

NO. 93293-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ASCENCION SALGADO-MENDOZA,

Respondent

BRIEF OF *AMICUS CURIAE* WASHINGTON DEFENDER
ASSOCIATION IN SUPPORT OF RESPONDENT

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae is the Washington Defender Association (WDA). WDA is a statewide non-profit organization whose membership is comprised of public defender agencies, indigent defenders, and those who are committed to seeking improvements in indigent defense. WDA is a not-for-profit corporation with 501(c)(3) status. The WDA's objectives and purposes are defined in its bylaws and include: protecting and insuring by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, including the right to counsel, and to resist all efforts made to curtail such rights; promoting, assisting, and encouraging public defense systems to ensure that all accused persons receive effective assistance of counsel.

WDA representatives frequently testify before the Washington House and Senate on proposed legislation affecting indigent defense issues. WDA has been granted leave on prior occasions to file amicus briefs in this Court. WDA represents 30 public defender agencies and has over 1,200 members comprising criminal defense attorneys, investigators, social workers and paralegals throughout Washington. WDA attorneys have significant expertise on the issues presented in the instant case based

on the extensive assistance we provide to defense attorneys in driving under the influence (DUI) cases.

This Court's decision in this case has potentially far-reaching implications to criminal practice in Washington. The purpose of this brief is to explain the importance of interviewing the specific toxicologist who the State will call to testify at a defendant's trial well in advance of trial.

II. ISSUE TO BE ADDRESSED BY AMICUS

Whether defense counsel can provide effective representation in a DUI case with a breath test when defense counsel does not know in advance of trial which of eight or more Washington State Patrol toxicologists will testify.

III. STATEMENT OF THE CASE

Amicus adopts the facts as stated in Mr. Salgado-Mendoza's supplemental brief.

IV. ARGUMENT

Defense attorneys must interview the State's witnesses in order to adequately prepare for trial and provide effective assistance to their clients. This is especially true in DUI cases where one of the State's witnesses is a toxicologist. The State's toxicologists are considered

forensic scientists and are often the government's most experienced expert witnesses in a DUI trial. Significantly, the toxicologist is not simply called to testify about the simulator solution that is prepared and certified at the toxicology laboratory to be used as a reference or accuracy check during the breath test process. They are not simply foundational witnesses. Rather, the toxicologist is readily relied upon by the State to elicit testimony regarding alcohol pharmacokinetics (i.e., the absorption, distribution, and elimination of alcohol), the effects of alcohol, field sobriety tests (FSTs) and their validation, retrograde extrapolation, Widmark's Formula, and, occasionally, the biological factors that impact breath test results. Washington State Patrol (WSP) toxicologists vary greatly in their education and experience. As a result, their testimony particularly regarding alcohol pharmacokinetics, FSTs, retrograde extrapolation, Widmark's Formula, and biological factors relevant to breath testing varies drastically. When the State provides the names of eight or more different toxicologists even though it plans to call only one at trial, it is impossible for defense attorneys, especially busy public defenders, to interview all eight potential witnesses and prepare eight different cross examinations. Further, experience in Seattle Municipal Court shows it is possible for the State to provide defense attorneys with the name of one toxicologist two weeks in advance of trial.

A. Defenders Must Interview the State’s Witnesses To Be Prepared For Trial and To Provide Effective Assistance of Counsel.

Those accused of a crime have a state and federal constitutional right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052 (1984); *State v. Tinkham*, 74 Wash.App. 102, 109, 871 P.2d 1127 (1994). To provide effective assistance, defense attorneys must interview witnesses in advance of trial. *State v. Jones*, 183 Wash. 2d 327, 339, 352 P.3d 776, 782 (2015) (internal citations omitted) (“To discharge this duty [to effectively represent a criminal defendant], trial counsel must investigate the case, and investigation includes witness interviews”). *See also State v. Burri*, 87 Wash. 2d 175, 180, 550 P.2d 507, 511 (1976) (State violated defendant’s right to counsel when it denied defense attorney “the opportunity to prepare for trial” by not allowing defense counsel to confer with witnesses).

