

UPCOMING NDAА TRAININGS

- 2018 Summer Summit**
Identifying, Investigating and Prosecuting Human and Labor Trafficking
 July 15–17, 2018, Spokane, WA
- NDAА-APLAN Regional Opioid Training**
 July 23, 2018, Arlington, VA
- Prosecuting Sexual Assault and Related Violent Crimes**
 August 13–17, 2018, Bellevue/East Seattle, WA
- Office Administration**
 September 10-14, 2018, Phoenix, Arizona
- NDAА-APLAN Regional Opioid Training**
 September 17, 2018, Salem, MA

INSIDE THIS ISSUE

- **Recognizing the Life Saving Power of the DRE** /page 4
- **Fostering CDL Partnerships on the “Road to Zero”** /page 7
- **Trial Tips and Techniques: Introducing Evidence** /page 9
- **TSRP Training Dates** /page 14
- **TSRP News** /page 15

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DOES ADDICTION IMPAIR ONE’S ABILITY TO DRIVE?

By Alyssa Staudinger,¹ Tiffany Watson,² and M. Kimberly Brown³

Reports of drug-impaired driving are on the rise, especially as the opioid crisis continues to permeate communities across the United States and as more states move to legalize marijuana use. Like alcohol, drug-impaired driving can have dangerous consequences. A 2009 study by the National Highway Traffic Safety Administration (NHTSA) found that for drivers with known test results, “18 percent of drivers killed in a crash tested positive for at least one drug.”⁴ By 2016, over 43 percent of fatally-injured drivers with known drug test results were drug-positive and over 50 percent were positive for two or more drugs.⁵ As these statistics indicate, the prevalence and potential dangerousness of mixing drugs and driving is clear.

These numbers also underscore the reason why every state makes it a crime to drive while under the influence of a drug. However, should the criminal justice system go further to protect the public by criminalizing drug addiction? Does the non-impaired but drug-addicted driver pose a similar danger to that of the driver under the influence of drugs? Does drug addiction impair one's ability to drive?

Many medical professionals and abuse counselors view drug addiction and mental health disorders similarly. The National Institute of Drug Abuse states, “[a]ddiction changes the brain in fundamental ways, disturbing a person’s normal hierarchy of needs and desires and substituting new priorities connected with procuring and using the drug. The resulting compulsive behaviors that weaken the ability to control impulses, despite the negative consequences, are similar to hallmarks of other mental illnesses.”⁶ The tendency to view drug-addiction as a disorder is relatively new.

Historically, those with an addiction to drugs were generally viewed as a menace to society. In 1937, Commissioner Henry Anslinger, the first commissioner of the Federal Bureau of Narcotics (FBN), testifying before Congress stated, “the major criminal in the United States is the drug addict; that of all the offenses committed against the laws of this country, the narcotic addict is the most frequent offender.”⁷ Criminalizing the drug addict and drug-involved behavior increased in 1971 when President Richard Nixon declared a “War on Drugs.”⁸ Subsequently, the Reagan era saw the passage of The Anti-Drug Abuse Act of 1986, which strengthened prosecution and penalties for the drug user.⁹

The end of the twentieth century saw a shift in the paradigm toward a more treatment-centered focus to drug addiction. For example, in 2011, the Obama Administration announced The National

Prevention Strategy, which focused on greater access to treatment services for more Americans.¹⁰ A more treatment-centered focus is, no doubt, necessary, and policy in support of this focus is tantamount to the fight against drug-addiction. But should, and more importantly, *can*, the criminal justice system do more? The State of California says “yes.”

California’s Driving Under the Influence statute makes it “. . . unlawful for a person who is addicted to the use of any drug to drive a vehicle.”¹¹ To establish that a driver was addicted while driving, a prosecutor must prove: (1) the defendant drove a motor vehicle; and (2) when he/she drove, the defendant was addicted to a drug.¹² The term “addicted” is not defined in the statute itself, but the California criminal jury instructions provide guidance by defining “addiction” in the following way:

A person is addicted to a drug if he or she:

1. Has become physically dependent on the drug, suffering withdrawal symptoms if he or she is deprived of it;
2. Has developed a tolerance to the drug's effects and therefore requires larger and more potent doses; and
3. Has become emotionally dependent on the drug, experiencing a compulsive need to continue its use.

