

Notre Dame Law School

NDLScholarship

Indiana Continuing Legal Education Forum
2021

Indiana Continuing Legal Education Forum

1-1-2021

Impaired Driving Defense 101 March 26, 2021

Indiana Continuing Legal Education Forum (ICLEF)

Follow this and additional works at: https://scholarship.law.nd.edu/iclef_2021

Recommended Citation

Indiana Continuing Legal Education Forum (ICLEF), "Impaired Driving Defense 101 March 26, 2021" (2021). *Indiana Continuing Legal Education Forum 2021*. 38.
https://scholarship.law.nd.edu/iclef_2021/38

This Article is brought to you for free and open access by the Indiana Continuing Legal Education Forum at NDLScholarship. It has been accepted for inclusion in Indiana Continuing Legal Education Forum 2021 by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

Impaired Driving Defense 101

March 26, 2021

Index

ICLEF Electronic Publications.....	5
MANUAL - Impaired Driving Defense 101 March 26, 2021.....	6
Agenda.....	9
Faculty.....	10
Faculty Bios.....	11
Manual Table of Contents.....	25
Section-1-Drew-Carroll.....	42
Section 1 - Drew Carroll.....	42
Section 1 Table of Contents.....	44
DUI Client Intake Sheet.....	45
Fact Sheet.....	46
Client File Information.....	47
Investigation Summary.....	48
Case Checklist Tab.....	49
Case Intake.....	50
Questionnaire.....	51
Section-2-Meredith-Mochel.....	91
Section 2 - Meredith Mochel.....	91
Section 2 Table of Contents.....	93
Section-3-Charles-J-Rathburn-Jr.....	96
Section 3 - Charles J. Rathburn, Jr.....	96
Section 3 Table of Contents.....	98
PowerPoint - Collateral Consequences.....	99
Normal consequences for a criminal charge.....	100
Additional consequences in an OWI (DUI) case.....	101
Section-4-Mark-A-Foster.....	103
Section 4 - Mark A. Foster.....	103
Section 4 Table of Contents.....	105
Alco-Sensor III Unpacking and Checkout Procedure.....	106
Indiana State Department of Toxicology Certification of Record.....	111
Instrument and Operator Certifications.....	112
Breath Test Operators and Instruments Indiana - Administrative Code.....	113
Article 2.5. Breath Test Operators and Instruments.....	116
Chemical Tests for Intoxication - Training Course for Breath Test Operator Certification.....	121
Section-5-Deandra-M-Grant.....	167
Section 5 - Deandra M. Grant.....	167
Section 5 Table of Contents.....	169
PowerPoint - Blinding Them With Science: Some Quick Tips on Blood Test Cases.....	170
Lawyer-Scientist Program at Axion Labs in Chicago.....	171
Create a Blood Timeline.....	173
Blood Tubes.....	174
Blood Tubes have expiration dates.....	179
Blood Storage.....	182
Sample Preparation.....	184
Contamination.....	195
Sloppy Work.....	201
Other Mistakes.....	203
Blanks.....	209
Knowledge Can Take You Far.....	214
Form - SUBPOENA DUCES TECUM REQUEST – CRIMINAL.....	216
Section-6-Charles-J-Rathburn-Jr.....	220
Section 6 - Charles J. Rathburn, Jr.....	220
Section 6 Table of Contents.....	222
PowerPoint - The Alphabet Soup: SFST, ARIDE, and DRE.....	223
The Alphabet Soup: SFST, ARIDE, and DRE.....	224

Impaired Driving Defense 101

March 26, 2021

Index

Standardized Field Sobriety Tests	225
Advanced Roadside Impaired Driving Enforcement	227
Drug Recognition Expert	228
12-Step DRE Evaluation Matrix	229
Seven Categories of Drugs	230
Section-7-Jennifer-A-Sturges	233
Section 7 - Jennifer A. Sturges	233
Section 7 Table of Contents	235
PowerPoint - Discovery Basics	236
Discovery for Impaired Driving Cases	237
Scope of Discovery	238
Defendant's Duty	240
Types of Discovery	242
Police Reports	246
Items Tested By Police	249
Motions to Non-Parties	250
Subpoena Duces Tecum	252
RFP/SDT	253
Indigent Request for Funds	254
Practice Tips	255
Sample Forms	256
FOIA Request - Machine Records	257
AUTHORIZATION TO DISCLOSE HEALTH INFORMATION	259
MOTION DEMAND FOR CROSS EXAMINATION	261
MOTION TO TAKE DEPOSITIONS AT PUBLIC EXPENSE	262
MOTION FOR DISCOVERY AND REQUEST FOR RULE 404 AND 405 EVIDENCE	263
EX PARTE MOTION FOR ORDER AUTHORIZING EXPERT AT PUBLIC EXPENSE	268
MOTION FOR EX PARTE DETERMINATION OF DEFENDANT'S MOTION FOR APPOINTMENT OF EXPERTS	272
MOTION TO PRESERVE EVIDENCE	276
MOTION FOR SPECIFIC DISCOVERY	280
NOTICE OF DEPOSITION	282
ORDER AUTHORIZING TAKING DEPOSITIONS AT COURT EXPENSE	283
ORDER FOR DISCOVERY AND REQUEST FOR RULE 404 AND 405 EVIDENCE	284
ORDER GRANTING FUNDS FOR EXPERT AND INVESTIGATIVE ASSISTANCE	285
ORDER PRESERVING EVIDENCE	286
REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS	287
NON-PARTY REQUEST FOR PRODUCTION	293
SUBPOENA	298
Section-8-L-Scott-Pejic	299
Section 8 - L. Scott Pejic	299
Section 8 Table of Contents	301
I. Operation of Vehicle	302
II. Reason for Stop or Contact with Vehicle	302
III. Endangerment	302
IV. Stop	303
V. Personal Contact	303
VI. Intoxication	304
VII. Refusal	305
VIII. License Issues	305
IX. Sentencing	305
Section-9-Charles-J-Rathburn-Jr.	306
Section 9 - Charles J. Rathburn, Jr.	306
Section 9 Table of Contents	308
PowerPoint - Voir Dire	309
Indiana Rules of Trial Procedure 47(D)	310

Impaired Driving Defense 101

March 26, 2021

Index

Section-10-Timothy-Huey	315
Section 10 - Timothy Huey	315
Section 10 Table of Contents	317
What we are told about opening statements	318
Why I used to hate opening statements	318
I use to start out with something like this	319
The problems Criminal Defense Lawyers face with opening statements	320
Should you just waive opening?	320
What's a poor Criminal Defense Lawyer to do?	321
Then I met Professor / Dr. Sunwolf	321
And then I met Dr. Paul Homoly	322
And then I found 1st Person Openings	322
First Person Openings That I DO NOT Do	322
What is a 1st Person Opening?	323
Creative –But Not Too Crazy- Opening Statements	323
Show Me Don't Tell Me	324
Some Simple Guidelines	324
Don't start out introducing yourself	324
Do talk about you client – use her name – tell her story – make them care	325
Don't start out thanking jurors	325
Skip the preambles and preliminaries - come out firing	325
Get their attention – wake them up	326
Go kick some – Arse	326
Horton JT day 2 opening	327
The First-Person Presentation at Trial: Using Its Power, Managing Its Risks	441
Section-11-Matthew-A-Dodd	449
Section 11 - Matthew A. Dodd	449
Section 11 Table of Contents	451
1. Recognizing the complementary approaches of destructive and constructive cross-examination	452
2. Proper preparation leads to powerful cross-examinations	452
2.1. Proper preparation requires a thorough knowledge of our case	453
2.2. Proper preparation establishes control	454
3. Proper preparation allows us to listen	457
4. Use sequencing to persuasively convey our client's narrative	458
5. Treat the cop as an expert witness	459
5.1. Marry the officer to his or her written report	459
5.2. Know the terminology but do not let it confine you	460
5.3. Officers will admit facts, but not conclusions	461
6. Conclusion	462
Section-12-Terrence-R-Rudes	464
Section 12 - Terrence R. Rudes	464
Section 12 Table of Contents	466
Section-13-Cara-Schaefer-Wieneke	469
Section 13 - Cara Schaefer Wieneke	469
Section 13 Table of Contents	471
PowerPoint - Making a Good Record for Appeal	472
Why is the "Record" Important?	473
What is the "Record"?	474
5 Tips to Building a Good Record	476
Tip #1	477
What's the point if the judge will just deny it anyway?	478
Summary denials and hurried trials	479
Tip #2	480
Tip #3	481
Example	482

Impaired Driving Defense 101

March 26, 2021

Index

Tip #4.....	484
Tip #5.....	485
Offers of Proof.....	486
Contact Information.....	488
Section-14-Scott-A-DeVries.....	489
Section 14 - Scott A. DeVries.....	489
Section 14 Table of Contents.....	491
PowerPoint - OVWI License Suspensions 101.....	492
License Suspensions overview.....	493
OVWI/OBWI.....	496
SDP at initial hearing.....	498
What happens to suspensions if case ends in Defendant's favor.....	499
What happens to SDP if case ends in Defendant's favor.....	500
Habitual Vehicular Substance Offender 9-30-15.5.....	501
HVSO Timing.....	502
Financial Responsibility.....	503
Habitual Traffic Violators.....	504
HTV continued.....	505
9-30-16 SDP Ineligibility.....	506
9-30-16 SDP Eligibility.....	507
9-30-16 SDP Conditions.....	508
Section-15-Charles-J-Rathburn-Jr.....	509
Section 15 - Charles J. Rathburn, Jr.....	509
Section 15 Table of Contents.....	511
PowerPoint - Using Experts.....	512
Using an Expert.....	515
Why use the Expert.....	516
Testimony by an Expert Witness (IRE 702).....	517
Testimony by an Expert Witness (IRE 703).....	533
Testimony by an Expert Witness (IRE 704).....	534
Potential Expert Testimony in an OWI Case.....	543
Blood Testing Expert Testimony.....	546
Breath Testing Expert.....	550
Urine Testing Expert Testimony.....	551
Section-16-John-L-Sandy.....	553
Section 16 - John L. Sandy.....	553
Section 16 Table of Contents.....	555



ICLEF Electronic Publications

Feature Release 4.1
August 2020

To get the most out of your *ICLEF Electronic Publication*, download this material to your PC and use Adobe Acrobat® to open the document. The most current version of the Adobe® software may be found and installed by clicking on one of the following links for either the free [Adobe Acrobat Reader®](#) or the full retail version of [Adobe Acrobat®](#).

Feature list:

1. **Searchable** – All ICLEF Electronic Publications are word searchable. To begin your search, click on the “spyglass” icon at the top of the page while using the Adobe® software.
1. **Bookmarks** – Once the publication is opened using the Adobe Acrobat® software a list of bookmarks will be found in a column located on the left side of the page. Click on a bookmark to advance to that place in the document.
2. **Hypertext Links** – All of the hypertext links provided by our authors are active in the document. Simply click on them to navigate to the information.
3. **Book Index** – We are adding an INDEX at the beginning of each of our publications. The INDEX provides “jump links” to the portion of the publication you wish to review. Simply left click on a topic / listing within the INDEX page(s) to go to that topic within the materials. To return to the INDEX page either select the “INDEX” bookmark from the top left column or right-click with the mouse within the publication and select the words “*Previous View*” to return to the spot within the INDEX page where you began your search.

Please feel free to contact ICLEF with additional suggestions on ways we may further improve our electronic publications. Thank you.

Indiana Continuing Legal Education Forum (ICLEF)
230 East Ohio Street, Suite 300
Indianapolis, Indiana 46204
Ph: 317-637-9102 // Fax: 317-633-8780 // email: iclef@iclef.org
URL: <https://iclef.org>



IMPAIRED DRIVING DEFENSE 101

March 26, 2021

www.ICLEF.ORG

Copyright 2021 by Indiana Continuing Legal Education Forum

DISCLAIMER

The information and procedures set forth in this practice manual are subject to constant change and therefore should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein. Further, the forms contained within this manual are samples only and were designed for use in a particular situation involving parties which had certain needs which these documents met. All information, procedures and forms contained herein should be very carefully reviewed and should serve only as a guide for use in specific situations.

The Indiana Continuing Legal Education Forum and contributing authors hereby disclaim any and all responsibility or liability, which may be asserted or claimed arising from or claimed to have arisen from reliance upon the procedures and information or utilization of the forms set forth in this manual, by the attorney or non-attorney.

Attendance of ICLEF presentations does not qualify a registrant as an expert or specialist in any discipline of the practice of law. The ICLEF logo is a registered trademark and use of the trademark without ICLEF's express written permission is prohibited. ICLEF does not certify its registrants as specialists or expert practitioners of law. ICLEF is an equal opportunity provider of continuing legal education that does not discriminate on the basis of gender, race, age, creed, handicap, color or national origin. ICLEF reserves the right to refuse to admit any person or to eject any person, whose conduct is perceived to be physically or emotionally threatening, disruptive or disrespectful of ICLEF registrants, faculty or staff.