The rules of professional conduct (RPC) and the Washington State Bar Association Performance Guidelines for Criminal Defense Representation (approved June 3, 2011) (WSBA Guidelines)¹ state the importance of pre-trial preparation. *See* RPC 1.1 (“Competent representation requires the

¹ “[W]hile not binding, relevant standards are often useful to courts in evaluating things like effective assistance of counsel.” *State v. A.N.J.*, 168 Wash. 2d 91, 110, 225 P.3d 956, 966 (2010).

legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation”); WSBA Guideline 4 (addressing counsel’s “duty to conduct an independent investigation”); WSBA Guideline 7 (addressing the importance of preparation for all aspects of trial).

B. It Is Especially Important That Defense Counsel Interview The Testifying Toxicologist Because That Expert May Testify About Many Complex Scientific Concepts And Such Testimony Varies Among the Toxicologists and Cases.

In a DUI trial, the toxicologist testifies not only about the simulator solutions involved in the breath test process, but also about complex scientific concepts such as alcohol pharmacokinetics, the validity of FSTs, retrograde extrapolation, Widmark’s Formula, and, potentially, the biological factors that impact breath test results—pretest breathing patterns, exhaled volume, breath temperature, and interference. Such testimony may be harmful or helpful to the defense theory of the case and, therefore, the defender must investigate that testimony to effectuate competent trial strategy. Because the WSP toxicologists have differing levels and degrees of education, experience, and competency in these subjects each toxicologist will testify differently about these concepts and principles at trial.

I. Toxicologists Can Serve as Expert Witnesses On Several Complex Scientific Subjects Related to Breath Tests and Field Sobriety Tests.

a. *Biological Variables*

A series of biological variables affect the results of a breath test. These include breathing patterns that may occur prior to the breath test, the volume of exhalation that enters the machine, the breath temperature of the person taking the test, and interfering chemicals that may be either naturally occurring on a person's breath or in the body (and therefore on the breath) of the person taking the test due to environmental exposure or as a result of medical conditions or special diets. WSP toxicologists differ in both their ability and willingness to discuss and acknowledge these biological factors when defense counsel interviews or cross examines them. Some toxicologists defer to the breath test technician for those questions, while other toxicologists are willing to offer testimony in these areas based on prior experience or their level of knowledge.

i. Pretest Breathing Patterns

Pretest breathing patterns, particularly a breathhold, can impact a breath test result. For example, an A.W. Jones study² showed that when a

² A.W. Jones is readily accepted as an authority in the field of breath testing and has taught at the Robert F. Borkenstein Course at Indiana University that appears on many of the toxicologists' CVs.

breathhold for 30 seconds occurred before blowing into a breath test machine, the concentration of alcohol increased by 15.7 +/- 2.24% and the temperature of breath rose by .6 +/- .09 degrees Celsius. A.W. Jones, How Breathing Technique Can Influence the Results of Breath-Alcohol Analysis, *Med. Sci. Law* (1982) Vol. 22, No. 4, 275-80. That same study also showed that keeping the mouth closed for 5 minutes (i.e., shallow breathing) increased expired alcohol concentration by 7.3 +/- 1.2% and the breath temperature by .7 +/- .14 degrees Celsius. *Id.*; see also Rod G. Gullberg³, The Mathematical Analysis of Breath Alcohol Profiles Generated During Breath Exhalation, *Journal of Analytical Toxicology*, Vol. 14, November/December 1990, 358-67 (recognizing that breathing pattern prior to exhalation can significantly influence the breath test).

ii. Exhaled Volume

A test subject's exhaled volume, i.e., the volume of his or her breath in addition to the length of that breath, impacts the results of a breath test. The longer a person exhales during testing, the higher the alcohol concentration in the result. Additionally, alcohol exchange in the airways is dependent on lung size of the subject. Hlastala, Michael and Anderson, Joseph, The Impact of Breathing Pattern and Lung Size on the

³ Rod Gullberg is a former head of the WSP Breath Test Section and is recognized as an expert in the field of breath testing by the State's experts, including both the toxicologists and breath test technicians.