The prosecution has the burden to prove a defendant meets all three criteria of “addiction” at trial. “The focus of [the statute] is to prohibit the individual who presents a potential danger on the highway from driving a motor vehicle”¹⁴ Under California law, a person is addicted when he “has reached the point that his body reacts physically to the termination of drug administration.”¹⁵ Courts have described addiction as “more a process than an event.”¹⁶ In fact, the

“emotional dependence and tolerance” elements have been found to be “descriptions of stages in the process which ultimately results in addiction.”¹⁷ A person addicted to drugs experiences physical symptoms when going through withdrawal of the drug, ranging from yawning and sweating to “...vomiting, diarrhea and fever...”¹⁸ These types of symptoms may impact a person’s ability to safely operate a vehicle and, thus, renders one a danger to others. California courts have analogized this to the epileptic driver and endorsed the law as “clearly within the legitimate confines of the state’s police power.”¹⁹ If a prosecutor can prove a defendant was suffering from withdrawal sickness while driving, it “is the unmistakable signal that the user is addicted.”²⁰

Interestingly, California courts distinguish addicts from habitual users. One court opined that establishing “habitual use” is not enough to prove that a defendant is guilty of violating California law.²¹ Though proving that the defendant was addicted at the time of driving is imperative, it is not an easy feat.

As every prosecutor knows, successful prosecution greatly depends on the strength of the evidence. In cases of driving while drug-addicted, a law enforcement officer must obtain actual evidence of addiction. Often, this means an officer must garner statements from the defendant. However, this can sometimes be difficult, considering a case cannot survive a probable cause analysis based on the defendant’s statements alone.²² Thus, the observations of the officer, including observations of track marks, pick sores, inability to draw blood, sunken cheeks, and poor dental hygiene, are extremely important. Consequently, prosecutions of this offense in California remain relatively rare, due to the difficulty of proving the “addiction” element of this offense, as well as the specific investigative questions that must be asked by law enforcement.

As an aside, while the legal use of a drug is not a defense to this crime, it is a defense if a defendant is participating in an approved treatment program.²³ This defense is, ostensibly, California’s attempt to push drug-addicted defendants into treatment.

There is little doubt that drug-impaired drivers pose a significant danger to the public. Non-impaired but drug-addicted drivers may pose a similar risk. California serves as an example of a creative manner to deal with at least one dangerous aspect that drugs present to society.

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⁴ NIDA. “Drugged Driving.” National Institute on Drug Abuse, 3 Jun. 2016, <https://www.drugabuse.gov/publications/drugfacts/drugged-driving>. Accessed 25 Jun. 2018, citing Drug Involvement of Fatally Injured Drivers. Washington, DC: National Highway Traffic Safety Administration; 2010.

⁵ Governors Highway Safety Association and Responsibility.org, “Drug-Impaired Driving, Marijuana and Opioids Raise Critical Issues for States,” May 2018.

⁶ NIDA. “Comorbidity: Addiction and Other Mental Disorders.” National Institute on Drug Abuse, 1 Mar. 2011, <https://www.drugabuse.gov/publications/drugfacts/comorbidity-addiction-other-mental-disorders>. Accessed 25 Jun. 2018.

⁷ Drug Enforcement in the United States: History, Policy, and Trends, Lisa N. Sacco, Analyst in Illicit Drugs and Crime Policy, October 2, 2014 <https://fas.org/sgp/crs/misc/R43749.pdf> (internal citation: See statements by H. J. Anslinger, Commissioner of Narcotics, Bureau of Narcotics, Department of the Treasury and Dr. James C. Munch, before the U.S. Congress, House Committee on Ways and Means, Taxation of Marihuana, 75th Cong., 1st sess., April 27-30, May 4, 1937, HRG-1837-WAM-0002.)

⁸ Richard Nixon, Special Message to the Congress on Drug Abuse Prevention and Control, June 17, 1971.

⁹ “State of Addiction Policy: The Criminalization of Addiction,” Sana Ahmed, <https://www.sovhealth.com/editorials/state-of-addiction-policy/state-addiction-policy-criminalization-addiction/>.

¹⁰ “State of Addiction Policy: The Criminalization of Addiction,” Sana Ahmed, <https://www.sovhealth.com/editorials/state-of-addiction-policy/state-addiction-policy-criminalization-addiction/>.

¹¹ See California Vehicle Code § 23152(c).

¹² California Vehicle Code § 23152(c); see also California Criminal Jury Instructions (CalCrim) 2112.

¹³ CalCrim 2112; see also *People v. O’Neil*, (1965) 62 Cal.2d 748.

¹⁴ *O’Neil*, 62 Cal.2d at 752-53. The *O’Neil* case dealt with an earlier version of the driving while addicted statute, California Vehicle Code § 23105.

¹⁵ CalCrim 2112; *See also* California Vehicle Code § 23152(c).

¹⁶ *People v. Duncan*, (1967) 255 Cal.App.2d 75, 78 (internal citations and quotation marks omitted).

¹⁷ *Duncan*, 255 Cal.App.2d at 78; *see also* CalCrim 2112.

¹⁸ *O'Neil*, 62 Cal.2d at 753.

¹⁹ *O'Neil*, 62 Cal.2d at 753-54.

²⁰ *Duncan*, 255 Cal.App.2d at 78.

