# City of Fircrest v. Jensen

## *Due process and science by legislative decree.*

**BY TED VOSK & SCHÖEN PARNELL**

On October 5th, after deliberating on the matter for nearly a year, the Washington Supreme Court handed down a decision in *City of Fircrest v. Jensen*.[1] Since then, many practicing in the area of DUI defense have struggled to understand what this decision means. This article is not aimed at the navigation of post-*Jensen* waters, though. Instead, its purpose is to explain the basis for the petition for a writ of certiorari being filed to the U.S. Supreme Court in *Jensen*. The petition challenges the state court's due process determinations with respect to application of RCW 46.61.506(4).

### Due Process and Evidence Generally

The Fourteenth Amendment commands that "[n]o State shall …deprive any person of life, liberty, or property, without due process of law."[2] This guarantee "operates to extend to the citizens and residents of the states … protection against *arbitrary state legislation* affecting life, liberty, and property."[3] Under it, "[i]t is manifest that it was not left to the legislative power to enact any process which might be devised. [Due process] is a restraint on the legislative … powers of the government, and cannot be so construed as to leave [the legislature] free to make any process 'due process of law,' by its mere will."[4]

In a state criminal prosecution, not only is an individual's "interest in the accuracy of a criminal proceeding … almost uniquely compelling," but the state also has a significant "interest in the fair and accurate adjudication of criminal cases."[5] Accordingly, due process analysis tends to "focus on the value of adjudicatory fairness … looking primarily to protect against the conviction of the innocent."[6] Practices that directly threaten the accuracy of the fact-finding process betray this concern and generally run afoul of due process requirements.[7] In this context, the Fourteenth Amendment sets limits on the rules of evidence that may be enacted by a state legislature.[8] Whether state evidentiary procedures violate due process standards generally rests on one of two factors: reliability and/or fairness.

An individual's right to a fair trial is in part contingent upon that person's ability to present "competent, reliable evidence."[9] In fact, "[t]he integrity of the adversary process [itself] depends both on the presentation of reliable evidence and the rejection of unreliable evidence."[10] Accordingly, "[r]eliability is … properly a due process concern."[11] Due process does not permit a conviction based on evidence lacking the requisite degree of reliability.[12] For this reason, "reliability is the linchpin in determining the admissibility" of evidence under the Fourteenth Amendment.[13] To satisfy due process, evidence admitted against a defendant must carry some minimum indicia of reliability.[14] Due process requires that evidence be excluded where it is "essential to safeguard the integrity of the truth-seeking process."[15]

It is also well "established that the fourteenth amendment forbids 'fundamental unfairness in the use of evidence whether true or false.'"[16] In this context, due process is violated where a practice fails to adhere to those "fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency."[17] "Every procedure which … might lead [a judge] not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law."[18] Each state's "interest … in a criminal prosecution is not that it shall win a case, but that justice shall be done …while [the state] may strike hard blows, [it] is not at liberty to strike foul ones. It is as much [its] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[19]

"The principle that a State may not

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knowingly use false evidence … to obtain a tainted conviction [is] implicit in any concept of ordered liberty."[20] A citizen's Fourteenth Amendment rights are also "abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve."[21] This includes statutes that establish "arbitrary" evidentiary standards that favor the state but yield results contrary to what the nature of the evidence would otherwise dictate under the rules of evidence.[22] While this does not bar states from enacting provisions that have the incidental "*effect* of making it easier … to obtain convictions, an evidentiary rule whose sole purpose is to boost the state's likelihood of conviction distorts the adversary process."[23] The "Court has therefore been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State."[24] The state may not insist that trials be run as a "search for truth" so far as defense evidence is concerned, while granting the prosecution the advantage of using evidence as if part of a "poker game:" this is "fundamentally unfair."[25]

Finally, issues of admissibility under the Fourteenth Amendment are solely within the province of the trial judge and should be determined outside the presence of the jury.[26] Moreover, a statute establishing a per se rule in such proceedings, precluding a judge from considering evidence presented by the defendant concerning the reliability of the evidence sought to be introduced at trial, may well run afoul of the dictates of due process.[27]