INDIANA CONTINUING LEGAL EDUCATION FORUM

OFFICERS

TERESA L. TODD

President

LYNNETTE GRAY

Vice President

HON. ANDREW R. BLOCH

Secretary

SARAH L. BLAKE

Treasurer

ALAN M. HUX

Appointed Member

LINDA K. MEIER

Appointed Member

DIRECTORS

James H. Austen

Sarah L. Blake

Hon. Andrew R. Bloch

Melanie M. Dunajeski

Mark A. Foster

Lynnette Gray

Alan M. Hux

Dr. Michael J. Jenuwine

Dean Jonna Kane MacDougall

Thomas A. Massey

Linda K. Meier

Richard S. Pitts

Jeffrey P. Smith

Teresa L. Todd

Inge Van der Cruysse

ICLEF

SCOTT E. KING

Executive Director

James R. Whitesell
Senior Program Director

Jeffrey A. Lawson
Program Director

IMPAIRED DRIVING DEFENSE 101



Agenda

- 8:50 A.M.** Welcome Introduction and Overview - *Charles J. Rathburn, Jr*
- 9:00 A.M. Initial client intake and client control - *Drew Carroll*
- 9:25 A.M. Brainstorming: Developing a theme of the case - *Meredith Mochel*
- 9:40 A.M. Collateral Consequences - *Charles J. Rathburn, Jr*
- 9:45 A.M. Breath Testing, PBT and EBT - *Mark A. Foster*
- 10:10 A.M. Blood Testing: Finding the weakest link - *Deandra M. Grant*
- 10:40 A.M. Coffee Break (10 minutes)**
- 10:50 A.M. The Alphabet Soup: SFST's, DRE, ARIDE - *Charles J. Rathburn, Jr*
- 11:00 A.M. Discovery - *Jennifer A. Sturges*
- 11:25 A.M. Plea Negotiation - *L. Scott Pejic*
- 12:00 P.M. Lunch Break (include slides during break)**
- 12:30 P.M. Voir Dire - *Charles J. Rathburn, Jr*
- 12:35 P.M. Opening Statements - *Tim Huey*
- 1:05 P.M. Cross-Examination - *Matthew A. Dodd*
- 1:30 P.M. Closing Statements - *Terrence R. Rudes*
- 1:55 P.M. Making your record for appeal - *Cara Schaefer Wieneke*
- 2:15 P.M. Driver's License Issues - *Scott A. DeVries*
- 2:35 P.M. Refreshment Break**
- 2:45 P.M. The Experts - *Charles J. Rathburn, Jr*
- 3:10 P.M. Bringing it together - *John L. Sandy*
- 3:40 P.M. Adjourn**

March 26, 2021

WWW.ICLEF.ORG

IMPAIRED DRIVING DEFENSE 101



Faculty

Program Chair

Charles J. Rathburn, Jr. - Rathburn Law Office, Indianapolis, IN - CJR@rathburnlaw.com

Faculty

Drew Carroll – Carroll Law Firm, Charleston, SC - Drewcarroll@carrolllawfirm.net

Scott A. DeVries – DeVries and Kelly, Indianapolis, IN - sdevries@devries-law.com

Matthew A. Dodd - Dodd Blackford & Carls, P.C., Big Sky, MT - Matt@doddlawfirm.com

Mark A. Foster – Foster O’Daniel Hambidge & Lynch, Evansville, IN - mfoster@fohlaw.com

Deandra M. Grant – Hamilton Grant, Dallas, TX - deandragrant@gmail.com

Tim Huey – Attorney at Law, Columbus, OH - dthlaw@gmail.com

Meredith Mochel – Attorney at Law, Chattanooga, TN - meredith@mochellaw.com

L. Scott Pejic – Pejic Law Group, Michigan City, IN - scott@pejiclaw.com

Terrence R. Rudes – Rudes Law Office, Port Clinton, OH - trudes@duiohio.net

John L. Sandy – Sandy Law Firm, Spirit Lake, IA - jmsandy@sandylawpractice.com

Jennifer A. Sturges – Rolfes Garvey Walker & Robbins, Greensburg, IN - jennifer.sturges.rgwr@gmail.com

Cara Schaefer Wieneke – Wieneke Law Office LLC, Brooklyn, IN - cara.wieneke@gmail.com

March 26, 2021

www.ICLEF.ORG

Charles J. Rathburn

Rathburn Law Office, Indianapolis



Charles James Rathburn Jr. is one of the most highly trained attorneys in the United States and specifically in the State of Indiana in this highly specific area of law. Mr. Rathburn is one of a few attorneys in the United States who is been qualified as an expert on breath testing, the standardized field sobriety tests, and alcohol's effects on the human body. He has countless hours of training in these areas and has been invited to speak nationally on these topics. In addition, Mr. Rathburn trains attorneys and judges about how a breath testing machine accepts a sample, analyzes a sample and provides a result from each breath delivery.

Drew Carroll

Carroll Law Firm, Charleston, SC



Drew Carroll practices law in Charleston. He is a graduate of the University of South Carolina and the University of South Carolina School of Law. Drew was a staff attorney with the Charleston County Public Defender's Office from 1997-1999. In 1999 he joined the Joye Law Firm, where he worked until forming the Carroll Law Firm in 2010. He is a frequent lecturer on the defense of DUI cases.

Drew has successfully completed the NPAS breath test courses on the DataMaster DMT and the BAC DataMaster, the only breath test device approved for use in South Carolina. He has also completed NHTSA's Standardized Field Sobriety Test Practitioners Course as well as the NHTSA/IACP DRE overview course.

Drew is President Emeritus of the DUI Defense Lawyers Association; a past President of South Carolina Association of Criminal Defense Lawyers; Chair of the Criminal Law Council of the South Carolina Bar Association; a member of the National College for DUI Defense, the National Association of Criminal Defense Lawyers, the South Carolina Bar Association, and the Charleston County Bar Association.



Scott DeVries is an Indianapolis attorney and owner/partner of DeVries + Kelly Law Office. Before beginning his career in law, Scott was an officer in the United States Marine Corps, then worked in the private sector as a regional sales director for two major office furniture companies. Scott attended the Indiana University School of Law at Indianapolis where he graduated with summa cum laude honors in 1995. Upon graduation, Scott DeVries gained admission to the North Carolina and Indiana Bars. After serving as a judicial clerk for the Indiana Court of Appeals, he spent seven years as a Marion County Deputy Prosecuting Attorney. In 2003, Scott was selected to be a Master Commissioner in the criminal courts. In 2007, Scott assumed the position of General Counsel of the Indiana Bureau of Motor Vehicles. During his years with the BMV, Scott analyzed every aspect of the Bureau's business operations and legal requirements. He rewrote almost the entire Administrative Code for the BMV, resulting in the repeal of numerous regulations and the adjustment of hundreds of other regulations. He redesigned the structure of the administrative hearings department to increase its efficiency and effectiveness, resulting in the elimination of thousands of backlogged pending cases. Additionally, he spearheaded a project to change the procedures for the electronic transmission of BMV records to customers in compliance with federal and state requirements. Scott DeVries is a frequent lecturer on motor vehicle law, and works with various working groups to prepare proposed changes to Indiana's motor vehicle laws for the Indiana General Assembly.

Matthew A. Dodd

Dodd Blackford & Carls, P.C., Bozeman, MT



Mr. Dodd comes from a family of lawyers and has been in the courtroom as long as he can remember. Prior to attending law school, Mr. Dodd worked for Dodd & Burnham, P.C., assisting in the representation civil and criminal clients. Mr. Dodd then worked for Spohrer & Dodd, aiding individuals in aviation and medical malpractice cases.

Mr. Dodd attended the S.J. Quinney College of Law at the University of Utah, where he graduated 4th in his class. During his time at S.J. Quinney, Mr. Dodd was a Note and Comment Editor on the Utah Law Review and was awarded Best Oralist in the Traynor Moot Court Competition after arguing before Chief Justice John Roberts of the United States Supreme Court, Chief Justice Durham of the Utah Supreme Court, and Judge Matheson of the Tenth Circuit Court of Appeals.

While working with the Rocky Mountain Innocence Center during law school, Mr. Dodd drafted an innocence petition to which the Utah Attorney General stipulated, securing the factual innocence and complete exoneration of a man wrongfully incarcerated for over four years.

Mr. Dodd has lectured and taught around the country on trial skills, DUI defense, and family law. He has written articles for state and national magazines on trial skills, DUI defense, and family law and is the co-author of the book, "Cross-Examination for Depositions".

Mr. Dodd is licensed to practice law in Montana and Utah.

Mark A. Foster

Foster O'Daniel Hambidge & Lynch, Evansville



Mark has strived to continue his own education in the area of DUI defense as well as teach others. Mark is certified in the administration of National Highway Traffic Safety Administration Standardized Field Sobriety Test. In addition, he is a certified operator of the BAC DataMaster by National Patent Analytical Systems. The following is a list of articles Mark has written for numerous seminars where he was a lecturer; "DUI Dram Shop," ICLEF, 1990; "Criminal Law", ICLEF, 1990; "Planning Your First Criminal Defense," ICLEF, 1997; "DUI," ICLEF, 1998; "What Every Lawyer Should Know about DUI," ICLEF, 1998; "DUI," ICLEF, 1999; "DUI & HTV-Quebec City, Quebec" ICLEF, 1999; "Traffic Law School," ICLEF, 2000; "Criminal Law-LasVegas," ISBA & ICLEF, 2001; "The Best of DUI," ICLEF, 2001; "Civil and Criminal Evidence," ICLEF, 2001; "DUI Defense," ICLEF, 2002; "Misdemeanor Court," Legal Aid Society, 2002; "Traffic Law School," ICLEF, 2002; "DUI Experts, Technology and Equipment," ICLEF, 2003; "Hot Topics – DUI," EBA, 2003; "Traffic School for Lawyers," ICLEF, 2004, "DUI," ICLEF, 2005; "DUI," ICLEF, 2006; "DUI," ICELF, 2008; "DUI," ICELF, 2008; "DUI," ICLEF, 2009; "The DUI Trial," ICLEF, 2010; "DUI," ICLEF, 2011; "DUI at Trial," ICLEF 2012; "Defending the Sex Crime Case," ICLEF, 2012; ICLEF, 2013; Current State of DUI Defense; Inside the Minds: Trends in DUI Discovery," 2011 Published by Aspatore, Super Lawyers 2011; 2012; 2013 ; Best Lawyers in Indiana 2011; 2012; 2013; DUI – ICLEF 2011, DUI @ Trial – ICLEF 2012, Defending The Sex Crimes Case – ICLEF 2012, Current State of DUI Defense – ICLEF 2013; Reality CLE (Criminal Law) – ICLEF 2013.

Deandra M. Grant

Hamilton Grant PC, Dallas, TX



AV-rated attorney *Deandra Grant* is a Partner at Hamilton Grant PC and her practice is focused on DWI defense in Texas. A graduate of Trinity University in El Paso and Southern Methodist University's School of Law, she is a national speaker on DWI law and science and the co-author of the annually updated book, *The Texas DWI Manual* (James Publishing), *Texas DWI: Truth & Consequences* and *Surviving Your Texas DWI*.

Deandra is a Standardized Field Sobriety Testing Instructor and has completed the Drug Recognition Overview course. She was the first attorney in Texas to pass the Forensic Sobriety Assessment Certification exam. In addition, she has completed coursework in DWI forensic blood and urine testing and was trained as an operator and maintenance technician of the Intoxilyzer 5000. Deandra has certificates in Forensic Chromatography: Theory & Practice (2011 & 2015), Forensic Analysis of Solid Drugs (2014), and Forensic Principles of DUID (2015) issued by Axion Labs and the American Chemical Society. In 2015, Deandra earned the distinction of being named an ACS-CHAL Forensic Lawyer-Scientist.

D Magazine has named Deandra to its list of Best Women Lawyers and Best Lawyers in Dallas. She's been named a "Texas Super Lawyer" and one of Texas' Top Rated Lawyers. Best Lawyers in Dallas named her one of the Top 10 DWI Lawyers in Dallas. Deandra completed a Graduate Certificate in Forensic Toxicology from the University of Florida's College of Veterinary Medicine and a Masters Degree in Pharmaceutical Science – Concentration in Forensic Science from the University of Florida's College of Pharmacy in 2016. Axion Analytical Labs added Deandra to their faculty in 2019.

Deandra is a member of the Texas Criminal Defense Lawyers Association (Board Member 2011-2016), the Dallas Bar Association, the Collin County Criminal Defense Lawyers Association, and the Dallas Criminal Defense Lawyers Association (Board Member since 2007). In addition, Deandra is a Charter Member and President Emeritus of the DUI Defense Lawyers Association. She is also a member of the American Chemical Society and the American Academy of Forensic Sciences.

D. Timothy Huey

Huey Defense Firm, Columbus, OH



In college and law school, *Tim Huey* focused on constitutional law. He is passionate about the defense of our constitutional rights and, to this day, carries a copy of the United States Constitution in his briefcase. Tim has devoted most of his professional career, over thirty years, towards learning as much about OVI / DUI law and science as possible.

Understanding that knowing the law and the science is useless unless you can explain it to judges and jurors to obtain dismissals and Not Guilty verdicts, Tim has spent a great deal of time studying and teaching the skills needed to be a very successful DUI defense lawyer.

While Mr. Huey focuses on DUI defense, his success in the courtroom and penchant for embracing and mastering cutting edge trial skills has led to his being brought into other types of criminal cases. His involvement has led to successful outcomes and verdicts in cases involving vehicular homicide (involving a judge's daughter), vehicular assault, assault, drug possession, guns charges, unlawful restraint (filed against a trooper) and rape (filed against a teenager who had consensual sex with his girlfriend.)