²¹ *O'Neil*, 62 Cal.2d at 754. West Virginia, on the other hand, makes it a crime for "... a habitual user of narcotics or amphetamine or any de-

rivative thereof]" to drive a vehicle. *See* West Virginia Code § 17C-5-2.

²² *See* CalCrim 359 ("[A] defendant may not be convicted of any crime based on his/her out-of-court statements alone. [The jury] may rely on the defendant's out-of-court statements to convict him/her only if [they] first conclude that other evidence shows that the charged crime was committed.")

²³ *See* CalCrim 2112; if there is evidence a defendant is participating in an approved treatment program, the court has a sua sponte duty to instruct on the defense.

RECOGNIZING THE LIFE SAVING POWER OF THE DRUG RECOGNITION EXPERT

By Tom Kimball, Director, National Traffic Law Center

When a Drug Recognition Expert (DRE) goes through his or her grueling training regimen, he or she is taught how to recognize whether a person is under the influence of one or more categories of drugs. Once the International Association of Chiefs of Police (IACP) has certified him or her, he or she puts his or her knowledge to use to determine whether drivers are impaired by drugs.

As part of this training, a DRE is also taught to recognize whether a medical issue that mimics impairment affects the individual he or she is examining. The value of determining that someone is not impaired by drugs, but suffering from a medical condition, sometimes puts a DRE in a situation where the individual examined could suffer great harm or die but for the intervention of the DRE.

In June, at the National Traffic Law Center's Commercial Driver License course in Los Angeles, one such story was shared. Anthony Marks served as a DRE with the Los Angeles Police Department as an auxiliary officer; his full-time job was in pharmaceutical sales. With his pharmaceutical sales job, he traveled to many physicians' offices. Soon, doctors and nurses learned of his drug recognition expertise. On a visit to a medical office in



Panorama City, a doctor approached him and asked him for help. Concerned parents brought their 16-year-old son to the doctor believing their son was using drugs. They noticed several changes in his behavior, and they had been to the emergency room once already. The doctor and his assistant performed several tests and took blood samples, but none of the tests indicated drug use. The doctor asked Anthony to perform his 12-step DRE exam. At the end of the evaluation, Anthony told the doctor and the parents the child was not on drugs.

Based upon Anthony's assessment, the doctor directed the parents to take the child to the emergency room for a scan of his brain.

The next time Anthony visited the doctor's office, he learned the rest of the story. The CT scan of the brain indicated the child was suffering from a brain bleed. The 16-year-old was a soccer player and hit his head while playing. If the child arrived at the hospital 20 minutes later, he would have died. Several medical doctors missed the diagnosis, but the DRE was able to rule out drugs as the cause of the suspected impairment and, instead, deemed it a medical problem. Anthony Marks cannot tell the story without the hair on his arms reacting.

This is not the only time a DRE evaluation has led to life-saving medical action on the part of the DRE officer. Here are four more incidents that occurred in 2016:

Florida

A DRE from the Indian River Shores Public Safety Department was called by a local police department to conduct a DRE evaluation on a subject who exhibited a horrific driving pattern, was obviously impaired, but did not have an odor of alcohol on his breath. The DRE began his evaluation and, during the process, saw signs of a medical problem. The DRE learned the subject was struck in the face with a board approximately two weeks prior and was treated in a trauma unit for a brain bleed. The subject told the DRE that he was cleared by doctors to return to a normal lifestyle. The DRE saw clinical signs and pupil irregularities that led him to determine the subject was still suffering from a medical condition and summoned assistance of medical staff for the subject. Because the DRE followed the proper protocol, his actions allowed a medically-impaired subject to get the proper and necessary medical attention and thwarted a needless criminal prosecution.

Michigan

A DRE was dispatched to a vehicle in a ditch. Upon his arrival, the driver was acting normal, but his speech slurred at times. The driver denied taking drugs or using alcohol. The DRE noted during the HGN test that the driver's pupils were slightly unequal and could not track equally. After further evaluation, the DRE suspected a medical situation and convinced the driver to accept an ambulance transport to the hospital. It was determined that the driver had suffered a mini-seizure at the scene and later, upon arrival at the hospital, suffered a more serious full seizure. The doctor credited the DRE with possibly saving the driver's life by recognizing medical signs and symptoms at the scene.

Wisconsin

A DRE with the Brown County Sheriff's Office responded to a local hospital to conduct a drug influence evaluation on a subject arrested for impaired driving following a crash. It was determined that the suspect ingested marijuana prior to the crash. During the evaluation, the DRE detected that the suspect's demeanor and behavior noticeably changed along with some indicators inconsistent with drug impairment. The DRE stopped the evaluation and summoned the attention of medical staff. It was later learned that the suspect suffered a seizure. The DRE's ability to recognize the onset of a seizure and summon medical staff to assist with this potentially life-threatening condition exemplified the importance of having a DRE involved in a suspected drug impaired driving case.

