reduce the breath or blood alcohol concentration limit for operating a motor vehicle or being in physical control of a motor vehicle from 0.08



to 0.05. It would make Washington the second state in the nation to make .05 the per se limit. .05 judge makes sense. This bill did not pass the 2023 legislative session but keep your eyes peeled, it is likely to surface again. Impairment starts at the first drink, and it has been estimated that a driver with a .05 BAC is 7 times more at risk of being involved in accidents.

The purpose of the law is to not make more arrests, but to change driver behavior. DUI is an entirely preventable crime.

For more information on Utah’s .05 law and its success, look at [NHTSA’s Traffic Tech newsletter](#).

BAC	Type of Impairment
	Lowest BAC at Which Impairment Was Found
0.001-0.009	Driving Simulator Lane Deviations Divided Attention
0.010-0.019	Drowsiness Psychomotor Skills Cognitive Tasks Tracking
0.020-0.029	Choice Reaction Time Visual Functions
0.030-0.039	Vigilance Perception
0.040-0.049	Simple Reaction Time

**Washington Case updates:**

**Unpublished Opinions:** Under the Washington Court Rules, General Rule 14.1(a) provides: “Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.



**Defendants’ refusal of the BAC was admissible.**

*The rhetorical remark by Defendant, and her actions, were correctly interpreted as a refusal to submit to the BAC.*

COA II reverses a ruling of the Pierce County Superior Court that agreed with a driver’s challenge to DOL’s revocation of her driver’s license for refusing to submit to a breath test after being arrested for DUI. Her argument was that a rhetorical question/retort that she had made to the arresting officer upon receiving implied consent warnings could not be interpreted as a refusal of a breath test. The key facts:

- Thompson had a blood alcohol level of .206 and was unaware that she had even been in an accident.
- She tried to resist arrest.
- The arresting officer informed Thompson of Washington’s ICW’s and that her license would be revoked if she refused to submit to an official breath test. Thompson expressed no confusion over this information. [The arresting officer] asked Thompson if she would be willing to blow into the breathalyzer machine at the police station, [and] she responded, “Why would I blow in that if you know I drank.”
- She did not express any intent to breathe into the machine and did not take the test.

- In Department of *Motor Vehicles v. McElwain*, 80 Wn.2d 624, 628 (1972), the Supreme Court held that if a driver “does not willingly submit and cooperate in the administration of a test, he must be deemed to have refused.” A lack of understanding not made apparent to the officer is of no consequence.

[\*Thompson v. Dep't of Licensing\*, 25 Wash. App. 2d 1038 \(2023\) unpublished](#)

### **Vouching for your officer—don't do it!**

#### **Brady list cannot be compared to an external lie detector.**

Division Three of the Court of Appeals rules that there is sufficient evidence to support defendant's convictions for second degree identity theft and forgery. Officers testified that the Δ confessed. Defendant's main strategy at trial was that the officers were lying in that regard. To counter the defendant's contention that the officers were lying, the trial prosecutor presented rebuttal testimony from one of the officers that the names of law enforcement officers who are deemed to be untrustworthy are put on a “Brady list”. In closing, the prosecutor also asserted this point about the impact of Brady on law enforcement officers. The court found the prosecutor was improperly “vouching” for the testimony of the officers. “Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony.” *State v. Coleman*, 155 Wn. App. 951, 957 (2010). A prosecutor places the prestige of the office behind a witness when they express a personal belief in the veracity of testimony. The State contends that the prosecutor's comments merely pointed out the bias and lack of bias for each witness. The court did not agree. This court makes it clear that it is improper vouching for a prosecutor to argue that law enforcement witnesses *would not risk* their career by testifying untruthfully. Case reversed.

[\*State v. Stotts\*, 26 Wash. App. 2d 154, 527 P.3d 842 \(2023\)](#)

**Opinion testimony:** [\*State v. Pine\*, No. 56439-4-II, 2023 WL 3735092 \(Wash. Ct. App. May 31, 2023\) unpublished](#)

#### **Observation and opinion testimony of HGN when conducted by a Doctor at the hospital was held to be admissible along with good case analysis of lay and expert opinions on impairment.**

