# Criminal Law



Published by the Criminal Law Section of the Washington State Bar Association

Volume 1 2 Fall 2010 Number 2

### **Greetings!**

By Wade Samuelson - Criminal Law Section Chair

As the 2010 Chair of the Criminal Law Section, I would like to invite all criminal law practitioners, both prosecution and defense, to join the section. The Criminal Law Section is somewhat unique in that it is composed of members who are always on opposite sides of the courtroom and often have significantly differing ideas as to what new laws should be enacted, what rules should be added or amended, and how to reconcile the competing rights of victims and defendants. The section is a great forum for both sides to communicate and work cooperatively wherever possible.

The section is proud to have sponsored the annual Criminal Justice Institute on September 16-17, 2010, at the Washington State Convention Center in Seattle. Our annual program addresses many topics and this year featured Mark Curriden and his presentation entitled *Contempt of Court: A Lesson in Professionalism and Legal History*. The 2-day seminar provided an entire year's worth of CLE credits – 15 credits, including 4 ethics! We hope to see you at next year's.

If you have any topics or issues that affect the practice of criminal law in Washington, I encourage you to contact your regional representative on the Criminal Law Section Executive Committee. You can find a list of Executive Committee members on the web and at the end of this publication. The Executive Committee meets every 4-6 weeks at 13 Coins restaurant in SeaTac. Typically, meetings are held on Saturdays, starting at 9:15 am. All members are welcome to attend. You may contact the section's Secretary/Treasurer, Aaron Wolff, to confirm meeting dates and get on the agenda if you would like to address the committee personally.

If you have any questions of me, please do not hesitate to ask. I am all ears as to how to make our section better! We are here to serve the members and always value your input! Have a great start to your autumn.

#### DO YOU LIKE TO WRITE?

Do you have an article you would like to publish in our newsletter? Submit articles to *chris.maryatt@kingcounty. gov.* All articles will be considered. Articles accepted may be edited for content.

## Marijuana Reform: A Call for Defense Attorneys and Prosecutors to Speak Out

By Alison Halcomb – Drug Policy Director, American Civil Liberties Union of Washington

Marijuana law reform is a hot topic these days. A range of reform proposals increasingly are gaining serious consideration. This is an area in which members of the legal profession have a vital role to play.

Last October, the U.S. Department of Justice issued a memorandum directing that federal resources not be spent on the investigation or prosecution of individuals in "clear and unambiguous compliance" with state medical marijuana laws. Five states (New Mexico, Rhode Island, Maine, New Jersey, and Colorado) and the District of Columbia now have laws establishing licensed, regulated systems of production and distribution of marijuana for medical use. Washington may join them in 2011 according to State Sen. Jeanne Kohl-Welles.

Reform efforts in Washington state extend beyond medicinal use. Last year, Sen. Jeanne Kohl-Welles and Rep. Dave Upthegrove introduced companion bills that would have reclassified simple possession of marijuana from a misdemeanor carrying mandatory minimums of a day in jail and a \$250 fine to a civil infraction subject to a \$100 penalty. Collected fines would have been earmarked for the

(continued next page)

#### **Table of Contents**

Greetings!1
Marijuana Reform: A Call for Defense Attorneys and Prosecutors to Speak Out1
Unexpected Deaths: Coroner Duties of a Small County Prosecutor5
A Primer on Pre-Trial Alcohol Monitoring of Defendants .6
Criminal Law Section Officers and Executive Committee9

#### Marijuana Reform... from previous page

Washington State Criminal Justice Treatment Account. The Senate version was passed out of committee on a bipartisan vote; its counterpart in the House received a hearing in 2010 and was supported by the Washington State Bar Association. However, the bill was voted down in committee 5-3.

This session, Rep. Mary Lou Dickerson introduced a measure that went further. Co-sponsored by nine other legislators, HB 2401 proposed to regulate, tax, and make marijuana available to adults 21 and over through state liquor stores. Revenues would have been earmarked for treatment and prevention services. HB 2401 also received a committee hearing but was voted down. However, Rep. Dickerson indicated she was simply starting the conversation, and we may see another bill introduced in 2011.

This July, legalizing marijuana topped public responses to Gov. Gregoire's online request for suggestions to address Washington's budget woes. According to Gregoire spokeswoman Karina Shagren, "It's a legitimate idea, but we'd have to see how the federal government would respond."

Washington has an opportunity to lead the nation in reforming our marijuana laws. We could set the standard for rational policies that address public health, public safety, and a wiser use of our public resources.

#### **Assessing the Options**

Just as liquor laws vary from state to state – and in some jurisdictions, from county to county – a new marijuana policy could take any number of forms. For purposes of broad analysis, we can compare the status quo with two general categories of reform: decriminalization and legalization. These terms need clarification, as different people use them differently.