### Due Process and Forensic Breath Test Evidence

In a prosecution for DUI, forensic breath "test results are 'virtually dispositive of guilt or innocence.'"[28] This is so even where the state is not prosecuting under the per se prong of a DUI statute because most jurors "would conclude that a person with [a] reading [in excess of the per se limit] was intoxicated when it was taken, in the absence of substantial evidence to the contrary."[29] "Since the presentation of countervailing evidence would be necessary to dissuade the fact-finder of the defendant's guilt, the effect of introducing [breath test] evidence [is that] [t]he burden of proof is shifted to the defendant."[30] Absent countervailing evidence, "[a] citizen's right to drive, and sometimes to liberty, will depend on the verdict of a machine."[31]

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"Under the Due Process Clause of the Fourteenth Amendment, [DUI] prosecutions must comport with prevailing notions of fundamental fairness … protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system."[32] This includes evidentiary safeguards beyond simple "protection against perjury" and which are "directly related to the reliability of the [breath test machine] itself.[33] "[D]ue process requires that the state ensure that the tests it demands drivers submit to produce reasonably accurate results."[34] Although a state may enact statutes governing the admissibility of breath test evidence, "the court must ascertain whether the statute[s] … establishing the reliability of breath testing … are contrary to due process."[35] "Reliability is a due process issue … with respect to the state's [breath] testing."[36]

"[C]onstitutional due process clearly requires courts to take a hard look at the admissibility of scientific test evidence that is regularly used against citizens in criminal and administrative

cases by the State."[37] "In order for the results of a blood alcohol test to be admissible [then], the state must prove that the reliability of the test satisfies due process and fairness."[38] Due process grants to each defendant the right to have the state demonstrate conformity with standards of testing and administration that produce a "residuum of competent evidence of reliability of the breath test."[39]

Even assuming appropriate standards, when "a defendant takes issue with the qualifications of the technician, the quality of the testing machine, or the maintenance of the equipment, and so forth, the court, in the interest of due process and fairness, may well be entitled to bar the evidence."[40] "Due process requires proof that the test was properly conducted."[41] "There are very basic due process problems involved in introducing blood alcohol tests that were not taken in conformity with [proper] guidelines for admissibility [enacted] to ensure the reliability and accuracy of scientific tests that in themselves resolve the question of guilt and innocence."[42] Where proper protocols have not been followed, "one cannot say that the test results are so reliable as to satisfy due process and fairness."[43]

[I]t must be recognized that thousands of [motorists] are criminally and civilly prosecuted for DUI each year; and most of them are of modest means. Some do not have lawyers, and even if they do, the vast majority of accused drivers cannot afford scientific experts to challenge … evidence of intoxication … Under these conditions, where liberty and valuable property interests are at stake, our legal system has a particularly strong "basic fairness" obligation to see that the evidence that is regularly used by the State in these proceedings, where most defenses must necessarily be limited in time and cost, meets a threshold of well-established scientific reliability.[44]

### Forensic Breath Test Evidence in Washington Prior to Enactment of RCW 46.61.506(4)

RCW 46.61.506(3), reads:[45]

> Analysis of the person's blood or breath to be considered valid under the provisions of this section … shall have been performed according to methods approved by the state toxicologist.…The state toxicologist is directed to approve satisfactory techniques or methods.

"Through [this provision] the people intended to allow the results of tests to be admitted under certain prescribed safeguards."[46] These safeguards were meant to ensure that all such evidence would be "reliable," "scientific and probative."[47] Moreover, the people explicitly chose to place the "authority … to prescribe approved methods for maintaining and administering Breathalyzer tests" in the hands of the state's highest expert on such matters, "the State toxicologist."[48]

Under these provisions, "the ultimate concern of the judiciary is that the methods approved result in an accurate test, competently administered, so that a defendant is assured that the test results do in fact reflect a reliable and accurate measure of his or her breath content."[49] "If the citizens of the State of Washington are to have any confidence in the breath-testing program, that program has to have some credence in the scientific community as a whole."[50]