Alcohol Breath Test, *Annals of Biomedical Engineering*, Vol. 35, No. 2, February 2007, pp.264-72; C. Dennis Simpson, Jessica A. Kerby, and Scott E. Kerby, Varying Length of Expirational Blow and End Result Breath Alcohol, *International Journal of Drug Testing*, Vol. 3. Numerous other scientific articles note that the exhaled volume factor is always present in breath testing. See Ohlsson, J., Ralph, D.D., Mandelkorn, M.A., Babb, A.L., and Hlastala, M.P., Accurate Measurement of Blood Alcohol Concentration with Isothermal Rebreathing, *Journal of Studies on Alcohol*, Vol. 51, No. 1, 1990, pp. 6-13; see also Grubb, D., Lindberg, Rasmussen, B., and Linnet, K., Re: Grubb et al, Breath alcohol analysis incorporating standardization to water vapour is as precise as blood alcohol analysis, Response Letter to Editor, *Forens. Sci. Int.*, 216 (2012) 88-91, in response to Letter to Editor, Hlastala, Michael and Anderson, Joseph, Re: Grubb et al., Breath alcohol analysis incorporating standardization to water vapour is as precise as blood alcohol analysis, *Forensic Sci. Int.* 216 (2012) 88-91 (“It is well accepted that the absolute BrAC varies with exhaled volume and breath temperature.”); Gullberg, Mathematical Analysis of Breath Alcohol Profiles, at 361(recognizing that alcohol concentration in breath increases as the breath continues in exhalation).

iii. Breath Temperature

As breath temperature increases so does the alcohol concentration on breath. The Datamaster is set to presume that the average human breath temperature is 34 degrees +/- .2 degrees Celsius; the simulator solution, which is used to mimic human breath and to serve as a reference or accuracy check for the Datamaster during the breath test sequence, is set to read within those parameters. The 34 degrees Celsius presumption, which is built into the breath testing process in the Datamaster, relies upon 1950 research conducted by R.N. Harger, R.B. Forney, and H.B. Barnes in Estimation of Level of Blood Alcohol from Analysis of Breath, *Journal of Laboratory and Clinical Medicine*, Vol. 36, 1950, pp. 306-18. This same presumption exists in WSP's new machine, the Draeger 9510. Since the 1950s, however, the scientific literature and research has expanded, and scientists now know that the average human breath temperature is at least 35 degrees Celsius. Dale A. Carpenter and James M. Buttram, Breath Temperature: An Alabama Perspective, International Association for Chemical Testing, Newsletter, Volume 9, Number 2, July 1998; *see also* G. Schoknecht and B. Stock, The Technical Concept for Evidential Breath Testing in Germany, Proceedings of the ICADTS T095, Adelaide Australia, 1995 and A.W. Jones, Quantitative Measurements of the Alcohol Concentration and the Temperature of Breath During a Prolong Exhalation, *Acta. Physiol. Scand.*, Vol. 11, 1982, pp. 407-12. For every 1

degree Celsius higher the subject's breath temperature is from the average temperature, the estimated concentration of alcohol will be increased, conservatively, by 6.5%. A.W. Jones, How Breath Technique Can Influence the Results of Breath-Alcohol Analysis, at 275; *see also* Harger, Estimation of Level of Blood Alcohol from Analysis of Breath.

iv. Interferrants

Interferrants may artificially increase the results of a subject's breath test. An interferrant is a chemical that has a similar chemical makeup or structure to that of ethanol and may interfere with the breath test machine's capability of separating ethanol (alcohol) from these other similar appearing chemicals. This is a particular danger for those who work with chemicals as part of their occupations or hobbies. Interferrants, such as toluene, acetone, xylene, isopropanol and ethyl benzene—all chemicals found in paint thinners, paints and other similar products—have similar structures to ethanol, and the Datamaster can mistake them for ethanol or alcohol. The Datamaster and other instruments that employ infrared spectroscopy, using minimal infrared wavelengths to detect compounds, have a difficult time separating these chemicals from alcohol. While the Datamaster has an interference filter, it is not a "catch-all" for every chemical compound. The Datamaster's use of only two infrared wavelengths to read compounds entering its chamber complicates the

ability to properly delineate and read alcohol separate and distinct from other similar chemicals. The risk is that, if unaccounted for, the presence of these chemicals on a person's breath will read as alcohol in the evidentiary result.⁴

Acetone is a naturally occurring compound on human breath. So it will be present even if the subject has not interacted with paint or paint thinner. Acetone has a very similar chemical structure to alcohol. The Datamaster's interference filter will detect acetone only at a level of .010. Up to .010 acetone may impact a breath test and be reflected as alcohol in the result without triggering the acetone filter. *See Washington State Patrol Breath Test Program, Calibration—Measuring Instruments Technical Manual, Chapter 3, page 3-8, effective 10/15/12; see also Glenn A. Case, Sandra Distefano, and Barry Logan, Evaluation of the ability of the BAC Verifier Datamaster to distinguish Ethanol from other Organic Solvents, 47th Annual Meeting of the AAFS, Seattle 1995.*