In its purest sense, "decriminalization" means removal of criminal penalties. In the U.S., 13 states have already decriminalized simple possession of marijuana (Alaska, California, Colorado, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New York, North Carolina, Ohio, and Oregon), all but two of them doing so more than 30 years ago. In Alaska, possession of marijuana for personal use is protected under the state constitution as a matter of privacy, and no penalty applies. All other states impose a fine.

However, no state has removed criminal penalties for either cultivation or delivery. This may be why the term "legalization" is particularly confusing. One vision of legalization has marijuana available in a taxed and regulated market, similar to alcohol or tobacco. However, some refer to California's Proposition 19, which will be voted on in November, as "legalization," even though its passage would only effect the removal of penalties for possession and growing for personal use. Prop. 19 specifically provides local governments the option of licensing, taxing, and regu-

lating commercial production and distribution, but such activities remain illegal until the local governments provide otherwise. Sponsors of Initiative 1068, which failed to make Washington's ballot this year, referred to it as a legalization measure, but I-1068 only proposed to remove all "state civil and criminal penalties for persons eighteen years or older who cultivate, possess, transport, sell, or use marijuana" and did not make any suggestions regarding licensing, regulation, or taxation.

For purposes of this article, "decriminalization" means removal of criminal penalties, whether for simple possession, growing, or delivery (regardless of whether money changes hands). "Legalization" is reserved for a proposal that contemplates creating a licensed, taxed, and regulated system for making marijuana available for purchase in the legal market. Under this approach, Prop. 19 is a decriminalization measure that includes a local legalization option

Drawing these distinctions highlights four key considerations in assessing the feasibility of marijuana law reform options: public health, public safety, public budgets, and federal preemption.

#### **Decriminalization**

Removing criminal penalties for marijuana-related activities would accomplish three important goals: savings in our criminal justice system, an end to unfair criminalization of otherwise law-abiding people, and movement toward racial justice.

According to the fiscal notes prepared by the Washington State Office of Financial Management for SB 5615 and HB 1177, misdemeanor marijuana law enforcement costs approximately \$15-16 million each year in jail, prosecution, and court resources. Additional costs include \$160 per each misdemeanor arrest that could have been handled as a civil infraction – or \$375 for each arrest that wouldn't have happened at all. Whether these savings would actually allow reallocation of public funds to other budget priorities is debatable. However, it is hard to defend continued use of criminal justice resources for punishment of marijuana users when so many other public safety priorities could make better use of them.

Moreover, criminalizing marijuana users has consequences for individuals and families that reach far beyond the initial arrest, mandatory court appearances, jail, fines, and lawyers' fees. People can lose employment and employment opportunities, housing, and federal financial aid for college. The choice of marijuana over beer can impact a parent's ability to spend time with a child or participate in his school activities. *State on Behalf of Hendrix v. Waters*, 89 Wn. App. 921, 951 P.2d 317 (1998). And these long-term consequences are disproportionally imposed on people of color. In Washington state, according to government records, an African American is three times as likely to be

(continued next page)

#### Marijuana Reform... from previous page

arrested for marijuana possession as a white person, three times as likely to be charged, and three times as likely to be convicted – despite the fact that whites use marijuana at a slightly higher rate.

Two shortcomings of the decriminalization approach are that it only generates revenue for government services if civil fines are included – fines that could never match the tax revenue from a legally controlled marijuana market – and it does not address the black market. Public health suffers when black market profiteers are left in charge of product safety and access restrictions like age limits. For example, the *New York Times* reported that 29 marijuana consumers were hospitalized in Germany with lead poisoning in 2008. According to the same publication, teenagers in the U.S. consistently report that it is easier to buy marijuana than cigarettes, beer, or prescription drugs, which are all legal, regulated substances.

And decriminalization does not end the harmful consequences of the black market for marijuana. According to the U.S. Department of Justice, black market marijuana sales in the U.S. constitute "the single largest source of revenue for the Mexican cartels" – not cocaine, heroin, or methamphetamine as one might have assumed. Moreover, in response to tightened border security, Mexican cartels have relocated marijuana production operations to U.S. national parks and forests to cut down on product loss, according to the *New York Times*. It is increasingly difficult to ignore the analogy between marijuana prohibition and the Mexican cartels on one hand and alcohol Prohibition, Al Capone, and whiskey smuggling on the other.

