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Editor: Paul Burglin
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DEAN'S MESSAGE

"Justice Through Knowledge," our motto, becomes much easier when you attain "Confidence Through Knowledge," our daily struggle and goal. Knowledge for our purposes has only two parts: what to say and how to say it. They are the form and substance of what we do on a daily basis. Real confidence can only be achieved by attaining both components of knowledge necessary to effectively aid those we represent.

There are far too many lawyers who bluff (or con) their way through most everything they do because they lack the real knowledge -- and the confidence -- to do otherwise. Though these lawyers may occasionally, and sometimes often, get lucky and appear successful without knowledge, eventually, and far too often, that luck runs out and it harms someone – or the many someones – who we are duty bound to represent with real skill and knowledge.

In seeking to fulfill its mission, the College strives to offer and provide this country's DWI lawyers with both confidence and knowledge so that they may attain justice for their clients and success for themselves. But, it does not come easy. It requires commitment and dedication as well as the willingness to invest both time and money in oneself and our profession. Far too few are willing to make the investment, and settle, instead, for merely getting by both professionally and otherwise.

The genesis of this article – and the themes it presents -- came after I watched the play "Catch Me if You Can." For those who have not seen either play or the 2002 movie, which I had not seen until after the play, I encourage you to do so. It is the story of the early years of former con man Frank Abagnale. By intermission, I realized that I had met the real Frank Abagnale when I was in high school nearly 40 years ago. Though I could not see it, I felt as though there was a memory sparkle in my eye. The refreshed memories made me downright giddy. As I continued to watch the play, I recalled more and more of that isolated event and viscerally felt as though I had reencountered a long lost friend -- though it is quite presumptuous of me to call a man whom I met for only a few moments one time nearly 40 years ago at one of his early speaking engagements a friend. I call him a friend because what I heard that day, decades ago, has guided a large part of my life and I have long coopted one of his many lessons, if not his exact words, as my own life lessons. Until I saw the play, I had long since forgotten his name, though I never forgot the lessons.

He came from a home in a small town in New York, the son of a loving mother and father. At age 16, he was unexpectedly called to family court to choose between his father and mother during their divorce. Unprepared and unwilling to make a choice, he ran away and headed to New York City. Over the next few years, he accomplished some extraordinary things -- though they all violated the law. He quickly became adept at creating forged checks, at "kiting" checks, and at convincing banks and others to cash his forged checks. He took on the fake identity of a Pan Am pilot and used it, as Pan Am reported, to fly (not as a pilot, but as a free deadheading passenger) more than one million miles and to visit 26 different countries -- all in his late teens as he represented himself to be 10 years older. Once warrants for his arrest began to surface, he left New York, quite well off financially for a teenager -- reportedly having bilked others out of more than two million in 1960's dollars, and relocated to Atlanta, where as a product of unplanned circumstances, he represented himself as a pediatrician and worked for a year as an Emergency Room supervisor of interns and residents. After he left Atlanta, he went to

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Missouri v. McNeely

Seminal Decision On Warrantless Blood Draws

Facts: DUI suspect refused both breath and blood testing and was subjected to a forced blood draw at a hospital. The State did not argue exigent circumstances beyond the natural dissipation of alcohol from the human body, and the arresting officer did not identify in his testimony any circumstances suggesting that he faced an emergency or unusual delay in trying to obtain a warrant. The blood-alcohol evidence was ordered suppressed by the trial court based on a violation of the Fourth Amendment. The Supreme Court of Missouri affirmed, as did the U.S. Supreme Court.

SOTOMAYOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, II–B, and IV, in which SCALIA, KENNEDY, GINSBURG, and KAGAN, JJ., joined, and an opinion with respect to Parts II–C and III, in which SCALIA, GINSBURG, and KAGAN, JJ., joined. KENNEDY, J., filed an opinion concurring in part. ROBERTS, C. J., filed an opinion concurring in part and dissenting in part, in which BREYER and ALITO, JJ., joined. THOMAS, J., filed a dissenting opinion.

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E.D.'S CORNER

We are truly looking forward to the 2013 Summer Session. Dean McKinney and the Board have put together a terrific program! Next up will be the NACDL/NCDD Vegas seminar, "*A Recipe for Success: Trial Techniques that Win*!" held October 3-5, 2013, and it promises to be a power-packed seminar as well! From Caesars Palace in Vegas, we go to a great Winter Session venue in San Diego, CA January 23-24, 2014 at the beautiful Loews Coronado Bay. What a great place to vacation! Beautiful weather, scenery and friends will make the 2014 Winter Session a MUST! A brochure with the program and registration form will be mailed to you shortly. It is a truly fantastic hotel and will be a great place to gather and enjoy the California sun chasing the January cold away!

If you are interested in applying for the Board Certification Examination, the application deadline is August 31, 2013. The examination will take place January 22, 2014 at the Lowes the day before the Winter Session begins.

Our new website is almost ready to be launched! You are going to appreciate the changes that will make it very easy to navigate to the Virtual Library and Brief Bank. Don't forget you can make your own changes to your bio on the NCDD website! You can also add your picture and change your contact information if you have moved.

I look forward to seeing you at one of the NCDD seminars soon!

- Rhea

Holding's Highlights

Parts I, II–A, II–B, and IV:

- "[W]hile the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber* [car accident investigation and DUI suspect in hospital], it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances."