Wyoming

A Wyoming Highway Patrol DRE was dispatched to the Interstate 25 Port of Entry for a possible impaired truck driver. The port employees stated the driver would not answer any questions and that his speech was slurred. They also stated he

nearly hit several vehicles as he pulled into the Port and that he staggered around outside his truck. The DRE spoke with the driver, who appeared pale and disoriented. The driver's speech was slurred but his pupils seemed normal. The DRE could not smell alcohol on his breath and noticed his skin was cold and clammy. The DRE checked his pulse, which was at 40 beats per minute. The driver was able to answer questions but seemed to have trouble speaking. Although the driver stated he did not need one, the DRE called for an ambulance. Within minutes of the ambulance request, the driver's speech became progressively worse and

or clues that appear identical to — those caused by intoxication.

Intoxication is expected to cause specific and known changes in physical and physiological responses that are roughly symmetric for the right and left parts of the body. For example, if a particular intoxicant is known to cause pupil dilation or difficulty on the One-Leg Stand Test, then both pupils will be dilated or test clues will appear when performed on either leg, respectively. In contrast, for example, stroke or trauma can potentially cause a problem on only one side.

If an officer observes an abnormal response

No officer ever wants to be the one to arrest an innocent person.

eventually got to the point the DRE could not understand him. The DRE then noticed the right side of the driver's face appeared to droop slightly and requested the ambulance to expedite. Once the ambulance arrived on scene, the driver was taken to the local Regional Medical Center. Life Flight later took the driver to Denver because he suffered a massive stroke. It is clear the DRE's intervention saved the man's life.

Expert Karl Citek, MS, OD, PhD, FAAO, was not surprised by any of these events. When asked about why DRE's can discern medical conditions from impairment, he indicated:

“Most medical conditions that can cause impairment can readily be distinguished from the effects of alcohol and/or drug intoxication. The most common conditions that could affect a person while driving, and that an officer would expect to encounter, include heart attack, hypoglycemia (a.k.a. insulin shock) in persons with diabetes, cerebral vascular accident (a.k.a. stroke), and trauma, either from a motor vehicle crash or other injury. None of these nor most other medical conditions will cause the same types of clues as —

during an evaluation, he/she determines if it is consistent with intoxication. For example, if nystagmus is present, does it occur with the head upright or tilted? Does it occur only when looking to the side rather than straight ahead? And are the eye movements horizontal rather than vertical or rotatory? In each instance, the former condition is most consistent with intoxication; the latter, while being abnormal and possibly indicative of impairment, would not be consistent with intoxication.”

The lifesaving skills of DREs have an additional impact. No officer ever wants to be the one to arrest an innocent person. No officer wants to be the one to later learn the person he arrested died in a jail cell because of a medical problem. An officer who observes behavior inconsistent with intoxication should take advantage of the specialized training and experience of a DRE officer. There is no greater work on this earth than to save the life of another. Congratulations to the officers involved in these five cases. If you know of similar situations, please send them to us for inclusion in future editions of *Between the Lines*.



Fostering CDL Partnerships on the “Road to Zero”

By Romana Lavalas, Senior Attorney, National Traffic Law Center

In May, the American Association of Motor Vehicle Administrators (AAMVA), in conjunction with the Federal Motor Carrier Safety Administration (FMCSA), held its Commercial Driver’s License (CDL) Coordinators/Information Technology (IT) Meeting in Columbus, Ohio. AAMVA is the organization that represents the interests of each state’s driver’s licensing authority (SDLA), the agency that administers and promulgates motor vehicle regulations. In other words, AAMVA is the agency that represents your departments of motor vehicle, public safety and/or transportation, the

employees of which maintain driver’s license records and administer driver’s license testing.

Jeanine Howard, the National Traffic Law Center’s (NTLC) FMCSA Staff Attorney, and I attended this three-day meeting of motor vehicle administrators, motor vehicle IT professionals, and federal regulators (FMCSA) to discuss how continued partnerships among these entities can lead to a decrease in commercial motor vehicle (CMV) fatalities.

This meeting focused on AAMVA’s CDL Coordinators and IT Managers. CDL Coordinators are the people in each state’s SDLA

who are responsible for overseeing the administration of their state's CDL licensing program. The IT Managers are the people responsible for assuring that the technology platforms used to transmit licensing and conviction information is up to date. This meeting was an opportunity for state and federal partners to discuss the administration of the FMCSA's CDL mandates and to share challenges and achievements in the administration of their CDL programs.

The NTLC was invited to participate in a session entitled, "Partnerships in Assuring Court Compliance." This session was designed to highlight the efforts of the NTLC and other partners' efforts to combat the practice known as Masking (see 49 CFR 384.266), or essentially any effort that prevents traffic convictions from reaching a CDL holder's driving record. During this session, I asked the SDLAs to do four things that are particularly relevant to those of you tasked with the enforcement of CDL and CMV-related regulations.