⁴ Toxicologists have researched the Datamaster's ability to distinguish alcohol from other chemicals with a similar structure. Glenn A. Case, Sandra Distefano, and Barry Logan, Evaluation of the ability of the BAC Verifier Datamaster to distinguish Ethanol from other Organic Solvents, 47th Annual Meeting of the AAFS, Seattle 1995. They found some interfereants did not trigger the Datamaster's acetone filter at all, some triggered it at the .010 threshold, and some triggered it beyond the .010 threshold.

b. Retrograde Extrapolation And Widmark's Formula

The State may use the toxicologist to introduce evidence regarding retrograde extrapolation and Widmark's Formula. Retrograde extrapolation is an estimation of a person's breath alcohol concentration at an earlier time than the time of the actual breath test. *See e.g., State v. Wilbur-Bobb*, 134 Wn. App. 627, 632, 141 P.3d 665 (2006) (toxicologist testified that "retrograde extrapolation is a mathematical formula for estimating a person's pretest blood alcohol concentration given that person's later verified blood alcohol concentration."); *State v. Mata*, 46 S.W.3d 902, 908-09 (Texas 2001) ("Retrograde extrapolation is the computation back in time of the blood-alcohol level—that is, the estimation of the level at the time of driving based on a test result from some later time"). Retrograde extrapolation is particularly important either when the subject submitted to the breath test more than two hours after driving because the statute that criminalizes DUI based on a breath test reading, RCW 46.61.502(1)(a), specifies that the person has an alcohol concentration of .08 or higher "within two hours after driving." Retrograde extrapolation is also important if the breath test result borders the legal limit of .08g/210L breath alcohol concentration (BAC).

Computing retrograde extrapolation requires knowledge about alcohol pharmacokinetics and a willingness to accept a number of

assumptions when performing the calculation. The accuracy and reliability of such an estimate is confounded by factors, such as (but not limited to) alcohol absorption and elimination rates, stomach contents duration of consumption, gender, the person's weight, the person's age, one's drinking pattern, the type of drink consumed, the amount of alcohol consumed, and the time period over which consumption occurred. *See Mata*, 46 S.W.3d at 909 citing Jennifer Pariser, *Note: In Vino Veritas: The Truth About Blood Alcohol Presumptions in State Drunk Driving Law*, 64 N.Y.U.L.REV. 141, 147 & 149 (1989), citing R. Erwin, DEFENSE OF DRUNK DRIVING CASES CRIMINAL/CIVIL § 15.04[1][b][i], at 15 (3d ed. 1988); Rodney Gullberg, *Variation in Blood Alcohol Concentration Following the Last Drink*, 10 J. OF POLICE SCIENCE & ADMIN. 289 (1982); Alan Jones *et. al.*, *Peak Blood Ethanol Concentration and the Time of Its Occurrence After Rapid Drinking on an Empty Stomach*, 36 J. OF FORENSIC SCIENCE 376, 381 (1991); NIAA ALCOHOL ALERT, "Alcohol Metabolism," No. 35 (Jan. 1997); Y. Al-Lanqawi *et. al.*, *Ethanol Kinetics: Extent of Error in Back Extrapolation Procedures*, 34 BRITISH J. OF CLINICAL PHARMACOLOGY 316, 320 (1992).

Significantly, retrograde extrapolation presumes that the person is "post-absorptive," or has reached his or her peak concentration (i.e., has

fully absorbed all consumed alcohol). Performing retrograde extrapolation when this assumption is false will result in a significant overestimation of the earlier BAC. “The peak often marks, for example, the changeover between the rising and falling blood alcohol concentrations, reflecting the absorption [] and elimination [] phases of distribution . . .” Dubowski, Kurt, Ph.D., *Absorption, Distribution, and Elimination of Alcohol: Highway Safety Aspects*, Department of Medicine and, Toxicology Laboratories, The University of Oklahoma Health Sciences Center, Oklahoma City, Oklahoma, Journal of Studies of Alcohol, Supplement No. 10, July 1985, pages 98-108, at 99. The toxicologist computes retrograde extrapolation by adding to the breath test result an average burnoff rate or range (i.e., elimination rate or range) for alcohol. The average burnoff rate readily testified to by our state toxicologists is .015 BAC per hour. Most state toxicologists mention there is a burnoff range of approximately .010-.20 BAC per hour.