- "When officers in a drunk driving investigation can reasonably obtain a warrant without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so (citing *McDonald v. United States*, 335 U.S. 451, 456)."

- "[T]echnological developments that enable officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion, are relevant to an assessment of exigency.

Part II-C:

Rejects Justice Robert's bright-line rule that an exigency exists if there is insufficient opportunity to obtain a warrant between the time of arrest and the time it takes to subject the motorist to a blood draw. (Kennedy did not join this portion of the opinion, expressing the view that states could possibly formulate a bright line rule based on the totality of circumstances).

Part III:

"States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws [citing license suspensions and admissibility of chemical test refusal in criminal prosecutions]." (Kennedy did not join this portion of the opinion, but expressed no disagreement with this statement in his separate concurring opinion)

ROBERTS, J., joined by BREYER and ALITO, JJ., (concurring in part and dissenting in part):

Officers need guidance. Agrees with majority that dissipation of alcohol in the human body does not create a per se exigency justifying warrantless blood draws in all DUI cases. However, if a warrant cannot reasonably be obtained within the time it takes the officer to have the blood drawn, than there is an exigency.

Footnote 2: A plurality of the Court suggests that my approach could make roadside blood draws a more attractive option for police [so they could argue there was no time to get a warrant], but such a procedure would pose practical difficulties and, as the Court noted in *Schmerber*, would raise additional and serious Fourth Amendment concerns.

THOMAS, J., dissenting: "Because the body's natural metabolization of alcohol inevitably destroys evidence of the crime, it constitutes an exigent circumstance. As a result, I would hold that a warrantless blood draw does not violate the Fourth Amendment."

The *McNeely* decision presents a number of issues that trial courts will have to address, including the following:

I. *Totality of the Circumstances*

Look for state courts and law enforcement agencies to seize upon the concurring opinion of Kennedy, the concurring/dissenting opinion of Roberts (joined by Breyer, and Alito), and the dissenting opinion of Thomas, to create bright line rules for facts constituting sufficient exigent circumstances for warrantless blood draws. Some reasonably predictable ones will be:

- Motor vehicle accident
- Passenger(s) needing assistance
- Necessity for medical attention
- Time of day and availability of magistrate
- Number of officers in police department

In the interim, trial courts will consider these and other circumstances.

II. Good Faith Exception

Where a warrantless blood draw without lawful consent is found to have occurred, the exclusion of the blood-alcohol analysis will not necessarily be excluded if a "good faith" exception to the exclusionary rule is established and found applicable. Several states courts have already made such a determination based on an officer's purported reliance on state court appellate precedents which established a categorical exception and/or a reasonable reliance on *Schmerber*. See *Davis v. United States*, 131 S. Ct. 2419 (2011) ("…searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule."). Yet many officers get their legal training from prosecutors who spin legal precedents in favor of law enforcement, raising the question of whether it's appropriate to find "good faith" reliance on such training. Even post-*McNeely* there will still be prosecutorial claims of "good faith" regarding an officer's belief in the sufficiency of exigent circumstances.

III. Retroactivity

Some trial courts are reportedly ruling that the *McNeely* holding is not retroactive---that it only applies to blood draws conducted after issuance of the decision. However, the U.S. Supreme Court's remand order to the Court of Appeals in *Brooks v. Minnesota* (April 22, 2013 – Docket No. 12-478) "for further consideration in light of *Missouri v. McNeely*" [cite] appears to send a clear signal that SCOTUS considers the decision binding on all pending cases. Brooks involved the warrantless taking of a urine sample in a DWI case.

IV. Breath-Alcohol Testing

The limits of *McNeely* will be tested with the contention that breath-alcohol results obtained without a search warrant are also subject to suppression. Such testing does constitute a search subject to Fourth Amendment scrutiny. *Skinner v. Railway Labor Executives Association*, 489 U.S. 602 (1989). However, unless there is a political shift on the current Supreme Court, it appears unlikely that *McNeely* will apply to warrantless breath test results unless perhaps the police force a mouthpiece into the subject's mouth. This is because Kennedy, J., wrote the majority opinion in *Maryland v. King*, 569 U.S. ___ (2013)(joined by Roberts, Alito, Breyer, and Thomas) finding no Fourth Amendment violation in the buccal swabbing of inmates. The following are some pertinent quotes from that opinion:

- "A buccal swab is a far more gentle process than a venipuncture to draw blood. It involves but a light touch on the inside of the cheek; and although it can be deemed a search within the body of the arrestee, it requires no "surgical intrusions beneath the skin." *Winston*, 470 U. S., at 760. The fact than an intrusion is negligible is of central relevance to determining reasonableness, although it is still a search as the law defines that term.

- "This application of `traditional standards of reasonableness' requires a court to weigh `the promotion of legitimate governmental interests' against `the degree to which [the search] intrudes upon an individual's privacy.' *Wyoming* v. *Houghton*, 526 U. S. 295, 300 (1999).

- "In the balance of reasonableness required by the Fourth Amendment, therefore, the Court must give great weight both to the significant government interest at stake…

- "The governmental interest must outweigh the degree to which the search invades an individual's legitimate expectations of privacy. In considering those expectations in this case, however, the necessary predicate of a valid arrest for a serious offense is fundamental.