Meredith Mochel

Practice Areas:

Criminal Defense

Education

Licensed in Tennessee and Georgia

Law School: University of Tennessee, 2003, J.D. cum laude

College: University of the South, 2000, B.A. with honors

Certified Legal Specialties

National Highway Traffic Safety Administration (NHTSA) DWI
Detection and Standardized Field Sobriety Testing



L. Scott Pejic

Pejic Law Group, PC

ASSOCIATIONS

- National College of DUI Defense, Member, 2005-present
- Indiana State Bar Association, Member, 1999-present
- LaPorte County Bar Association, Member, 1999-present

EDUCATION

- Harvard University, Organic Chemistry summer session, 1994
- Valparaiso University, B.S., 1996
- Valparaiso University School of Law, J.D., 1999

CONTINUING EDUCATION

- BAC DataMaster Breath Instrument Training, Certificate of Competency, 2005
- NHTSA/IACP Standardized Field Sobriety Test Training, Practioner Course Certificate of Training, 2005
- NCDD Winter Program, DUI Defense Certificate of Completion, 2009
- 16th Annual Mastering Scientific Evidence, Certificate of Completion, 2009
- BAC DataMaster Breath Instrument Training, National Patent Analytical Systems Certificate of Competency, 2009
- NHTSA/IACT DUI Detection & Standardizing Field Sobriety Testing Instructor, Certificate of Completion, 2009
- EC/IR I Training, Certificate of Completion, 2010
- EC/IR II Training, Certificate of Completion, 2010
- 17th Annual Mastering Scientific Evidence, Certificate of Completion, 2010

SPEAKING ENGAGEMENTS

- NWI Lawyers Inc/Valparaiso School of Law CLEM Seminar, Evidential Breath Testing: The Basics, 2011
- Tavern Owner's Association, Alcohol and the Law, 2011
- Defending the DUI Client, Standardized Field Sobriety Testing, 2012
- Current State of DWI Defense, Standardized Field Sobriety Testing, 2013
- Tavern Owner's Association, Alcohol and the Law, 2013
- DUI: Pre-Trial & Post Trial, Case Law Statutory Update, 2017
- DWI@Trial, Instructions and Pre-trial Motions, 2018



Terrence Rudes has been practicing law for over 40 years in Northwest Ohio. His focus is on DUI and Criminal Law and is considered one of the best in the nation. Terry is above all else a teacher. Whether it is his fellow attorneys, prosecutors, judges, or juries, he crafts his message to persuade his audience to agree with it.

John M. Sandy

Sandy Law Firm, Spirit Lake, IA



John is a native of Spirit Lake, Iowa. In 2010 John graduated from the University of St. Thomas School of Law in downtown Minneapolis, Minnesota. While in law school John served as the Editor-in-Chief of the University of St. Thomas Journal of Law and Public Policy and worked at an exclusive criminal defense firm in downtown Minneapolis. John enjoys litigation and focuses his practice in the areas of criminal defense, personal injury, and family law. John and his wife, Elizabeth, moved back to Spirit Lake in 2010 from the Twin Cities to join Sandy Law Firm. Elizabeth is a local realtor and when not in the courtroom or law office John enjoys spending time with his family and hunting.

EDUCATION:

B.A. University of St. Thomas, 2007; Cum Laude

J.D. University of St. Thomas School of Law, 2010; Dean's Honors

EMPLOYMENT:

Sandy Law Firm, P.C. | Spirit Lake, Iowa | 2014-present, Partner

Minnesota Assistant Public Defender | District 5 | 2014-present

Sandy Law Firm, P.C. | Spirit Lake, Iowa | 2010-2013, Associate

Colich & Associates | Minneapolis, Minnesota | 2009-2010 Boutique Criminal Defense Firm

United States Federal Public Defender | Minneapolis, Minnesota | 2008-2009 Clerk

PROFESSIONAL ASSOCIATIONS:

Iowa State Bar Association

Minnesota State Bar Association

ISBA Criminal Law Section Council Member

Dickinson County Bar Association

Board Director for Lakes Regional Healthcare Foundation

DUI Defense Lawyers Association

ISBA Young Lawyers Division

LICENSURES:

Iowa State Court

Minnesota State Court

U.S. District Court, Northern District of Iowa

U.S. District Court, Southern District of Iowa

Iowa PERB Mediator



Jennifer A. Sturges

Jennifer A. Sturges of ROLFES, GARVEY, WALKER & ROBBINS in Greensburg, Indiana, began practicing law in October 2013 at the age of 45. She first learned about the importance of OWI discovery, and understanding the science of blood draws and chemical testing at the Indiana Public Defender Council's Trial Practice Institute in 2014 to prepare for her first jury trial in October of that year. She's handled over 900 criminal cases in her first 7 years of practice, primarily in Decatur, Rush, and Franklin County, Indiana. She is currently serving her 2nd term on the Indiana Public Defense Counsel board of directors, her 3rd term as president of River Valley Legal Aid board of directors, and is co-founder and president of Speranza, Inc., a non-profit women's recovery residence in Greensburg, Indiana.

Prior to attending law school, she began her professional life in human resources for 11 years starting at the corporate headquarters for Shoe Carnival, Inc. in Evansville, Indiana, and later at Harcourt Industries, Inc., a small manufacturing firm in Milroy, Indiana. Then, she went on to serve 6 years as Executive Director for the Greensburg-Decatur County Chamber of Commerce where she helped bring Honda Manufacturing to Indiana.

She received her undergraduate degree in English Literature from Butler University and her law degree from Indiana University –McKinney.

Cara L. Schaefer Wieneke

Wieneke Law Office, LLC, Brooklyn



After graduating from Indiana University, where she majored in Criminal Justice, Cara attended law school at the Indiana University School of Law in Indianapolis. She was a member of the *Indiana Law Review*, was named to the *Order of Barristers* in the school-wide moot court competition, received an award for her dedication to pro bono service, was included in the *Who's Who: American Law Students* in 2002, and was president of the *Law Students Against Capital Punishment*. She graduated *summa cum laude* in 2003.

As an attorney, Cara served as a judicial law clerk for the Honorable Margret G. Robb on the Court of Appeals of Indiana. After a brief stint at a family law firm, Cara devoted her practice to providing legal representation for criminal defendants at the appellate and post-conviction stages. As a deputy state public defender, she focused exclusively on representing clients during the post-conviction process. After leaving the State Public Defender's Office, Cara opened her own firm. She is currently the managing member of the Wieneke Law Office, LLC, where she handles indigent appellate and post-conviction cases from all over the state.

Cara is admitted to practice law in the State of Indiana, the Northern and Southern Districts of Indiana, and the Supreme Court of the United States. She is the author of the *Sex Offender Pamphlet*, a resource on offender registration issues for criminal defense attorneys. She is a life member of the National Association of Criminal Defense Lawyers and Scribes – the American Society of Legal Writers. She has handled over 200 appeals, participated in 15 oral arguments before Indiana's appellate courts, been a presenter at numerous seminars for criminal defense attorneys, and practiced in nearly every county in the state.

Table of Contents

Section One

Initial Client Intake and Client Control..... Drew Carroll

DUI Client Intake Sheet	1
Fact Sheet	2
Client File Information	3
Investigation Summary	4
Case Checklist Tab.....	5
Case Intake.....	6

Section Two

**Brainstorming: Developing a
Theme of the Case..... Meredith Mochel**

Section Three

Collateral Consequences..... Charles J. Rathburn, Jr.

PowerPoint Presentation

Section Four

Breath Testing, PBT and EBT.....	Mark A. Foster
Alco-Sensor III Unpacking and Checkout Procedure.....	1
Indiana State Department of Toxicology Certification of Record.....	6
Instrument and Operator Certifications	7
Breath Test Operators and Instruments Indiana Administrative Code	8
Article 2.5. Breath Test Operators and Instruments	11
Chemical Tests for Intoxication – Training Course for Breath Test Operators Certification.....	16

Section Five

**Blinding Them With Science: Some
Quick Tips on Blood Test Cases..... Deandra M. Grant**

PowerPoint Presentation

Subpoena Duces Tecum Request – Criminal

Section Six

**The Alphabet Soup: SFST,
ARIDE, and DRE..... Charles J. Rathburn, Jr.**

PowerPoint Presentation

Section Seven

Discovery Basics..... Jennifer A. Sturges

PowerPoint Presentation 1

Forms

FOIA Request – Machine Records.....	22
Medical Disclosure Release.....	24
Motion Demand for Cross Examination.....	26
Motion to Take Depositions at County Expense	27
Motion for Discovery and Request for Rule 404 and 405 Evidence.....	28
<i>Ex Parte</i> Motion for Order Authorizing Expert at Public Expense	33
Motion for <i>Ex Parte</i> Determination of Defendant’s Motion for Appointment of Experts.....	37
Motion to Preserve Evidence	41
Motion for Specific Discovery	45
Notice of Depositions	47
Order Authorizing Taking Depositions at Court Expense.....	48
Order for Discovery and Request for Rule 404 and 405 Evidence.....	49
Order Granting Funds for Expert and Investigative Assistance.....	50
Order Preserving Evidence.....	51
Request for Production of Documents and Things.....	52
Non-Party Request for Production	58
Subpoena.....	63

Section Eight

Plea Negotiations..... L. Scott Pejic

I.	Operation of Vehicle.....	1
II.	Reason for Stop or Contact with Vehicle.....	1
III.	Endangerment.....	1
IV.	Stop.....	2
V.	Personal Contact.....	2
VI.	Intoxication.....	3
VII.	Refusal.....	4
VIII.	License Issues.....	4
IX.	Sentencing.....	4

Section Nine

Voir Dire..... Charles J. Rathburn, Jr.

Section Ten

First Person Opening Statements

Creative – but not too Crazy..... Timothy Huey

What we are told about opening statements	1
Why I used to hate opening statements.....	1
I use to start out something like this	2
The problems Criminal Defense Lawyers face with opening statements	3
Should you just waive opening?	3
What’s a poor Criminal Defense Lawyer to do?	4
Then I met Professor / Dr. Sunwolf.....	4
And then I met Dr. Paul Homoly	5
And then I found 1 st Person Openings	5
First Person Openings That I Do Not Do.....	5
What is a 1 st Person Opening?	6
Creative – But Not Too Crazy-Opening Statements.....	6
Show Me Don’t Tell Me	7
Some Simple Guidelines.....	7
Don’t start out introducing yourself.....	7
Do talk about your client – use her name – tell her story – make them care	8
Don’t start out thanking jurors.....	8
Skip the preambles and preliminaries – come out firing	8
Get their attention – wake them up	9
Go kick some – Arse.....	9

Section Eleven

Cross-Examination..... Matthew A. Dodd

Crossing the Cop – Constructive and Destructive Cross-Examination in DUI Cases

1. Recognizing the complementary approaches of destructive and constructive Cross-examination.....	1
2. Proper preparation leads to powerful cross-examinations.....	1
2.1. Proper preparation requires a thorough knowledge of our case	2
2.2. Proper preparation establishes control	3
3. Proper preparation allows us to listen.....	6
4. Use sequencing to persuasively convey our client’s narrative.....	7
5. Treat the cop as an expert witness.....	8
5.1. Marry the officer to his or her written report	8
5.2. Know the terminology but do not let it confine you.....	9
5.3. Officers will admit facts, but not conclusions.....	10
6. Conclusion.....	11

Section Twelve

Closing Statements..... Terrence R. Rudes

Section Thirteen

Making a Good Record for Appeal..... Cara Schaefer Wieneke

PowerPoint Presentation

Section Fourteen

OVWI License Suspensions 101..... Scott A. DeVries

PowerPoint Presentation

Section Fifteen

Using Experts..... Charles J. Rathburn, Jr.

PowerPoint Presentation

Section Sixteen

Bringing It Together..... John L. Sandy

Section One

Initial Client Intake and Client Control

Drew Carroll
Carroll Law Firm
Charleston, South, Carolina
Drewcarroll@carrolllawfirm.net

Section One

Initial Client Intake and Client Control..... Drew Carroll

DUI Client Intake Sheet..... 1
Fact Sheet..... 2
Client File Information 3
Investigation Summary..... 4
Case Checklist Tab 5
Case Intake..... 6

DUI CLIENT INTAKE SHEET

LEGAL NAME: _____ NICKNAME: _____

HOME PHONE: _____ CELL: _____ WORK: _____

PHYSICAL ADDRESS: _____

MAILING ADDRESS: _____

E-MAIL: _____

AGE: _____ DOB: ____/____/____ WEIGHT: _____ HEIGHT: _____

DRIVER'S LICENSE NUMBER: _____ STATE: _____

ARE YOU AN AMERICAN CITIZEN? YES OR NO (CIRCLE ONE)

WHAT IS YOUR COUNTRY OF BIRTH: _____

DO YOU HAVE A CDL (COMMERCIAL DRIVER'S LICENSE)? YES OR NO (CIRCLE ONE)

SINGLE / MARRIED / SEPARATED / DIVORCE / WIDOWED? (CIRCLE ONE)

ACCIDENT: YES OR NO (CIRCLE ONE) HOW MANY CARS INVOLVED? _____

IF YES, WHAT IS THE NAME OF YOUR INSURANCE COMPANY? _____

AGENT: _____ PHONE #: _____ POLICY #: _____

FIELD SOBRIETY TESTS GIVEN? YES OR NO (CIRCLE ONE) IF YES, CHECK WHICH ONES BELOW:

- Finger to nose _____
- One Leg Stand _____
- Heel to Toe _____
- Follow Pen / HGN _____
- Count Backwards _____
- Alphabet _____
- Finger Counting _____
- Stand Still- Look Up/Rhomberg _____
- Other: _____

DID YOU HAVE ANYONE IN YOUR CAR WITH YOU? YES OR NO (CIRCLE ONE)

NAME OF PERSON: _____ RELATIONSHIP: _____

WERE THERE OTHER OFFICERS ON THE ROADSIDE? YES OR NO (CIRCLE ONE)

DID YOU TAKE THE BREATH TEST? YES OR NO (CIRCLE ONE)

DID YOU TAKE A BLOOD TEST? YES OR NO (CIRCLE ONE)

DID YOU TAKE A URINE TEST? YES OR NO (CIRCLE ONE)

DID YOU RECEIVE ANY OTHER TICKETS? (i.e. speeding, no seat belt, open container)

IF YES, LIST HERE: _____

WERE YOU VIDEO RECORDED ON ROADSIDE? YES OR NO (CIRCLE ONE)

WERE YOU VIDEO RECORDED AT THE JAIL? YES OR NO (CIRCLE ONE)

HOW DID YOU KNOW TO CONTACT CARROLL LAW FIRM? _____

FACT SHEET

Client Name: _____

Date of Birth: _____ Age: _____ SS#: _____ - _____ - _____

Height: _____ Weight: _____ Marital Status: S / M / SEP / D / W

DOA: _____ Day: _____ Location: _____

Roadside Video: Yes / No Roadblock: Yes / No

Violation: _____ A.M. / P.M. Arrest: _____ A.M. / P.M.