The procedures promulgated by the toxicologist are "based on currently accepted scientific principles and practices in the field of breath alcohol testing."[51] They "are intended to implement the directive of the statute by … identifying … individuals … to … maintain [testing] equipment, and … identifying certain aspects of the operation of [the] equipment, necessary for reliable testing."[52] They "ensure the highest possible confidence in the Breath Testing Program."[53] "Deviation [from promulgated standards] may be justified where … the scientific integrity of the procedure, the instrument, the program or any breath alcohol measurement is not compromised."[54]

The toxicologist has recognized that "an *accurate and reliable* breath test requires a good instrument, program, and protocol."[55] In this context, "the following are required for an *accurate and reliable* breath test … an instrument in proper working order [which has been] properly calibrated."[56] "'Calibration' is the process of standardizing the DataMaster instrument to a known ethanol vapor concentration using a certified simulator solution. This allows for the quantitative measurement of the ethanol concentration in a person's breath."[57]

Another measure promulgated by the toxicologist to ensure the reliability of state breath tests is the performance of a quality assurance procedure ("QAP") on each DataMaster: "*Prior to … being installed in the field for evidentiary use*" and "*At least once every year.*"[58] "The Quality Assurance Procedure ensures the accuracy, precision and forensic acceptability of the DataMaster instrument for the purpose of quantitatively measuring the alcohol concentration of a person's breath."[59]

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gated strict protocols for the preparation and use of simulator solutions.[60] "[T]he simulator protocol relates to accuracy of breath testing, [an] evidentiary concern[]."[61] "The simulator test is of particular significance in certification of the DataMaster machine, and in the machine's self-testing of calibration which it goes through each time a breath alcohol analysis is performed in accordance with procedures in the WACs."[62] "Obviously, the simulator solution is key to simulator testing."[63] To ensure that use of the simulator solution remains an effective safeguard the toxicologist has mandated that: "Solutions shall be changed at least every 60 days regardless of number of tests or measurement value."[64]

"These specifications demonstrate the toxicologist's concern to ensure accuracy."[65] "[A]dherence to the protocols for evaluation and certification and the protocol for preparing and testing the simulator solution, when coupled with compliance with applicable WACs [regulations], produces scientifically reliable results."[66] This included having to introduce "proof [that the DataMaster] had been checked and calibrated."[67]

Because RCW 46.61.506(3) was enacted as part of a citizen initiative, this regime also reflects a judgment by the citizens of Washington concerning the fairness of the procedures involved. Given the significant bodily intrusion[68] and the dire consequences that could befall a motorist who fails a breath test, that substantial precautions ought to be taken to ensure that the breath test consented to is both "scientific"[69] and "reliable"[70] as determined by the state's highest expert on such matters, "the State toxicologist."[71] This final judgment evidences what the citizens of Washington deemed necessary to guarantee fairness in the administration and use of breath tests as evidence of guilt in a criminal proceeding.[72]

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### Forensic Breath Test Evidence in Washington after Enactment of RCW 46.61.506(4) and the Denial of Due Process

While passage of SHB 3055 left RCW 46.61.506(3) intact, newly added section 4 made compliance with RCW 46.61.506(3) longer mandatory. "The legislature has made clear its intention to make BAC test results fully admissible once the State has met its prima facie burden [under RCW 46.61.506(4)(a)]."[73] Although the admissibility of the test may be challenged on some other grounds, any challenges to "the reliability or accuracy of the test, the reliability or functioning of the instrument, or any maintenance procedures … shall not preclude the admissibility of the test."[74] "These provisions clearly preclude challenges to the admissibility of BAC test results on reliability and accuracy grounds once the requirements of subsection (4)(a) are met."[75]

Under section (4)(a), however, the state is no longer required to produce any evidence of instrument calibration, the performance of an annual QAP or even that the simulator solution used in a particular test has been replaced within the 60 days preceding the test (collectively hereinafter, "standards"). As illustrated above, though, these steps are recognized by the state toxicologist as being critical to insuring a valid and reliable test. The court's rejection of these standards is particularly confusing given its concession that where "the reliability of the scientific evidence [is concerned, the court] should defer to the judgment of scientists."[76] These standards, however, were established by the state toxicologist, the state's highest scientific expert.