First, I suggested that SDLAs should become acquainted with their Traffic Safety Resource Prosecutor (TSRP) and/or become more acquainted with the prosecutors in their states who routinely subpoena SDLA employees for traffic trials. These existing relationships serve as a resource for the SDLAs to educate traffic-handling prosecutors about the special rules applicable to CDL holders. It is likely that each SDLA is contacted by at least one prosecutor in every office to subpoena SDLA employees to testify in DUI and general traffic cases. These prosecutors are in the best position to be educated by SDLA personnel about the consequences of traffic convictions on a CDL holder's driving record.

Second, I encouraged SDLAs to reach out to the NTLC to identify the point during the adjudication process the SDLAs are seeing evidence

of Masking convictions, whether it's roadside or in the courtroom with prosecutors and judges. The NTLC has direct access to the network of Traffic Safety Resource Prosecutors (TSRPs) nationwide who regularly communicate with state prosecutors and judges about traffic-safety matters. The NTLC may be able to assist the SDLA with educating others about Masking by reaching out to an individual state's TSRP.

Third, I reminded the SDLAs that CDL holders convicted of felonies using motor vehicles are subject to disqualification. I asked for their support to keep these CDL holders off the roads by ensuring that these felony convictions, once transmitted to the SDLA by the courts or prosecutors themselves, are properly recorded on the CDL holder's driving record resulting in the disqualification of a CDL.

Finally, I encouraged SDLAs to invite the NTLC to join them at their states' Highway Safety, Judicial, Prosecutor and/or Law Enforcement meetings. The FMCSA attorneys at the NTLC are available to speak to these groups about FMCSA regulations. Further, because the NTLC is grant-funded, the NTLC can use grant funding to speak to these groups at no cost to the group making the request.

Ultimately, this session served to emphasize the vital role that prosecutors and judges play in the complete and accurate recording of convictions on the driving records of CDL holders. This includes prosecutors and judges being aware of the federal prohibition on the practices of deferral and diversion of CDL-related offenses, as well as keeping CDL holders accountable to the high standards that their skills and training demand. It is only through cooperation that we will drive down deaths caused by CMVs on the "Road to Zero."

TRIAL TIPS AND TECHNIQUES

Occasionally, *Between the Lines* will include a guest author to provide readers with trial tips and techniques. For this edition, Jim Camp is the featured author. Mr. Camp was a civil trial lawyer in Wisconsin from 1982 until he was elected District Attorney for Green Lake County, Wisconsin, in 1991. He served as the District

Attorney until 2007. In 2007, Mr. Camp moved to Tennessee and served as an Assistant District Attorney General and as a Traffic Safety Resource Prosecutor until 2016. In 2016, he became President of Dynamic Messages, LLC, and speaks and trains nationally serving law enforcement and prosecutors. He may be contacted at jim@dynamicmessages.net.

Introducing Exhibits

By Jim Camp

Over the years, I have had many opportunities to observe young prosecutors in trial advocacy workshops as well as in actual trial practice. It is always a delightful and encouraging experience. From a critical instructor's point of view, we are always on the lookout for behaviors and habits that can be improved. One of the trial techniques most often lacking is the ability to properly introduce exhibits.

Exhibits are obviously important. They constitute tangible proof. Something the jury can see or hear or touch. Exhibits can constitute Real Evidence (physical items which make up the foundation or physical substance of a crime), Demonstrative Evidence (used to explain or illustrate facts to be presented) and Documentary Evidence (writings or records).

The introduction of exhibits seems like one of the most basic of all trial practice elements. It is for this very reason that lawyers tend to take the procedure for granted. Because we tend to take it for granted, it is beneficial to review the basics.

First, we must determine if the evidence is relevant pursuant to Federal Rules of Evidence (FRE) 401. Does it tend to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence?

Next, if the exhibit is relevant evidence, is its probative value substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence? If it passes muster under FRE 403 and it is helpful to our case, we must prepare for the introduction of the exhibit.

All potential exhibits should be assembled and organized prior to trial. Preparing a list of exhibits helps achieve this goal since it indicates which witness will be used to introduce each exhibit. Exhibits should be pre-marked for identification, preferably in the order in which they are intended to be introduced, and copies should be made for the court and defense counsel. This exercise forces a prosecutor to pre-plan the introduction of the evidence. During trial, it also allows the litigator to keep track of which exhibits have been introduced, received, and denied.

Exhibits can only be introduced after a set of procedural steps is taken. Failure to follow these steps may give the impression the prosecutor lacks ability and experience. Doing it the right way every time creates an

impression of skill and professionalism.