In 1932 E.M.P. Widmark “created what we know today as the ‘BAC curve,’ which represents the rise and fall of an individual’s BAC as his body absorbs and eliminates alcohol.” *Mata*, 46 S.W.3d at 909. Critically, “if a driver is tested while in the absorption phase, his BAC at the time of the test will be higher than his BAC while driving. If tested while in the elimination phase, his BAC at the time of the test will be

lower than while driving, depending on whether he had reached his peak before or after he was stopped.” *Id.* The same holds true for retrograde extrapolation calculations. This problem has been recognized by many scientists, including those who teach at the Robert F. Borkstein course at Indiana University attended by our state toxicologists, such as Drs. A.W. Jones and Kurt Dubowski. See toxicologist CVs listing Robert F. Borkenstein Course on Alcohol and Highway Safety for various years at this link: <http://www.wsp.wa.gov/forensics/toxlabindex.php#vitae> . “They write that retrograde extrapolation is a ‘dubious practice’ and that expert testimony on the issue ‘requires careful consideration of the absorption kinetics of ethanol and the factors influencing this process.’” *Id.* at 911 citing Jones *et al.*, 36 J. OF FORENSIC SCIENCE 376-385 (1991); *see also* Dubowski, *Absorption, Distribution, and Elimination of Alcohol: Highway Safety Aspects*, at 99. Dr. Dubowski has written “[e]xtrapolation of a later alcohol test result to the time of the alleged offense is always of uncertain validity and therefore forensically unacceptable Finally, no forensically valid forward or backward extrapolation of blood or breath alcohol concentrations is ordinarily possible in a given subject and occasion solely on the basis of time and individual results.” *Id.* at 106; *see also* Kurt Dubowski, *Time-of-Test DUI Laws vs. BAC Extrapolation*, Center for Studies of Law in Action, Borkenstein Course, Indiana

University, December 2006 (presentation slide on “speculative retrograde extrapolation”).

A related concept, Widmark’s Formula or Equation, is also within the State’s regular overboard disclosure regarding the anticipated toxicologist’s testimony. E.M.P. Widmark developed an equation for estimating the amount of alcohol consumed, i.e., if there is a known alcohol concentration then this equation may be used to estimate the number of drinks a person would have consumed to reach that alcohol concentration. *See* Rod G. Gullberg, *Estimating the Uncertainty Associated with Widmark’s Equation as Commonly Applied in Forensic Toxicology*, Washington State Patrol, Breath Test Program, Seattle, WA, 2007 citing E.M.P. Widmark, *Principles and Applications of Medicolegal Alcohol Determination*, 107-108, Biomedical Publications, Davis, CA, 1981; *see also* Washington State Patrol Breath Section website at http://www.wsp.wa.gov/breathtest/docs/webdms/Studies_Articles/Widmarks%20Equation%2003-07-2002.pdf (last visited January 24, 2017). In addition, Widmark’s Formula can also be used to estimate a person’s breath or blood alcohol concentration based on a stated number of drinks consumed by that person. *See* http://www.wsp.wa.gov/breathtest/docs/webdms/Studies_Articles/

Widmarks%20Equation%2003-07-2002.pdf. Much like retrograde extrapolation, performing Widmark's Formula relies upon estimations, presumed averages, and assumptions.

c. Field Sobriety Tests

Periodically, the State relies on a toxicologist who is a witness in a DUI trial to bolster the FSTs which the arresting officer has previously testified about and discuss their validity as divided attention tests or tasks. There are three standardized field sobriety tests—the Horizontal Gaze Nystagmus (HGN) test, the Walk and Turn test, and the One-leg Stand test. In the Walk and Turn test, the person “takes nine heel to toe steps, turns in a prescribed manner, takes nine heel to toe steps back, counts the steps out loud, and watches their feet.” *DWI Detection and Standardized Field Sobriety Testing, Participant Manual revised 10, 2015, Session 7, page 13*, at this link <http://www.wsp.wa.gov/breathtest/dredocs.php>. In the One-leg Stand the person raises one foot approximately six inches and counts for thirty seconds. *DWI Detection and Standardized Field Sobriety Testing, Participant Manual revised 10, 2015, Session 7, page 16*, at this link <http://www.wsp.wa.gov/breathtest/dredocs.php>. In the HGN test the person holds his head still and follows an object, such as the tip of a pen, with his eyes. *DWI Detection and Standardized Field Sobriety Testing, Participant Manual revised 10, 2015, Session 7, pages 6-7*, at this link