On the other hand, the statutory requirements were promulgated by a legislature that never claimed any scientific expertise of its own or conducted any sort of inquiry on the matter. Nonetheless, blithely stating that "courts need not assess the reliability

of the scientific evidence," the court concluded that RCW 46.61.506(4) does not offend due process because the argument that a citizen "is entitled to a fair trial, including a right to be convicted by reliable evidence … is without merit."[77]

The court's decision defies reason. Reliance on breath test technology depends on the certitude offered by the application of tested scientific principles and practices to the analysis of breath alcohol. This certitude, however, may only be claimed if we adhere to those tested principles.[78] If we fail to adhere to them, the evidence obtained is no longer supported by science. The absurdity of allowing scientific tests to be used as evidence which fail to follow simple procedures *known by the state to be necessary* to ensure a scientifically valid and reliable result would undermine public confidence in the administration of government and justice itself.

This is not the first time a government has engaged in the practice of science by decree. Perhaps the most famous example is that of Galileo who was convicted for asserting, contrary to the law of the time, that the earth revolved around the sun.[79] Even more recently the Indiana State Legislature introduced a bill to define the value of pi.

> [T]the ratio between the diameter of a circle and the circumference of a circle is known as pi, and is equal to roughly 3.14159. It is a long decimal number that is hard to remember, so in 1897 the legislature of the State of Indiana decided that they would make life easier for high school students by passing a law that the value of pi would be 3.0 exactly.[80]

As a measurable ratio, however, pi is what it is.[81] Legislating its value is as absurd as passing "a law that the earth is flat."[82] Adopting the proposed value for pi would have forced "Detroit … to manufacture cars with elliptical [oval shaped] wheels."[83] One can imagine the bumpy ride that would result in and the likely fate of the U.S. automobile industry. The point is that the laws of nature cannot be changed by legislative fiat.[84]

Analogously, "the determination of … BAC by means of breath tests is a scientific process. [To be scientifically valid, each test] must be performed according to proper scientific practices and standards established by scientists with specific knowledge of the subject."[85] If they are not, the breath tests can have "no credence in the scientific community" and the citizens "no confidence in the State's breath-testing program." Allowing the state to use tests without taking the time to demonstrate compliance with the basic scientific standards recognized and developed by the state itself would raise grave "concerns regarding the reliability of evidence and affect the integrity of the truth-seeking process."

Of greater concern is the fact that even if a defendant can produce conclusive proof that these standards were not adhered to, the trial court is not permitted to consider that in determining the admissibility of the breath test. RCW 46.61.506(4) "clearly precludes challenges to the admissibility of BAC test results on reliability and accuracy grounds once [its] requirements … are met."[86] Thus, even where both parties and the trial court itself know that a breath test lacks the necessary foundation to establish its reliability, the state is permitted to, and the court forced to allow, the unreliable evidence to be introduced to the jury and relied upon as a valid basis for a finding of guilt.

Even if an individual could afford to hire an expert to explain and establish the need for these standards to a jury, why should he or she have to? The statute makes admissible what may be conclusive evidence of guilt without requiring the state to demonstrate compliance with basic scientific standards *developed by the state and recognized by the state to be necessary to ensure the reliability and forensic acceptability of that evidence*. By permitting the state to present this evidence while excusing it from having to provide any evidence that these standards have been complied with, the legislature is condoning the deprivation of individual liberty based solely on a test result from a machine *it knows* may not be scientifically reliable. This is akin to allowing the state to use misleading evidence *it knows* to consist of half truths and forcing a citizen to prove to the jury what both parties already know is required to reveal the full truth. Even where both parties and the trial court itself know that the standards have not been satisfied, a citizen's fortunes are left to whether or not he or she is skillful enough to educate the jury concerning standards the *state already knows* are required for reliability.

Does such a result reflect the "profound attitude of fairness … between the individual and government" demanded by due process?[87] "If prosecutors are permitted to convict guilty defendants by [such] unfair means, then we are but a moment away from the time when prosecutors will convict innocent defendants by unfair means

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[subjecting] the freedom of each citizen is subject to peril and chance."[88] Such indifference to the potential loss of liberty by a citizen *shocks the conscience and is clearly fundamentally unfair* to all citizens of Washington. At a minimum, the *fundamental procedural fairness* mandated by due process requires that the state produce some evidence that it has followed those standards *it knows* to be necessary to guarantee a scientifically valid and reliable test before that test is introduced to a jury.

