

FILED
Feb 18, 2016
Court of Appeals
Division I
State of Washington

No. 73929-8

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CITY OF KENT,

Respondent/Plaintiff

v.

COREY COBB,

Petitioner/Defendant.

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

On November 4, 2013, Cobb was arrested for driving while license suspended in the third degree. Cobb voluntarily agreed to give a blood sample, and it returned with a result of 5.9 ng/ml of THC. Cobb was charged with Driving while Under the Influence of Marijuana and Driving while License Suspended in the Third Degree in the Kent Municipal Court.

Cobb contested the constitutionality of the statute arguing that a person of common intelligence has no ability to know whether they are at or above the 5.0 ng/ml THC per se limit to act in conformity with the law. Cobb also argued that the law was a violation of police powers. The Kent Municipal Court ruled that: “The statute clearly informs the public of the proscribed conduct – i.e. that one cannot operate a motor vehicle in the State of Washington when he/she has a THC reading of 5.0 ng/mL or higher within two hours of driving. The statute is not vague merely because a driver may not be able to predict with complete certainty the point at which his/her consumption of THC would meet or exceed the proscribed limits.”

Cobb went to trial on March 10, 11 and 12, 2015. The City of Kent only proceeded on the THC per se prong of Driving Under the Influence, RCW 46.61.502(1)(b), and Driving while License Suspended in the Third

Degree. The jury found Cobb Guilty of both charges. This appeal was timely filed.

II. ASSIGNMENTS OF ERROR

1. Whether the Revised Code of Washington (RCW) 46.61.502(1)(b) and the accompanying statutes, as adopted pursuant to Initiative Measure No. 502, are a violation of Cobb's 14th Amendment Right to due process?

A. To what extent does due process require a person of common intelligence to "estimate rightly"?

B. Whether the science behind I-502 supports a per se level for THC DUIs, as compared to the standard that was set for Alcohol DUIs?

C. Whether a person of common intelligence can determine their THC concentration based on the Pharmacokinetics of marijuana?

D. Whether there is a correlation between THC concentration and impairment that would allow a person of common intelligence to act in conformity with the law?

2. Whether RCW 46.61.502(1)(b) and the accompanying statutes are a valid exercise of the states police powers?

3. Whether Initiative I-502 was in violation of Washington Constitution, Article II, Section 19, the single-subject rule for ballot measures?

III. STATEMENT OF THE CASE

Factual History

On November 4, 2013 at 1:04 p.m., Officer Dexheimer witnessed Cobb turn right from Fourth Avenue to Smith Street in Kent, Washington. Report of Proceedings Volume I (hereinafter "RPI") at 107, 124. Smith

Street is a four lane road with two lanes going in the westbound direction. Cobb turned directly into the left westbound lane and passed a slower moving vehicle. RPI 108. Officer Dexheimer used a laser speed measuring device and determined that Cobb was traveling at 40 mph on a street with a 30 mph limit. Cobb then changed lanes without signaling. Officer Dexheimer conducted a traffic stop on Cobb. RPI 110.

Officer Dexheimer arrested Cobb because his privilege to drive was suspended in the third degree. RPI 114, *see also* Report of Proceedings Volume II (hereinafter “RPII”) 174, (Department of Licensing Records Custodian Testimony) 195 (Testimony of Cobb). When Officer Dexheimer handcuffed Cobb, he smelled the odor of burnt marijuana on his clothing and saw that the conjunctiva of his eyes was red. RPI 115. Cobb was informed of his *Miranda* rights and subsequently stated that he had smoked a bowl of marijuana about five or six hours earlier. RPI 116, RPII 186. Cobb estimated that he smoked about half of a gram of marijuana. *Id.*

Officer Dexheimer found three small bottles with marijuana in them, a lighter, a marijuana grinder, a swisher sweat cigar and a bottle of Visine in a backpack that was in Cobb’s car. *Id.* Cobb also had a medical marijuana authorization card. RPI 117, 120, 121. When asked if Cobb would do Field Sobriety Tests, Cobb stated that the card said, “He should only do

the tests at the station.” RPI 121. The only information on the bottles of marijuana was the name of the marijuana and information about the clinic where the marijuana was purchased. RPII 16. There were no instructions, THC concentrations or dosing information. *Id.*

Officer Dexheimer is a trained Drug Recognition Expert (hereinafter “DRE”). RPI 100. Cobb agreed to participate in the 12 step DRE exam. RPI 121. Cobb was asked if he had any physical problems that would prevent him from performing the exam, and he indicated that he had allergies and his eyes itched, but it would not stop him from doing the exam. RPII 19. Cobb also indicated that he recently had his wisdom teeth extracted. RPII 20, 186. Cobb had obtained the marijuana from a clinic for pain management. RPII 186, 192. Cobb had smoking marijuana, edibles and a THC balm. RPII 193.

During the exam, Cobb was asked three separate times when he last smoked marijuana. Cobb indicated that he had smoked marijuana five to six hours earlier; a couple of hours earlier; and that he smoked at 8:30 a.m. RPII 39-40, 75-76, 188, 189, 200, 201. Cobb also indicated that he applied the THC balm at 8:30 a.m.. RPII 193-194. Cobb had been using the THC products for the past week. RPII 196.

After performing the DRE Exam, Cobb voluntarily agreed to give a blood sample. RPII 59. Cobb’s blood was collected by the nurse at the

Kent Jail at 2:24 p.m.. RPII 61. Cobb's blood was examined by Christie Mitchell-Mata, a forensic scientist from the Washington State Patrol Toxicologist Lab. RPII 111. The Washington State Patrol Toxicology Lab Report dated December 20, 2013 sets forth the drug analysis results: THC of 5.9 ng/ml and Carboxy-THC¹ of 110 ng/ml. *Id.*; *see also* Appendix 1, Police Report #13-14496, Citation # k100276, dated 11/4/2013.

Procedural History

Cobb was charged with Driving while Under the Influence of Marijuana and Driving while License Suspended in the Third Degree in the Kent Municipal Court, filed under cause number K100276. *See* Clerk's Papers (hereinafter "CP") 1-2. Cobb filed his Motion and Supporting Memoranda on March 26, 2014. CP 17-393. On April 22, 2014 the parties and the Court agreed that the motion should proceed *en banc*. CP 3-13. The City filed its response on June 9, 2014. CP 394-444.

The Kent Municipal Court denied Cobb's motion. CP 445-466. Kent Municipal Court ruled that RCW 46.61.502 "clearly informs the public of the proscribed conduct" and was "not vague merely because a driver may not be able to predict with complete certainty the point at which his/her consumption of THC would meet or exceed the proscribed limits." Kent

¹ Carboxy THC is the metabolite of THC and has no impairing affects. THC is primarily metabolized to 11-hydroxy-THC which has equipotent psychoactivity. The 11-hydroxy-THC is then rapidly metabolized to the 11-nor-9-carboxy-THC (THC-COOH) which is not psychoactive.

Ruling at 4. The Court incorrectly stated that Cobb struck the police powers argument. *Id.* at 1, *see also* Transcript of Proceedings from the Motion Hearing on June 18, 2014 at 4, 5, 6, 26.

Cobb filed a Writ of Certiorari on August 15, 2014 in King County Superior Court. The Superior Court denied Cobb's motion upholding Kent's ruling. *See* Appendix 2, Superior Court Order in re: Petitioner's Application for Writ of Certiorari, dated and filed November 18, 2014.

Cobb filed a Motion for Discretionary Review of the Kent and Superior Court ruling with the Division One Court of Appeals that was also denied, but for different reasons. The Court of Appeals stated in its denial: "The City agrees that Cobb's vagueness challenge raises an issue of public interest that will warrant an appellate decision, but the City argues that it will be more appropriate for review to occur after a trial based on the record developed." *See* Appendix 3, January 22, 2015, Court of Appeals, Division 1, Decision Denying Review, No. 72795-8-I.

Cobb went to trial on March 10, 11, and 12, 2015. The City of Kent only proceeded on the THC per se prong of Driving Under the Influence, RCW 46.61.502(1)(b), and Driving while License Suspended in the Third Degree. RPI 18. The jury found Cobb Guilty of both charges. RPIII 5. Cobb timely filed this appeal and request for the Supreme Court to accept direct review. The Supreme Court assigned the case to the Court of

Appeals, Division 1. *See* Appendix 4, Supreme Court Ruling to Transfer Review to Court of Appeals, dated July 23, 2015, No. 91589-0.

IV. ARGUMENT IN SUPPORT OF ASSIGNMENTS OF ERROR

1. RCW 46.61.502 and the accompanying statutes are a violation of Cobb's 14th Amendment right to due process.

No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926): "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law... The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue." This is reiterated in *United States v. Harriss* that states "[t]he underlying principle is that no man shall be held criminally

responsible for conduct which he could not reasonably understand to be proscribed.” *United States v. Harriss*, 347 U.S. 612, 617-18, 74 S. Ct. 808, 812, 98 L. Ed. 989 (1954); *see also State v. Bauer*, 174 Wash. App. 59, 78-79, 295 P.3d 1227, 1237 *review granted*, 177 Wash. 2d 1019, 304 P.3d 115 (2013) *and rev'd*, 180 Wash. 2d 929, 329 P.3d 67 (2014).