#### Legalization

In addition to creating new jobs in marijuana and industrial hemp industries, legalization offers the opportunity to protect public health – not only through quality control and regulation of access, but also through generation of tax revenues that can be spent on effective public education campaigns and substance abuse prevention and treatment strategies. The fiscal note for HB 2401 estimated \$46 million in revenue for the state general fund in the first year, increasing to \$61 million by FY2019. The Liquor Control Board would have collected an additional \$140 million annually, increasing to \$173 million by FY2019, 98 percent of which would have been dedicated to substance abuse treatment and prevention services.

The most common objections to legalizing marijuana are that use would increase, and we would "send the wrong message" to kids. In 2009, University of Washington professor Roger Roffman provided thoughtful comments to the *New York Times* addressing both concerns:

What if marijuana is legalized? No one can say for certain. Using one country's reform example to estimate what would happen in another is very risky. How countries differ (cultural, social, political, economic) makes a big difference.

However, the Dutch "coffee shops" example might give us a little insight. The de facto legalization policy in the Netherlands did not, in itself, affect rates of marijuana use among adults or young people. But rates of use among young people increased when the number of coffee shops increased and the age of legal access was 16. Then these rates declined when the number of coffee shops was reduced and the age of legal access became 18.

A cautious conclusion, as I see it, is that any consideration of legalization should include careful planning for how those who are most vulnerable to harm from marijuana use, children and adolescents, can be protected.

How can we protect youth while making marijuana legally available for adults? According to the American Journal of Public Health, the U.S. experience with tobacco smoking demonstrates how public education campaigns combined with labeling requirements and advertising restrictions can encourage healthier choices by youths without arresting adults.

Another concern is whether legalizing marijuana would increase incidences of individuals driving while intoxicated. To be sure, driving while intoxicated by any substance, whether marijuana, alcohol, or prescription medications, is a most serious matter. This is why we have DUI laws. DUI enforcement and public education are better places to spend tax dollars than marijuana prohibition, which continues to fail as a strategy for discouraging either use or abuse. While marijuana arrests have tripled nationwide over the past two decades, marijuana use rates have remained steady according to federal government studies.

Finally, the "sending the wrong message" argument needs to be recognized for what it is: a dodge. The human experience with intoxication is complicated and deserves a more thoughtful response than "Just Say No." We need to be able to explain why, as a society, we have decided to allow adults to engage in some behaviors that are not appropriate for minors. We are fully capable of doing so when we make the effort. We can emphasize the importance of preventing, recognizing, and treating substance abuse without denying the fact that the overwhelming majority of people who use marijuana will not suffer or inflict serious harm on others.

If we want to be effective messengers about marijuana to our children, we need to end the hypocrisy that undermines our credibility. The current U.S. president and preceding two

(continued next page)

#### Marijuana Reform... from previous page

have all admitted using marijuana, as has the man who has won the most gold medals in Olympic history. More than 15 million Americans are current marijuana users; at least 40 percent have tried it at some point in their lives according to federal government studies. The notion that marijuana use causes harms so serious that absolute prohibition is the appropriate response is no longer credible. The notion that 40 percent of Americans are criminals is untenable.

#### Federal Preemption: The Law and the Politics

In the context of marijuana laws, the doctrine of federal preemption provides that any state law creating a "positive conflict" with the federal Controlled Substances Act is preempted. 21 U.S.C. § 903. A positive conflict arises "only when the state law affirmatively requires acts violating the federal proscription." San Diego, et al. v. NORML, et al., 165 Cal. App. 4th 798, 821, 81 Cal. Rptr. 3d 461, 477 (2008), rev. denied, cert. denied, 129 S. Ct. 2380 (2009). As defined in this article, it is difficult to imagine a state legalization proposal that would not run into preemption issues. Product inspection and testing, for example, would require someone to be in possession of marijuana in violation of federal law. Decriminalization, on the other hand, would not be susceptible to a federal preemption challenge. Under the "commandeering" doctrine, the federal government cannot require a state to enact or keep on its books any criminal law, nor can it require states to enforce federal criminal laws. Printz v. United States, 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997).

The most salient question was correctly framed by Gov. Gregoire's spokeswoman as a political rather than legal one: How would the federal government actually respond to the passage of a legalization measure? The current administration has announced a hands-off policy for state medical marijuana laws, and six jurisdictions now have regulatory schemes for production and distribution of marijuana for medical use. The laws of one of those jurisdictions, the District of Columbia, are specifically subject to Congressional review. Congress did not overrule the District's decision to proceed with regulation.

When labor and civil rights organizer A. Philip Randolph met with President Franklin Delano Roosevelt to press his issues, Roosevelt expressed his support, then issued a challenge: "Now, go out and make me do it." The current administration might be taking a similar approach to marijuana. The Department of Justice is letting state-regulated medical marijuana markets go unchallenged. Moreover, Gil Kerlikowske, Director of the Office of National Drug Control Policy (and former Seattle police chief) was recently quoted as saying that some state and local medical marijuana jurisdictions were "doing a really good job of licensing, land use, those kind of regulations."