Even if we ignored the fact that the standards recognized and established by the state existed, RCW 46.61.506(4) would still be violative of due process. This follows from the command that:[89]

> In assessing whether there is sufficient evidence of the foundational facts [contained in the checklist of section a], the court or administrative tribunal is to assume the truth of the prosecution's or department's evidence and all reasonable inferences from it in a light most favorable to the prosecution or department.

Pursuant to this directive, in establishing the foundational requirements of the statute, no matter how weak the evidence presented by the state or whether the defendant can conclusively establish that the state's evidence is false or even if the trial court in its judgment determines that the state's evidence is not credible, it must be assumed to be true. This impacts not only the reliability of the evidence that will be permitted to go to the jury but the fundamental fairness of the proceedings themselves.

First, if even patently incredible evidence must be presumed to be true for purposes of establishing the admissibility of a breath test, there is virtually no hurdle whatsoever that the state must clear in establishing the reliability of the evidence it intends to introduce to the jury. Any conjecture, half-truth or fabrication, no matter how obviously untrustworthy, must be accepted as true. The legislature has substituted its judgment for that of the trial judge with respect to the credibility of witnesses and evidence in a particular matter even though it is not privy to who or what the witnesses and evidence are or what they tell us. Clearly such a determination, devoid of any knowledge of the facts and circumstances surrounding the administration of a particular test, cannot ensure that *minimum indicia of reliability* required by due process.

Second, the command to "assume the truth of the prosecution's … evidence and all reasonable inferences from it in a light most favorable to the prosecution" does not simply tip the balances in favor of the state, it brazenly does away with them all together. Given that the law clearly dictates that *courts must accept as true all evidence submitted by the state* to establish the foundation for admissibility of a breath test, any motion by a defendant to refute that evidence becomes frivolous as it is no longer supported by law.[90] Thus, any attorney who attempts to challenge the admissibility of a breath test at this stage through evidence contradicting that being relied upon by the state, could be subject to sanctions simply for trying to ensure the reliability of the evidence.[91] A more obvious "procedure … [requiring a judge] not to hold the balance nice, clear, and true between the state and the accused" cannot be imagined. This is clearly *fundamentally unfair* and denies the accused due process of law."[92]

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## Notes

1. *City of Fircrest v. Jensen*, __ Wn.2d __, 143 P.3d 776 (2006).
2. U.S. Const amend. XIV.
3. *Hibben v. Smith*, 191 U.S. 310, 325 (1903); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).
4. *Den ex dem. Murray v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 276 (1855); *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 457 (1962).
5. *Ake v. Oklahoma*, 470 U.S. 68, 78-9 (1985).
6. Jerold Israel, "Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines," 45 *St. Louis L.J.* 303, 397 and n.549 (2001); Cf., *U.S. v. Nobles*, 422 U.S. 225, 230 (1975). See also, *State v. Michaels*, 642 A.2d 1372, 1381 (N.J. 1994) (The due process requirement "of a fair trial … seeks ultimately to determine the truth about criminal culpability").
7. *Thompson v. Louisville*, 362 U.S. 199 (1960); *Tot v. United States*, 319 U.S. 463 (1943); *Mooney v. Holohan*, 294 U.S. 103 (1935); *State v. Ferguson*, 2 S.W.3d 912, 914 n.3 (Tenn. 1999) ("As a general rule … a trial lacks fundamental fairness where there are errors which call into question the reliability of the outcome.").
8. *Lisenba v. People of State of California*, 314 U.S. 219, 236 (1941). See also, *Holmes v. South Carolina*, __ U.S. __, 126 S.Ct. 1727, 1728 (2006); *Montana v. Egelhoff*, 518 U.S. 37, 53 (1996); *Dutton v. Evans*, 400 U.S. 74, 223 and n.4 (1970) (Blackmun, J., concurring); *Tot* at 467.
9. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).
10. *Taylor v. Illinois*, 484 U.S. 400, 414-5 (1988). See also, *Bolden v. State*, 967 S.W.2d 895, 899 (Tex.App. 1998) (In determining whether a state's rule of evidence violates due process, "[T]he social interest involved … requires consideration be given to the integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process").
11. *White v. Illinois*, 502 U.S. 346, 363-4 (1992) (Thomas, J., concurring).
12. *California v. Green*, 399 U.S. 149, 163 n.15 (1970); Green, 399 U.S. at 186 n.20 (Harlan, J., concurring).
13. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977); *Michaels* at 1381 ("reliable evidence remains at the foundation of a fair trial… If crucial inculpatory evidence is alleged to have been derived from unreliable sources

due process interests are at risk").