Welcome Attendees!
2013 SUMMER SESSION
Cambridge, MA

CASE LAW ROUNDUP

Case Highlights from Donald Ramsell (Illinois) and Paul Burglin (California)

FIFTH AMENDMENT

Silence at Roadside May Be More Incriminating Than Words!

Salinas v. Texas
570 U.S. ___, 133 S.Ct. 928 (2013) – Docket No. 12-246

Berkemer v. McCarty, 468 U.S. 420 (1984) held that a motorist's pre-arrest, pre-Miranda roadside statements are admissible at trial. *Salinas v. Texas* (Docket 12-246) just empowered prosecutors to introduce silence by DUI suspects in response to roadside questioning as evidence of guilt, unless the suspect expressly invokes the Fifth Amendment right to remain silent.

"Before petitioner could rely on the privilege against self incrimination, he was required to invoke it[,]" wrote Alito, J., (joined by Roberts and Kennedy, JJ.). Concurring with the plurality, Thomas, J. (joined by Scalia, J.) opined that the Court should permit silence to be used as evidence of guilt even if the Fifth Amendment is expressly invoked!

At oral argument, Ginsburg, J. asked, "What does silence mean other than "I fear self-incrimination?" Along with Sotomayor and Kagan, JJ., she joined the dissenting opinion of Breyer, J., who cited prior Court precedent holding that "no ritualistic formula is necessary in order to invoke the privilege." (quoting *Quinn v. United States*, 349 U. S. 155, 164 (1955)).

EDITOR'S NOTE: The *Salinas* Catch-22: *Suspects have the right to remain silent, but their silence may be used against them unless they talk.*

FST Refusal Held Inadmissible Under State's Self-Incrimination Clause, But Incriminating Statements Made During Course of Participation Deemed Admissible

Commonwealth v. Brown **(Mass. Appeals Court June 20, 2013 – Docket No. 12-P-614)**

Defendant's refusal to participate in (or complete) field sobriety testing may not be introduced by the State as evidence of guilt. Admission would place the accused in a Catch-22 situation---participate in the FST's and furnish incriminating evidence, or refuse and produce "consciousness of guilt" evidence.

However, statements made in the course of such participation about the difficulty or inability of the FST's are admissible because they are not compelled statements.

Chemical Test Refusal Suppressed Where Defendant Not Admonished It Could Be Used Against Him In Court

Sauls v. State**, ___ S.E.2d __, 2013 WL 292146 (GA Supreme Court)**

Trooper failed to admonish DUI suspect that his failure to submit to chemical testing could be used against him in Court. This was deemed a material omission from GA's "Implied Consent" statute which requires a full reading of the requirement and consequences.

The GA Supreme Court reversed the Court of Appeals and ordered suppression of the refusal at trial, even though Defendant had interrupted the trooper during the reading.

EDITOR'S NOTE: NCDD member Allen Trapp notched this victory.

FOURTH AMENDMENT

No Exigent Circumstance Found In 125 Minute Delay In Getting Defendant To Hospital For Blood Draw

State v. Reed
--- S.W.3d ----, 2013 WL 2285129 (Mo.App. S.D.) – Docket No. SD 32465

The State appealed the trial court's suppression of blood-alcohol test results by arguing that the following "totality of circumstances" presented an exigent circumstance that dispensed with a warrant requirement: "(1) the trooper had to complete a prior DWI investigation prior to turning his attention to Reed; (2) the trooper had to allow twenty minutes for Reed to attempt to contact an attorney before refusing to consent to the blood test; (3) the trooper had to transport Reed to the hospital (for the test); (4) the evanescent nature of blood alcohol concentration; and (5) the additional hour or two delay necessary to obtain a search warrant. The State frames the argument thusly: `Does a two hour and five minute delay caused by a prior driving while intoxicated investigation, the evanescent nature of blood alcohol concentration in a person's blood, and an additional hour or two hour delay necessary to obtain a search warrant create an exigent circumstance to the search warrant requirement of the Fourth Amendment?'"

In affirming the trial court's suppression of the evidence, the Court noted the trial court's ruling was substantially supported by the following findings:

1. "[T]here was no evidence submitted by the State that other law enforcement officers were unavailable to assist [the trooper]. In fact, [the trooper] did request and receive the assistance of a Deputy Sheriff in transporting Reed to the jail. There was no reason given why that Deputy, or others, could not have helped in completing the application for and obtaining a search warrant."
2. "[T]here was no accident to investigate and no need to arrange for the medical treatment of an injured person. In fact, there was no[t] even erratic driving to investigate."
3. [The trooper] had a host of choices before him.... [H]e chose not to seek a search warrant. He did not call the Office of the Prosecuting Attorney to determine whether search warrants would readily be available. He testified that he knew how to do so, was trained to do so, and had done so in the past."

EDITOR'S NOTE: This case was heard at the trial court level prior to the SCOTUS decision in *McNeely v. Missouri*, but subsequent to *State v. McNeely*, 358 S.W.3d 65 (Mo. bank 2012) which was affirmed by SCOTUS.

No Good-Faith Exception Based On Non-Binding Or Amorphous Case Law Precedent.

U.S. v. Martin
--- F.3d ----, 2013 WL 1197849 (C.A.7 (Ill.)) – Docket No. 11–1696

Law enforcement placed a GPS tracking device on Defendant's car without a warrant. Subsequently, SCOTUS determined that such action constitutes a search within the meaning of the Fourth Amendment and requires a warrant. See *U.S. v. Jones*, ___U.S.___, 132 S.Ct. 945 (2012). Citing *Davis v. U.S.*, ___U.S.___, 131 S.Ct. 2419, the government contended that the "good-faith" exception applies where an officer relies upon then-existing case law precedent.