Other Charges: _____

Arresting Officer: _____ Agency: _____

Field Sobriety Tests: Yes / No

Results:

(a) _____

(b) _____

(c) _____

Witness for State: (a) _____

(b) _____

Witness for Defense: (a) _____

(b) _____

Observation Time: _____ Datamaster Serial #: _____

Breath Test: Yes / No / Refusal / Incomplete Reading: _____

Time of Test / Refusal: _____

Operator: _____ Agency: _____

Blood Draw: Yes / No Hospital: _____ Urine Test: Yes / No

Trial Date: _____ Judge: _____

Accident: Yes / No Number of Vehicles Involved: _____

Insurance Company for Defendant: _____

Agent / Phone #: _____ Policy #: _____

Insurance Company for Other Party: _____

Agent / Phone #: _____ Policy #: _____

Bond Information: PR / Cash / Surety Bondsman: _____

Referred by: _____

CLIENT FILE INFORMATION

Our Client: _____

Date of Interview: _____ Interview Attorney: _____

Mailing Address: _____

Street: _____

City: _____ Zip: _____

Phone: Home: (____) _____ Cell: (____) _____

Phone: Work: (____) _____ Okay to call? Y / N

Alternate Contact: (____) _____ Name: _____

Email Address: _____

Charge	Officer	Agency	Court	DOA
--------	---------	--------	-------	-----

THINGS TO DO:

_____ Order a 10-year driving record

_____ Order an incident report from _____

_____ Order a copy of the roadside video _____

_____ Order accident report from _____

_____ Prepare a letter for jury trial to _____

Mail _____ Hand Carry _____ Fax _____

_____ Prepare letter for Preliminary Hearing to _____

_____ Send letter to Solicitor _____

_____ Prepare RULE 5 Motion _____

_____ RETAINER DUE NO LATER THAN: _____

ATTORNEY NOTES: _____

CLIENT: _____

INVESTIGATION SUMMARY

GOOD POINTS (Pluses)

1. _____
2. _____
3. _____
4. _____
5. _____
6. _____
7. _____
8. _____
9. _____
10. _____
11. _____
12. _____
13. _____
14. _____

BAD POINTS (Minuses)

1. _____
2. _____
3. _____
4. _____
5. _____
6. _____
7. _____
8. _____
9. _____
10. _____
11. _____
12. _____
13. _____
14. _____

Case #: 200145 (2020-0911)		Case Type: DUI Class: LIT	DOI: 12/22/2020 Assigned: KELLIE	Lim Date: 1/1/2021 Date Opened: 12/28/2020	Page 1 of 1			
1/12/2021 01:43 PM		Case Checklist Tab						
Code	Description	Status	Staff	#	Due Date	S/R	Phase	Lim
111			KELLIE		00/00/0000	Single		
LIM	Preliminary Hearing Deadline	Open	KELLIE		01/01/2021	Single		!
LW1	Preliminary Hearing Deadline Warning (3 days)	N/A	KELLIE		00/00/0000	Single		
LX2	IC Hearing Req Deadline	Open	KELLIE		01/21/2021	Single		!
LX3	IC Hearing Req Deadline Warning (15 days)	Done	KELLIE		01/08/2021	Single		
MED	Request Medical Records		KELLIE	0 *	00/00/0000	Single		
MIS	misc		KELLIE		00/00/0000	Single		
SMT	Statement for Travel		KELLIE	0 *	00/00/0000	Single		
Z11			KELLIE		00/00/0000	Single		
AA0	Fee Agreement /Retainer Paid	Done	KELLIE		01/08/2021	Single	1	
AA1	>Req Prelim Hearing	N/A	KELLIE	0 *	00/00/0000	Single	1	
AA8	File Label	Done	KELLIE	0 *	01/08/2021	Single	1	
AA9	Firm's Commitments	N/A	KELLIE	0 *	00/00/0000	Single	1	
AC1	>Req Jury Trial	Done	KELLIE	0 *	01/08/2021	Single	1	
AC2	Confirm Receipt of JTR	Done	KELLIE		01/08/2021	Single	1	
AD5	IC Hearing Requested? Def signed NOS (5 day warn)	Done	KELLIE		01/08/2021	Single	1	
AD6	NOS IC faxed/confirm or by hand (5 day warn)	N/A	KELLIE	0 *	00/00/0000	Single	1	
AD7	>Request SCDMVH Subpoena	Done	KELLIE		01/08/2021	Single	1	
AD8	Serve Subpoena (Resp. Due Date)	Open	KELLIE		03/19/2021	Single	1	
AF1	>Req Accident Rpt	N/A	KELLIE	0 *	00/00/0000	Single	1	
AF5	>Req 10 year Driving Rec	N/A	KELLIE		00/00/0000	Single	1	
AF7	>Req Incident/arrest/booking Rpts	Open	KELLIE	0 *	12/28/2020	Single	1	
AG0	>Datamaster Video?	Done	KELLIE		01/08/2021	Single	1	
AG1	>Download from SLED Website	Done	KELLIE		01/08/2021	Single	1	
AG2	Copy DM to disc and in file	Done	KELLIE		01/08/2021	Single	1	
AG3	>Strip DMAudio for Transcriptionist	N/A	KELLIE		00/00/0000	Single	1	
AG5	>Roadside Video?	Open	KELLIE		12/28/2020	Single	1	
AH0	>Warning - Video(s) Rec'd??	Open	KELLIE		03/19/2021	Single	1	
AI1	>Send IV Tape to Transcriptionist	N/A	KELLIE		00/00/0000	Single	1	
AJ1	Rec'd Questionnaire from Def	Open	KELLIE		01/11/2021	Single	1	
AK1	>Prepare Brady (Docs 126)	Open	KELLIE		01/18/2021	Single	1	
AE1	>Rec'd/Confirm IC Hearing Date - (Enter on Case Tab)	Open	KELLIE		01/22/2021	Single	2	
AE3	IC Rescinded?	Open	KELLIE		04/28/2021	Single	2	
AE4	>IC Sustained?	Open	KELLIE		04/28/2021	Single	2	
CA1	>No Longer Rep?		KELLIE		00/00/0000	Single	2	
AP3	Fee Due - 3 Month Reminder Letter	Open	KELLIE	0 *	03/28/2021	Single	3	
AP6	Fee Due - 6 Month Reminder Letter	Open	KELLIE	0 *	06/26/2021	Single	3	
BA0	>Rec'd/Confirm Jury Trial Hearing Date - (Enter on Case Tab)	Open	KELLIE		07/07/2021	Single	3	

Case Intake - (MFN 1/6/2021 03:53 pm)

Case Type:

Prefix:

First Name:

MI:

Last Name:

Suffix:

ID Code:

Age (Party):

Home Address:

Home City:

Home State:

Home Zipcode:

Home County:

Home Country:

Mobile Phone: () -

Home Phone: () -

Business Phone: () -

Home Email:

Date of Incident: 00/00/0000

Synopsis:

AO Agency (Tab6):

AO Agency Abbreviated (Tab6):

Arresting Officer (Tab6):

DM Operator (Tab6):

DM OP Agency (Tab6):

Date of Arrest (Tab6): 00/00/0000

Day of Arrest (Tab6):

Time of Arrest (Tab6): 00:00 AM

Charge 1 (Tab6):

Charge 2 (Tab6):

Charge 3 (Tab6):

Charge 4 (Tab6):

Other Tickets/Charges (Tab6):

Court (Tab3):

Court Abbreviation (Tab3):

Court Date (Tab3): 00/00/0000

Court Time (Tab3): 00:00 AM

Where Stopped (Tab6):

Why Stopped (Tab6):

Roadblock (Tab6):

Accident (Tab6):

No. of Vehicles (Tab6):

DataMaster (Tab6):

DM Reading (Tab6):

IC Hearing? (Tab6):

Blood Test Requested (Tab6):

DL # (Tab6):

Blood Urine Results (Tab6):

Hospital (Tab6):

Number - State

Bond (Tab6):

How Much (Tab6):

Bail Bondsman (Tab6):

Comments:

Do we want this case? (Case):

Date of Sign up (Case): 00/00/0000

Atty (Tab6):

Appt Date (Tab6): 00/00/0000

Time (Tab6): 00:00 AM

Staff 1:

Referred By:

Referral Note:

Referred To:

Rathburn Law Office
Charles James Rathburn Jr.

7901 Blue Jay Lane, F

Attorney at Law

317-344-9009 (O)

Indianapolis, IN 46077

Chuck@Rathburnlaw.com

260-433-2881 (C)

Re: State of Indiana v.
Case No.

Dear

CONFIDENTIAL INFORMATION

This document is being prepared in anticipation of legal representation. There is no waiver of the attorney client privilege and in fact it is asserted as to all comments placed in this document and attachments.

Please complete every part of this form that applies to you. Answer the questions to the best of your ability. The sooner you complete this form, the better your memory will be about the incident and all the important facts surrounding your case. Your detailed answers to these questions will be the primary source of information used to prepare your defense.

All personal data will be kept confidential. Take sufficient time to complete this questionnaire. You should use extra sheets of paper to supplement your responses whenever necessary, however, don't delay in returning the questionnaire since time can be an important factor in your case.

[1] Basic

1. Full Legal Name: _____
2. Please call me: _____
3. Other names I've used: _____
4. Birth Date: _____ / / _____ Age: _____

5. Place of birth: _____
6. Are you a United States Citizen? Yes, No (please circle one)
7. What is your Social Security number? _____ / _____ / _____
8. What is your drivers license number? _____
9. What is the state of issue? _____
10. Are there restrictions? Yes, No (please circle one)
11. Please describe the restrictions. _____
12. Date of Issue: _____ / _____ / _____ Expiration: _____ / _____ / _____
13. Are you married, single, separated, divorced, widowed, or engaged (Please circle one)?
14. If married, what is your spouse's name? _____
15. How long have you been married? _____
16. How many children do you have? _____
17. What are their names?
 1. Name: _____ Birth Date: _____ / _____ / _____
 2. Name: _____ Birth Date: _____ / _____ / _____
 3. Name: _____ Birth Date: _____ / _____ / _____
 4. Name: _____ Birth Date: _____ / _____ / _____
 5. Name: _____ Birth Date: _____ / _____ / _____
 6. Name: _____ Birth Date: _____ / _____ / _____

[2] Contact Information

18. Home Address: _____

19. City, State, ZIP: _____

20. Is it a house, town home, condominium, or apartment (Circle one)?

21. Do you own, rent (Circle one)?

22. If you do not want to use that address to receive correspondence from me, what other mailing address should I use for mail in this case?

1. Mailing Address: _____

2. City, State, ZIP: _____

23. Home Phone: _____ - _____ - _____

24. Work Phone: _____ - _____ - _____

25. Cell Phone: _____ - _____ - _____

26. E-mail address: _____

27. Emergency Contact Name: _____

28. Emergency Contact telephone number: _____ - _____ - _____

29. Emergency Contact E-Mail Address: _____

[3] Employment

30. Employer: _____

31. Employer Address: _____

32. Directions to and from work:

33. Job Title: _____

34. Duties: _____

35. Length of Employment: _____

36. Annual Income: _____

37. Employment previous five years if different from the employer listed above:

38. Length of employment for each:

39. Are there any problems with your present employment? Yes, No (Circle one)

40. Describe: _____

41. Is a vehicle required for your employment? Yes, No (Circle one)

42. Would you be fired, restructured in duties, passed over for a promotion or demoted:

1. If convicted of an OWI? Yes, No (Circle one)
2. If you are driving privileges were to be suspended? Yes, No (Circle one)
3. If your driving privileges were suspended but you had a "work permit"? Yes, No (Circle one)

43. Do you drive a company owned vehicle? Yes, No (Circle one)

44. Does your company's insurance carrier insure you? Yes, No (Circle one)

45. How many miles do you drive to/from/as part of work on a routine day? _____

46. How many total miles do you drive each week (business and personal)? _____

47. Is public transportation readily available to you? Yes, No (Circle one)

48. Do you have a security clearance issues at work? Yes, No (Circle one)

[4] Health

49. What was your weight at time of arrest: _____

50. What was your height at time of arrest: _____

51. What are your general health conditions: _____

52. Do you have any physical disabilities or prior surgeries? Yes, No (Circle one)

53. If so, please describe:

54. Do you take any prescribed medications on a daily or periodic basis? Yes, No
(Circle one)

55. If so, please describe the medication, dosage and frequency.

56. If you have specific health problems, please describe them in detail.

57. Do you wear dentures or bridge work? Yes, No (Circle one)

58. Do you wear braces? Yes, No (Circle one)

59. Do you have mouth jewelry? Yes, No (Circle one)

60. Do you have any dental problems? Yes, No (Circle one)

61. If you answered yes to any question from 57 through 60, please describe in detail those yes answers.

[5] Effects of a Possible Conviction

62. What effect would a conviction have on you personally?

63. Would a conviction have an effect on your marriage or relationship? Yes, No
(Circle one)

64. If so, please describe: _____

65. Do you have to prove the ability to be insured in order to drive a company vehicle? Yes, No (Circle one)

66. Do you ever need to rent a vehicle for personal or business use? Yes, No (Circle one)

67. If your answer was yes and you're convicted of an OWI or your license were suspended, would the denial of access to a rental vehicle affect you or your business? Yes, No (Circle one)