14. *Manson* at 114; *Moore v. Illinois*, 434 U.S. 220, 227 (1977); *Neil v. Biggers*, 409 U.S. 188, 198 (1972); Cf., *Townsend v. Burke*, 334 U.S. 736, 741 (1948).
15. *Brewer v. Williams*, 430 U.S. 387, 425 (1977) (Burger, J., dissenting); *Moore* at 227. See also, *Michaels* at 1381 (To satisfy due process, "[C]ourt has a responsibility to ensure that evidence admitted at trial is sufficiently reliable.").
16. *Blackburn v. State of Ala.*, 361 U.S. 199, 206 (1960).
17. *U. S. v. Lovasco*, 431 U.S. 783, 790 (1977); *Brown v. State of Mississippi*, 297 U.S. 278, 286 (1936).
18. *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927).
19. *Berger v. U.S.*, 295 U.S. 78, 88 (1935).
20. *Napue v. People of State of Ill.*, 360 U.S. 264, 269 (1959); *Alcorta v. State of Tex.*, 355 U.S. 28, 31-2 (1957); *Mooney* at 112-3.
21. *Holmes* at 1731; *Rock v. Arkansas*, 483 U.S. 44, 58, (1987); *Chambers v. Mississippi*, 410 U.S. 284, 297, 303 (1973).
22. *Washington v. Texas*, 388 U.S. 14, 24-5 (1967) (Harlan, J., concurring).
23. *Egelhoff* at 68 (O'Connor, J., dissenting).
24. *Wardius v. Oregon*, 412 U.S. 470, 475-6 (1973).
25. *Wardius* at 475-6.
26. *Jackson v. Denno*, 378 U.S. 368, 389-94 (1964); *Lego v. Twomey*, 404 U.S. 477, 489-90 (1972). See also, *State v. Haley*, 689 A.2d 671, 674 (N.H. 1997) ("The private interest affected by a pretrial hearing on the admissibility of evidence is important because…a conviction may hinge on the admission or exclusion of certain evidence").
27. *Rock* at 56-7 and n.12.
28. *Mack v. Cruikshank*, 2 P.3d 100, 104 (Ariz. App. 1999).
29. *State v. McElroy*, 568 So.2d 1016, 1016-7 (La. 1990) (Dennis, J., concurring).
30. *McElroy*, 568 So.2d at 1016-7.
31. *State v. Garthe*, 678 A.2d 153, 158 (N.J. 1996).
32. *California v. Trombetta*, 467 U.S. 479, 485 (1984).
33. *Trombetta* at 485, 489 n.10.
34. *Mack* at 104.
35. *Meehan v. Kansas Dept. of Revenue*, 959 P.2d 940, 943 (Kan.App. 1998).
36. *Mack* at 105.
37. Cf., *State v. Dilliner*, 569 S.E.2d 211, 224 (W.Va. 2002) (Starcher, J., concurring) (HGN).
38. *State v. Honeyman*, 560 So.2d 825, 829 (La. 1990).
39. *Layton City v. Peronek*, 803 P.2d 1294, 1300 (Utah App. 1990).
40. *State v. McElroy*, 553 So.2d 456, 458 n.1 (La. 1989).
41. *Com. v. Lucarini*, 8 Pa. D. & C.3d 679, 684 (Pa.Com.Pl. 1977).
42. *McElroy*, 568 So.2d at 1016.
43. *State v. Busby*, 893 So.2d 161, 167 (La.App. 2005).
44. *Dilliner* at 223-4 (Starcher, J., concurring).
45. RCW 46.61.506(3).
46. *State v. Felix*, 479 P.2d 87, 90 (Wash. 1971).
47. *State v. Parker*, 558 P.2d 1361, 1363 (Wash. 1976); *Nowell v. State Dept. of Motor Vehicles*, 516 P.2d 205, 206-7 (Wash. 1973).
48. *State v. Peterson*, 674 P.2d 1251, 1253 (Wash. 1984); *Felix* at 89-90.
49. *State v. Ford*, 755 P.2d 806, 809-10 (Wash. 1988).