"With respect, we find that to be an unwarranted expansion of the Supreme Court's decision in *Davis* and not one that we should adopt in the present case. *Davis* expanded the good-faith rationale in *United States v. Leon*, 468 U.S. 897 [cites] only to "a search [conducted] in objectively reasonable reliance on *binding appellate precedent,*" finding that this set of searches are not subject to the exclusionary rule. See *Davis*, 131 S.Ct. at 2434. (emphasis added). As Justice Sotomayor pointed out in her opinion concurring in the judgment, *Davis* "d[id] not present the markedly different question whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled…

"We reject the government's invitation to allow police officers to rely on a diffuse notion of the weight of authority around the country, especially where that amorphous opinion turns out to be incorrect in the Supreme Court's eyes."

Partial Obstruction Of License Plate By Trailer Ball Hitch Not Grounds For Detention

People v. Gaytan **(IL - Court of Appeal, Dist. 4) May 13, 2013 – Docket**

No. 4–12–0217)

The IL statute at issue provides that the "registration plate shall at all times be free from any materials that would obstruct the visibility of the plate, including, but not limited to, glass covers and plastic covers."

The last phrase of the statute led the Court to conclude that a trailer ball hitch---since it is not an item physically attached to the license plate---is not the type of obstruction that constitutes a violation of the statute (employing the doctrine *ejusdem generic*).

DISCOVERY

No "Due Diligence Rule" For Defense Regarding *Brady* Disclosures

U.S. v. Tavera **(6th Cir. June 20, 2013 – Docket No. 11-6175)**

Defendant was a passenger in a truck transporting concealed methamphetamine. He denied having any knowledge of it but was convicted nevertheless. His conviction was vacated when it was discovered after trial that the co-defendant driver had told the prosecutor during plea negotiations that Defendant had no knowledge of the drug conspiracy.

Citing *Strickler v. Greene*, 527 U.S. 263 (1999), the Court first determined there is a true *Brady* violation (*Brady v. Maryland*, 373 U.S. 83 (1963)) requiring a new trial where (a) the subject evidence is favorable to the accused, either because it is exculpatory or it is impeaching; (b) the evidence was either willfully or inadvertently suppressed by the State; and (c) prejudice ensued from the suppression.

The Court then cited *Banks v. Dretke*, 540 U.S. 668 (2004) in rejecting the government's contention that Defendant had a "due diligence"obligation to discover the exculpatory statement by asking the co-defendant if he had made any statements to law enforcement. Banks held that "[a] rule… declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process."

Defendant's Independent Sample Analysis Must Be Disclosed Under State Discovery Rule

Kidder v. State **(FL Court of Appeal, Dist. 2) June 12, 2013 – Docket No. 2D12-3535**

When a criminal defendant elects to participate in Florida's criminal discovery process (which permits such things as the taking of depositions), he or she is obligated to disclose independent chemical test results even if the analyst is not being called by the defense as a witness.

The Court declared that disclosure of the test result "should not be construed as permitting the introduction of the results…in the State's case-in-chief. Other issues may yet remain, including but not limited to whether such evidence is cumulative and whether it would constitute improper bolstering."

EDITOR'S NOTE: The opinion does not state that disclosure would have been mandated in the absence of Defendant's election to participate in the state's criminal discovery process.

State of West Virginia v. Games-Neely
(2013) - Docket No. 11-1648

Defendant filed a motion for, *inter alia*, the "downloaded data for the Intoximeter EC/IR II breath machine used in this case."

"Defendant…has the right to challenge the State's foundation for admitting the Intoximeter results, as well as the right to challenge whether the test was in compliance with the statute and the protocols approved by the department of health. [cite] To that end, one of the features of the Intoximeter is that it has the capability to store the information sought by the Defendant… We, therefore, determine that neither the magistrate court nor the circuit court erred in allowing the discovery sought by the Defendant as it is both relevant and material to his case.

EDITOR'S NOTE: This WV Supreme Court case was handled by NCDD members Harley Wagner and Jason Glass.

EXPERTTESTIMONY

Expert's Reliance Upon NHTSA Article Concerning Impairment at .05 Percent Allowed

Belmonte v. Cook **(U.S. District Court, S.D. Ohio, May 30, 2013 – Docket No. 2:12-CV-911)**

Prosecution expert testified about effect of BAC of .048 to .063 percent on an average person. He referenced an April 2000 NHTSA article indicating that one can be impaired at .05 percent. He was not familiar with the studies underlying the article, and acknowledged he did not know if the studies were reliable or done in a scientifically acceptable manner. He could not say whether the article was "widely accepted in the scientific community," but said it was an "important document in the community" (whatever that means!).

The Court found that reliability of the article was sufficiently established for his reference and reliance upon it by his testimony that: (a) it was prepared for the government by two individuals who reviewed the complete literature on the subject, including peer review journals; (b) there were over 100 papers referenced in the review; (c) he had not seen any papers invalidating the article since its publication in April 2000; and (d) the article was used as a teaching aid in workshops he had attended.

EDITOR'S NOTE: It is doubtful that anyone will invalidate the NHTSA article as a result of this decision, since the Court did not identify the article in its opinion other than to note the publication date.