In order to satisfy the Fourteenth Amendment of the U.S. Constitution and Article 1, Section 3 of the Washington State Constitution² guarantee of procedural due process, a statute must set forth clear legal standards so that citizens may know how to conduct themselves in conformity with the law and law enforcement personnel may avoid enforcing the law in an arbitrary and discriminatory manner. *Kolender v. Lawson*, 461 U.S. 352, 357–58, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). When a challenged statute does not involve First Amendment rights, the statute is not evaluated for facial vagueness, but must be evaluated in light of the particular facts of each case. *State v. Halstien*, 122 Wn.2d 109, 117, 857 P.2d 270, 275 (1993). A statute is presumed to be unconstitutional when it appears unconstitutional beyond a reasonable doubt. *Haley v. Medical*

² Based on the *Gunwall* criteria, it does not appear that the due process clause in the Washington Constitution art. 1, § 3 should be construed any differently than the U.S. Constitution amend. 14, § 1. There is no greater protection under the State Constitution in terms of determining whether a statute is void for vagueness. *State v. Gunwall*, 106 Wash. 2d 54, 58, 720 P.2d 808, 811 (1986). As such, the analysis is based only upon federal due process principles set forth by the United States Supreme Court and the Washington Supreme Court. *See, e.g., World Wide Video, Inc. v. Tukwila*, 117 Wash.2d 382, 390, 816 P.2d 18 (1991), cert. denied, 503 U.S. 986, 112 S.Ct. 1672, 118 L.Ed.2d 391 (1992).

Disciplinary Bd., 117 Wash.2d 720, 739, 818 P.2d 1062 (1991); *City of Seattle v. Eze*, 111 Wash.2d 22, 26 759 P.2 366 (1988); *State v. Aver*, 109 Wash.2d 303, 306–07, 745 P.2d 479 (1987). The party challenging a statute carries the burden of proving its unconstitutionality. *Haley*, 117 Wash.2d at 739, 818 P.2d 1062; *Eze*, 111 Wash.2d at 26, 759 P.2d 366; *Aver*, 109 Wash.2d at 307, 745 P.2d 479; *Halstien*, 122 Wn.2d 109, 118, 857 P.2d 270, 276 (1993).

A statute violates due process principles if: (1) it “does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed,” or (2) it “does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” *State v. Williams*, 144 Wash.2d 197, 203, 26 P.3d 890 (2001) (internal quotation marks omitted) (quoting *City of Bellevue v. Lorang*, 140 Wash.2d 19, 30, 992 P.2d 496 (2000)). A statute is unconstitutionally vague if either requirement is not satisfied. *Halstien*, 122 Wn.2d 109, 117–18, 857 P.2d 270, 276 (1993); *State v. Lee*, 135 Wash.2d 369, 393, 957 P.2d 741 (1998).

RCW 46.61.502(1)(b) does not provide adequate notice to citizens because it does not define the criminal offense with sufficient definiteness that people of ordinary intelligence can understand what conduct is proscribed. In the present case, Cobb was charged with violating RCW

46.61.502(1)(b), driving under the influence while having a Tetrahydrocannabinol (THC) concentration of 5.0 ng/ml or higher within two hours of driving. RCW 46.61.502(1)(b) states that “(1) A person is guilty of driving while under the influence of intoxicating liquor, marijuana, or any drug if the person drives a vehicle within this state: ... (b) The person has, within two hours after driving, a THC concentration of 5.00 or higher as shown by analysis of the person's blood made under RCW 46.61.506”. It is not disputed that RCW 46.61.502(1)(b) satisfies prong two of procedural due process by providing an ascertainable standard of guilt to protect against arbitrary enforcement. All people that drive with THC concentrations of 5.0 ng/ml or higher within two hours of driving are considered in violation of this statute.

A person of common intelligence must be able to determine if they are in violation of the statute. In *State v. Franco*, the Washington Supreme Court held that the former per se level of 0.10 percent blood alcohol standard, was not unconstitutionally vague. *State v. Franco*, 96 Wash.2d 816, 824-25, 639 P.2d 1320(1982). The Court found the standard gave a fair warning to a defendant because it made them aware they were not to drive a vehicle after drinking in excess and charts were available showing the number of drinks necessary to produce the prohibited level, and it was reasonable to assume that a driver was impaired at that level of blood

alcohol. *Franco*, at 825, 639 P.2d 1320. The *Franco* decision was affirmed in *Brayman*, finding that “the standard gave fair warning in that it was reasonable to assume that a driver was impaired at that level of blood alcohol and that charts were available showing the number of drinks necessary to produce the prohibited level.” A per se level for alcohol was not a violation of procedural due process because a person can determine whether they are in violation of the statute based on excessive consumption and/or alcohol calculations. *State v. Brayman*, 110 Wn.2d 183, 196, 751 P.2d 294, 301 (1988).

The first issue is whether the language of RCW 46.61.502(1)(b) gives sufficient notice to a person to understand how to act in conformity with the law. For the most part, every American law is written in plain English. Due process does not rest on whether a person can read the law and understand what it says; it requires a reasonable person to understand how to act in conformity with the law. While the Supreme Court Commissioner noted in the Ruling Transferring Review to Court of Appeals that “[a]t first blush, the law here provides clear notice: it is unlawful to drive a vehicle in Washington with a blood THC content of 5.0 ng/ml or higher”, due process requires more than just being able to read the law. Supreme Court Ruling at p 3.

The U.S. Supreme Court has long recognized that “the decisions of the court, upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them.” *Connally*, 269 U.S. at 393. A person of reasonable intelligence should not have to consult experts in order to know how to act in conformity with the law. *State v. Dougall*, 89 Wash. 2d 118, 122, 570 P.2d 135, 137 (1977) citing *Powers v. Owen*, 1966 OK CR 141, 419 P.2d 277, 279 (Okl.Cr.1966).

There are many examples in Washington case law where the language is clear, but a person does not have the ability to know how to act in conformity with the law. In its opinion, the *Franco* Court cites *Matter of Powell*, 92 Wash. 2d 882, 888-89, 602 P.2d 711, 714 (1979). The Court in *Powell* overturned a conviction for a controlled substance violation, finding that “it is even more unreasonable to expect an average person in this state to maintain continuous contact with the office of the Code Reviser in Olympia in order to determine which substances have been designated as controlled.” *Powell*, 92 Wash. 2d at 889.

The question isn't whether the language is understandable; due process requires that a reasonable person be able to understand how to act in conformity with the law based on “common understanding and practice.”

Id. The *Powell* Court cited a number of cases with similar findings that establish “the rule that ‘(s)tatutory language must convey a sufficiently definite warning of proscribed conduct when measured by common understanding and practice.’” *Id.* quoting *State v. Jordan*, 91 Wash.2d 386, 588 P.2d 1155 (1979) (holding that it was unreasonable to expect an average citizen to search the Federal Register continually to determine which substances had been classified as controlled); *State v. Dougall*, 89 Wash.2d 118, 570 P.2d 135 (1977) (holding that it is unreasonable to expect an average person to continually research the Federal Register to determine what drugs are controlled substances under RCW 69.50); *State v. Martinez*, 85 Wash.2d 671, 538 P.2d 521 (1975) *overturned* on other grounds (holding RCW 9.87.010(13) failed to apprise an individual of the circumstances under which ‘willful loitering’ on school premises or on the public premises adjacent thereto is subject to punishment); *Seattle v. Pullman*, 82 Wash.2d 794, 514 P.2d 1059 (1973) (holding a statute that simply proscribes ‘loitering’ is impermissibly vague because the word loiter standing alone does not necessarily connote sinister or illegal activity and, thus, the ordinary citizen will be uninformed as to what types of behavior will and will not be subject to criminal prosecution).

A person of common intelligence can roughly estimate their blood or breath alcohol content (BAC) based on an individual’s body weight,

gender, the amount of alcohol one has consumed, and the time frame the alcohol was consumed. *Widmarks* formula and other basic guides, including apps for phones and websites, help a person determine their BAC.³ A person can also determine how long they would need to wait after drinking in excess, in order for their BAC to drop below 0.08%.⁴

The legislative intent behind establishing per se levels for alcohol was to prevent people from drinking in excess and then operating a motor vehicle regardless of whether their ability to drive is impaired. *State v. Crediford*, 130 Wn.2d 747, 754-55, 927 P.2d 1129, 1132-33 (1996). The legislation and courts recognize that it is not illegal to drink alcohol and then drive a motor vehicle. *Id.*; see also *State v. Hansen*, 15 Wash. App. 95, 546 P.2d 1242 (1976). The law is intended to punish a person who drives a motor vehicle when their ability to drive is impaired by alcohol or when they consume an excessive amount of alcohol and then drive a vehicle. *Id.* A DUI involving alcohol creates no procedural due process issue because a person is on notice that they should not operate a motor vehicle after consuming excessive amounts of alcohol or if their ability to drive is impaired by alcohol.

³ Alcohol Toxicology for Prosecutors: Targeting Hardcore Impaired Drivers. American Prosecutors Research Institute, (July 2003).
http://www.ndaa.org/pdf/toxicology_final.pdf, Appendix 5.

⁴ *Id.*

The *Franco* decision notes that other States have taken a similar position in determining whether per se laws for alcohol are void for vagueness. See, e.g., *Roberts v. State*, 329 So.2d 296 (Fla.1976); *Greaves v. State*, 528 P.2d 805 (Utah, 1974). Texas, California and Arizona also have weighed in with similar analysis as to whether the per se laws are constitutionally vague. See *Dahl v. State*, 707 S.W.2d 694, 700-01 (Tex. App. 1986); *Burg v. Mun. Court*, 35 Cal. 3d 257, 269-72, 673 P.2d 732, 739-42 (1983); *Fuenning v. Superior Court In & For Maricopa Cty.*, 139 Ariz. 590, 596-98, 680 P.2d 121, 127-29 (1983). In each of these cases, the Courts found that a person must consume more than a small quantity of alcohol to produce a .10% alcohol concentration (the legal standard at the time) and the fact that the person has consumed a quantity of alcohol should put a person of ordinary intelligence on notice that he is in jeopardy of violating the statute. The cases also emphasize that charts are readily available that show, with reasonable certainty, the number of different alcoholic beverages necessary for a particular individual to reach a blood-alcohol level of .10%. In *Burg*, the Court notes that this information is even included in the Driver's Handbook published by the Department of Motor Vehicles. *Burg*, 35 Cal.3d at 272 (1983). Washington includes similar language explaining when it is safe to drive

after consuming alcohol in its Washington Driver Guide published by the Department of Licensing.⁵

By creating a per se limit for marijuana, the law establishes a similar understanding as alcohol DUIs in *Hansen* that it is not illegal to consume marijuana and then operate a motor vehicle. *Hansen*, 15 Wash. App. 95. A violation has occurred only if a person operates a motor vehicle when their ability to drive is impaired by marijuana or they have a THC concentration of 5.0 ng/ml within two hours of driving. Unlike alcohol where there is a correlation between the .08% BAC level and excessive consumption of alcohol, there is not a correlation between the 5.0 ng/ml THC level and excessive consumption of marijuana. Additionally, there is not a correlation between the 5.0 ng/ml THC level and impairment. Further, no system, chart, or algorithm exists in order for an ordinary person to determine his or her THC level. Based on the extent of information, the science of how marijuana affects and is measured in the human body is discussed in detail below.