Perhaps a well-crafted regulatory proposal for non-medical marijuana that reflected thoughtful consideration of both public health and public safety issues would force "the other Washington" to let this Washington "serve as a laboratory" for "novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

## Prosecutors and Defense Attorneys Have a Special Duty to Speak Out

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and the capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

- Introductory paragraph from Fundamental Principles of the Rules of Professional Conduct for Washington State

Whatever specific direction reform efforts take, current and former prosecutors and defenders have a special duty to protect the integrity of our criminal justice system. This duty flows not from any rule or court decision, but from our status as agents of, and first-hand witnesses to, the system's operation.

The criminal justice system is a testing ground of the fundamental fairness of our laws. Beyond depriving one of her liberty by locking her up behind bars, labeling someone a criminal strips her of the badges of citizenry, replaces them with a scarlet letter, and, more often than not, changes the trajectory of her life fundamentally. The use of the criminal sanction is, at its essence, the rawest display of our society's power over an individual. Overuse of that power undermines respect for the law and belief in the justness of our society. As former Assistant U.S. Attorney Paul Butler argues in his recent book, *Let's Get Free: A Hip-Hop Theory of Justice*, our over-reliance on criminal sanctions to make our neighborhoods safer and more comfortable places to live is actually having the opposite effect.

With marijuana, the criminal laws have been stretched beyond their proper scope. It is time for criminal law practitioners to call on our elected leaders, and on the fields of health, education, and civil regulation, to help us shape a rational marijuana policy that will restore respect for our laws.

Editor's Note: The ACLU of Washington hosted a forum featuring local and national leaders of marijuana law reform at Town Hall Seattle on September 12.

## **Unexpected Deaths: Coroner Duties of a Small County Prosecutor**

By Michael Boska - Deputy Prosecutor, Kittitas County

While sitting through three years of law school, envisioning future application of legal skills in writing, in the office, and in the courtroom, I never envisioned serving as a deputy coroner responsible for handling death scenes and ultimately determining cause and manner of death. As I would learn, however, prosecuting attorneys in smaller counties around Washington are expected to serve as coroners. According to Art. XI, § 5 of the Washington Constitution, a county may be classified by population and the Legislature may authorize "election in certain classes of counties certain officers who shall exercise the powers and perform the duties of two or more officers." RCW 36.16.030 enumerates this as: "... in each county with a population of less than forty thousand no coroner shall be elected and the prosecuting attorney shall be ex officio coroner."

When I began working in Kittitas County as a deputy prosecutor, I was intrigued while reading about the risks and duties associated with ex officio coroner duty. I was warned of exposure to blood-borne pathogens; the responsibility to inform next of kin that their loved one has died; the examination of bodies; and a plethora of other tasks that I never expected to engage in as an attorney. Kittitas County has twelve deputy prosecutors along with the elected Prosecuting Attorney – and the weeks of the year are divided up equally such that each of us is left with an obnoxiously loud pager for four or five non-consecutive weeks. Interestingly, in cases where suspicion of a felony having occurred arises, a separate prosecutor dispatches to the scene in order to act in the prosecutorial capacity while the original deputy acts solely with the legal duties of coroner in mind.

I have handled approximately twelve unexpected deaths in this role, including drug-related deaths, suicides, and various other unexpected or unnatural deaths. (The coroner's jurisdiction extends only so far as RCW 68.50.010 permits: those in apparent good health who die without attendance by a doctor, and other select circumstances). My most memorable case involved a decedent who was found inside a submerged vehicle, with the doors locked and windows rolled up. As is often true in the courtroom, the full truth of precisely how this occurred will never, and can never, be known. We are required to make judgments based only on the evidence available, and satisfy ourselves we have found the most probable cause and manner of death. (Incidentally, cause of death refers to the proximate medical reason why the decedent died: asphyxiation, heart failure, etc.; whereas manner of death is a more general classification about the nature of the death: homicide, suicide, natural, accidental). In the case of the woman in the submerged vehicle, based on investigation of social circumstances in her

life in addition to the physical circumstances of the scene, we deemed her death a suicide.

Unfortunately, working as ex officio coroner tends to breed a very sobering attitude about death, even when no criminal activity is involved, forcing one to very quickly become desensitized to everything surrounding it. What coroner duty has taught me is that while many natural deaths may be foreshadowed by poor health or illness, many people die at home alone from unexpected terminal heart attacks, not after hours battling on a hospital bed as our culture so often leads us to believe. It is perhaps worth remembering to call our parents or grandparents every now and then, because any of us can suddenly be gone without warning.