<http://www.wsp.wa.gov/breathtest/dredocs.php> . The National Highway Traffic Safety Administration (NHTSA) has sponsored validation tests of the three standardized FSTs that examined police officers' arrest decisions after the officers had administered the three standardized FSTs. DWI Detection and Standardized Field Sobriety Testing, Participant Manual revised 10, 2015, Session 8, page 6 - 13.

2. It Is Especially Important That Defense Counsel Interview The Specific Toxicologist Who Will Testify At Trial Because the Toxicologists Testify Differently From One Another.

The WSP toxicologists have a wide range of experience and education. For example, David Nguyen and Elizabeth Wehner have been working as toxicologists only since October 2014—less than three years—while Asa Louis has been a toxicologist since 2003 (and a forensic analyst since 1991) and Dr. Naziha Nuwayhid has been a toxicologist since at least 2000 (but obtained a Ph.D. in medical sciences in 1982). The WSP toxicologists' CVs are available for review at this link:

<http://www.wsp.wa.gov/forensics/toxlabindex.php#vitae>. The education of Washington State Patrol's toxicologists is similarly varied. Some toxicologists have Ph.D.s in toxicology, while one has a Ph.D. in medical sciences. Other toxicologists have a bachelors' degree in a field other than toxicology. For example, Lyndsey Knoy has a B.S. in chemistry and

Amanda Black has a B.S. in chemistry and veterinary science. Other toxicologists have master's degrees in forensic science.

This varying range of education and experience translates into a wide range of testimony about alcohol pharmacokinetics, FSTs, biological factors, retrograde extrapolation, and Widmark's Formula. Some toxicologists are comfortable testifying about biological variables related to breath testing and others refuse to address the subject due to a lack of education and knowledge. For example, one toxicologist might readily admit on cross examination that it is necessary to know a person's breath temperature in order to reach the most exact breath alcohol result while another toxicologist would not have the necessary knowledge to make that statement.

The knowledge and comfort level of each toxicologist regarding retrograde extrapolation testimony also varies. Some toxicologists refuse to perform retrograde extrapolation, even when posed hypotheticals during interviews, in cases where the blood or breath test was taken within two hours of driving, asserting that that two-hour window is, in part, there to ensure post-absorption. Other toxicologists are willing to perform retrograde extrapolation back to within an hour of driving or to an even earlier posed time via a hypothetical. Some toxicologists require knowing the time of the last drink consumed by the individual before they are

comfortable performing retrograde extrapolation as that information assists them in determining whether the person is post-absorptive or not. Other toxicologists do not require such information. Some toxicologists perform retrograde extrapolation using an average burnoff rate of .015 BAC per hour while others will use a range of .010-.20 BAC, and state a range for their estimate.

Finally, WSP toxicologists vary in the extent of their exposure to, and formal training about, FSTs. As a result, they differ in their willingness to discuss the three standardized tests and the validation studies. Different toxicologists also testify differently about the effects of a defendant's medical problems on his or her performance on the FSTs.

A defense attorney who does not know how the toxicologist will testify about biological variables or if the toxicologist will even be willing to address that subject cannot effectively prepare a cross examination of the toxicologist. The attorney cannot give a specific study to the toxicologist who will testify in advance of trial so that she can cross examine the toxicologist at trial. She cannot gauge the toxicologist's reaction to that study by asking the toxicologist to review the study and then asking the toxicologist follow up questions. Finally, she will not know whether to seek funds for a defense expert who can discuss an issue

that the toxicologist might not have the education and experience to address.