A. To what extent does due process require a person of common intelligence to “estimate rightly”

The Kent Municipal Court ruled that RCW 46.61.502(1)(b) “clearly informs the public of the proscribed conduct” and is “not vague merely

⁵ Department of Licensing Washington Drivers Guide, <http://www.dol.wa.gov/driverslicense/docs/driverguide-en.pdf>, section 5-4. Appendix 6.

because a driver may not be able to predict with complete certainty the point at which his/her consumption of THC would meet or exceed the proscribed limits.” Kent Ruling at 4. The Kent Court’s logic seems to be based on the premise that if you decide to consume marijuana then you are on notice that you are in violation and might have a THC level greater than 5.0 ng/ml.

Due process does not require impossible standards of specificity or absolute agreement. *City of Spokane v. Douglass*, 115 Wash. 2d 171, 179, 795 P.2d 693, 696 (1990). “[A] statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.” *Eze*, 111 Wash.2d at 27, 759 P.2d 366 (1988). “[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree... [i]f his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death.” *Nash v. United States*, 229 U.S. 373, 377, 33 S. Ct. 780, 781, 57 L. Ed. 1232 (1913).

Several of the Court opinions discussing the per se alcohol DUI, cited earlier, addressed the issue of estimating rightly. In *Fuenning*, the Arizona Court stated:

Pragmatically, there may be no way for a particular drinker to know the precise moment he reaches the physiologic point at which driving or controlling a vehicle will violate the law. We take notice, however, that it requires more than a small amount of alcohol to produce a .10% BAC. Those who drink a substantial amount of alcohol within a relatively short period of time are given clear warning that to avoid possible criminal behavior they must refrain from driving. While the driver may not be able to determine that his BAC is .10%, rather than .099%, such precision is not required to prevent the statute from being declared vague. Due process requires neither perfect notice, absolute precision nor impossible standards.

Fuenning v. Superior Court In & For Maricopa Cty., 139 Ariz. 590, 596-98, 680 P.2d 121, 127-29 (1983); *Burg v. Mun. Court*, 35 Cal. 3d 257, 269-72, 673 P.2d 732, 739-42 (1983) (“Although it is true that even with use of a chart a person may err in his estimate and thereby violate the statute, this fact does not render the statute invalid.”); *Dahl v. State*, 707 S.W.2d 694, 700-01 (Tex. App. 1986) (“It is a matter commonly known to persons of ordinary intelligence that one must consume more than a small quantity of alcohol to produce a .10% alcohol concentration. The fact that a person has consumed a quantity of alcohol should notify a person of ordinary intelligence that he is in jeopardy of violating the statute.”).

In its analysis, the Kent Court cites *City of Seattle v. Eze*, 111 Wn.2d 22 (1988) (“loud and raucous” and “unreasonably disturbs others” as proscribed in disorderly bus conduct statute upheld); *State v. Sullivan*, 143 Wn.2d 162 (2001) (“judicial process” in barratry statute upheld); *Holland*

v. Tacoma, 90 Wn.App. 533 (1988) (car noise ordinance prohibiting “audible” at more than 50 feet upheld); and *City of Bellevue v. Lorang*, 992 P.2d 496 (2000) (“without purpose of legitimate communication” in Telephone Harassment ordinance was void for vagueness).

In *City of Seattle v. Eze*, the Court examines whether “loud and raucous” and “unreasonably” were vague terms. *Eze*, 111 Wn.2d at 26-31. The Court in *Eze* found that “the prohibited disturbances are easily measured” by their impact on the normal activities of the people on the bus, “so that citizens have fair notice of what activities are prohibited”. *Id.* at 29. While not precise, there is a way of determining when you are in violation of the statute. Similar to the finding in *Franco* and *Brayman*, the defendant in *Eze* has the ability to estimate when his/her conduct is in violation of the law.

In *Holland v. Tacoma*, the dispute was over an ordinance that prohibited playing automobile sound equipment at a volume that can be heard more than 50 feet away. In *Holland*, the Court states that a “person of common intelligence knows what it means for sound to be “audible” at more than 50 feet away.” *Holland*, 90 Wash.App at 544. The defendant’s argument in *Holland* was that the ordinance was vague because a person could not determine exactly how sound traveled based on the location, atmospheric conditions and day. The Court found that while “the driver

may have a hard time predicting the way sound travels, he will know what conduct violated the ordinance.” *Id.* Unlike determining THC concentration, *Holland* is an example of prohibited conduct that, while not precise, is capable of being measured by a person of common intelligence.

In *State v. Sullivan*, the Court found that “judicial process” was not vague because the term has an ordinary definition that is consistent with the general purpose of the statute and the language is plain and unambiguous. *Sullivan*, 143 Wn.2d at 177. In *City of Bellevue v. Lorang*, the Court found the ordinance to be vague because the language “legitimate communication” was a highly subjective standard. *Lorang*, 140 Wash.2d at 30. The decision in *Lorang* was based on the second prong of the vagueness argument in that it did not give clear standards to guide law enforcement. *Id.* at 31. Every example the Kent Municipal Court gives is consistent with *Franco* and *Brayman*, in that a person of ordinary intelligence can determine how to act in conformity with the law based on everyday experience or common definitions of the English language, which is consistent with “common understanding and practice.” In the case for per se alcohol levels, “common understanding and practice” equates to when a person drinks alcohol in excess and should know or they can determine whether they are in violation based on mathematical

estimations. There is no “common understanding or practice” with the per se THC level.

The science behind how marijuana affects the human body and how it is measured in the human body is discussed in detail below. Unless the court is going to adopt the blanket provision that “if you smoke you know,” it is unreasonable to expect a person of common intelligence to “estimate rightly” in determining their THC concentration. Even scientists, toxicologists and pharmacists in the field of Marijuana Pharmacokinetics do not have the ability to estimate a person’s THC concentrations. With all of the potential variables that are discussed below, a person of common intelligence has no ability to estimate with any degree of certainty what their THC concentration may be.

B. The science behind I-502 does not support a per se level for THC DUIs, as compared to the standard that was set for Alcohol DUIs

It is clear from a review of all the studies, articles, and the opinion generated by the Colorado workgroup, NHTSA and the Governor’s Highway Safety Association that the 5 ng/ml per se limit is not a generally accepted scientific theory or principle. Further, it would likely punish a significant amount of innocent behavior.

Initiative Measure No. 502 was drafted by New Approach Washington, which was a coalition of Washington citizens. The drafters

of I-502 justified the prohibitions on driving with a THC concentration of 5.0 ng/ml or greater based on six scientific articles. *See* Appendix 7, Backgrounder, The Science Behind I-502's Per Se Standard. New Approach Washington selected quotes from the six scientific articles to support the 5.0 ng/ml per se THC level for DUIs. As this was not a bill passed by our State Legislators, the I-502 Backgrounder is the closest text available to understanding the legislative intent of proposing the per se 5.0 ng/ml THC concentration prong of Driving Under the Influence.

In comparison, Colorado through its Drug Policy Task Force of the Colorado Commission on Criminal and Juvenile Justice created a Marijuana DUID Workgroup, which recommended against a per se standard. The group met seven times and heard testimony from eight national and international experts on marijuana and driving, before making their recommendations to the Colorado legislature in creating the marijuana DUI laws. *See* Appendix 8, Findings of the Marijuana DUID Workgroup. Several of the same experts who testified were authors in the articles cited by I-502 and several of them spoke against a per se level. As a result, the Colorado workgroup specifically did not recommend implementing the 5.0 ng/ml per se level, as there was not sufficient information to determine impairment exists at this level. *Id.* The Colorado

legislature did not adopt a per se level for driving under the influence of marijuana. Section 42-4-1301 (6), C.R.S.

In Washington, we have adopted a standard for determining if evidence based on novel scientific procedures is admissible set forth in *Frye v. United States*, 293 F. 1013, 1014, 34 A.L.R. 145 (D.C.Cir.1923). The rule in *Frye* states that “evidence deriving from a scientific theory or principle is admissible only if that theory or principle has achieved general acceptance in the relevant scientific community.” *State v. Martin*, 101 Wash.2d 713, 719, 684 P.2d 651 (1984). While the *Frye* test does not necessarily apply to drafting legislation, it should be used as guide when the legislation is claiming to be based on a scientific principle.

The relevant scientific community has not reached a general acceptance of the 5.0 ng/ml per se level for THC DUIs.

“The available evidence does not support the development of an impairment threshold for THC (in blood) which would be analogous to that (of) alcohol. The available evidence indicates that the response of individuals to increasing amounts of THC is much more variable than it is for alcohol. So with alcohol we have a considerable body of evidence that can place risk odds at increasing levels of blood alcohol content. For example, a .08 blood alcohol content is associated with about four times the crash risk of a sober person. The average arrest is at .15 BAC; that is associated with about 15 times the crash risk. Beyond some broad confirmation that higher levels of THC are generally associated with higher levels of impairment, a more precise

association of various THC levels and degrees of impairment are not yet available.”