The positive side is that all of the skills utilized are also those needed for a prosecutor: an ability to interact with people who are under a great deal of stress and understanding the basics of dealing with potential crime scenes. Many of the scientific principles involved are applicable to homicides, which at some point in their careers most deputy prosecutors will come to handle. Finally, the knowledge of anatomy gained from attending a postmortem examination (something typically done by biology majors in undergraduate studies) cannot be overstated. I have been to four, and learned something every time.

The reality is that attorneys are not able to come close to doing the job alone. The prosecutor's office gives great amounts of deference to investigations performed by law enforcement officers. Our office almost always consults doctors to determine relevant medical history and medical examiners perform post-mortem examinations. After reviewing our initial reports to gain an understanding of surrounding circumstances, they are truly the most qualified to determine the cause *and* manner of death.

While we strive to serve the public well in this area, most of us are eagerly awaiting the results of the 2010 census in order to determine if the county population exceeds forty thousand. Despite all of the training, one must concede that this is a job better handled by a dedicated professional who works year-round in this role. Although it will be a relief to surrender the pager, I will miss the ongoing education that comes with doing something the vast majority of attorneys never will.

#### **DISTRIBUTION**

If you are already a member of the Criminal Law Section, please distribute this newsletter freely to others who may wish to join.

## A Primer on Pre-Trial Alcohol Monitoring of Defendants

By Kennet Phillipson – Associate Attorney, Fox Bowman Duarte

Courts are often placed in the position of imposing pretrial release conditions on defendants charged with alcohol-related crimes. In light of a 2007 decision to restrict the types of pretrial conditions they can impose, judges have been searching for other options to ensure that defendants do not consume alcohol. *Butler v. Kato* 137 W.App. 515 (2007). Whether it is a 2nd offense DUI or a vehicular homicide, both prosecutors and defense attorneys would be well-served to know what sort of pretrial alcohol monitoring is available and the upsides and downsides to each so that they can help the courts tailor the appropriate conditions for each individual defendant.

Below is a summary of the most available equipment and tests.

#### **Ignition Interlock Devices**

Ignition interlocks (IID) are breath testing devices hardwired into the ignition system of a car. A driver must blow into the device and it must register a reading of less than .025 g/210L of breath in order to start the vehicle. As a way of preventing circumvention of the device, the IID usually requires a driver to blow into the device at random intervals while driving. A reading above the .025 limit while driving will cause the horn to honk and the headlights to flash until the car is turned off.

There are many companies that manufacture and install IIDs, but all use similar fuel-cell technology to measure the alcohol in a driver's breath. This is a different technology than is currently used in Washington's BAC Datamasters, though the technology is in fact used in the preliminary breath-testing devices used by law enforcement in the field. The benefits of the technology are that it is relatively small and affordable and requires less frequent calibration and very little power to operate.

The clear downside to current fuel-cell technology is that it is generally not admissible in Washington courts because it has yet to meet the requirements under *Frye. See e.g., State v. Smith,* 130 Wn.2d 215 (1996), *discussing Frye v. United States, 293 F. 1013* (D.C. Cir. 1923). Prosecutors have been reluctant to put the resources into gathering the necessary experts and seeking its admission. This may change in the coming years, but for now, BAC readings based on fuel-cell technology are generally inadmissible.

That is not to say that IIDs are ineffective. In fact, available research seems to point to the fact that IIDs are very effective deterrents against continued drinking and driving. (The Alcohol Interlock Curriculum for Practitioners has an excellent discussion on this subject, which can be found at: <a href="http://aic.tirf.ca/section2/qa.php">http://aic.tirf.ca/section2/qa.php</a>.) They generally are a reliable and cost-effective way to deter recidivism.

IIDs do have significant costs however, most of which are born by the defendant. Almost all jurisdictions which impose the requirement make defendants pay for the device themselves. At roughly \$65-\$90 a month and the addition of an installation charge, the IID can be a financial burden, especially on those defendants living paycheck-to-paycheck or who are indigent. For many defendants, poverty is one of the reasons they find themselves going through the revolving door of the justice system; requiring an IID which they cannot afford may simply be setting them up for failure. Even for those who can afford it, requiring an IID on work vehicles can significantly impact employment for some people. Those with commercial licenses are obviously affected, but also salespeople, postal workers, repair workers, and myriad others who must drive for a living could face termination if the court were to order an IID on all vehicles driven. Furthermore, there is a significant stigma attached to having an IID installed on one's car. For real estate agents, home health care workers or any defendants who must take clients in their personal vehicle, it is embarrassing and burdensome. For parents, it requires a difficult discussion with children.