The following example relates to the introduction of a document prepared by a law enforcement witness. Remember that different types of exhibits will require different types of foundational questions under the Rules of Evidence, but the procedural framework is basically the same:

1. Have the exhibit marked if you have not had it marked prior to the start of the trial. Take the exhibit to the clerk and ask to have it marked for identification.
2. After it is marked and returned to you, show the exhibit to defense counsel. (A copy of the exhibit should have been provided to him previously. If not, one should be handed to him at this time.) State for the record:

“Your Honor, may the record reflect I am showing defense counsel what has been marked State’s Exhibit # ___ for identification. May the record also reflect a copy of that exhibit has been provided to the defense.”

3. After defense counsel has reviewed and returned the exhibit, ask the Court if you may approach the witness. In many courtrooms failure to ask permission may lead to an embarrassing admonition.
4. When the Judge grants permission to approach, show the witness the exhibit and state:

“Trooper McConnell, I’m handing you a document marked States Exhibit # ___ for identification.”

5. After the witness has had time to review the exhibit, ask questions laying a foundation:

“Can you identify this document?”

“Please tell the jury what it is.”

“Have you seen this document before?”

“When was the first time you saw it?”

“Where were you at that time?”

“Do you know who prepared this document?”

6. Move for admission of the exhibit into evidence by stating:

“Your Honor, I move that State’s Exhibit # ___ for identification be admitted in evidence as State’s Exhibit # ___.”

7. When the time is right, ask permission to publish the exhibit to the jury:

“Your Honor, may I show State’s Exhibit # ___ to the Jury?”

8. When the time is right, ask to publish the exhibit:

“Your Honor, may we show State’s Exhibit# ___ to the Jury?”

This procedure should be followed every time you intend to introduce an exhibit. While it may seem cumbersome, it is the correct and professional procedure for the task, avoids confusion on the record, and protects the record on appeal. It also creates a bit of suspense for the jury, which heightens the impact of the exhibit.

Do it right the first time and every time. As they say, the devil is in the detail.

STATE SUPREME COURT DECISIONS

Reading Between the Lines

In the field of traffic safety, the same issues tend to arise in trials across the country. Issues determined in two states, whether they are adjacent or distant, are sometimes resolved in the same way, opposite ways, and often somewhere in between. To keep prosecutors, law enforcement officers, judges, and other traffic safety partners informed, here are a few notable decisions of various State Supreme Courts.

DISTRICT OF COLUMBIA

Dickerson v. District of Columbia, 2018 D.C. App. LEXIS 135 (2018).

Facts & Procedural Posture:

While on patrol, an officer observed the Defendant's vehicle "cross over and straddle the dividing white lane hash marks, make an abrupt stop at a red light inside the crosswalk, travel slowly through a yellow light, and cross over the solid yellow line into oncoming traffic." *Id.* at 2. After the officer "activated his emergency lights, [the Defendant] traveled for another half block, scraping his passenger side tires against the curb as he pulled over." *Id.* Upon approaching the Defendant's driver side door, the officer saw that the Defendant's "eyes were bloodshot and watery." *Id.* The Defendant admitted to drinking, and the officer testified, "he could smell a strong odor of alcohol coming from [the Defendant's] breath and person." *Id.* Following some investigative questioning, the officer tried to have the Defendant complete field sobriety tests. *Id.* at 3. Prior to conducting the tests, the Defendant told the officer "he had a pinched nerve in his back and that he was taking Xanax, Gabapentin, and Ambien." *Id.* While administering the horizontal

gaze nystagmus ("HGN"), the officer identified six clues. *Id.* at 2. The Defendant failed to complete the one-leg stand test and the walk-and-turn test as required. *Id.* at 3. The officer subsequently arrested the Defendant, believing he was under the influence of alcohol. *Id.* at 4. At trial the Defendant attempted to qualify a toxicologist in the areas of toxicology, pharmacology, and field sobriety tests. *Id.* The trial court declined to accept the toxicologist as an expert in the administration and interpretation of field sobriety tests and declined to allow the toxicologist to opine that the Defendant's pinched nerve influenced his field sobriety test performance. *Id.* at 5. The Defendant was found guilty and appealed. *Id.*

Issue #1:

Did the trial court erroneously find the defense expert not qualified to testify in the area of field sobriety tests?

Analysis:

The Court found no abuse of discretion in excluding the defense expert's testimony on the administration and interpretation of the HGN test. *Id.* at 12. The Court relied on record testimony from the expert that, "he studied the NHTSA manual and decided how to perform [the HGN tests] and how to interpret them based on [the manual]." *Id.* at 9. The Court reasoned, "[w]hile 'the relevant knowledge for eligibility to testify as an expert may be based on experience,' we agree that that experience must be based on more than one's own interpretation of the standard NHTSA manual used in administering HGN tests." *Id.*

Further, the Court reasoned that the defense failed to establish a reliable basis for the expert's theory regarding the effects of the Defendant's

prescription medications on his field sobriety test performance. *Id.* at 10. Moreover, the Court stated, “[the Defendant] did not proffer any blood tests, medical records, or testimony from which his expert could have shown a reliable basis for believing that [the Defendant’s] prescription medications, rather than his being under the influence of alcohol or drugs, caused the nystagmus.” *Id.* at 11.