This statement was taken from testimony of Dr. Jeffrey Michael, Associate Administrator for Research and Program Development at the National Highway Traffic Safety Administration (hereinafter “NHTSA”), before the US House of Representatives, Committee on Oversight and Government Reform, on July 31, 2014.⁶ The statement is consistent with the NHTSA Drug and Human Performance Fact Sheet on Marijuana which states that “[i]t is difficult to establish a relationship between a person's THC blood or plasma concentration and performance impairing effects... [i]t is inadvisable to try and predict effects based on blood THC concentrations alone.”⁷ A recent study published by NHTSA, that examined alcohol and drug presence in fatality crashes over a 40 year period from all 50 states, took a similar position: “Every State has enacted a law defining drivers who are at or above .08 grams per deciliter BAC as ‘legally impaired,’ but there are no similar, commonly accepted impairment levels for other drugs... The alcohol laws are based on evidence concerning the decreased ability of drivers across the population

⁶ US House of Representatives, Committee on Oversight and Government Reform, July 31, 2014 at 1:11:30, <https://oversight.house.gov/hearing/planes-trains-automobiles-operating-stoned/>, Appendix 9.

⁷ NHTSA Drug and Human Performance Fact Sheet: Cannabis / Marijuana (Δ 9 - Tetrahydrocannabinol, THC); <http://www.nhtsa.gov/PEOPLE/INJURY/research/job185drugs/cannabis.htm>, Appendix 10.

to function safely at these BACs. Such evidence is not currently available for concentrations of other drugs.”⁸

The Governor’s Highway Safety Association also expressed this opinion on a per se level for THC in its 2015 report on Drugged Driving authored by Dr. Jim Hedlund, formerly a senior official with NHTSA:

Per se laws with a limit greater than zero are modeled after alcohol per se laws, set at a BAC of 0.08 in the United States. They are apparently straightforward but conceal some thorny issues. The most fundamental is that setting a positive per se limit, such as 5 ng for THC, implies that the limit is related to impairment and that all, or most, drivers have their abilities impaired at concentrations above the limit. The scientific evidence to establish such an impairment threshold for drugs simply does not exist, and may never exist.⁹

The logic and science behind Washington’s per se level is inconclusive and not sufficient to establish a basis for the law. It is clear that the studies relied on by I-502 do not support the conclusions that were drawn from them. Second, the only true conclusion that all of the studies agree on is that there is inconclusive evidence as to what point marijuana affects a person’s ability to drive.

⁸ Berning, A. and Smither, D.; Understanding the Limitations of Drug Test Information, Reporting, and Testing Practices in Fatal Crashes. Behavioral Safety Research; DOT HS 812 072, November 2014. Appendix 11.

⁹ Dr. Jim Hedlund, Drug-Impaired Driving: A Guide for What States Can Do. Governor’s Highway Safety Association, (September 2015), http://www.ghsa.org/html/files/pubs/GHSA_DruggedDriving2015_R7_LoResInteractive.pdf at pg 20. Appendix 12.

There are essentially three types of studies that are used to analyze the effects of intoxicants on driving: 1) epidemiological studies; 2) experimental studies; and 3) cognitive studies. There are two types of epidemiological studies: 1) epidemiological culpability studies compare the rate at which crash-involved, drug positive drivers and drug-negative drivers are deemed to be at fault for their crashes; and 2) epidemiological case control studies which determine both the severity of THC impairment and the prevalence of THC use among the driving population by measuring the frequency of cannabis use among drivers who are involved in accidents compared to the frequency of cannabis use among a control group of drivers in the same areas around the same time. Case controlled studies are preferred because they eliminate more sources of potential bias in estimating crash risk resulting from drug use.¹⁰ Experimental studies measure the potential risk of an accident using a driving simulator or driving course. Cognitive studies measure the effects of smoking marijuana on cognitive processes that are considered to be integral to safe driving.

The current per se .08% BAC was founded on a scientific framework that focused on the results of epidemiological studies that determined the

¹⁰ R. Compton and A. Berning, Drug and Alcohol Crash Risk. Traffic Safety Facts, Research Notes: Behavioral Safety Research, DOT HS 812 117, (February 2015), Appendix 13.

increased risk of accidents based on increasing BAC. For an in depth look at the history of how the United States adopted the .08% per se BAC laws and the role NHTSA and the Governor's Highway Safety Association played in implementing the standard, the Court is encouraged to read: Andrea Roth, *The Uneasy Case for Marijuana As Chemical Impairment Under A Science-Based Jurisprudence of Dangerousness*, 103 Cal. L. Rev. 841, 843 (2015). Appendix 14. The most influential study that convinced the United States to adopt a per se standard for alcohol DUIs was an epidemiological case control study done by Robert Borckenstein in Grand Rapids, Michigan.¹¹ Even the studies cited in I-502 recognized the importance of epidemiological studies in determining a per se level, stating “[t]he large number of epidemiological studies on alcohol and driving has produced a strong correlation between BAC and accident risk and jurisdictions world-wide now typically use BAC concentrations of between 0.05 and 0.11% as indicators of various degrees of impairment by alcohol.”¹² NHTSA has also emphasized the importance of epidemiological studies as compared to experimental and cognitive studies stating that: “while useful in identifying how marijuana affects the

¹¹ R. Compton, (February 2015); *see also* Roth, 103 Cal. L. Rev. 841, 843 (2015) at 124.

¹² Grotenhermen, F., Leson, G., Berghaus, G., Drummer, O. H., Krüger, H. P., Longo, M., Moskowitz, H., Perrine, B., Ramaekers, J. G., Smiley, A., and Tunbridge, R., Developing limits for driving under cannabis. *Addiction*, (2007) 102(12): 1910-1917. *See* Appendix 15.

performance of driving tasks, experimental and observational studies do not lend themselves to predicting real world crash risk.”¹³

Epidemiological studies express the relative risk of impaired driving in the form of an “odds ratio” (OR), which is the multiplier for the increased risk from driving under the influence of an intoxicant. The control driver with no alcohol or drugs is typically given an OR of 1.0, where the increase in OR is the odds in which an accident is likely to occur based on the impairment.

In February 2015, NHTSA published the results of its epidemiological case control crash risk study that it conducted in the United States.¹⁴ Data were collected from more than 3,000 crash-involved drivers and 6,000 control drivers (not involved in crashes) in Virginia Beach, Virginia. The Study determined the crash risk for alcohol and drugs. Table 8 of the study lists the relative risk adjusted and unadjusted for age and gender. The adjusted and unadjusted relative risk for a person with a .02 BAC is .85 and .82, at a .05 BAC it is 2.07 and 2.05, at a .08 BAC it is 3.93 and 3.98, and at a .15 BAC it is 12.18 and 12.82.¹⁵ This means that a driver is four times more likely to get in an accident at a .08 BAC than a driver that has not consumed any alcohol or drugs. These results are consistent with

¹³ R. R. Compton, et al., (February 2015).

¹⁴ R. Compton, et al., (February 2015).

¹⁵ R. Compton, et al., (February 2015), *see* Table 8.

the 1964 Grand Rapids Study and other epidemiological studies determining the OR for alcohol related accidents.¹⁶

The 2015 NHTSA study determined that the unadjusted OR for THC and crash risk was 1.25.¹⁷ When the THC OR was adjusted for age, gender and race/ethnicity it was 1.05.¹⁸ The OR was reduced to 1.0 when the number was adjusted for the effects of alcohol and demographics.¹⁹ These numbers are consistent with other recent epidemiological studies that examined the OR for THC positive drivers being involved in an accident. The 2004 case control study by Movig et al., determined that: “No increased risk for road trauma was found for drivers exposed to cannabis.”²⁰ The 2013 meta-analysis study by Elvik reported the adjusted fatal crash risk OR for THC was 1.26, 1.10 for accidents involving injury and 1.26 for accidents involving damages.²¹ In 2014, Romano et al. published a culpability study that determined that “[w]hen the drug-positive variable was separated into marijuana and other drugs, only the

¹⁶ R. Compton, et al., (February 2015); *see also* Andrea Roth, 103 Cal. L. Rev. 841, 843 (2015) at 124.

¹⁷ R. Compton et al., (February 2015) see Table 3.

¹⁸ R. Compton et al., (February 2015) see Table 4.

¹⁹ R. Compton et al., (February 2015) see Table 5.

²⁰ Movig, K., et. al., Psychoactive substance use and the risk of motor vehicle accidents. *Accident Analysis and Prevention* 36 (2004) 631-636. Appendix 16.

²¹ R. Elvik, Risk of Road accident associated with the use of drugs: A systematic review and meta-analysis of evidence from epidemiological studies. *Accident Analysis and Prevention* 60 (2013) 254-267; see table 6. Appendix 17.

latter [other drugs] was found to contribute significantly to crash risk.”²²
In 2014, Poulsen et al. published a culpability study where “96 drivers had used cannabis by itself and 30 had a THC concentration of 5.0 ng/ml or more. Not only was the slight positive association of crash risk with cannabis use in the 96 drivers not statistically significant (OR 1.3 95% CI 0.9-2.3), there was absolutely no increased risk related to higher blood THC concentrations (OR 1.0 95% CI 0.4-2.4).”²³

To put these numbers into perspective, consider that the adjusted OR for a BAC of .05 is 2.07²⁴; drivers with two or more passengers in the car possess a crash risk of more than two-fold (OR=2.2)²⁵; driving while pregnant has an OR of 1.42²⁶; and tobacco smokers have a 1.5-fold increase in risk for motor vehicle crash over non-smokers²⁷.

Of the six studies on which I-502 bases the per se THC levels, three of them are summaries of other studies, two of them are epidemiological studies and one is a cognitive study. All three of the I-502 summary

²² Romano, E., et. al., Drugs and Alcohol: Their Relative Crash Risk. *Journal of Studies on Alcohol and Drugs*, (2014). Appendix 18.