"Sleep Walking" Expert Testimony Improperly Excluded Says Oregon Supreme Court

State v. Newman**, ___P.3d___ (2013 WL 2370589 (Or.) – Docket No. S060182**

An element of proof for DUI conviction in Oregon is that the accused engaged in a volitional act that led to the driving. The trial court barred the defense from having an expert witness testify about "sleep driving" as part of a defense that defendant's act of driving was not volitional.

"[T]he jury could have considered evidence that defendant engaged in the volitional act of drinking, if there were evidence that drinking led to the driving. However, the jury also could have concluded that defendant's "sleep driving" would have occurred without regard to whether he consumed alcohol and, thus, that defendant did not engage in a voluntary act which led to the act of driving.

"We note that ORS 161.095 provides that criminal liability may be imposed when conduct includes either a voluntary act `or the omission to perform an act which the person is capable of performing.' Here, defendant's proffered testimony was that he had not, to his knowledge, engaged in "sleep driving" prior to this incident. On remand, if the state produces evidence to the contrary, a jury could conclude that defendant's failure to take adequate precautions was an omission to perform an act defendant is capable of performing under ORS 161.095(1) and, if supported by the evidence, that that failure to act led to the driving."

Defendant was entitled to adduce evidence that his act of driving was not volitional, and his expert witness should have been allowed to testify. It did note that the State is "entitled to present evidence that defendant's drinking or other volitional act resulted in defendant driving his vehicle that evening," or to "show a voluntary act with evidence that defendant had engaged in "sleep driving" prior to this incident and failed to take adequate precautions to remove access to his car keys."

OUR THANKS TO FOUNDATION CONTRIBUTORS

The governing body of the NCDD Foundation wishes to express our deep appreciation to all those members who have contributed to the scholarship funds. As you recall, several 2012 Summer Session attendees were provided with assistance, permitting many to join in our fellowship and knowledge seeking, who, otherwise, could not attend.

At the time of this note of thanks, the Foundation has paid the tuition for five attendees For the 2013 Summer Session. It is great to share with others! For those who have done so, accept our "thank you."

The list of members sharing by their scholarship contributions is as follows:

Cole Law Frim
Domenic A. Lucarelli
Fred Slone
A. Randolph Hough
Scott E. Wonder
Larry Kohn
Paul Cramm
Michael Nichols
Joseph P. Rem, Jr.
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John C. Talpos
Teddy & Meekins Trial Lawyers
James Nesci
Sheri Pewitt
Qlo Crum
Stephen Barnard
Nichols, Webb & Loranger
Ryan Russman

TRIAL TIP

by Thomas J. Quinn[1]

Don't forget, as officers and prosecutors often do, the Stopping Sequence and the Exit Sequence from the SFST Manual.

As part of the DUI detection process the officer is to "observe the manner in which the driver responds to your signal to stop." This Stopping Sequence is used by the officer to determine if there are any clues to reinforce his suspicion of DUI by observing the manner in which he exits the vehicle. Clues may include an attempt to flee, no response, slow response, an abrupt swerve, sudden stop, or striking the curb or another object. If no clues are exhibited it casts doubt on any allegation of failure to safely operate a motor vehicle.

The Exit Sequence describes "how the driver steps and walks from the vehicle and actions or behavior during the exit…" "The officer is to be alert to look for the driver who shows angry or unusual reactions; cannot follow instructions; cannot open the door; leaves the vehicle in gear; "climbs" out of the vehicle; leans against vehicle or keeps hands on vehicle for balance.

Failure by the officer to even mention those on direct casts doubt on any testimony he may try to give claiming he saw problems with driving or physical performance.

Further point out the SFST Manual provides techniques on how to make some tests more difficult, not fairer or more revealing of intoxication, such as never using the starting and stopping points for a number count that ends in 0 or 5 because these numbers are too easy to recall and having the driver count backwards or to recite the alphabet beginning with a letter other than A and stopping at a letter other than Z.

Jurors want the accused to have a fair shake not have things unmentioned or made more difficult.

[1]Attorney Thomas J. Quinn has been a practicing criminal defense attorney in Greenville, SC, since 1978.

THE FALLACY OF FINGER-TO-NOSE TEST FOR DETERMINING ALCOHOL IMPAIRMENT

By Patrick Mahaney[1]

Reviewed by: Dr. Jimmie L. Valentine, Ph.D.[2]

Technical Review: Dr. Valerie Valentine Acevedo, D.O.[3]

When a motorist is stopped and questioned for suspected drunk driving, one of the "field sobriety tests" sometimes administered is the "Finger to Nose" test. Most police officers are completely unaware of the origins and the stated purpose of the "Finger to Nose" test and why it is not a part of the Standardized Field Sobriety Tests (SFSTs).

The "finger-to-nose" test is a derivative of the Romberg sensory ataxia test.[1] This procedure was initially developed by Doctor Moritz H. Romberg (1795-1873) while Dr. Romberg was studying tertiary syphilis at the University Hospital in Berlin, Germany. The exam is based on the premise that a person requires at least two of the three following senses to maintain balance while standing: proprioception (the ability to sense the relative position of neighboring parts in one's body); vestibular function (the ability to know one's head position in space); and vision (which can be used to monitor, and adjust for, changes in body position).