68. If yes, please describe:

69. In what other ways would an OWI conviction or license suspension affect your employment or professional standing?

70. Are you involved in any cases (divorce, child custody, business negotiation, etc.) where an OWI conviction or license suspension might affect a resolution in your favor? Yes, No (Circle one)

71. If yes, please describe:

72. Are you a member of a board of directors for any entity whether a public company, a private company or a not-for-profit entity? Yes, No (Circle one)

73. If you are not a United States Citizen, what is your legal status? Are you in the United States illegally or on any type of visa or temporary work permits status? Yes, No (Circle one)

74. If so, please give the details of your entry into the United States.

75. Do you ever need to travel outside of the continental United States? Yes, No
(Circle one)

76. To what countries do you regularly travel? _____

77. Are you aware of any limitation on your ability to enter those countries if you
are convicted of an alcohol driving offense? Yes, No (Circle one)

78. What would be the restriction? _____

[6] Events the Day of Arrest

79. Date of arrest: _____

80. Time of arrest: _____

81. Alcohol driving offense (1st, 2nd, 3rd etc.) in your lifetime? _____

82. Next court date: _____

83. Court where charged: _____

84. Type of test taken: Blood, Breath, Urine, Refused (Circle One)

85. Alleged BAC: _____

86. During the 24-hour period preceding your arrest, describe your activities, in
great detail, from the time you went to bed the night before until you took your
last chemical test or refused the chemical test for the last time (list them in
chronological order). If you were working around chemicals, paints or solvents,
please be sure to tell me what those chemicals were. You should use extra
sheets of paper if necessary. Please tell me who you were with, what you had to
eat, what you had to drink, at what time the drinks were consumed, the size of
the drinks you had and any other information you believe would be helpful and
my understanding the events of that day.

87. With whom did you talk during the last three hours before your arrest?

1. Name: _____

1. Address: _____

2. Telephone Number: _____

3. Relationship to you: _____

2. Name: _____

1. Address: _____

2. Telephone Number: _____

3. Relationship to you: _____

3. Name: _____

1. Address: _____

2. Telephone Number: _____

3. Relationship to you: _____

4. Name: _____

1. Address: _____

2. Telephone Number: _____

3. Relationship to you: _____

5. Name: _____

1. Address: _____

2. Telephone Number: _____

3. Relationship to you: _____

88. Was anyone with you in the vehicle when you were arrested? Yes, No (Circle one)

1. If so, please list their names:

1. Name: _____

1. Address: _____

2. Telephone Number: _____

3. Relationship to you: _____

4. What was their condition: sober, drinking, impaired, passed out (Circle one)

2. Name: _____

1. Address: _____

2. Telephone Number: _____

3. Relationship to you: _____

4. What was their condition: sober, drinking, impaired, passed out (Circle one)

3. Name: _____

1. Address: _____

2. Telephone Number: _____

3. Relationship to you: _____

4. What was their condition: sober, drinking, impaired, passed out (Circle one)

4. Name: _____

1. Address: _____

2. Telephone Number: _____

3. Relationship to you: _____

4. What was their condition: sober, drinking, impaired, passed out (Circle one)

89. Did anyone (including those listed above) observe or overhear any portion or aspect of the police stop or arrest? Yes, No (Circle one)

90. If so, please list them:

1. Name: _____
2. Name: _____
3. Name: _____
4. Name: _____

91. Did the police allow anyone with you to drive the vehicle from the scene, or to move the vehicle? Yes, No (Circle one)

1. If yes, who? _____

92. If you know, describe what screening for impairment or ability to drive the officer required from the person prior to allowing the person to operate the vehicle.

93. Describe the traffic conditions you encountered on the roadway at the time of your arrest:

94. Please describe the weather conditions:

[7] Roadblocks

95. Was the arrest as a result of a roadblock or license check? Yes, No (Circle one)

96. How far ahead did you see it?

97. How long did you wait in line before getting to an officer? _____

98. Were you given any advance notice of the roadblock (i.e. was the roadblock well marked invisible from flares, fluorescent cones or the police lights)? Yes, No (Circle one)

1. Please give the details:

99. How many police cars did you see? _____

100. Were their emergency lights activated? Yes, No, Some were (Circle one)

101. How many police officers did you see at the roadblock location?

[8] Driver's License and Initial Questioning by Officer

102. Were you complying with the restrictions on your driver's license when you were stopped? Yes, No (Circle one)

103. Where was your license when he first began to look for it?

104. If you did not have your driver's license in your possession at the time of the stop, please give details about where your driver's license was and why it was not in your possession at the time of the stop

105. What were the officer's first words to you when the officer first encountered you? Please be exact.

106. What did you say in response to the question?

107. Did the officer comment on your breath "smelling like alcohol" or similar words? Yes, No, I don't recall (Circle one)

108. Were any containers of alcohol visible to the officer as the officer observed from the outside of your vehicle? Yes, No, I'm not certain (Circle one)

109. If so, what were they, were they full, partially full, unopened or empty?
(Circle)
110. Did the officer confiscate these containers for use as evidence against you in this case? Yes, No, I am not certain (Circle one)
111. Had you attempted to mask the smell of your breath? Yes, No (Circle one)
112. If yes, how and what did you use?

113. Were any other suspicious or illegal items visible from outside your car when the police officer approached your vehicle? Yes, No (Circle one)
114. If yes, what and where were they?

[9] Insurance and Registration

115. In whose name is the vehicle registered? _____
116. In what state is the vehicle registered? _____
117. Did the arresting officer ask for the vehicle registration? Yes, No (Circle one)
118. Did you produce the vehicle registration? Yes, No, (Circle one)
119. Did the arresting officer ask for proof of insurance? Yes, No (Circle one)
120. Did you produce proof of insurance? Yes, No, I did not have insurance (Circle one)
121. In what state is the vehicle insured? _____
122. In whose name is the vehicle insured? _____
123. What is the name of the insurance company? _____
124. What is the policy number? _____

[10] Field Sobriety Tests or Roadside Sobriety Tests

125. Did the officer direct you or request you to perform any coordination or roadside sobriety tests? Yes, No (Circle one)
126. How long after getting out of your vehicle were you first requested or told to perform these tests? _____

127. What was the exact wording used by the officer in making this request or demand?

128. Did the officer ask you any preliminary questions about your physical limitations, injuries, impairments, present illnesses, or medications before beginning to test you? Yes, No (Circle one)

129. Before you began doing any of the field sobriety tests, were you under the impression you had the right to refuse to do those tests? Yes, No, (Circle one)

130. If you did not think you had the right to refuse to do those tests, what caused you to have that impression? _____

131. Before you began doing any of the field sobriety tests, were you under the impression you had the right to leave? Yes, No, (Circle one)

132. If you did not think you had the right to leave the scene, what caused you to have that impression?

133. Was there anything about this traffic stop that led you to believe that this was not going to be a brief encounter with the police but that you were going to be detained for a more prolonged period of time? Yes, No (Circle one)

134. If yes, please give the specific facts a reason for your belief:

135. If you did not think you were free to leave, what questions did you ask and how did the officer respond?

136. Describe the shoes you were wearing (if you were wearing any shoes) during the field sobriety tests:

137. Were there any street lights (or other lights) above or near your location to illuminate the area? Yes, No (Circle one)

138. Describe the lighting in the area:

139. Before doing any or all of these field sobriety test, did you ask to speak with an attorney? Yes, No (Circle one)

140. How did the officer respond to this request? _____

141. Where were the lights in relation to where you were taking the test including automobile headlights? Please diagram on a separate sheet of paper.

142. What were the agility or coordination tests that you performed in the order they were given and how you believe you did?

1. Type of test: _____

1. Officer's score: _____

2. How did you think you did? _____

2. Type of test: _____

1. Officer's score: _____

2. How did you think you did? _____

3. Type of test: _____

1. Officer's score: _____

2. How did you think you did? _____

4. Type of test: _____

1. Officer's score: _____

2. How did you think you did? _____

5. Type of test: _____

1. Officer's score: _____

2. How did you think you did? _____
6. Type of test: _____
1. Officer's score: _____
2. How did you think you did? _____
143. How were the road, shoulder, or parking lot conditions where the tests were given? (Circle the appropriate descriptions) level, sloping, smooth, rocky, wet, dry, grassy, dirt, holes, ruts, wide, narrow, windy, calm, visible line to walk, no visible line to walk, raining, snowing, hot, cold, light traffic, moderate traffic, heavy traffic, no traffic, glasses on, glasses off, contact lenses on, contact lenses often, I was nervous, I was crying, I was angry, I was matter-of-fact.
144. If there were any distractions, please list them:
- _____
- _____
- _____
145. Were the officer's emergency lights still flashing while the tests were being conducted? Yes, No (Circle one)
146. Did any people gather to watch? Yes, No (Circle one)
147. If so, how many? _____
148. What was the approximate temperature? _____
149. What was the humidity? High, low, I don't recall (Circle one)
150. Was there moonlight? Yes, No, I don't recall (Circle one)
151. If you were asked to recite the alphabet (or part of the alphabet), when was the last time you said the alphabet before the time of your arrest? _____
152. Did the officer recite the alphabet in its entirety before asking you to do it? Yes, No, I did not have to say the alphabet (Circle one)
153. On any other verbal tasks that you were asked to perform, such as counting backwards, had you ever attempted to do that before being asked to perform that test at the time of your arrests? Yes, No, I was not asked to count (Circle one)
154. If so, when was the last time you did this? _____

155. Were you shaking when you were being asked to perform these tasks? Yes, No, I don't recall (Circle one)

156. Did the officer demonstrate any or all of these tasks before you did them? Yes, No, some but not all (Circle one)

157. Did the officer advise you what you had to do on each test in order to pass it? Yes, No, some but not all (Circle one)

158. Why did you perform these tasks?

159. Did the officer ever indicate to you that these tasks were 100% voluntary or optional? Yes, No (Circle one)

160. Did the officer ever make any statement or promise to you that if you passed these tests that the officer would let you go home? Yes, No, I did not perform these tasks (Circle one)

161. Did the officer ever indicate, in any manner or fashion, that not performing these tasks would either cause you to lose your license, be subjected to immediate arrest or be convicted of an OWI for refusing? Yes, No (Circle one)

162. Did you blow into a handheld alcohol test machine at the scene of the stop? Yes, No, I don't recall (Circle one)

163. If so, were you permitted to see the digital reading that the machine indicated? Yes, No (Circle one)

164. Did the officer ever indicate, in any manner or fashion, that not blowing into the handheld alcohol test machine would either cause you to lose your license, be subjected to immediate arrest or be convicted of an OWI for refusing? Yes, No (Circle one)

165. What did the officers say about the test result?

166. Were you asked or required to blow more than one time into the hand-held breath machine? Yes, No, I didn't blow into the handheld device (circle one)

167. Did the officer ever make any statement or promise to you that if you passed the hand-held breath test, that the officer would let you go home? Yes, No (Circle one)

168. Did the officer ever advise you that the hand-held test is voluntary and that you had the right to refuse to take the hand-held test without any penalty in court or loss of your driving privileges? Yes, No (Circle one)

169. How soon after the stop to the officer ask you to blow into the handheld machine? _____

170. In relation to the other physical agility tests, at what point was the hand-held breath test given to you? Before, Midway, After, Not at all (Circle one)

171. Did you physically or vocally resist or interfere with the officer's arrest procedures when you were arrested? Yes, No (Circle one)

172. What did you do or say? _____

173. Did anyone else physically or vocally attempt to interfere with the officer's arrest procedures when you were arrested? Yes, No (Circle one)

174. What did they do or say?

175. Did you ever advise any of the officers with whom you came into contact, at the arrest scene, at the testing site, or at the jail, that you wanted an independent test of your blood, breath or urine? Yes, No (Circle one)

176. Who did you ask and how did they respond?

[11] Arrest

177. Were you ever told you were under arrest or similar wording to indicate that you were going to jail? Yes, No (Circle one)

178. If so, when and by whom?

179. Were you told exactly why you were being arrested? Yes, No (Circle one)

180. What were you told?

181. Did the officer advised you of all offenses for which you were being charged?
Yes, No (Circle one)

182. Did the officer charge you with additional traffic violations that he failed to mention when he initially stopped you? Yes, No (Circle one)

183. What were those charges?

184. What was the last thing the officer said or did before he told you that you were under arrest?

[12] Implied Consent

185. Assuming that you were read or given your implied consent rights at the scene of the stop, did the officer say or read the following language?

“I have probable cause to believe that you have operated a vehicle while under the influence of intoxicating liquor or drugs. I must offer you a chemical test for intoxication to be given by a qualified chemical test technician. If you refuse to submit to the test, your license to drive will be suspended for one year. Will you submit to the chemical test?” Yes, No, Not applicable (Circle One)

186. When you heard these words, did you understand these warnings and penalties and consequence as stated by the officer? Yes, No, not applicable (Circle one)

187. What was your interpretation of the words the officer read to you?

188. At the time the officer read these warnings to you did the officer tell you or otherwise let you know that you were under arrest for operating a vehicle while intoxicated? Yes, No, not applicable (Circle one)

189. What was your understanding of the words the officer read to you?

190. Did you realize that you had an absolute right to refuse to take the state administered test? Yes, No (Circle one)

191. Did the officer speed read or hurry the reading of these warnings? Yes, No, not applicable (Circle one)

192. If you believed then or if you believe now that the reading of these advisement was deficient or misleading in any way please give the details of why you have this belief.