²³ H. Poulsen, Moar, R., & Pirie, R., The culpability of drivers killed in New Zealand road crashes and their use of alcohol and other drugs. *Accident Analysis and Prevention* 67 (2014) 119-128. Appendix 19.

²⁴ R. Compton et al., (February 2015).

²⁵ S. McEvoy, Stevenson, M., & Woodward, M., The contribution of passengers versus mobile phone use to motor vehicle crashes resulting in hospital attendance by the driver. *Accident Analysis & Prevention* 39, (2007), Pages 1170–1176. Appendix 20.

²⁶ Redlmeier, D., et. al., Pregnancy and the risk of a traffic crash. *CMAJ* (2014). Appendix 21

²⁷ R. Brison, Risk of automobile accidents in smokers. *Canadian Journal of Public Health* (1990). Appendix 22.

articles review another I-502 study, which is the 2004 culpability study by Drummer, et al.. Drummer found that: “For drivers with blood THC concentrations of 5.0 ng/ml or higher the odds ratio was greater and more statistically significant (OR 6.6, 95% CI 1.5–28.0). The estimated odds ratio is greater than that for drivers with a blood alcohol concentration (BAC) of 0.10–0.15% (OR 3.7, 95% CI 1.5–9.1).”²⁸ The Drummer study analyzed 3400 traffic fatalities in three Australian states.²⁹ The study found that driver’s with blood THC levels less than 5.0 ng/ml, and those with only carboxy-THC present had an OR of 1.0, but those with levels greater than 5.0 ng/ml had an OR of 6.6 (which it equated to the same as that for a BAC of 0.15%). The authors of I-502 and the 2009 Ramaekers article focus on this result in determining the per se level of 5.0 ng/ml THC. However, both the other I-502 summary articles by Sewell and Grotenhermen analyze the Drummer data and show why the result is wrong and misleading.

In refuting the results of the Drummer study, the Sewell article stated that, “a later reanalysis of the same data, [in Drummer], that adjusted for the age and sex of the fatalities found that OR of crashing for cannabis dropped to 0.6 (not significantly different from 1.0), versus 7.6 for

²⁸ Drummer, O. H., Gerostamoulos, J., Batziris, H., Chu, M., Caplehorn, J., Robertson, M. D., & Swann, P., The involvement of drugs in drivers killed in Australian road traffic crashes. *Accident, Analysis and Prevention*, (2004) 36(2):239-248. Appendix 23.

²⁹ *Id.*

alcohol.”³⁰ The Grotenhermen analysis of the Drummer data, points out that the “ORs represent an average for the entire respective range of THC concentrations, so the average OR for a driver with a THC concentration in blood of anywhere between 5 and 100 ng/mL is 6.6.”³¹ When the Grotenhermen article breaks the data down, it shows that “THC concentrations in blood are not associated with an elevated risk (OR>1) until they exceed 6 ng/mL.”³² A BAC of 0.05% alcohol was associated with an OR of about 1.5-2 that was the equivalent OR of a 6.0 to 8.0 ng/ml THC concentration. Both Drummer and Ramaekers were authors of the 2007 Grotenhermen article and participated in this analysis. The correlation between THC concentration and accident risk was charted in the Grotenhermen article. See Exhibit 4, Grotenhermen, et al., (2007) chart. A person with 5.0 ng/ml of THC (OR <1.0) is less likely to get in an accident than that of a sober driver (OR =1.0).

The 2009 article by Ramaekers, et al., was also not a study, but a review of several studies that examined the effects of marijuana on driving.³³ The article notes that nearly fifty percent of the studies cited

³⁰ Sewell, R. A., Poling, J., & Sofuoglu, M., The effect of cannabis compared with alcohol on driving. *Am J Addict.*, (2009) 18(3): 185-193. See Appendix 24.

³¹ Grotenhermen, et al., 2007.

³² *Id.*

³³ Ramaekers, J., Berghaus, G., Van Laar, M., & Drummer, O., Dose related risk of motor vehicle crashes after cannabis use: an update. *Drugs, Driving, and Traffic Safety*, 477-499 (2009). Appendix 25.

were not subject to peer review. Three of the main studies on which the Ramaekers' article relies in making its conclusion are the 2006 Raemakers study, the 2004 Drummer study and the 2004 Grotenhermen study. Grotenhermen was one of the experts who testified against a 5.0 ng/ml per se level to the Colorado workgroup.³⁴

A prominent epidemiological study that the Ramaekers' article reviewed analyzed the crash risk for drivers impaired by alcohol and THC. The study "revealed no significant association between crash risk and cannabis exposure."³⁵ 98.6% of the drivers stopped participated in the study.³⁶ THC "[c]ulpability surveys showed little evidence that crashed drivers who only used cannabis are more likely to cause accidents than drug-free drivers."³⁷

The I-502 article by Sewell et al., was a 2009 review of other studies.³⁸ The authors' concluded that: "Overall, though, case-control and culpability studies have been inconclusive, a determination reached by several other recent reviewers. Similar disagreement has never existed in the literature on alcohol use and crash risk."³⁹ The article discusses

³⁴ See Appendix 8, Findings of the Marijuana DUID Workgroup

³⁵ Ramaekers, J. G., et al. (2009).

³⁶ Mathijssen, M., & Houwing, S., The Risk of Drink and Drug Driving – Results of a Case-Control Study conducted in the Netherlands. IMMORTAL deliverable D-R4.2, European Commission RTD programme, Brussels, (2005). Appendix 26.

³⁷ *Id.*

³⁸ Sewell, et al., (2009).

³⁹ *Id.*

several of the studies that the Ramaeker article addressed, including Drummer and the 2006 Ramaekers study. However, unlike the 2009 Ramaeker article, the Sewell article sorts the studies between those that show impairment and those that do not. Additionally, the article suggests that the experimental studies that involved driving demonstrated that THC can improve driving.⁴⁰ It is clear from the article that the authors believe the evidence is inconclusive.

The 2007 article by Grotenhermen et al., is also a review of other studies.⁴¹ Similar to Sewell, the authors' conclude that: "Inadequate evidence from epidemiological studies renders this limit preliminary and suggests the need for review and possibly revision in the future. Our findings also suggest that using a zero limit for legal determination of impairment by cannabis, which in practice corresponds to the limit of detection for THC in blood, would classify inaccurately many drivers as driving under the influence of, and being impaired by, the use of cannabis."⁴²

The Grotenhermen article held a similar view as the Sewell article, finding that the science is inconclusive. The authors argued that the impairment approach, or as Washington refers to the "affected by"

⁴⁰ *Id.*

⁴¹ Grotenhermen et al., (2007).

⁴² *Id.*

approach, “best meets the objectives of DUID laws. It observes and assesses the fitness of drivers and potentially penalizes those who are actually impaired.”⁴³

The next I-502 study was a 2012 epidemiological case control study by Kuypers et al., which was similar to the 2005 Netherlands study by Mathijssen discussed above in the Ramaekers article.⁴⁴ Only 48% of the 6163 drivers stopped in the control group participated in Kuyper’s study, as compared to the 98.6% in the Mathijssen study.⁴⁵ Kuyper’s stated that the low participation can “lead to an underestimation of the prevalence of drugs in the general driving population and an overestimation of the risk associated with particular drugs.”⁴⁶ As a result, the ratio of accidents where the driver had THC in his or her blood would be inflated as compared to the ratio of control drivers who have THC in their blood, because 52% of the control refused to participate.

The final I-502 study by Ramaekers, et al., is a cognitive study that took twenty recreational users of cannabis and administered single doses of 0, 250 and 500 ng/ml THC by smoking.⁴⁷ Three tests were then

⁴³ *Id.*

⁴⁴ Kuypers, K. P. C., Legrand, S., Ramaekers, J. G., Verstraete, A. G.. A case-control study estimating accident risk for alcohol, medicines and illegal drugs. PLoS ONE, 7(8): e43496. (2012). Appendix 27.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Ramaekers, J. G., Moeller, M. R., van Ruitenbeek, P., Theunissen, E. L., Schneider, E., Kauert, G., Cognition and motor control as a function of Delta-9-THC concentration in

performed on a computer measuring their performance and THC levels throughout.⁴⁸ While the typical preferred dose for users to achieve the desired psychological effect of marijuana ranges between 194-524 ng/ml THC, this study based its conclusions on relatively high doses administered to non-frequent users.⁴⁹ The majority of the studies recognize that it is not the level of THC in the blood that results in effects but the amount of THC consumed, or as it is commonly referred to as “dose based” effects.⁵⁰

Of note, the authors of the study recognized issues with its results finding that: “Individual drivers can widely differ in their sensitivity for THC induced impairment as evinced by the weak correlations between THC serum and magnitude of performance impairment in the present study.”⁵¹ Additionally, in comparison with alcohol DUIs and in reference to the results at low THC thresholds, the study notes that: “it is no problem in experimental studies to demonstrate driver impairment for BACs as low as 0.2-0.5 ng/ml. Yet, epidemiological surveys have repeatedly demonstrated that crash risk only starts to increase at BACs>0.5ng/ml.”⁵²

serum and oral fluid: Limits of impairment. *Drug and Alcohol Dependence*, (2006) 85: 114-122. *See* Appendix 28.

⁴⁸ *Id.*

⁴⁹ Robbe, H. & O’Hanlon, J., Marijuana and Actual Driving Performance, Executive Summary. National Highway Traffic Safety Administration (1993). *See* Appendix 29.

⁵⁰ Sewell et al., (2009); Grotenhermen et al., (2007).

⁵¹ Ramaekers et al., (2006).

⁵² *Id.*

In addition to basing the results on dosing infrequent users with high amounts of THC, the study relied on a relatively small sample size and has not been replicated. However, the majority of the articles selected by I-502 base their position for imposing a per se 5.0 ng/ml THC level on the results from this 2006 Ramaekers study and the 2006 Drummer study.