As Dr. Romberg noted in his classic publication, *Lehrbuch*: "If he is ordered to close his eyes while in the erect posture, he at once commences to totter and swing from side to side; the insecurity of his gait also exhibits itself in the dark." [Translated from the original German into English.] See, "Romberg and His Sign" by J.M.S. Pearce, *European Neurology* (2005) pp. 210-13. One of the key factors in the administration of the Romberg test is deprivation of visual senses by placing the person in a state of darkness, either actual darkness or shutting the eyelids to create a 'sense' of darkness. Once the individual affected with ataxia is placed in a darkened environment, the individual will fall over or sway significantly from side to side, due to impaired proprioception.

Neurosyphilis is an infection of the brain or spinal cord caused by the bacterium Treponema pallidum. It usually occurs in people who have had chronic, untreated syphilis, usually about ten to twenty years after first infection. However, not every person infected with syphilis will develop this complication. The classic signs of neurosyphilis are: difficulty walking, loss of coordination, loss of reflexes, muscle weakness, and wide-based gait (walking with legs spread apart to compensate for loss of balance). Once the disease has progressed to this point, the next and final stages are generally manifested by symptoms of dementia, blindness, confusion and insanity. As is well-known, American gangster Al Capone had advanced neurosyphilis prior to his death in 1947.

When Dr. Romberg completed studies to test for Stage III syphilis in the mid-1840's, there was no microscopic examination process available. It was not until 1906 that bacteriologist August von Wassermann, coincidently also at the state hospital in Berlin, developed the now famous Wassermann test to determine syphilis antibodies present in the blood. Until the Wassermann test was developed, the only neurological testing available for advanced stage syphilis was the Romberg test. In fact, the Romberg test is still employed today in the study of proprioception disorders.

In a recent scientific publication, "Romberg's Test" by Dr. Gokula of the Department of Internal Medicine of Michigan State University, the examination of the subject is done as follows: "The patient should be examined to rule out other causes of ataxia…The patient is then made to stand with his feet close together, arms by his side and eyes open. Any significant swaying or tendency to fall is noted. The patient is then asked to close his eyes…Romberg's test is considered positive if there is significant imbalance with the eyes closed or the imbalance significantly worsens on closing the eyes." Dr. Gokula, *Journal of Postgraduate Medicine* (2003) pp.169-72. Thus, when the examination is undertaken by a medical doctor with specialized training in neurology, the Romberg test may prove a valuable indicator of existing neurological disease. However, the test itself has never been validated as a method to determine alcoholic sobriety. Romberg's sign and the finger to nose test are only a simplified version of a variety of testing to evaluate coordination disturbances of the entire central nervous system. In no way can one assume that the Romberg sign and the finger to nose test are exclusive to the use and consumption of alcohol.

In the 1960's and into the 1970's, law enforcement agencies made a rough attempt to utilize the Romberg test as a measure of alcohol insobriety. As the forerunner to the National Highway Traffic Safety Administration's "Standard Field Sobriety Battery" (1983), the National Safety Council developed the "Alcohol Influence Form" in 1939 for law enforcement officers to document insobriety and motor vehicle operation.[2] That form was then standardized by the Northwestern Traffic Institute and distributed widely to police agencies throughout the United States from the 1950s throughout the late 1970s as a combined note taking and field sobriety testing form. Romberg's test was adapted by the NWTI as an improvised field sobriety test, wherein the subject was required to touch his or her nose with eyes closed. People with normal proprioception error in placement will not exceed 20 millimeters (the finger is placed within 20 millimeters of the tip of the nose), but not miss the entire nose. However, people suffering from impaired proprioception (a common symptom of moderate to severe alcohol intoxication) will fail this test due to difficulty locating their limbs in space relative to their noses. In actual practice, however, the "finger-to-nose" test is so varied in its administration and its objective evaluation as to have little relative use as a field sobriety test for determining alcohol sobriety.

Many other medical conditions produce impaired proprioception, and therefore a positive Romberg's sign and the test result similar to that seen with alcohol intoxication. The most common of these conditions would be peripheral neuropathy, of which more than 100 types have been identified. Some of these types are commonly seen in the public at large, although the underlying cause of the condition may not be apparent. At least 8% of the general population is known to have some type of peripheral neuropathy: a history of trauma to the back or limbs, diabetes (up to 70% of all diabetics have peripheral neuropathy), thyroid disease, vitamin deficiency, infections (HIV, shingles, and others), and conditions less frequently encountered, such as multiple sclerosis.

The Romberg test as commonly used by law enforcement authorities requires the subject to stand with their feet together, hands at their side, the head tilted back, and their eyes closed. Tilting the head disturbs the inner ear function which is necessary to maintain balance. The eyes depend upon the vestibular system to stabilize orientation. When one of the senses is 'de-activated,' such as closing the eyes, the Romberg test can detect dysfunction in the remaining pathways to and from the cerebellum. In a clinical setting, the test is always performed with the eyes open at first, in order to establish a performance baseline. The performance baseline evaluation is critical to using the Romberg test for neurological use.