193. Did the officers say anything beyond the implied consent warning to elaborate or explain your obligation to submit to the chemical test or the penalties which would befall you if you refused to submit to the state's test? Yes, No (circle one)

194. If yes, please provide the wording used by the officer.

195. What were you doing in what was going on around you at the time the officer was giving you these implied consent warnings?

196. Did you ever advise any of the officers with whom you came into contact at the arrest scene, at the testing site at the jail, or any other time or place that you wanted an independent test of your blood, breath, or urine? Yes, No (Circle one)

197. If you did, please give the exact details and time that this was done.

[13] Miranda Warnings

Please do not confuse this warning with the implied consent rights in the previous section.

198. Were you given your Miranda warnings at any time? (You have the right to remain silent. You have the right to an attorney. If you want an attorney and cannot afford an attorney, the court will appoint one for you. Anything you say or do can be held against you.) Yes, No (Circle one)

199. If you were read those rights, who read those rights to you, where were they read to you and when were they read to you?

[14] Conversation after Arrest

200. When were you told you were under arrest? _____

201. At what point did you feel you were not free to leave? _____

202. What did the officers say or ask you first after you were arrested?

203. Precisely what was asked next and by whom?

204. Were you struck, punched, injured, verbally abused or roughed up by any of the officers when you were arrested? Yes, No (Circle one)

205. If so, please describe in detail what happened.

[15] Other People Present

206. Were other people present during the arrest process or during the time the field sobriety tests were being given to you that were not previously mentioned?

Yes, No (Circle one)

1. If so, who were they?

1. Name: _____

1. Address: _____

2. Telephone Number: _____

3. Relationship to you: _____

2. Name: _____

1. Address: _____

2. Telephone Number: _____

3. Relationship to you: _____

3. Name: _____

1. Address: _____

2. Telephone Number: _____

3. Relationship to you: _____

4. Name: _____

1. Address: _____

2. Telephone Number: _____

3. Relationship to you: _____

5. Name: _____

1. Address: _____

2. Telephone Number: _____

3. Relationship to you: _____

207. If you do not know their names, please describe each of them to the best of your ability and where and when you encountered this person.

[16] Car Towing or Removal from Scene

Complete the Applicable Parts of This Section

208. What is the make, model, and year of the vehicle:

209. What happened to the vehicle? _____
210. If it was towed, what is the name of the towing service? _____
211. Did you hear the officer call for the tow truck? Yes, No (Circle one)
212. Were you present when the tow truck arrived? Yes, No (Circle one)
213. Were you present when your vehicle was towed? Yes, No (Circle one)
214. Did the tow truck operator observe any of the field sobriety tasks? Yes, No,
I do not know (Circle one)
215. Did you speak to the tow truck operator? Yes, No, I do not recall (Circle one)
216. Did you get a copy of the tow truck operator's report? Yes, No (Circle one)
217. Did you have to sign a permission form? Yes, No (Circle one)
218. Was your vehicle searched? Yes, No (Circle one)
219. Were you present? Yes, No (Circle one)
220. Was anything removed or missing from your vehicle or was it ransacked?
Yes, No (Circle one)
221. If so, describe the condition of your vehicle in detail.

222. If you had a cellular telephone available, did the officer ever let you or offer to
call someone to get your vehicle rather than have the vehicle towed? Yes No
(Circle one).

223. How long after the officer stopped you, did the tow truck arrive?

224. Did the arresting officers stay at the scene until the vehicle was towed away?

Yes, No (Circle one)

[17] At Station, Jail, Testing Facility

225. Did you see a clock when you arrived? Yes, No (Circle one)

226. What was the time? _____

227. How many officers did you see? _____

228. Did you have a conversation with anyone at the police station, jail or testing facility? Yes, No (Circle one)

229. With whom did you have this conversation and what did you discuss?

230. Before you took the state's breath test, were you asked any health or environmental contamination questions, such as: "Are you taking any medication? Do you have any false teeth, a bridge or anything foreign in your mouth? Have you been around any pain vapors or other chemicals today?" Yes, No (Circle one)

231. If so, what were you asked and what was your response to these questions?

232. Were you searched? Yes, No (Circle one)

233. Were you fingerprinted? Yes, No (Circle one)

234. Are you aware if you were video recorded at any point in your contact with the police officer? Yes, No (Circle one)

235. If so, where do you think these video recordings were made?

236. Did you sign any papers? Yes, No (Circle one)

237. If so, what were the papers that you signed?

238. Did the arresting officer make any statements about the circumstances of your arrest, about your alcohol test reading or anything else of significance to the other officers? Yes, No (Circle one)

239. If yes, what were those statements?

240. Did the arresting officer or any other officer ask you about prior OWI offenses or tell you that your computer record showed prior OWIs? Yes, No (Circle one)

241. Did you say anything to the officer about prior OWIs without being asked about this? Yes, No (Circle one)

242. If yes, please give the details of what you said.

243. Was the arresting officer physically present in the room where you were taking the chemical test and did the officer keep you in view the entire time that you were in the testing room? Yes, No, I don't remember (Circle one)

244. Please explain your answer.

245. Did the arresting officer or any other officer in the testing room have their portable radios or cellular telephones on their belt or shoulder when they were in the testing room? Yes, No, uncertain (Circle one)

246. While you were in the room where the testing was being conducted, did you ever hear or observe an officer use radio equipment in communicating with the dispatcher or other officers? Yes, No (Circle one)

247. If yes please give details of what you observed.

248. Was anyone smoking in the testing room prior to or during the time you were being tested? Yes, No, I do not know (Circle one)

249. Did any officer make comments to the arresting officer, to the testing officer, or to you? Yes, No, (Circle one)

250. If so, what did they say?

251. Did you ever ask to use the restroom? Yes, No (Circle one)

252. Were you granted permission to go to the restroom? Yes, No (Circle one)

253. If yes, how long after you asked were you granted that permission?

254. Were you permitted to make a telephone call? Yes, No (Circle one)

255. If yes, when were you permitted to make this telephone call?

256. Who did you call? _____

257. Were you allowed to smoke, drink water, or put anything into your mouth in the 15 minutes immediately preceding taking the chemical test? Yes, No, I don't remember (Circle one)

258. If so, please give the details of what you were allowed to place into your mouth.

259. Did you belch, burp, vomit or regurgitate within 15 minutes before the test was administered? Yes, No, I don't remember (Circle one)

260. Was the officer aware of this? Yes, No (Circle one)

261. What did the officers say to you?

[18] Breath Tests

The next two section should be completed by you only if you were administered a breath test at a police station after your arrest. If you were not taken to a breath machine and asked to blow into the machine, skip the sections.

262. What was the breath test operator's name? _____

263. For what agency did he work? _____

264. Was the operator present when you arrived? Yes, No, I don't know (Circle one)

265. When did the breath test operator arrive? _____

266. Did you see the operator turn on the machine? Yes, No (Circle one)

267. Did you ever hear the breath test machine give any computer-generated beeps or chirps, before, during or after your testing? Yes, No, I do not know (Circle one)

268. If yes, what do you recall hearing and when did you hear it?

269. When did the testing officer begin observing you prior to the testing?

270. Was this observation continuous and uninterrupted? Yes, No, I do not recall (circle one).

271. Were you ever left alone after the police stopped you on the roadway and before you took the chemical breath test? Yes, No (circle one)

272. When, where and for how long do you believe you were left alone?

273. Where were the officers during this time?

274. How many times did you blow into the machine? _____

275. How many tickets were printed? _____

276. Was anyone else present when you submitted to the chemical breath test?
Yes, No (Circle one)

277. Please give their name, if you do not know their name, please describe them.

278. Described the approximate room temperature or you took your breath test.
Cold, cool, normal, warm, hot (Circle one)

279. Describes the lighting conditions in the room were you took your breath test.
Bright, normal, dim, dark (Circle one)

280. Did anyone look or ask to look inside your mouth before you were tested?
Yes, No (choose one)

281. At the breath testing location, did anyone ask you if you had been around paint vapors, volatile chemicals or solvents during the day before you were stopped? Yes, No (Circle one)

282. Did you have a fever or elevated body temperature when you were tested?
Yes, No (Circle one)

283. If so, was the elevated body temperature from dancing, exercising, sunbathing, outdoor activity, menstrual cycle (for women) or other exertion? Yes, No (Circle one)

284. Please indicate the activity.

285. Are you a smoker? Yes, No (Circle one)

286. Did you have difficulty performing the breath test? Yes, No (Circle one)

287. If so, give details of the difficulty you experienced.

288. If you were required to give a second breath sample on the official breath test machine, not the handheld test, was the mouthpiece changed each time? Yes, No, I do not recall (circle one)

289. In the 12 hours immediately before being tested on the breath machine, were you exposed to solvents, paints, cleaning solutions, active mineral spirits of any kind, any nail care products, or any caustic or aromatic products? Yes, No (Circle one)

290. If so, describe the products.

[19] Conversation With Breath Test Operator

291. Did the breath test operator ask you any questions? Yes, No (Circle one)

292. If so, what were you asked?.

293. Did the breath test operator give you any instructions, explain how the machine worked, or how you were to blow into the machine? Yes, No (Circle one)

294. If so, what were the instructions?

295. Did the breath test operator ever show you the officer's permit to operate the machine? Yes, No (Circle one)

296. Was the arresting officer present and observing all procedures at all times during the testing process? Yes, No, it was the same officer, I can't recall (Circle one)

297. When you gave the breath sample, was your body in an upright position perpendicular to the floor, or were you leaning forward to reach the mouthpiece from a sitting or standing position? Standing perpendicular, sitting perpendicular, standing bent over, sitting bent over (Circle one)

298. Describe your physical position in detail.

299. Did you get to see the numerical reading on the front of the machine? Yes, No (Circle one)

[20] Blood or Urine Test

This section should only be completed if you were given a blood or urine test by the police.

300. Where were you taken to obtain the blood or urine test?

301. Who took you for the blood or urine test?

302. When did this occur, in relation to the time of your arrest? _____

303. Had you already given a breath sample at the police station before being taken for a blood or urine test? Yes, No (Circle one)

304. What were you told or asked by the police in order to obtain your consent for this sample to be taken from you?

305. Who drew or took your blood or urine sample? _____

306. Were you required to sign any forms before the nurse, doctor or technician would take your blood or urine? Yes, No (Circle one)

307. If so what did you sign? _____

308. Did the person who took your blood sample use any type of cloth or swab to cleanse the surface of your skin before taking the sample? Yes, No (Circle one)

309. If so, please describe what was done to prepare your skin.

310. As the needle was removed from your arm, did the person who took the sample put a swab or cloth over the puncture site? Yes, No (Circle one)

311. What happened to the blood or urine sample after it was collected from you? Please be as specific as possible.

312. Were you told, or were you under the impression, that if the police took the blood or urine test that you could not request your own independent test of your blood, urine or breath by a different medical or laboratory provider? Yes, No, I do not recall, not applicable (Circle one)

[21] Right to Counsel

313. Were you ever advised by anyone that you did not have the right to consult with an attorney? Yes, No (Circle one)

314. Who advise you of this right? _____

315. When were you advised of this? _____

316. Did you ever ask to call an attorney? Yes, No (Circle one)

317. Did you know an attorney's phone number? Yes, No (Circle one)

318. Did you have an opportunity to make a phone call to anyone? Yes, No (Circle one)

319. Who did you call? _____

320. If you were denied the right to call an attorney before deciding whether to take the state's tests, did the officer, or anyone at the station, explain why you were being denied access to legal counsel? Yes, No (Circle one)

321. If yes, who told you and what did they tell you?

322. Were you given a phonebook? Yes, No (Circle one)

323. Did you ask for a phonebook? Yes, No (Circle one)

324. Were you physically able to read that night (i.e. coherent and not impeded or restrained)? Yes, No (Circle one)

325. Were you told that you could call an attorney? Yes, No (Circle one)

326. When were you told this and by whom? _____

327. When we told you could make a phone call to anyone else, if you desired?

328. Did the police cooperate with you in providing telephone access? Yes, No (Circle one)

329. If not, or if you were delayed in being provided telephone access or the police limited your calls, please give details of what happened.

330. Could you talk privately? Yes, No (Circle one)

331. Were the police listening to your conversation? Yes, No (Circle one)

[22] Forms Signed

332. Did you ever sign your name that night? Yes, No (Circle one)

333. What document did you sign and why?

334. Did you ever refuse to sign your name on any document? Yes, No (circle one)

335. What documented you refuse to sign?

336. Why did you refuse?

[23] Video or Audio Taping

337. Do you know if a video or audio recording was made of the arrest scene or at the testing site? Yes, No (Circle one)

338. Were there any clues that a recording may have been made? Yes, No (Circle one)

339. Please explain why you believe this?

340. Did you know that a recording was being made at the time it was being made? Yes, No (Circle one)

[24] Release from Jail

341. What was the date of your release from jail? _____

342. What time were you released from jail? _____

343. Were you released into someone's care? Yes, No (Circle one)

344. If yes, who were they, what is their address and telephone number?

345. How did that person know to come in assist you? _____

346. Did you have any conversations with that person? Yes, No (Circle one)

347. What did you talk about? _____

348. Were there any discussions about getting an independent test? Yes, No
(Circle one)

349. If so, please describe in detail that discussion.

350. Did you sign any of the forms for the bond? Yes, No (Circle one)

[25] Accident

This section is to be completed only if an accident of some type has occurred in connection with your OWI arrest.