Issue #2:

Did the trial court erroneously limit the defense expert’s testimony regarding the effect of the Defendant’s lower back pinched nerve on his ability to perform two balance field sobriety tests?

Analysis:

The Court found that the trial court did not err in limiting the expert’s testimony. *Id.* at 14. The Court reasoned, the trial court properly qualified the defense expert in the areas of toxicology and pharmacology, based on his education, training and experience. *Id.* at 12. However, “[a]lthough [he] completed anatomy, physiology, and pathology courses in the 1960s..., those courses alone do not qualify him as someone who possesses the skills, training, and experience necessary to diagnose a lower back pinched nerve and opine as to its effect on one’s ability to perform balance field sobriety tests.” *Id.*

GEORGIA

Walsh v. State, 2018 Ga. LEXIS 138 (2018).

Facts & Procedural Posture:

A law enforcement officer responded to the report of a person sleeping in a vehicle while in a traffic lane. *Id.* at 1. The officer observed the Defendant in the driver’s seat with his head down, his foot on the brake pedal, his hand on the gearshift and the car in drive and running. *Id.* at 1. The officer smelled an odor of alcohol. *Id.* The Defendant awoke after multiple attempts to wake

him. *Id.* The officer observed the Defendant’s eyes to be bloodshot, glassy, and extremely watery. *Id.* at 2. The Defendant performed field sobriety tests, including the horizontal gaze nystagmus (“HGN”) test. *Id.* The officer conducted the HGN test while the Defendant was wearing eyeglasses. *Id.* However, the officer testified that the proper administration of the HGN test is to have the individual remove his/her eyeglasses. *Id.* “The officer further testified that the manner in which this test was conducted was a ‘substantial deviation’ from his training regarding proper HGN procedures; he also testified that this deviation from the correct protocol was nonetheless ‘substantial compliance with the guidelines [that could] still yield informative results,’ did not cause a difference in the test results, and that he was still able to make a fair observation of the six validated clues of the HGN test.” *Id.*

The Defendant filed a motion to suppress the results of the HGN test. *Id.* at 3. The trial court granted the motion to suppress. *Id.* The Court of Appeals reversed the trial court’s decision. *Id.*

Issue:

Whether the Court of Appeals erred in reversing the trial court’s grant of the Defendant’s motion to suppress the results of the HGN?

Analysis:

The Court found that the Court of Appeals erred in reversing the trial court’s decision. *Id.* at 14. The Court reasoned, “it is plain that the trial court found a conflict in the officer’s testimony that, allowing a subject to wear glasses is a ‘substantial deviation’ from the proper procedures for conducting the test, and that doing so was nonetheless ‘substantial compliance’ with the guidelines such that the test was conducted in an acceptable manner.” *Id.* at 13. Moreover, the Court stated, “[t]he proper administration of [the Defendant’s] HGN test was part of the State’s

foundational burden, and under the evidence presented during the hearing on the motion to suppress, the trial court did not clearly err in granting the motion.” *Id.* at 14.

NEVADA

State v. Sample, 414 P.3d 814, 2018 Nev. LEXIS 24, 134 Nev. Adv. Rep. 23 (2018).

Facts & Procedural Posture:

While on night patrol duty, an officer observed a vehicle “cross over fog lines and double lines, accelerate rapidly, cross into a southbound turn lane, and veer back into the northbound travel lane.” *Id.* at 815. The officer subsequently activated his overhead lights and siren. *Id.* However, the vehicle did not stop; the driver continued to drive and pulled into the driveway of a home, which was later determined to be the Defendant’s residence. *Id.* The officer followed the vehicle into the driveway and approached the driver side door. *Id.* Upon approaching the driver’s side of the vehicle, the officer saw that the Defendant had “red, watery eyes and the smell of alcohol coming from inside the vehicle.” *Id.* The officer then observed the Defendant drink from a plastic bottle with clear liquid inside, despite the officer’s demands to stop. *Id.* The Defendant admitted to drinking alcohol, his “speech was slow and slurred,” and he was “unsteady on his feet.” *Id.* at 816. The Defendant was handcuffed and placed in the back of the patrol car after not complying with demands to remain at the front of the officer’s vehicle. *Id.* While handcuffed in the back of the patrol vehicle, the officer administered a PBT on the Defendant. *Id.* The officer placed the Defendant under arrest and obtained a telephonic search warrant because the Defendant refused to consent to blood testing. *Id.* The officer told the judge that the Defendant consented to the PBT and results of the PBT were included in the affidavit of probable cause to obtain the telephonic search warrant. *Id.* The officer obtained

the warrant and blood samples were taken from the Defendant. *Id.*

The Defendant filed a motion to suppress the PBT results, as well as the blood test results as “fruit of the poisonous tree.” *Id.* The district court granted the Defendant’s motion to suppress. *Id.*

Issue #1:

Did the district court err in finding that the PBT results were obtained in violation of the Defendant’s Fourth Amendment rights?