In short, ignition interlock devices can be an effective way to discourage drinking and driving as long as attorneys have little expectation of enforcing penalties on violations and are sensitive to costs on defendants.

#### **Urine Tests**

Urine tests or urinalysis (UA) are chemical tests, which test either for 1) the presence of ethanol or 2) a biochemical marker called Ethyl Glucuronide, more commonly called EtG. For accuracy, the tests require that a person be monitored while giving the sample, so a defendant must necessarily travel to a probation department, treatment facility, or laboratory to give the sample. The test itself can take many forms, from an in-office test that simply requires dipping a strip into the sample to a laboratory procedure that requires specialized training and equipment.

Testing for the presence of ethanol is the simplest test. It can detect alcohol anywhere from 3 to 24 hours after consumption. However, the test is limited to a determination as to whether someone has consumed and not to the specific amount of alcohol consumed. Depending upon the specific test used, testing for the presence of ethanol in the urine is scientifically accepted and can be admissible under *Frye*, assuming other foundational requirements are met.

The testing for EtG is much more complicated. Designed to detect the consumption of alcohol for up to 5 days afterward, the testing process requires specialized lab equipment. The real problem with EtG is that the test is so sensitive that any exposure to alcohol will result in a positive test. In other words, there is no reliable way to discriminate between alcohol that has been consumed and other alcohol exposure in the environment (e.g., hair spray, cleaning supplies, vinegar, desserts, etc.). As a result, the (continued next page)

#### A Primer on Pre-Trial Alcohol Monitoring of Defendants from previous page

federal government issued an advisory in 2007 indicating that: "Legal or disciplinary action based solely on a positive EtG, or other test discussed in this *Advisory*, is inappropriate and scientifically unsupportable at this time." Needless to say, EtG testing has not met the *Frye* standard in any published opinions Washington.

A bigger issue is whether the imposition of UAs are allowed as a pretrial condition of release. In *State v. Rose*, Division 2 of the Court of Appeals held that a urinalysis is a search under the Fourth Amendment, so only with a special needs warrant exception is a UA allowable. They further went on, "without a showing that drug use leads to a higher likelihood of absconding or an individual determination by the trial court that [defendant's] drug use would increase the likelihood of him failing to appear, the special needs warrant exception does not apply." 146 Wn.App. 439, 458 (2008).

Given the precedent, if courts and prosecutors seek to require pretrial UAs, a significant factual showing is required tying pretrial alcohol use to the likelihood of failing to appear. This is a difficult burden in most cases, and with the other available alternatives, it might be unnecessary. But under the right circumstances, it may be appropriate.

#### **SCRAM Bracelets**

SCRAM is the acronym for "secure continuous remote alcohol monitoring," and it takes the form of an ankle band which holds a small device next to the skin. The device works by analyzing the chemical composition of perspiration as it evaporates. The device works semi-continuously (every 30 minutes). Once a day, it uploads the results to the monitoring company.

Only one company currently manufactures the devices, though many private companies offer SCRAM monitoring throughout the state. While some of the technology in the device is proprietary, it relies on the more common fuel-cell technology in determining a person's blood-alcohol content. As mentioned previously, fuel-cell technology is not currently admissible in Washington state because it has yet to meet the *Frye* standard.

Besides the fuel-cell technology, SCRAM bracelets have an additional layer of science that has yet to gain general acceptance by the courts. Called transdermal alcohol, it is the process by which alcohol moves from the body onto the skin surface. Its occurrence is well documented, with more than 20 peer-reviewed studies. Nevertheless, there has been a noticeable lack of large-scale quantitative surveys or case-controlled studies and scientists have yet to figure out exactly how the process works. Of ongoing concern is the problem of interference. Unlike evidentiary breath-testing machines, the fuel cell used in the SCRAM device is not designed to discern between the many types of alcohol.

Moreover, because the device tests externally (rather than from breath), it is more susceptible to interference in the atmosphere than other fuel-cell devices

This is an issue of first impression in Washington appellate courts, as there is no case law addressing the SCRAM device or whether it meets the *Frye* standard. With the backing of the manufacturer of the device, prosecutors in other states such as Florida, Georgia, Louisiana and South Dakota have sought its admissibility and succeeded; similar efforts in some other states have failed.

As a result, the SCRAM device is designed to be used solely as a monitor for alcohol use, and not a quantitative measurement of the level of alcohol. As the inventor of the device testified in Michigan, there are simply too many factors that cannot be controlled, therefore precluding use of the SCRAM as a quantitative evidentiary tool. It is only to be used as a screening device.