351. Were you involved in an accident? Yes, No (Circle one)

352. Was more than one vehicle involved in the accident? Yes, No (Circle one)

353. Please describe the accident in detail.

354. Were you inside your vehicle when the officer first arrived on the scene? Yes, No (Circle one)

355. If no, please give details of where you were in relation to your vehicle.

356. Were other people from your vehicle also there? Yes, No (Circle one)

357. After the accident, did you ever leave the immediate area for any purpose, such as to call a tow truck, call police, etc.? Yes, No (Circle one)

358. If so, please give the details of how long you were gone, where you were when, why you left, etc:

- 359. Was anyone killed or injured? Yes, No (Circle one)
- 360. If so, please give full details on a separate sheet.
- 361. Did the air bag deploy inside your vehicle? Yes, No (Circle one)
- 362. If yes, please give details of how it affected you.

- 363. Do you recall the circumstances leading up to the accident? Yes, No (Circle one)
- 364. If so, please describe in detail the circumstances (where were you, where were you going, what happened right before the accident, etc.).

- 365. Did the arresting officer make it clear to you at what point of the investigation that the officer was terminating the accident investigation and beginning a criminal investigation for suspected drunk driving against you? Yes, No (Circle one)
- 366. When, if you recall, did the investigation turned from accident investigation to criminal investigation?
- 367. Please give details about what questions the police asked, by whom and at what location they asked the questions.

-
-
368. Did the officer ever ask you about what you had to drink and when it had been consumed? Yes, No (Circle One)
369. Were you given any Miranda advisements before the officer began to question you? Yes, No, I do not recall (Circle one)
370. Before this case, had you ever been the driver of a vehicle in which another person was injured or killed? Yes, No (Circle one)
371. If so, please give full details about that incident.

[26] Driving and Criminal Record

372. In what states have you held a valid driver's license?
-
-
373. What were the approximate dates you held those licenses?
-
-
374. Have you had a prior OWI in your lifetime anywhere? Yes, No (Circle One)
375. If so, where and when?

The prosecutor will have this information and I must know the entire history to be able to properly analyze your chances in trial.

376. If you have been charged with any other serious driving offense, drug-related offense or alcohol related offense anywhere, lists all on a separate sheet including the court, city, state and date of your arrest and convictions.

I am especially interested in any offense began as an OWI and were reduced or change to another offense.

377. Were you represented by an attorney in these previous cases? Yes, No (Circle one)

378. If so, what is that attorney's name, address and telephone number?

379. What were the outcomes?

380. Are you presently on parole or probation? Yes, No (Circle one)

381. If so, please give the details concerning the offense and court where you are presently on parole or probation.

382. Was your license under suspension in any jurisdiction when you were arrested in this case? Yes, No (Circle one)

383. Give the details of the circumstances surrounding your license suspension.

384. List all prior suspensions of your driving privileges whether in effect now or not.

385. Please list all prior traffic violations including the approximate date of the occurrence and conviction.

386. Please list all prior criminal convictions including the approximate date of the occurrence and conviction.

[27] Other Attorneys

387. Prior to coming to me for legal assistance, did you consult with any other attorneys about the present case? Yes, No (Circle one)

388. If so, with whom did you consult? _____

389. What advice, regarding a possible plea or about challenging this case, were you given by such other attorneys?

390. Do you understand that you are free to follow that attorney's advice, or any other attorney's advice, and that you're no way bound to use my legal services in your case unless you hire me? Yes, No (Circle one)

[28] Refusal of the State's Breath Blood or Urine Tests

Complete this section only if you refused, or allegedly refused, to submit to the state's breath blood or urine tests as required by the arresting officer.

391. What actions or statements did the police officer do or make just before your alleged refusal to take the state's tests?

392. Why did you refuse, or why did the officer claim that you refused, the state's tests?

393. In what way, or with what words or conduct, did you allegedly refuse the state's tests?

394. Were you aware that your driving privileges would be suspended for one or two years by administrative action for refusing to submit to the state's tests? Yes, No (Circle one)

395. Do you wish for me to handle your license suspension hearings, assuming that a timely appeal has been filed? Yes, No (Circle one)

396. Do you understand that these administrative proceedings are separate proceedings from your OWI and any other pending criminal offenses? Yes, No (Circle one)

397. Have you provided me with everything you have received from the Indiana Bureau of Motor Vehicles or any other state's licensing agency or from the arresting officer? Yes, No (Circle one)

398. Have you received any notification from the arresting officer, the court, or from the Indiana Bureau of Motor Vehicles notifying you of a proposed suspension or revocation of your privilege to drive? Yes, No (Circle one)

399. If so, have you filed a timely appeal? Yes, No (Circle one)

[29] Other Charges from Same Incident

400. If you are charged with any other traffic offenses or crimes, please give the following information on each separate offense:

1. Offense: _____
 1. Were you aware that you had committed this offense? Yes, No (Circle one)
2. Offense: _____
 1. Were you aware that you had committed this offense? Yes, No (Circle one)
3. Offense: _____
 1. Were you aware that you had committed this offense? Yes, No (Circle one)
4. Offense: _____
5. Were you aware that you had committed this offense? Yes, No (Circle one)

[30] Administrative License Suspension

401. After your arrest, did you receive a form indicating that your driving privileges in Indiana would be suspended? Yes, No (Circle one)

IMPORTANT NOTICE: when returning this questionnaire to me, if you have not already done so, please supply me with the following documents:

1. Copies of all traffic citations that you received after being arrested;
2. Copies of any breath test machine results;
3. Copies of any incident report or arrest report from the case if you have obtained them;
4. Copies of any accident report from the case, if you have obtained it;
5. Copies of any bond release forms relating to this case;
6. Copies of any personal item inventory forms, jail intake or documents received upon release from jail, you received in connection with your arrest;
7. Copies of any other documents, receipts or other papers of any type whatsoever that you or your family, friends, or bondsman received upon your release from jail;
8. A copy of all towing records;
9. A copy of the license suspension form completed by the police at the time you were jailed;

10. Copies of other examples of your signature, for comparison purposes (example: copies of old canceled checks, letters, etc.);
11. I must have a copy of your previous driving history from every state in which you have had a driver's license in the last 10 years. I can provide you with assistance in obtaining those driving records if you need it.
12. On any previous OWI cases or habitual violator advisements, make copies of all prior documents that are in your possession, relating to any aspect of such cases.
13. On the date of your arrest for this charge, do you believe you were intoxicated or under the influence of alcohol, drugs or combination of alcohol and drugs? Yes, No (Circle one)
14. A copy of your Driving Record. If you are an Indiana licensee, you can obtain a free copy at www.in.gov/bmv

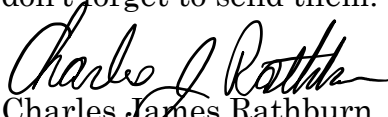
Note: I only need copies of these documents. Do not send me your originals. You will need them.

To the best of my knowledge and belief, the foregoing information is true and correct.

Signature: _____

Dated: _____

Thank you for completing this questionnaire. Don't forget to send copies of documents relating to this case. I will need them with the questionnaire, so please don't forget to send them.


Charles James Rathburn, Jr.
Rathburn Law Office

Section Two

Brainstorming: Developing a Theme of the Case

Meredith Mochel
Attorney at Law
Chattanooga, Tennessee
meredith@mochellaw.com

Section Two

**Brainstorming: Developing a
Theme of the Case..... Meredith Mochel**

Section Three

Collateral Consequences

Charles J. Rathburn, Jr.
Rathburn Law Office
Indianapolis, Indiana
CJR@rathburnlaw.com

Section Three

Collateral Consequences..... Charles J. Rathburn, Jr.

PowerPoint Presentation

Impaired Driving Defense 101

Collateral Consequences

Charles James Rathburn, Jr., ICLEF 03-26-2021

Impaired Driving Defense 101

Collateral Consequences

Normal consequences for a criminal charge

1. Potential incarceration
2. Probation
3. Payment of Fines and Costs

Impaired Driving Defense 101

Collateral Consequences

Additional consequences in an OWI (DUI) case

1. Driver's license suspension
 1. Refusal
 2. Chemical test over 0.08
2. Level of charge
 1. Misdemeanor
 2. Felony

Impaired Driving Defense 101

Collateral Consequences

1. Commercial Driver disqualification
2. Pilot's license
3. Professional License
 1. Doctor,
 2. Nurse,
 3. Attorney, and
 4. Others

Section Four

Breath Testing, PBT and EBT

Mark A. Foster

Foster O'Daniel Hambidge & Lynch
Evansville, Indiana
mfoster@fohlaw.com

Section Four

Breath Testing, PBT and EBT..... Mark A. Foster

Alco-Sensor III Unpacking and Checkout Procedure 1

Indiana State Department of Toxicology Certification of Record 6

Instrument and Operator Certifications..... 7

Breath Test Operators and Instruments Indiana Administrative Code..... 8

Article 2.5. Breath Test Operators and Instruments 11

Chemical Tests for Intoxication – Training Course for Breath Test Operators
Certification 16

UNPACKING AND CHECKOUT PROCEDURE

Before your instrument was shipped from the factory it was checked for accuracy. However, before placing your instrument into operation, as part of your checkout procedure, you should perform a successful accuracy/calibration check to assure yourself that the instrument's calibration settings are still properly adjusted. Record the results in the proper calibration log/record.

INTRODUCTION

The Alco-Sensor III is a handheld (pocket sized) breath alcohol testing device designed to read breath alcohol concentration (BrAC) or estimate blood alcohol concentration (BAC). Nothing more than a disposable mouthpiece and a 9-volt alkaline battery are necessary to keep the Alco-Sensor III operational.

With normal usage the unit should provide thousands of tests before the sensor needs replacing. The plug-in 9 volt ALKALINE battery* should run 500 tests. Calibration is rapid and simple. An approved dry gas tank or a simulator with properly certified and maintained ethanol solution may be utilized for calibration.

* Other types of batteries may not produce 500 tests.

1

OPERATOR TRAINING

The results supplied by a properly calibrated Alco-Sensor III can be no better than the quality of the sample collected by the operator. Good sampling technique is essential to obtaining a deep lung breath sample, and a deep lung breath sample is essential to obtaining a breath alcohol reading that correlates with a blood alcohol sample drawn at the same time.

AS SIMPLE AS THE ALCO-SENSOR III IS TO USE, TRAINING IN ITS USE IS RECOMMENDED.

There are several possible training resources. Often there are state organizations which train personnel in the use of the Alco-Sensor III. Examples are: Health Departments; State Police; Municipal Police Academies; Junior College Systems, and others. Present users are frequently willing to assist new programs with advice and training. (References are available.)

We have a VCR instructional tape, which may be purchased. Personalized training programs can be arranged at your facility. For additional information contact **Intoximeters** at 1-800-451-8639.

INSTRUMENT CALIBRATION

The accuracy of an instrument is verified by running a known alcohol concentration (standard) through the Alco-Sensor III's sampling system, and verifying that the result is within an acceptable tolerance of the expected value of the standard. This is called an accuracy or calibration check. If the accuracy check reading is within the acceptable range, the Alco-Sensor III is considered calibrated. If the reading is not within the acceptable

2

tolerance, the Alco-Sensor III must be calibrated. Alco-Sensor III's generally hold their calibration for months.

TO PRODUCE ACCURATE RESULTS, THE UNIT MUST BE IN CALIBRATION. (Note: A calibration is only required if the reading from an accuracy check is not within the acceptable tolerance).

A recommended procedure for setting up a new program is to put the unit in place and run an accuracy check once a week for the first month. Reviewing these results should give you confidence in the stability of the calibration. If it holds calibration in your environment, set a policy of running an accuracy check monthly – otherwise, continue weekly checks.

PRINCIPLE OF OPERATION ALCOHOL IN THE BREATH

The accuracy of any breath alcohol test is dependent upon the relationship between the concentrations of alcohol in the blood and deep lung breath.

The amount of alcohol in a properly collected breath sample is governed by the amount of alcohol in the bloodstream circulating in the lungs. To get a reading that accurately reflects the blood alcohol concentrations, a deep lung breath sample must be collected and analyzed.

1

3

ask the subject to blow as long as possible. The first portion of breath from the subject must not be sampled since its alcohol content is low, and not representative. It will take about 3 to 5 seconds to empty the lungs through the mouthpiece. Toward the end of this period, while the subject is still blowing, the READ button should be depressed. Then, the action valve will draw 1cc of deep lung breath into the fuel cell from the passing breath stream.

Using mouthpieces of other design than those supplied by the manufacturer may cause inaccurate readings by as much as 10-20%. For instance, whistling or overly restrictive mouthpieces can either draw room air into the breath sample or pressurize the system causing inaccurate readings.

FUEL CELL

The fuel cell is a plastic membrane coated with a thin layer of platinum black and an active chemical. (Field use indicates the cells generally have a life of 2-5 years.) When the READ button is depressed, the breath sample is drawn into the fuel cell. All the alcohol in the 1cc sample is immediately absorbed on the fuel cell and converted to acetic acid. The resulting electric current is measured and converted into a digitally displayed BAC reading.

DIGITAL DISPLAY

A BAC reading takes between 15 to 40 seconds to develop in the standard fuel cell unit. This reading will hold for a few moments before deteriorating. During this period the READ button can be released and reactivated without affecting the value. However, the SET button should not be depressed during this period, as it will destroy the accumulating reading.