Testimony about intoxication and impairment ( ineffective assistance challenge denied). This case offers a good history of opinion testimony and how to distinguish our caselaw in Washington. The trial court admitted the officer's observation that Pine's eyes were bouncing as they moved horizontally when the doctor was examining Pine. “It has long been the rule in Washington that a lay witness may express an opinion on the degree of intoxication of another person where the witness has had an opportunity to observe the affected person.” *City of Seattle v. Heatley*, 70 Wn. App. 573, 580, 854 P.2d 658 (1993). “[A] police officer may opine that, based on his experience and observations, the defendant was intoxicated and impaired.” *McLean*, 178 Wn. App. at 248. be odor alone. *State v. Pine*, No. 56439-4-II, 2023 WL 3735092, at \*8-9 (Wash. Ct. App. May 31, 2023)

“Pine points us to *State v. Quaale*, where the Supreme Court held that it was improper to admit a trooper's testimony that, based solely on a horizontal gaze nystagmus test, there was “ ‘no doubt’ ” “the defendant was impaired.” 182 Wn.2d 191, 198, 340 P.3d 213 (2014). The expert testimony was inadmissible in *Quaale*'s trial for driving under the influence because a horizontal gaze nystagmus test “merely shows physical signs consistent with ingestion of intoxicants” and is not by itself proof of a certain level of intoxication. *Id.* at 198. “Although an officer may testify that the test revealed signs consistent with alcohol consumption,” the officer in *Quaale* “cast his conclusion in absolute terms and improperly gave the appearance that the [horizontal gaze nystagmus] test may produce scientifically certain results.” *Id.* at 199 (emphasis added).” *Id.*

Conversely, in McLean, a trooper pulled over the defendant for weaving while driving, smelled alcohol, administered field sobriety tests, and then arrested the defendant for driving under the influence. 178 Wn. App. at 241. Although the trooper testified as a lay witness at trial, the State elicited testimony about his “training and experience in identifying impaired drivers.” Id. The trooper testified that he arrested “drivers for driving under the influence only if he believe[d] they [were] impaired by alcohol or drugs.” Id. at 242. Defense counsel did not object. Id. We held that not objecting could “be characterized as a legitimate trial tactic seeking to avoid emphasizing [the trooper's] testimony about McLean's intoxication and arrest.” Id. at 248. And we held that McLean could not demonstrate prejudice because under the circumstances, the trooper's “testimony did no more than convey his opinion that McLean was intoxicated.” Id. at 249; [State v. Pine, No. 56439-4-II, 2023 WL 3735092 \(Wash. Ct. App. May 31, 2023\)](#)

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**WSP IMPAIRED DRIVING DRAEGER ALCOTEST 9510 SOFTWARE UPDATES:**

On July 6, 2023, the State Toxicologist approved an update to the software employed by the State's currently deployed evidential breath test instrument, the Draeger Alcotest 9510. The software approval was based on the culmination of work completed by the Breath Test Program and their vendor, Draeger Safety Diagnostics International (DSI). No changes to the instrument's metrological functions or algorithms were requested and the vendor has provided documentation stating that none were made. This is important because it means there is no basis for arguing that the testing process was not scientifically supported or inaccurate in anyway. In sum, after extensive retesting, the actual testing of the sample in the Draeger was left unchanged.

The Breath Test Program provided the [attached](#) document which provides an overview of the changes made to the software the timeline of work, and final approvals. Breath Test Technicians will be updating breath test instruments over one (non-calendar) year. This is a public record available on the WSP website.

**Dear Prosecutors,**

*Please contact your TSRP's with your DUI questions, impaired driving questions, motions to suppress if you need assistance, case law questions, and in general try and keep us in the loop on what is happening in your court. If you get an unexpected ruling, let us know.*

*We have briefings, transcripts, information on defense experts, and a plethora of materials to address nearly every DUI litigation issue. If we don't have it, we have a national organization to tap into.*

*If you have been doing this long enough you are aware that most defense arguments are not new, they just resurface as new attorneys are hired.*

*We are here to help. Please reach out. Until then, take care.*

*Respectfully,*

*Melanie Dane and Bradley Lane*

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*This Newsletter was brought to you by your TSRP's Melanie Dane and Bradley Lane, in collaboration with WTSC, WSP, and the Toxicology Lab.*

*We appreciate all the efforts that our impaired driving section, DUI Prosecutors, and Law Enforcement Officers undertake to make our roadways safe for all users.*

Find us on the web:

<https://duienforcers.wildapricot.org>

***Opinions expressed here are those of the authors. Some issues discussed are evolving and fluid. They are expected to change over time. Always consult your policy documents and your legal advisor before changing practices or implementing revisions.***

***Also please talk with your local criminal prosecutors. They will have the most up to date information about rulings and their effect on cases.***