The major issue with the law enforcement use of the Romberg test to determine alcoholic impairment is that balance requires the

proper functioning of the vestibular system, the proprioception system, and the visual system simultaneously. See, Herdman, S.J., *Vestibular Rehabilitation*, (2002). Unless a clinical evaluation is undertaken by a trained medical doctor prior to use of the Romberg test, any purported results developed from the Romberg test are only speculative. In fact, the Romberg test was found to be so unreliable as an indicator of alcoholic sobriety that its use was specifically rejected by the National Highway Traffic Safety Administration for inclusion in the NHTSA standard test battery.[3] Thus, a police officer's use of this discredited field sobriety test, originally conceived to study syphilitic patients, has only negligible use in determining alcoholic impairment and cannot in any manner form the basis for credible probable cause to support an arrest for DUI or DWI.

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[1] Ataxia is a neurological sign and symptom that consists of gross lack of coordination of muscle movements. Ataxia is a non-specific clinical manifestation implying dysfunction of the parts of the nervous system that coordinate movement, such as the cerebellum.

[2] See, Dr. Kurt Dubowski, Ph.D., Acceptable Practices for Evidential Breath Alcohol Testing, The Robert Borkenstein Course, Indiana University, May 2008.

[3] Sworn testimony of Marcelline Burns in *State v. Meador*, 674 So.2d 826 (Fla. App. 1996). Burns was the co-author of the original National Highway Traffic Safety Administration publication "Development and Field Test of Psychophysical Tests for DWI Arrest" (1981) which was the basis for the NHTSA foundational publication "DWI Detection and Standardized Field Sobriety Testing" (1983). See, also, ImObersteg, A. "The Romberg Balance Test: Differentiating Normal Sway from Alcohol-Induced Sway," *DWI Journal, Law & Science*, Vol. 18, No. 5 (May, 2003)

THE MAGICAL REARVIEW MIRROR

By Joseph S. Passanise[1]

In May 2012, a Missouri State Highway Patrol Trooper stopped an individual for "failure to stop at a stop line by allegedly passing the stop block four feet," in the early morning hours in Branson, MO. One thing led to another and ultimately the individual was arrested for a DWI.

In the Trooper's Alcohol Influence Report, he indicated he was able to look in his rearview mirror and see that the suspect passed the white block stop line which then precipitated him turning around and making the stop. This Trooper had over 25 to 50 DWI trials and over 350 DWI arrests in his ten-year career, so he was no stranger to the DWI process.

In deposition, the Trooper stated that at approximately 150 yards or more (a football field and a half) away was when he observed in his rearview mirror this purported traffic violation. He said it was his normal practice to use his rearview mirror for observing violations and this was the basis for many of his detentions in DWI arrests.

Utilizing Google maps and photographs of the intersection during the deposition, the "magical rearview mirror" was shown to be not so magical. A lot of the facts that developed from the deposition were mysteriously not included in the report. Further inconsistencies arose when the Trooper started contradicting himself and added "crossing the centerline" as a basis for the stop even though it was not in his report.

Despite all of his DWI experience, he had not really been cross-examined before on his DWI stops. Ultimately, the prosecutor dismissed the DWI and kept the alleged traffic violation off the individual's record.

The take home lesson here is even though it is in black and white in the written report, never assume, always inquire, and test the officer's credibility with common sense.

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TRIAL JUDGES AND TRIAL LAWERS — SHARED TRIBULATIONS IN THE ARENA OF JUSTICE

The recent passing of retired Judge Thomas Penfield Jackson of the U.S. District Court for the District of Columbia was occasion for the *New York Times* to recount one of his many jokes over the years that were intended to make a point:

A law professor, an appellate judge and a trial judge are duck hunting. In the blind, the three place a friendly wager on who will bag the first mallard. When a bird finally flies by, the law professor turns to a text book, matches one source against another and finds a helpful illustration, but by the time he makes his decision, the bird has flown away.

Another bird comes into view and the appellate judge steps forward. After checking pertinent cases, decisions, and precedents, the appellate judge takes aim, but again, the bird is gone.

When a third bird crosses overhead, the criminal judge slides between the other two, raises his shotgun and blows the winged creature clear out of the sky. "I hope to hell that was a duck," he says.

(Washington Post, 12/10/1998). Jackson had himself been a trial judge, presiding over such notable trials as that of D.C. Mayor Marion S. Barry, Jr., on cocaine charges (during which he shared the aforementioned joke), and Microsoft Corporation on anti-trust violations. When defense counsel complained in the latter trial that a videotape of Bill Gates's deposition contained too many "I don't remember" responses for the jury to hear, Jackson responded, "I think the problem is with your witness, not the way his testimony is being presented." Gates had the last laugh though, when Judge John G. Roberts (later elevated to the U.S. Supreme Court) and the D.C. Circuit Court of Appeals reversed the judgment against Microsoft based on improper commentary by Jackson while the case was pending.

Before becoming a trial judge, Jackson was a trial lawyer defending hospitals in medical malpractice cases. He was once quoted as saying his favorite thing about litigation was "destroying a witness." He owned a sailboat he named *Nisi Prius* (Latin for "trial court").

Sources: NY Times (2013), Baltimore Sun (1999), and Washington Post (1998).

Louisiana, where he took and passed the Louisiana bar examination without ever having completed high school, much less having attended a day of College or law school. He worked in the Louisiana Office of the Attorney General for close to a year before leaving because some began to question and look into his background.