It is clear from a review of all of the studies, articles, and the opinion generated by the Colorado workgroup, NHTSA and the Governor's Highway Safety Association, that the 5.0 ng/ml per se THC limit is not a generally accepted scientific theory or principle. Further, it would likely punish a significant amount of innocent behavior. While the goal of the per se BAC limit is to punish excessive drinking, the same cannot be said of a per se limit for THC.

C. Whether a person of common intelligence can determine their THC Concentration based on the Pharmacokinetics of Marijuana

The level of THC in a person's body does not correspond in the same way in different individuals, and the level of THC does not correspond with the amount of marijuana smoked. Studies I-502 cited make it clear that "for a given time-lapse between smoking and blood testing, the correlation between a smoked THC dose of THC and the resulting THC blood concentration shows considerable inter- and intra-individual

variability.”⁵³ THC levels are “hard to calculate, as THC levels in the blood peak quickly following inhalation then decrease rapidly according to complex pharmacokinetics, making it almost impossible to extrapolate backwards from the concentration of THC at the time of the blood test to the concentration at the time of the traffic accident.”⁵⁴

THC is highly lipophilic, meaning it accumulates rapidly in body fat where it is stored in various tissues, and then it is slowly redistributed to the blood.⁵⁵ The speed with which THC is released back into the blood stream is highly variable across individuals.⁵⁶ Unlike alcohol, which is water soluble and typically metabolizes at an approximate rate of 0.015% per hour, THC typically lasts in a person with no impairing effects for hours, and in some cases days after consumption.⁵⁷ THC can remain in a person’s body for several days and up to a month, as discussed below.⁵⁸

THC concentrations in blood do not correspond with the quantity of THC consumed. The 2006 Raemakers study examined the rate at which

⁵³ Grotenhermen, et al.,(2007).

⁵⁴ Sewell, R. et al., (2009).

⁵⁵ Schwilke, E., Karschner, E., Lowe, R., Gordon, A., Cadet, J., Herning, R., & Huestis, M., Intra- and Intersubject Whole Blood/Plasma Cannabinoid Ratios Determined by 2-Dimensional, Electron Impact GC-MS with Cryofocusing. *Clin Chem.* 55(6):1188-1195 (2009). Appendix 30.

⁵⁶ *Id.*

⁵⁷ Toennes, S., Ramaekers, J., Theunissen, E., Moeller, M., & Kauert, G., Comparison of Cannabinoid Pharmacokinetic Properties in Occasional and Heavy Users Smoking a Marijuana or Placebo Joint. *Journal of Analytical Toxicology*, (2008) Vol. 32 470-477. Appendix 31; *see also* Karschner, E., Schwilke, E., Lowe, R., Darwin, W., Pope, H., Cadet, J., & Huestis, M., Do delta9-tetrahydrocannabinol concentrations indicate recent use in chronic cannabis users? *Addiction*, 104:2041-48 (2009). Appendix 32.

⁵⁸ Karschner, E. et al., (2009).

THC is metabolized in the blood.⁵⁹ The study dosed individuals with 250 ng/ml and 500 ng/ml of THC. The study only published the mean and high end results, but did not publish the lower end of the results. Even with this data, two different individuals of similar build and age, smoking the same quantity and strength of marijuana, could have THC levels in their blood ranging between 58 to 160 ng/ml for a 250 ng/ml dose and 95 to 240 ng/ml for a 500 ng/ml dose.⁶⁰ Assuming that there were results that were lower than the mean, this range of THC concentration is likely even more diverse.

A study done by Toennes, et al., also examined the rate at which THC is metabolized in the blood. The Study dosed 24 people with 500 ng/ml THC by smoking. The initial result of THC concentration in their blood ranged from 7.9 to 244.8 ng/ml five minutes after consumption.⁶¹ Eight hours after this consumption, when there were no measurable impairing effects of THC, the THC concentrations still ranged from non-detectable to 10.7 ng/ml.⁶²

THC can remain in the blood long after impairment, which further complicates a person's ability to determine if a violation of RCW 46.61.502(1)(b) will occur. This fact is illustrated by a number of studies.

⁵⁹ Ramaekers, J. G., et al., (2006)

⁶⁰ *Id.*

⁶¹ Toennes, S., et al., (2008).

⁶² *Id.*

For example, one of the twenty participants in the Toennes study had a THC concentration of 10.7 ng/ml eight hours after smoking.⁶³ In another study, several frequent users consumed marijuana and then were put into a controlled environment, where they did not have any access to marijuana and had their THC concentration levels checked over a seven day period. Two of the subjects of the study still had THC concentrations of 3 and 2.2 ng/ml on the seventh day.⁶⁴

Another recent 2015 Study examined the residual levels of THC in blood of habitual users.⁶⁵ Eleven of the 21 subjects had blood THC levels above 5.0 ng/ml five hours after the last reported use. Nine of the 21 subjects had blood THC levels above 5.0 ng/ml on the second day, 24 hours or more after the last reported use. Six subjects were above 5.0 ng/ml beyond 48 hours after their last reported use. Three subjects were above 5.0 ng/ml three days after their last use. The longest time that any subject had a blood THC concentration of 5.0 ng/ml or higher was 129 hours or 5 days and 9 hours. Four of the subjects had results that initially decreased and then jumped up before going back down. The other important observation of this study was that almost all of the subjects had residual THC ranging from 1.0 to 5.0 ng/ml several days after last use.

⁶³ Toennes, S, et. al., (2008).

⁶⁴ Karschner, E. et al., (2009).

⁶⁵ M. Odell, et. al., Residual cannabis levels in blood, urine and oral fluid following heavy cannabis use, Forensic Science International 249(2015) 173-180. Appendix 33.

A 2013 study placed thirty male chronic daily cannabis smokers in a secure research unit for up to 33 days, with daily blood collection.⁶⁶ Both THC and its inactive metabolite THC-COOH were detected in blood up to one month after last smoking. In addition to THC remaining in the body for long periods of time, this study, like other studies, had evidence that THC levels can spike upward even several days after consumption and beyond the period of impairing effects.⁶⁷

People that use regularly and those who use marijuana medicinally for cancer, glaucoma, HIV/AIDs or Tourette's syndrome, are likely to always have a base level of THC concentration in their blood. The synthetic THC in MARINOL®, which is an FDA approved drug for the control of nausea and vomiting in cancer patients and an appetite stimulant for AIDs patients, is identical in all respects to THC found in smoked and edible products and impossible to distinguish in blood or urine tests.⁶⁸ Also notable is that FDA warnings to Patients receiving treatment with MARINOL® Capsules are specifically warned not to drive until it is established that they are able to tolerate the drug and to perform such tasks

⁶⁶ M. Bergamaschi, et. al., Impact of prolonged cannabinoid excretion in chronic daily cannabis smokers' blood on per se drugged driving laws. *Clin Chem.* 59 (2013) 519-526. Appendix 34.

⁶⁷ *Id.*

⁶⁸ M. ElSohly, et. al., Delta 9-tetrahydrocannabivarim as a Marker for the Ingestion of Marijuana versus Marinol: Results of a Clinical Study. *Journal of Analytical Toxicology*, 25 (2001) 565-571. Appendix 35.

safely.⁶⁹ The ability to develop a tolerance to the impairing effects of marijuana has also been documented in studies. “Patients who take cannabinoids at a constant dosage over an extensive period of time often develop tolerance to the impairment of psychomotor performance, so that they can drive vehicles safely.”⁷⁰

THC concentrations also vary depending on how a person ingests the marijuana. “The rate of marijuana absorption into the blood stream and body tissues is determined by the route of drug administration.”⁷¹ Smoking is the principle method for consumption. After smoking, THC is rapidly absorbed into the blood stream, yielding maximal THC concentrations 3 to 15 minutes after intake.⁷² Significant THC concentrations in blood (7 to 18 ng/mL) are noted following even a single puff or hit of a marijuana cigarette.⁷³ Orally ingested forms of THC, such as edibles, are released slowly into the blood and maximal THC concentration levels are reached between 1 to 7 hours after consumption.⁷⁴

⁶⁹ <http://www.fda.gov/ohrms/dockets/dockets/05n0479/05N-0479-emc0004-04.pdf> (page 5). Appendix 36.

⁷⁰ Grotenhermen F, Müller-Vahl K: The therapeutic potential of cannabis and cannabinoids. *Dtsch Arztebl Int* (2012); 109(29–30): 495–501. Appendix 37

⁷¹ Wong, k., et al., Establishing legal limits for driving under the influence of marijuana. *Injury Epidemiology*, (2014). Appendix 38.

⁷² *Id.*

⁷³ NHTSA Drug and Human Performance Fact Sheet: Cannabis / Marijuana (Δ 9 - Tetrahydrocannabinol, THC)

⁷⁴ Wong et al., (2014).

A person of common intelligence has no ability to determine if they are in violation of the statute. There are so many variables that affect THC concentrations in blood that it is impossible for a person who consumes marijuana to determine their THC concentration. Unlike alcohol, there is no correlation between 5.0 ng/ml of THC in a person's blood and consuming marijuana in excess. No system exists to determine what a person's THC level may be, in relation to how much marijuana a person consumes. Additionally, no method is available for a person to determine when their THC concentration would drop below 5.0 ng/ml, regardless of whether they are impaired or not. There is not a standard measurable rate at which THC leaves the body, and in many cases, THC levels have increased days after consumption. People who consume marijuana regularly are likely to have residual levels in their system that would affect any resulting THC levels.

D. Whether there is a correlation between THC concentration and impairment that would allow a person of common intelligence to act in conformity with the law.