Here in Washington, the SCRAM device costs around \$500 a month. This is a cost usually born by the defendant, though some cities pay for the device when it is ordered by the court. The real benefit for defendants is that it can be easily disguised under pants and it is almost silent, so there is very little social stigma attached to wearing the device. The obvious benefit to prosecutors and the court is that the alcohol monitoring is continuous, preventing defendants from consuming alcohol entirely, not just when they are considering getting behind the wheel.

For a defendant who does not own a car, who must use her personal vehicle for work, or for a defendant whom the court has particular reason to think will consume alcohol in violation of the court's order, the SCRAM device might be a valid, albeit expensive, alternative to the IID.

#### **Home Alcohol Testing**

Home alcohol monitoring is generally ordered in addition to electronic home monitoring (EHM), although it can be ordered separately by the court. There are several types of home alcohol testing, but the most common device sits on a table top and hooks up to a defendant's phone line. At preset times throughout the day, the machine will beep, requiring the defendant to blow into a tube attached to the device. As the defendant is blowing, the unit takes a photograph of the person to ensure that it is in fact the defendant providing the sample. Both the test result and the picture is then transmitted to the monitoring company or probation department.

These home alcohol testing devices also use fuel-cell technology just like SCRAM and the IID leading to the aforementioned issues regarding admissibility.

However, home alcohol monitoring has the distinct advantage for prosecutors in that it is usually administered through probation or corrections departments and so a vio-(continued next page)

## A Primer on Pre-Trial Alcohol Monitoring of Defendants from previous page

lation can be noted within days, instead of weeks or months. Because it is often run by the city or county, sometimes home alcohol testing is subsidized or free.

When defendants are required to pay for the service, it generally runs from \$260-\$500 a month. Often, that cost is in conjunction with EHM. It is more restrictive than some of the other methods of monitoring because it requires a defendant to be home during certain hours. It also only monitors a defendant during those hours, with very little supervision during the other hours of the day.

For those defendants already required to be on electronic home monitoring, home alcohol testing is clearly the most cost-effective and efficient method to monitor alcohol. However, for most others, it is impractical and expensive.

#### Conclusion

As CrR and CrRLJ 3.2 both state that the courts must impose the least restrictive conditions to both ensure that the accused will return to court and to ameliorate any danger that the accused will commit a violent crime. When courts find that alcohol monitoring is necessary, defense attorneys' and prosecutors' tailoring their recommendations to the judge in light of the costs and benefits of each method will go a long way toward persuading the judge to their side.

WSBA Service Center 800-945-WSBA • 206-443-WSBA questions@wsba.org

#### **Editor's Note**

While all articles submitted require citations, most citations with the exception of those to specific statutes and cases are omitted for the purposes of this newsletter. However, if anyone wants to cite check and receive a list of full citations for an article, please do not hesitate to contact our editor, Chris Maryatt, at *chris.maryatt@kingcounty.gov*.

### Join the Section

The officers and Executive Committee of the Criminal Law Section invite you to join as a member. Seminars and newsletter reports are included in the benefits available to members. All Washington State Bar Association members are eligible.

- Please enroll me as an active member. Enclosed is a check for \$25 for annual dues.
- ☐ I am not a member of the Washington State Bar Association, but I want to receive your newsletter. My \$25 check is enclosed.

For membership year: October 1, 2010 - September 30, 2011

Name	
Firm name	
Address	
City	
State Zip	
Email address	
Telephone	
	office use only
end Enrollment Form and check to:	Date
Vashington State Bar Association 325 Fourth Avenue, Suite 600	Check #

#### **Criminal Law Section Officers and Executive Committee**

#### Chair

Mr. Wade S. Samuelson (Defense) Olson Althauser Samuelson & Rayan PO Box 210 Centralia, WA 98531-0210 (360) 736-1301 wade@centralialaw.com

#### Chair-Elect

Ms. Jennifer Johnson Grant (Prosecution) City of Seattle, Criminal Division PO Box 94667 Seattle, WA 98124 (206) 684-8531 jennifer.grant@seattle.gov

#### Secretary and Treasurer

Mr. Aaron Wolff (Defense) Aaron James Wolff, Attorney at Law PS Inc. 4040 Lake WA Blvd. NE, Suite 300 Kirkland, WA 98033 (425) 822-1220 aaron@cowanlawfirm.com

Mr. Edwin Aralica (Defense) Associated Counsel for the Accused 420 West Harrison, Suite 201 Kent, WA 98032 (253) 520-6509 ext. 225 edwin.aralica@acapd.org