The defense needs to learn and plan on how to confront the toxicologist's knowledge and ability to testify about or perform retrograde extrapolation and Widmark's Formula. What the toxicologist is willing and able to testify to about retrograde extrapolation often dictates defense counsel's trial strategy—this is particularly so in cases where there is a test result bordering the .08g/210L BAC limit or the subject took the test more than two hours after driving. With time to interview the toxicologist, defense counsel is able to decide on important motions in limine and to effectively prepare for a meaningful cross-examination of that expert testimony. Further, knowledge of the toxicologist and his or her comfort level and experience with retrograde extrapolation assists defense counsel in determining whether to call a defense expert to offer rebuttal evidence at trial or to rely upon that toxicologist's testimony to support the defense case.

There are numerous reasons a defense attorney needs to know how a toxicologist will testify regarding FSTs. If a defendant passed one or more of the FSTs, the defender would want to know if the testifying toxicologist would be willing to speak to the significance of that or whether she should seek funds to hire her own expert. The same is true if

the defendant had a medical issue that may have influenced her performance on the FSTs. The defender may also want to learn the toxicologist's knowledge of the validation studies and that witness's ability to testify about the FSTs if the police officer did not perform them to the required standards.

C. It Is Unreasonable and Difficult, If Not Impossible, To Interview And Prepare Cross Examinations For All Toxicologists On The State's Witness List Before Trial.

In 2015, the most recent year for which data is available, there were 647 DUI jury trials and 250 DUI bench trials—a total of 897 DUI trials. Caseloads of the Courts of Washington, Courts of Limited Jurisdiction, DUI/Physical Control Misdemeanors - 2015 Annual Report, at this link: <http://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=d&req=a&tab=CourtLevel&fileID=rpt07>. According to estimates by the Washington Office of Public Defense, public defenders represent approximately 60% of people accused of crimes in courts of limited jurisdiction. Misdemeanor public defenders often handle 300 to 400 cases per year. Washington Standards for Indigent Defense 3.4 (“The caseload of a full-time public defense attorney or assigned counsel should not exceed the following: . . . 300 Misdemeanor cases per attorney per year or, in jurisdictions that have not adopted a numerical case weighting system as described in this Standard, 400 cases per year; . . .”).

An interview of a single toxicologist takes at least one hour, and preparation of a cross examination of that single toxicologist may take up to three hours, especially for attorneys new to criminal defense, who tend to start in misdemeanors. A public defender simply does not have the time to interview eight or more toxicologists and prepare eight or more alternate cross examinations every time she has a DUI case best resolved by a trial.

D. Prosecutors in Seattle Municipal Court Provide Defense Counsel With The Name of One Toxicologist Fourteen Days In Advance Of Trial.

Based on the experience of WDA members, amicus knows that prosecutors in Seattle Municipal Court have been providing defense attorneys who set DUI cases for trial with the name of a specific toxicologist 14 days prior to trial since February 2011. In January 2011, Christine Jackson, an attorney at The Defender Association (now the Defender Association Division of the Department of Public Defense for King County), filed a motion in Seattle Municipal Court arguing that CrRLJ 4.7 required the prosecutor to disclose the name of the specific toxicologists who would testify in several DUI cases headed to trial. In response, Judge Bonner of Seattle Municipal Court asked the city prosecutor to propose a solution that would bring the city into compliance with CrRLJ 4.7. In February 2011, the city proposed that it reveal the

names of the specific toxicologist who would testify at a “readiness” hearing that would occur 11 days prior to a DUI trial. Judge Bonner adopted the city’s proposal. Seattle Municipal Court no longer holds DUI readiness hearings 11 days in advance of trial because the city voluntarily started supplying the defense with the names of specific toxicologists who would testify in specific trials 14 days in advance of those trials. The court allows the prosecutor to name a different toxicologist if the court continues the trial date for a specific DUI case.

V. CONCLUSION

WSP toxicologists testify in DUI trials that involve breath tests where several complex scientific concepts are relevant. Because they vastly differ in their education and experience, their testimony varies greatly. In order to be prepared for a DUI trial that involves a breath test, defense counsel must interview the toxicologist who will testify and prepare a cross examination specific to him or her. This is nearly impossible when the State does not timely reveal the name of the specific toxicologist who will testify at trial.

Respectfully submitted this 27th day of January, 2017.

Amicus Curiae
WASHINGTON DEFENDER ASSOCIATION

A handwritten signature in black ink that reads "Magda Baker". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Magda Baker, WSBA #30655
Lauren McLane, WSBA # 40945