50. *City of Seattle v. Clark-Munoz*, 93 P.3d 141, 145-6 (Wash. 2004) (quoting, District Court Panel).
51. WAC 448-13-010 (repealed Oct 23, 2004); *City of Seattle v. Allison*, 59 P.3d 85, 89 (Wash. 2002).
52. WAC 448-16-010.
53. Washington State Patrol Breath Test Section, *Policy and Procedure Manual*, I (2005).
54. Id.
55. Washington State Patrol Breath Test Section, *Training Outline for DataMaster and PBT, Operator Basic*, 27 (2004).
56. Id.; Patrick Harding, "Methods for Breath Analysis," in *Medical-Legal Aspects of Alcohol* 185, 187 (James Garriott ed., 4th ed. 2003) (calibration of breath test machine is critical).
57. Note 53 at p.22.
58. Note 53 at p.24.
59. Id.; *Harding*, note 56 at 189 (failure to perform QAP "jeopardizes the reliability of the testing result").
60. Washington State Toxicology Laboratory, *Procedure for the Preparation of .08 Simulator External Standard Solution For Use With A Breath Test Instrument* (2005); Note 53 at p.31-3.
61. *State v. Straka*, 810 P.2d 888, 893 (Wash. 1991).
62. *Straka* at 893.
63. *Straka* at 894.
64. Note 60 at p.1.
65. *City of Sunnyside v. Fernandez*, 799 P.2d 753, 755 (Wash.App. 1990).
66. *Straka* at 893.
67. *State v. Watson*, 756 P.2d 177, 179 (Wash.App. 1988); *Peterson* at 1254.
68. *State v. Wetherell*, 514 P.2d 1069, 1073 (Wash. 1973); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *Holland v. Parker*, 354 F.Supp. 196, 199 (D.S.D. 1973).
69. *Parker* at 1363.
70. *Nowell* at 206-7.
71. *Peterson* at 1253; Felix at 89-90.
72. "[D]eliberate efforts by a legislative body to circumvent the initiative or referendum rights of an electorate will not be looked upon favorably." *Citizens for Financially Responsible Government v. City of Spokane*, 662 P.2d 845, 852 (Wash. 1983).
73. *Jensen* at 784.
74. RCW 46.61.506(4)(c).
75. *Jensen* at 795 (Sanders, J., dissenting).
76. *Jensen* at 783.
77. *Jensen* at 783-4.
78. *Layton City v. Peronek*, 803 P.2d 1294, 1299-1300 (Utah App. 1990).
79. *State v. O'Key*, 899 P.2d 663, 678 n.21 (OR. 1995).
80. 141 *Cong. Rec*. H4690-4753 (daily ed. May 10, 1995) (statement of Rep. Zimmer).
81. Eric Weisstein, *CRC Concise Encyclopedia of Mathematics* (1999).
82. Jan Gullberg, *Mathematics: From the Birth of Numbers*, 95-6 (1997).
83. 133 *Cong. Rec*. E141-03 (1987) (statement by Arthur C. Clarke, scientist).
84. *Gullberg*, note 82, at p.96
85. "Recommended Standards and procedures of The Canadian Society of Forensic Science Alcohol Test Committee," 36(3) *Soc. Forens. Sci. J.* 101, 113 (2003).
86. *Jensen* at 795 (Sanders, J., dissenting).
87. *Lankford v. Idaho*, 500 U.S. 110, 121 (1991).
88. *State v. Lavaris*, 707 P.2d 134, 136 (Wash. App. 1985).
89. RCW 46.61.506(4)(b).
90. CRLJ 11(a)(2).
91. CRLJ 11(a).
92. *Tumey* at 532.