Term: 2008-2011

Hon. Peter S. Banks (Prosecution) Skamania Co. Prosecuting Atty's Office PO Box 790

Stevenson, WA 98648-0790 banks@co.skamania.wa.us

Term: 2010

Mr. Hugh K. Birgenheier (Prosecution) Pierce Co. Prosecuting Atty's Office 930 Tacoma Ave. S. Room 946 Tacoma, WA 98402-2102 (253) 798-3468

hbirgen@co.pierce.wa.us Term: 2010-2012

Ms. Jeri Bonkoski (Defense) Skagit County Public Defender 121 W. Broadway Mount Vernon, WA 98273-4335 (360)-336-9405 ierib@co.skagit.wa.us

Term: 2010

Mr. Ronald A. Hammett (Defense) Law Office of Ronald A Hammett PO Box 3940 Omak, WA 98841 (509) 826-1918 ron@hammettlaw.com

Term: 2009-2011

Mr. James A. Hershey (Prosecution) Chelan Co. Prosecuting Attorney's Office 401 Washington Street, 5th Level Wenatchee, WA 98801 (509) 667-6202 james.hershey@co.chelan.wa.us

Term: 2009-2011

Mr. Jimmy I. Hung (Prosecution) King Co. Prosecuting Atty's Office 516 Third Ave., W-554 Seattle, WA 98104 (206) 296-9000 jimmy.hung@kingcounty.gov Term: 2010-2012

Ms. Kim E. Hunter (Defense) Law Offices of Kim E Hunter PLLC 27121 174th Pl. SE, Ste. 201A Covington, WA 98042 (253) 709-5050 kim@khunterlaw.com

Ms. Leesa Manion (Prosecution) King Co. Prosecuting Atty's Office 516 Third Avenue, W-400 Seattle, WA 98104 leesa.manion@kingcounty.gov (206) 296-9067 Term: 2009-2010

Mr. Chris Q. Maryatt (Prosecution) King Co. Prosecuting Atty's Office 516 Third Ave., W-554 Seattle, WA 98104 (206) 296-9000 chris.maryatt@kingcounty.gov Term: 2010-2012

Mr. Roger Rogoff (Prosecution) United States Attorney's Office 700 Stewart Street, Suite 5220 Seattle, WA 98101 (206) 553-7970 roger.rogoff@usdoj.gov Term: 2010-2011

Prof. John Strait (Defense) Seattle University School of Law 900 Broadway Seattle, WA 98122-4340 (206) 398-4077 straiti@seattleu.edu Term: 2008-2010

Mr. Mark E. Vovos (Defense) Mark E. Vovos PS, Attorneys at Law 1309 West Dean Avenue, Suite 100 Spokane, WA 99201-2018 (509) 326-5220 mvovos@concentric.net Term: 2009-2011

You can visit our website at www.wsba.org, click on Sections and then Click on Criminal Law.

If you are receiving this newsletter via email, go to the link below:

http://www.wsba.org/lawyers/groups/criminallaw

At our website, we post our Executive Committee roster, email and other contact information as well as our calendar of events.

This is a publication of a section of the Washington State Bar Association. All opinions and comments in this publication represent the views of the authors and do not necessarily have the endorsement of the Association nor its officers or agents.

Washington State Bar Association Criminal Law Section 1325 Fourth Avenue, Suite 600 Seattle, WA 98101-2539



Manage your membership anytime, anywhere at www.mywsba. org! Using mywsba, you can:

- View and update your profile (address, phone, fax, e-mail, website, etc.).
- View your current MCLE credit status and access your MCLE page, where you can update your credits.
- Complete all of your annual licensing forms (skip the paper!).
- Pay your annual license fee using MasterCard or Visa.
- Certify your MCLE reporting compliance.
- Make a contribution to LAW Fund as part of your annual licensing using MasterCard or Visa.
- Join a WSBA section.
- Register for a CLE seminar.
- Shop at the WSBA store (order CLE recorded seminars, deskbooks, *Resources*, etc.).
- Access Casemaker free legal research.
- Sign up to volunteer for the Home Foreclosure Legal Assistance Project.

# CLE Credits for Pro Bono Work? Limited License to Practice with No MCLE Requirements?

Yes, it's possible!

Regulation 103(g) of the Washington State Board of Continuing Legal Education allows WSBA members to earn up to six (6) hours of credit annually for providing pro bono direct representation under the auspices of a qualified legal services provider.

APR 8(e) creates a limited license status of Emeritus for attorneys otherwise retired from the practice of law, to practice pro bono legal services through a qualified legal services organization.

For further information contact Sharlene Steele, WSBA Access to Justice Liaison, at 206-727-8262 or sharlene@wsba.org.