As all "good" things must come to an end, it also did for Frank Abagnale. At age 21, he was arrested in France on an Interpol warrant from Sweden. It took the French just long enough to discover that he had also passed hundreds of fake checks in France to charge, convict and sentence him to a year in a French jail. He served six months of that sentence, in conditions so dreary that he went from close to 200 pounds to less than 110 pounds. He was then extradited to Sweden where he was again convicted and spent more time in jail before being extradited to the United States. In the United States, he was sentenced to 12 years in federal prison. After serving less than five years, he was paroled on, among other conditions, that he use his substantial skills and knowledge to aid his country and the FBI until the completion of his parole.

This new opportunity and second chance was one he embraced -- both for the government and through a security firm he established to provide the same private sector banks and companies he had once defrauded the knowledge and mechanisms to prevent future fraud by others who were then and now as he had once been.

This abbreviated and woefully incomplete version of his early life is far from complete, but it is sufficient for a bit of background to the lessons I hope to impart.

After listening to him speak in the mid 1970's and talking to him afterwards, I came away mesmerized and remain that way today. Here was a man who was able, through work at a basic understanding, to convince others that he knew what he was talking about, even when he really had no clue. The idea, not to mention the challenge, was intriguing. During the play, the actor playing his father told him, "If you act like you are confident, you will become confident." I heard either that line or a version of it when I heard him speak at my high school. I do not recall whether that was his specific version of that line or whether I have plagiarized his real version for close to the last four decades, but my version of that line -- though it may have originated verbatim as his -- has always been, "If you act like you know what you are doing, you can get away with anything."

Though I was naively mesmerized, I soon thereafter realized, as he had, that real success comes not just from knowing what to say and bluffing your way through substance, but by having the actual knowledge that produces real confidence and not just bluffs. I realized that if someone could achieve seemingly remarkable things without real knowledge, truly remarkable things could be achieved with real knowledge and skill. The line, "If you act like what you know what you are doing you can get away with anything," is a nice and sometimes funny anecdote, but it is not true in the long run – especially for lawyers representing citizens accused of crimes. It might more appropriately be "if you only act like you know what you are doing, you can get away with many things, but when you don't, you and others will get hurt badly."

The difference between who and what Frank Abagnale was and who and what he has become is the same difference between lawyers who have true confidence from knowledge attained through hard work and those who just bluff their way through everything. It is the difference between lawyers who provide their clients real benefits for the fees they are paid and those who just "bleed `um and plead `um." It is the difference between a dump truck, as it is often coined, and a truly fine driving machine.

Frank Abagnale had (and likely still has) the inherent skill of knowing how to say things so that others believed him even when he had no real clue what he was talking about. For lawyers, this skill is the ability to think on your feet – the form of how to say it. We often face situations where we have to think on our feet to successfully meet the challenge presented. The ability to do so without knowledge and substance can only get us so far. Thinking on our feet becomes much more effective (and much less likely to land us in trouble as it did Frank Abagnale) when we have the knowledge to add real substance to the words we speak and make them authoritative and persuasive. We all know lawyers who have been caught claiming to have knowledge when they knew they were just bluffing. We (and judges and prosecutors) know and remember those lawyers and the stories because of the adverse effect it had on their reputation. Pretend skill and knowledge is no substitute for real skill and knowledge. Pretend confidence is little more than an excuse for not bothering to attain the actual knowledge to have real confidence.

The take away from all this is simple. It is always best to truly know what you are doing, and to seek to gain the skill, knowledge and excellence to do so. While there will be times when you face situations where you do not really know what you are doing and you must use -- and learn to use -- your wit, knowledge, and skills to think on your feet and to "act like you know what you are doing," even when you do not, we can minimize, if not eliminate, those events by attaining real knowledge. We must also remain aware that there are limits, in our case ethical and legal, by which we must abide lest we end up as Frank Abagnale, needing the services of a lawyer who we hope really is excellent and really has the knowledge to know what he or she is doing.

Finally, Frank Abagnale's story is also one epitomizing the value of second chances and of how our bad professional choices may follow each of us. His story ought to provide the motivation and drive to all of us to take a different path -- a path toward real good, real accomplishment, and the real utilization for good of our God given skills and talents. Those lawyers who lack the ability to know what to say and how to say it, and therefore lack the knowledge to have confidence, have many second chance opportunities to take a different path and achieve "Confidence Through Knowledge" and, thus, "Justice Through Knowledge. Only you can make the choice of what kind of lawyer you want to be. Just know that if you chose to be one who only acts like you know what you are doing, others will soon enough come to know it as well and you will not only not get away with anything, but will also do a great disservice to your reputation, to your clients and to our profession.

The College was formed and committed twenty years ago – and remains committed today -- to provide DWI defense lawyers the ability to really know what you are doing and not just act like it: that is, simply, to know what to say and how to say it. Your next opportunities to become a confident lawyer because you have real knowledge and skill and to be the kind of truly excellent lawyer we all should want to be are at Cambridge, MA, July 25-27, 2013, at NCDD's Summer Session on the campus of Harvard law School, in Las Vegas at the NACDL/NCDD 17th Annual DWI Means Defend With Ingenuity program at Caesar's Palace, October 3-5, 2013, at the NCDD Winter Session in San Diego, California, January 23-24, 2014, at the Lowe's Coronado Resort, and at the 21st Annual Mastering Scientific Evidence in DWI Cases, in New Orleans, March 20-22, 2014 . See the CLE listings at www.ncdd.com for the agenda and registration forms.

It has been my privilege to have been your Dean for the last year and I look forward to continuing to see all of you who have become part of this wonderful organization at future NCDD events.