No conclusive evidence has been found that shows a correlation between THC levels and impairment that would allow a person to estimate their THC levels. As stated earlier, the risk of getting into an accident after consuming marijuana is relatively low, and the OR for a 5.0 ng/ml THC concentration is less than or equal to 1.0, the same as a sober driver.

A recent experimental study done in 2015 attempted to determine how THC concentrations in blood related to driving impairment.⁷⁵ Typically, experimental studies are based on dosing participants at certain levels and then examining the effects on driving (commonly referred to as “dose based” effects), where this study attempts to find a correlation between THC concentrations in blood and its effects on driving.⁷⁶ The study was conducted at the National Advanced Driving Simulator in Iowa. The main finding in the study was that BAC concentrations of .05 and .08% were associated with similar lane weaving as THC concentrations of 8.2 and 13.1 ng/ml, respectively. The authors of this study indicate that there would be more results published later regarding THC effects on driving. Those have not yet been published.

Robbe and O’Hanlon conducted one of the larger and more in depth studies on marijuana and driving, which was sponsored by NHTSA.⁷⁷ The study examined the “dose based” effects of marijuana on driving performance.⁷⁸ The study dosed individuals with 0, 100, 200, and 300 ng/ml of THC and then monitored and tested their driving skills in a

⁷⁵ Harman, R.L., et al., Cannabis effects on driving lateral control with and without alcohol. *Drug Alcohol Depend.* (2015). Appendix 39.

⁷⁶ *Id.*

⁷⁷ Robbe, H. & O’Hanlon, J., (1993).

⁷⁸ Robbe and O’Hanlon (1993).

closed course and on city streets and highways.⁷⁹ The study stated many findings, but most notably that “[r]esults from driving simulator and closed-course tests show that THC in single inhaled doses up to about 250 ng/ml has relatively minor effects on driving performance, certainly less than blood alcohol concentrations (BACs) in the range of 0.08-0.10%.”⁸⁰ Similar to Harman, Robbe and O’Hanlon found that “THC’s effects on [lane travel] were equivalent to those associated with BACs in the range of 0.03-0.07%. Other driving performance measures were not significantly affected by THC.”⁸¹ Two of the major conclusions of the study, were that: (1) “THC’s effects [on driving performance] after doses up to 300 ng/ml never exceed alcohol’s at BACs of 0.08%; and, were in no way unusual compared to many medicinal drugs”; and (2) “[i]t appears not possible to conclude anything about a driver’s impairment on the basis of his/her plasma concentrations of THC and THC-COOH determined in a single sample.”⁸²

In a Norwegian study where 546 drivers who tested positive for THC were examined by police physicians (DREs), 54% of them were judged

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

not to be impaired.⁸³ The unimpaired drivers had blood THC concentration that ranged from 0.32-24.8 ng/mL, while the impaired drivers ranged from 0.3-45.3 ng/mL.⁸⁴

The City argued that a person should know to avoid driving for three to five hours after consuming marijuana based on information that is available to them online. *See* Appendix 41, City of Kent's Answer to Statement for Grounds of Direct Review, dated April 17, 2015. However, the City's argument is inconsistent with publications from NHTSA and the other studies cited. These estimates are based on one time use in controlled scientific settings and do not take into account the multiple other factors that affect THC concentrations, such as method of ingestion, frequency of use, and the variable pharmacokinetics in different individuals.

The City has also argued that the science cited to by Cobb would allow a person of common intelligence to understand how long THC would last in their system. The studies and analysis in this argument are not based on information readily available to the average person. Many of the studies require financial investment in scientific journals and as demonstrated by the complexity of the scientific analysis in this brief, would likely require

⁸³ Khiabani, H., Bramness, JG, Bjerneboe, A., & Morland, J., Relationship between THC concentration in blood and impairment in apprehended drivers. *Traffic Inj Prev* 7:111-116, (2006). Appendix 40.

⁸⁴ *Id.*

some form of advanced education in order to understand the scientific conclusions.

Unlike alcohol, where there is mass amounts of information readily available to the average person explaining how consumption of alcohol affects BAC levels (like the information published in the Washington State DOL Driver Guide), there is little public information as to how marijuana consumption affects THC levels. The most readily available information to an average person about THC comes from the NHTSA fact sheet, which states that: “Plasma THC concentrations generally fall below 5.0 ng/mL less than 3 hours after smoking.”⁸⁵ The Toennes study found that the performance impairment of THC is “maximal during the first hour after smoking and sharply declines over 2-4 hours after THC use.”⁸⁶ Another study indicated that “Current research suggests that acute impairment from cannabis typically clears 3-4 hours after use. This time span could be recommended to users as a minimum wait period before driving.”⁸⁷ The NHTSA fact sheet also states that the “[e]ffects from smoking cannabis products are felt within minutes and reach their peak effects in 10-30 minutes. Typical marijuana smokers experience a high

⁸⁵ NHTSA Drug and Human Performance Fact Sheet: Cannabis / Marijuana (Δ 9 - Tetrahydrocannabinol, THC).

⁸⁶ Id.

⁸⁷ B. Fischer, et al., Lower risk cannabis use guidelines for Canada (LRCUG): A narrative review of evidence and recommendation. *Revue Canadienne de Sante Publique* 102 (2011). Appendix 42.

that lasts approximately 2 hours.”⁸⁸ This range is consistent with Cobb’s understanding of when he would be allowed to drive, based on the two to three hour warning on his Medicinal Marijuana Authorization. RPII 200.

When asked about a person being able to determine their THC level, Officer Dexheimer, a Washington State trained DRE testified that he does not “know of any formulas or any way to calculate that stuff.” RPII 82. In addition, Officer Dexheimer testified that THC falls below detection levels, not just below 5.0 ng/ml, within four to five hours after consumption. RPII 84. Even the Washington State Toxicologist, who is a forensic scientist, testified that THC levels would drop below 2.5 ng/ml in three to five hours. RPII 115, 116, 133-137. As discussed above, this estimation does not take into account the multiple factors that affect THC concentrations. The toxicologist also testified that there was no formula that would allow a person to estimate what their THC levels would be. RPII 139-143.

Cobb waited four and half hours before driving after consuming THC, as recommended by NHTSA and his medicinal marijuana provider, and his blood was tested six hours after his last consumption. Cobb had been regularly consuming THC, for pain management, during the week prior to being stopped. Cobb had ingested THC by smoking, using edibles, and

⁸⁸ NHTSA Drug and Human Performance Fact Sheet: Cannabis / Marijuana (Δ 9 - Tetrahydrocannabinol, THC)

THC balm which he applied to his gums. Cobb's Carboxy-THC (THC-COOH) level was 110 ng/ml, which is evidence that Cobb was using THC regularly. There is not a direct correlation between the THC-COOH level in a person and how much THC the person just consumed. However, high THC-COOH levels can be indicators of regular use. The NHTSA fact sheet states that: "Chronic users can have mean plasma levels of THC-COOH of 45 ng/mL, 12 hours after use."⁸⁹

The City is correct in that a due process vagueness challenge is "as applied" to Cobb's facts. However, the science clearly establishes that there is no simple relationship between quantities of ingestion and increased levels of THC concentration in blood. THC concentrations vary depending on the method of ingestion. The impairing effects of marijuana dissipate well before the THC concentration is removed from the blood. THC can last in a person's blood for a month and can be over 5.0 ng/ml for more than five days. In order for Cobb, or any person that uses THC to "estimate correctly" they would either need to get their blood checked or wait a week before driving. Even scientists are not in agreement as to the per se level, nor are they able to determine a person's THC concentration based on consumption.

⁸⁹ NHTSA Drug and Human Performance Fact Sheet: Cannabis / Marijuana (Δ 9 - Tetrahydrocannabinol, THC); <http://www.nhtsa.gov/PEOPLE/INJURY/research/job185drugs/cannabis.htm>

The very idea of a per se law for THC further complicates a person of common intelligence's understanding of what is lawful, because it implies that a person is now allowed to consume marijuana and then drive as long as they are not over the legal limit.

For these reasons, RCW 46.61.502(1)(b) and the accompanying statutes, are a violation of Cobb's 14th Amendment Right to due process for vagueness as no standard is available that would allow a person of ordinary intelligence to determine if they are in violation of the law.

2. RCW 46.61.502 and the accompanying statutes, are not a valid exercise of the states police powers.

Every legislative enactment must promote a legitimate state interest. The Washington State Constitution provides: "All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights." Const. art. 1, § 1. From this declaration comes the state's police power. However, this power is limited and two criteria must be satisfied to uphold any legislation enacted pursuant to this authority. *State v. Conifer Enterprises, Inc.*, 82 Wn.2d 94, 96, 508 P.2d 149 (1973). First, the law must tend to promote the health, peace, morals, education, good order and welfare of the people, and second, the statute must bear a reasonable and substantial relationship to accomplishing the allowable

purpose for which it was enacted. *Id.* at 96-97. When legislation goes far beyond what is reasonably necessary to achieve a legitimate purpose, it constitutes an abuse of the police power, and the conviction must be reversed and dismissed. *Seattle v. Ross*, 54 Wn.2d 655, 662, 344 P.2d 216 (1959).

The issue presented here is whether the criminalization of THC concentrations of 5.0 ng/ml two hours after driving bears a reasonable and substantial relationship to the State's legitimate interest in preventing driving while under the influence. The State has a substantial interest in reducing the risk posed by intoxicated drivers, and laws that limit the consumption of alcohol by operators of motor vehicles are clearly within the province of the Legislature. *State v. Franco*, 96 Wn.2d 816, 824, 639 P.2d 1320 (1982).