Analysis:

The Court concluded “the district court properly suppressed the PBT evidence as an unconstitutional search.” *Id.* at 817. The Court reasoned, “the PBT was not administered pursuant to a warrant or an exception to the warrant requirement.” *Id.* On appeal, the State argued that the PBT was not a violation of the *Fourth Amendment* because it was a search incident to arrest. *Id.* However, the Court rejected this argument because it was made for the first time on appeal. *Id.*

Issue #2:

Did the district court erroneously invalidate the telephonic search warrant used to obtain the evidentiary blood draw?

Analysis:

The Court found the suppression of the blood test results to be an error. *Id.* The Court reasoned, “...even though the telephonic search warrant contained a false statement by [the officer] regarding the improperly obtained PBT, it was, nevertheless, supported by other facts showing probable cause.” *Id.* Moreover, “without considering the PBT, the search warrant was still supported by probable cause.” *Id.* at 818.

Mark Your CALENDAR *for these Training Dates*

FLORIDA—*Vin Petty*

TSRP Basic DUI Trial Advocacy Week	July 16-20, 2018
LEO Basic DUI Trial Preparation	August 8, 2018
LEO Basic DUI Trial Preparation	September 19, 2018
LEO Basic DUI Trial Preparation	October 3, 2018

ILLINOIS—*Jennifer Cifaldi*

Ignition Interlock	August 23, 2018
Impaired Driving Conference	October 15-16, 2018

KENTUCKY—*Tom Lockridge*

Kentucky Prosecutors Conference, Traffic Safety Track	August 29-31, 2018
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MICHIGAN—*Kinga Canike and Ken Stecker*

Cops in Court	July 19, 2018
Nuts and Bolts	August 8, 2018
Cops in Court	September 13, 2018

MINNESOTA—*Bill Lemons*

DUI and Traffic Safety Webinar	August 2018 (Date TBD)
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NEBRASKA—*Ed Vierk,*

WYOMING—*Ashley Schluck, and*

COLORADO—*Jennifer R. Knudsen*

Tri-State Training on Emerging Issues in DUI-D	July 17, 2018
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NORTH CAROLINA—*Sarah Garner*

Summer Meeting	July 17-18, 2018
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TENNESSEE—*Terry Wood and Linda Walls*

Prosecuting the Drugged Driver	August 8-9, 2018
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WASHINGTON—*Moses Garcia, Courtney Popp, Miriam Norman,
and Katie McNulty*

Regional Law Enforcement and Prosecutor Impaired Driving	August 3, 2018
Regional Law Enforcement and Prosecutor Impaired Driving	September 1, 2018

WEST VIRGINIA—*Nicole Cofer-Fleming*

Prosecuting the Drugged Driver	September 2018 (Date TBD)
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Traffic Safety Resource Prosecutor NEWS

In **Idaho** in May, *Jared Olson* facilitated a "Prosecuting the Alcohol Impaired Driver" course training 40 prosecutors and 4 police officers. The outstanding faculty included *Chris Daniels*, *Jen Knudsen*, and *Miriam Norman* (the TSRPs from Indiana, Colorado, and Washington, respectively) as well as local law enforcement instructors.

The **Washington** TSRPs (*Moses Garcia*, *Courtney Popp*, *Miriam Norman*, and *Katie McNulty*) recently concluded the state's three-day Traffic Safety Conference in Richland, WA. The conference included five different tracks, with attendance by over 600. Additionally, *Moses Garcia* presented a "Litigation Issues in Draeger case" session at the annual Washington District & Municipal Judges Conference at Lake Chelan. He also taught at the Training Institute for the Alcohol Ignition Interlock Program Administrators (AIIPA) in St. Louis, MO.

In early June, *Vin Petty* held the Annual 2-day "Advanced DUI Seminar" in Lake Mary, **Florida**. In attendance were 53 prosecutors. This seminar covered numerous advanced topics, including: a case law update, Daubert Issues, HGN & DRE Issues as taught by a DRE Instructor, Implied Consent Issues, and tactics for the Cross Examination of Expert Witnesses. Additionally, later in June, he held a 1-day "Basic DUI Trial Preparation" Course for Law Enforcement in Atlantic Beach, Florida. In attendance were 18 law enforcement officers. This seminar covered numerous topics from all aspects of a DUI Investigations, including DUI Case Law/Charging, Traffic Stop Issues, Implied Consent Issues, Miranda & DUI Stop Issues, and Report Writing techniques.