The legislature can penalize the excessive consumption of intoxicants associated with the operation of a motor vehicle. *Brayman*, 110 Wash.2d at 193. In *Crediford*, the Court held that, "it was the Legislature's prerogative to determine that there is a relevant relationship between a driver's alcohol concentration of 0.10 percent or greater, as detected by an analysis of that person's breath or blood within two hours of driving, and the ability of that driver to have safely operated a motor vehicle within the previous two hours." *State v. Crediford*, 130 Wn.2d 747, 754-55, 927 P.2d

1129, 1132-33 (1996). The Court also recognized that the statute did not exceed the police powers because a sufficient nexus exists between persons who consume sufficient quantities of alcohol which result in a 0.10% BAC and to impaired driving. *Crediford*, 130 Wn.2d at 755-56.

A per se level of 5.0 ng/ml of THC concentration in the blood, neither prevents excessive smoking of marijuana nor does it target a majority of impaired drivers. No sufficient nexus between THC levels of 5.0 ng/ml and impaired driving exist, unlike that which exists between .08% BAC and impaired driving. As a result, the statute exceeds the police powers of the State.

RCW 46.61.502(1)(b) is an unlawful use of police power because in casting so wide a net in its attempt to criminalize driving while under the influence of THC, it criminalizes behavior not generally deemed criminal. The statute goes far beyond the means necessary to protect our citizens. Enforcement of this law will punish persons who are not driving while under the influence of THC. In addition, there is no nexus between the per se limit and excessive consumption of marijuana. The law punishes persons who are not a threat to the safety of our citizens. Therefore, RCW 46.61.502(1)(b) does not bear a reasonable and substantial relationship to its legitimate goal.

3. Initiative I-502 was in violation of Washington Constitution, Article II, Section 19, the single-subject rule for ballot measures.

In approving an initiative measure, the people exercise the same power of sovereignty as the legislature does when it enacts a statute, *Wash. Fed'n of State Emps. v. State*, 127 Wash.2d 544, 556, 901 P.2d 1028 (1995), and are subject to the same constitutional limitations, *City of Burien v. Kiga*, 144 Wash.2d 819, 824, 31 P.3d 659 (2001). Therefore, even if an initiative is approved by a majority of voters, it will be struck down if it violates Washington's constitution. *Id.*

Article II, section 19 provides, “No bill shall embrace more than one subject, and that shall be expressed in the title.” This provision is to be liberally construed in favor of the legislation. *Amalgamated Transit Union Local 587 v. State*, 142 Wash.2d 183, 205, 11 P.3d 762, 27 P.3d 608 (2000); *Wash. Fed'n of State Emps.*, 127 Wash.2d at 555, 901 P.2d 1028. The purpose of this prohibition is to prevent logrolling or pushing legislation through by attaching it to other legislation. *Id.* The Washington Supreme Court declared that “when laws are enacted in violation of this constitutional mandate, the courts will not hesitate to declare them void.” *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 32 Wash.2d 13, 24, 200 P.2d 467 (1948) (Wash. Toll Bridge Auth. I). Article II, section 19 applies to

initiatives as well as to bills. *Wash. Fed'n of State Emps.*, 127 Wash.2d at 553–54, 901 P.2d 1028.

In determining whether legislation contains multiple subjects, the court should determine whether the title is general or restrictive; “in other words, broad or narrow, since the legislature in each case has the right to determine for itself how comprehensive shall be the object of the statute.” *Gruen v. State Tax Comm'n*, 35 Wash.2d 1, 22, 211 P.2d 651 (1949), overruled in part on other grounds by *State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wash.2d 645, 384 P.2d 833 (1963); *Amalgamated Transit*, 142 Wash.2d at 207, 11 P.3d 762, 27 P.3d 608. When an initiative title is general, “[a]ll that is required [by the constitution] is that there be some “rational unity” between the general subject and the incidental subdivisions.’ ” *State v. Grisby*, 97 Wash.2d 493, 498, 647 P.2d 6 (1982) (quoting *Kueckelhan v. Fed. Old Line Ins. Co.*, 69 Wash.2d 392, 403, 418 P.2d 443 (1966)). “[T]he existence of rational unity or not is determined by whether the matters within the body of the initiative are germane to the general title and whether they are germane to one another.” *Kiga*, 144 Wash.2d at 826, 31 P.3d 659 (citing *Amalgamated Transit*, 142 Wash.2d at 209–10, 11 P.3d 762, 27 P.3d 608); *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wash.2d 622, 638, 71 P.3d 644 (2003).

The Title of I-502 states that: “This measure would license and regulate marijuana production, distribution, and possession for persons over twenty-one; remove state law criminal and civil penalties for activities that it authorizes; tax marijuana sales; and earmark marijuana-related revenues.” See Appendix 43, State of Washington House of Representatives Summary of Initiative 502; see also Appendix 44, New Approach Washington Initiative I-502. The I-502 Summary states that: “This measure would remove state-law prohibitions against producing, processing, and selling marijuana, subject to licensing and regulation by the liquor control board; allow limited possession of marijuana by persons aged twenty-one and over; and impose 25% excise taxes on wholesale and retail sales of marijuana, earmarking revenue for purposes that include substance-abuse prevention, research, education, and healthcare. Laws prohibiting driving under the influence would be amended to include maximum thresholds for THC blood concentration.” *Id.*

A restrictive title “is one where a particular part or branch of a subject is carved out and selected as the subject of the legislation.” *State v. Broadaway*, 133 Wash.2d 118, 124, 942 P.2d 363 (1997) (quoting *Gruen*, 35 Wash.2d 1 at 211 P.2d 651 (1949)). The title of I-502 is not general as it addresses every law the initiative intends to change, except for the penalization of Driving Under the Influence. If the title is not restrictive,

it is misleading. The title of I-502 implies that it only deals with the legalization of marijuana and adjusting the law to implement change. The initiative licensed and regulated marijuana production, distribution, and possession for persons over twenty-one; removed state law criminal and civil penalties for activities that it authorized; taxed marijuana sales; and earmarked marijuana-related revenues. However, it also established a per se law for THC DUIs and amended the implied consent laws. Prior to the passage of I-502, it was not illegal for a person to drive a motor vehicle with THC in their blood. RCW 46.61.502 only prohibited a person from driving when their ability to drive was affected by THC.

If the Court determines that the initiative is General, then the criminalization of driving under the influence of marijuana with a THC concentration of 5.0 ng/ml or higher does not have a rational unity with the title. “Only where rational unity exists can we be certain voters were not required to vote for an unrelated subject of which the voters disapproved in order to pass a law pertaining to a subject of which the voters were committed.” *City of Burien v. Kiga*, 144 Wash. 2d 819, 827, 31 P.3d 659, 663 (2001); e.g., *Brower v. State*, 137 Wash.2d 44, 969 P.2d 42 (1998) (finding an initiative embracing two purposes—short-term and long-term funding schemes—constitutional because there was a rational unity between the schemes and the construction of a new stadium). The

subject of I-502 clearly deals with the legalization of marijuana and its regulation. The imposition of a penalty for driving under the influence of marijuana for an initiative that implies that it is legalizing marijuana use does not have a rational unity.

IV. CONCLUSION

In order to satisfy the Fourteenth Amendment of the U.S. Constitution and Article 1, Section 3 of the Washington State Constitution guarantee of procedural due process, a statute must set forth clear legal standards so that citizens may know how to conduct themselves in conformity with the law. Statutes must employ words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them. Due process requires that a reasonable person be able to understand how to act in conformity with the law based on “common understanding and practice.”

The Franco and Brayman decisions clearly state that the per se prong for alcohol DUIs is not vague because a person can estimate their BAC level using a formula similar to Widmarks or know they are close or over the legal limit because they drank excessive amounts of alcohol. Unlike alcohol where there is a correlation between the .08% BAC level and excessive consumption of alcohol, there is not a correlation between the 5.0 ng/ml THC level and excessive consumption of marijuana. There is

also not a correlation between the 5.0 ng/ml THC level and impairment. No system, chart, or algorithm exists in order for an ordinary person to determine his or her THC level. Further, it is unreasonable to expect a person of common intelligence to “estimate rightly” in determining their THC concentration. With all the potential variables, a person of common intelligence has no ability to estimate with any degree of certainty what their THC concentration may be.

For these reasons, RCW 46.61.502(1)(b) and the accompanying statutes, is a violation of Cobb’s 14th Amendment Right to due process.

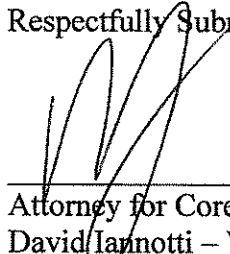
Further, RCW 46.61.502(1)(b) and the accompanying statutes are not a valid exercise of the states police powers. The criminalization of THC concentrations of 5.0 ng/ml two hours after driving does not bear a reasonable and substantial relationship to the State's legitimate interest is preventing driving while under the influence.

Finally, I-502 was a violation of Article II, section 19 single subject rule of the Washington State Constitution.

For the reasons indicated above, Cobb respectfully requests this Court to find RCW 46.61.502(1)(b) and the accompanying statutes unconstitutional.

DATED: February 18, 2016.

Respectfully Submitted,



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V. APPENDIX

- Appendix 1 - Police Report #13-14496, Citation #K100276, dated 11/4/2013.
- Appendix 2 - Superior Court Order in re: Petitioner's Application for Writ of Certiorari, dated and filed November 18, 2014, No.: 14-2-22591-1 KNT.
- Appendix 3 - January 22, 2015, Court of Appeals, Division 1, Decision Denying Review, No. 72795-8-I.
- Appendix 4 - Supreme Court Ruling to Transfer Review to Court of Appeals, dated July 23, 2015, No. 91589-0.
- Appendix 5 - Alcohol Toxicology for Prosecutors: Targeting Hardcore Impaired Drivers. American Prosecutors Research Institute, (July 2003). http://www.ndaa.org/pdf/toxicology_final.pdf
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- Appendix 8 - Findings of the Marijuana DUID Workgroup.
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CERTIFICATE OF SERVICE

I certify that on the 14th day of February, 2016, I caused a true and correct copy of this Brief to be served on the following in the manner indicated below:

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