8

Calibration Standards:

Mini-Alco Can

ELEMENTS:

- A. Pressurized gas can. *Discard plastic collar from stem before use*
- B. Valve - Button activated flow control.

MAKBUP: Argon - Alcohol single phase gas mixture

CHARACTERISTICS:

- A. Ten test capacity.
- B. Twelve month shelf life.
- C. Expiration date is stamped on the label of the gas can.
- D. Gas value is effected by elevation variations. The gas value can be determined by consulting the chart that is included with the Mini-Alco Can instructions.

Dry Gas Standard



10

If 888 is displayed the 9 volt alkaline battery is falling and needs replacing.

Units of Measure:

A digital result of .100 equates to:

- .100 grams of alcohol/100 mL of blood, or
- .100% Blood Alcohol Concentration (BAC), or
- .100 grams/210 liters of breath

CHECKING CELL READINESS

The Alco-Sensor III has an automatic zeroing feature. When the READ button is depressed completely and held for 5 to 10 seconds, the digital display should show .000.

If this does not occur, depress the SET button for a few moments and then check the instrument again.

FREQUENCY OF ACCURACY CHECK

Initially, accuracy checks should be run once a week. If an accuracy check has not occurred within the past 30 days, an accuracy check should be run prior to running a subject test to ensure the instrument has maintained proper calibration.

9

ELEMENTS:

- A. Pressurized approved dry gas tank.
- B. Small single staged approved regulator.

MAKBUP: NIST traceable tank contains a single-phased mixture of Nitrogen and Ethanol. (The concentrations available are .038% at sea level, and .082% at sea level and .100% at sea level).

CHARACTERISTICS:

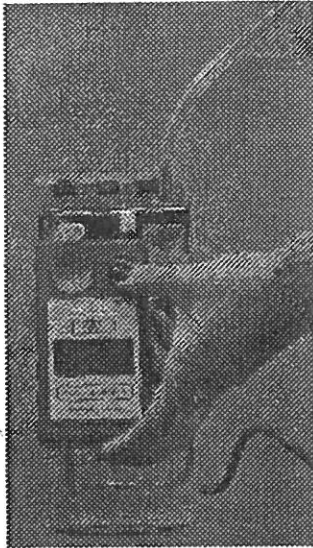
- A. Flow rate of the regulator is 1.5 liters per minute.
- B. Used properly, a 105 liter tank should supply at least 500 samples and a 17 liter tank should supply at least 75 samples.
- C. New tanks show approximately 1025 psi on the gauge. Follow instructions on the tanks to mount the regulator. When the regulator is initially mounted, depress the regulator control button and allow the gas to purge the valve for 10 seconds.
- D. Expiration date is stamped on the label of the dry gas standard.
- E. Tanks should only be used when they are between 10° - 40° C.
- F. If the tank has been maintained at temperatures below 0°C (32°F), see tank manufacturer's QAP for proper handling of the dry gas standard.

(Note: If you are using your dry gas standard in a number of locations, an optional device you may want to consider is the True-Cal Device. Variations in barometric pressure can affect the expected value of a pressurized dry gas standard, according to standard gas laws. The True-Cal device is designed to sense changes in barometric pressure and report an adjusted value for the dry gas standard. For additional information contact **Intoximeters** at 1-800-451-8639.)

11

2

Wet Bath Simulator (Standard)



ELEMENTS:

- A. Glass jar which holds 500cc of solution.
- B. Jar head contains heater thermostat, stirrer, thermometer, inlet and outlet ports for sampling headspace gas standing above the solution.

MAKBUP: Solution is a water/alcohol mixture of a certified BrAC/BAC concentration.

12

7. Depress SET button on Alco-Sensor III.
8. Attach *MINI-ALCO ASSEMBLY* to the ASIII.
9. Observe the value marked on the Mini-Alco Can – this is the target value at sea level. (Note the elevation value on the chart).
10. Depress valve on Mini-Alco Can for 6 seconds. On the 4th to 5th second of the 6 second count, depress the READ button and hold it down. (NOTE: The vapor must be flowing through the mouthpiece when the READ button is depressed).
11. Release the valve on the Mini-Alco Can.
12. Remove the *MINI-ALCO ASSEMBLY* from the Alco-Sensor III and observe the reading until it becomes stable for 5 seconds.
13. The displayed result should be within $\pm .010$ of the value marked on the Mini-Alco Can.
14. If the reading does not meet the specified tolerance, the unit requires a calibration adjustment. (Follow instructions below – under CALIBRATION PROCEDURE).

Using Dry Gas Standard:

1. Follow instructions on the dry gas standard to mount the regulator.
2. Purge regulator by depressing button/valve on regulator for approximately 3 to 4 seconds before running your first accuracy check of the day.
3. Attach new mouthpiece to the end of the regulator line – small plastic tubing.
4. Check temperature strip on back of Alco-Sensor III – any visible number verifies proper operating temperature.
5. Depress READ button, .000 should be seen for at least 5 to 10 seconds.

14

CHARACTERISTICS:

- A. Follow solution manufacturer's recommendation for storage and use of solution. Studies have shown that after running 20 tests per bottle of solution, the solution value will be depleted by 2.4%.
- B. Liquid should be clear with no visible particles suspended in the solution.
- C. A simulator containing a solution of known BrAC/BAC value must be at the operating temperature of 34°C. The simulator top must be on securely so the system is airtight. To check, cover the outlet port and blow into the intake port. Air bubbles will not rise rapidly through the solution if the top is secure.

ACCURACY CHECK PROCEDURE

Before beginning have these items available: instrument, calibration standard, new mouthpiece

Using Mini-Alco Can:

1. Remove plastic sleeve from top of Mini-Alco Can.
2. With a light back and forth motion, attach valve to stem on top of Mini-Alco can.
3. Attach short end of new mouthpiece to plastic nozzle on valve. (This will be called *MINI-ALCO ASSEMBLY* throughout the procedure).
4. Check temperature strip on back of Alco-Sensor III – any visible number verifies proper operating temperature.
5. Depress READ button, .000 should be seen for at least 5 to 10 seconds.
6. If .000 is not seen, depress SET button and recheck in one minute. (Follow Step 5 again. If .000 is still not seen for 5 to 10 seconds, contact **Intoximeters** at 1-800-451-8639. The unit must display .000 for 5 to 10 seconds before proceeding with the Accuracy Check).

13

6. If .000 is not seen, depress SET button and recheck in one minute. (Follow Step 5 again. If .000 is still not seen for 5 to 10 seconds, contact **Intoximeters** at 1-800-451-8639. The unit must display .000 for 5 to 10 seconds before proceeding with the Accuracy Check).
7. Depress SET button on Alco-Sensor III.
8. Carefully attach Alco-Sensor III to mouthpiece assembly.
9. Observe the value marked on the Dry Gas Standard – this is the target value. (Note the elevation value on the chart).
10. Depress regulator control button for 6 seconds. On the 4th to 5th second of the 6 second count, depress the READ button and hold it down. (NOTE: The gas must be flowing through the mouthpiece when the READ button is depressed).
11. Release the regulator control button.
12. Carefully detach the mouthpiece assembly from the ASIII and observe the reading until it becomes stable for 5 seconds.
13. The displayed result should be within $\pm .010$ of the value marked on the Dry Gas Standard.
14. If the reading does not meet the specified tolerance, the unit requires a calibration adjustment. (Follow instructions below – under CALIBRATION PROCEDURE).

Using Wet Bath Simulator (Standard):

1. Prepare Wet Bath simulator for use – a simulator containing a solution of known BrAC/BAC value must be at the operating temperature of 34°C.
2. Liquid should be clear with no visible particles suspended in the solution.
3. The simulator top must be on securely so the system is airtight. To check, cover the outlet port and blow into the intake port. Air

15

3

CALIBRATION PROCEDURE

bubbles will not rise rapidly through the solution if the top is secure.

4. Check temperature strip on back of Alco-Sensor III – any visible number verifies proper operating temperature.
5. Depress READ button, .000 should be seen for at least 5 to 10 seconds.
6. If .000 is not seen, depress SET button and recheck in one minute. (Follow Step 5 again. If .000 is still not seen for 5 to 10 seconds, contact **Intoximeters** at 1-800-451-8639. The unit must display .000 for 5 to 10 seconds before proceeding with the Accuracy Check).
7. Depress SET button on Alco-Sensor III.
8. Attach mouthpiece to Alco-Sensor III and then to simulator.
9. Observe the value of the solution – this is the target value.
10. Blow into the inlet port of the simulator for 6 seconds. On the 4th to 5th second of the 6 second count, depress the READ button and hold it down. (NOTE: The vapor must be flowing through the mouthpiece when the READ button is depressed).
11. Stop blowing into the inlet port of the simulator.
12. Carefully detach the ASIII from the simulator and observe the reading until it becomes stable for 5 seconds.
13. The displayed result should be within $\pm .010$ of the value of the solution.
14. If the reading does not meet the specified tolerance, the unit requires a calibration adjustment. (Follow instructions below – under CALIBRATION PROCEDURE).

16

calibration standard and the reading on the ASIII are the same). When the reading on the ASIII and the target value of the calibration standard are the same and remain constant for 5 seconds, the unit is calibrated.

Note: After initially turning the calibration screw clockwise to begin the Calibration Procedure, under no circumstances should the calibration screw be turned clockwise to increase the number displayed on the ASIII. If during the first adjustment counterclockwise the reading on the ASIII is carried below the target value of the calibration standard, DO NOT bring the value up by turning the screw clockwise. Wait and see if the reading rises to the target value. If the reading surpasses the target value immediately turn the calibration screw counterclockwise until the target value of the calibration standard and the reading on the ASIII are the same. If not, repeat the calibration procedure.

8. Once you are satisfied with the reading displayed on the ASIII, depress the SET button.
9. It is essential to verify the calibration. Wait 3 minutes, then run an accuracy check using a new mouthpiece. (Follow the step by step procedures previously described in Accuracy Check Procedure). The reading should be within $\pm .003$ of the target value of the Calibration Standard. If it is not – wait another three minutes and then repeat the Calibration Procedure followed by an Accuracy Check.

18

When to Perform a Calibration

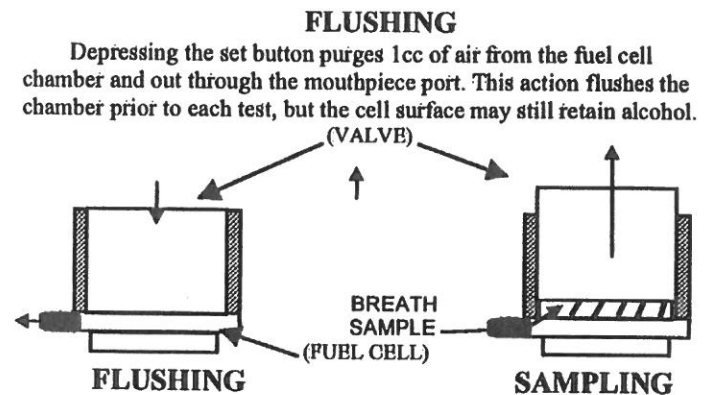
A calibration procedure should be performed when the result of an accuracy check indicates the unit does not read a standard within your testing program's specified acceptable tolerances.

Calibration Procedure

Before beginning have these items available: instrument, calibration standard, new mouthpiece, calibration screwdriver.

1. Observe target value of calibration standard you are using.
2. Insert screwdriver in calibration screw located in hole on right side of unit.
3. Turn screw two full turns clockwise.
4. Attach calibration assembly to Alco-Sensor III.
5. Depress valve on calibration standard for 6 seconds. (If you are using a Wet Bath Simulator & Solution as the calibration standard, you should blow into the inlet port of the simulator). On the 4th to 5th second of the 6 second count, press the READ button. (NOTE: The gas/vapor must be flowing through the mouthpiece when the READ button is depressed).
6. Carefully detach the Alco-Sensor III from the calibration assembly and insert the screwdriver in the calibration screw.
7. Observe the display on the ASIII. Once the reading has surpassed the target value of the calibration standard, immediately turn the calibration screw counterclockwise until the target value and the reading on the ASIII are the same. (If the reading on the ASIII again rises above the target value, the calibration screw should again be turned counterclockwise until the target value of the

17



If any residual alcohol is present in the system, a positive reading is displayed when the READ button is depressed and held down for 5 to 10 seconds.

CAUTION: Sufficient time must be allowed after each test for all traces of alcohol on the cell surface to be eliminated. This can be accelerated by locking the SET button down to short circuit the cell. If the Alco-Sensor III is ready to use, a .000 will be displayed continuously when the READ button is held down for 5 to 10 seconds.

Even when exposed to breath samples with high alcohol levels, a cell should clear within 2 minutes when the SET button is depressed and the unit is kept in the pocket.

19

4

FOR ACCURATE RESULTS, THE ABOVE PRECAUTIONS MUST BE OBSERVED OR CUMULATIVE READINGS WILL RESULT.

OPERATING INSTRUCTIONS

1. Remove unit from box. Note temperature window on back of unit. Liquid crystal reading of 20° to 40°C indicates the unit is in the operating temperature range.
2. Mount mouthpiece. (SET button must be depressed).
3. Press READ button and hold down for 5 to 10 seconds to verify unit is ready to use. .000 for 5 to 10 seconds indicates the instrument is clean and ready for sampling.
4. Depress SET button. Cocks the sample valve and prepares unit for subject sample.
5. Instruct subject to blow steadily for as long as possible.
6. Push READ button *before* exhalation ceases (but not less than 3 seconds after blowing starts).
7. Keep READ button depressed until maximum reading is obtained (three seconds).
8. Record the result.
9. Discard mouthpiece and depress SET button

*If the Alco-Sensor III is being used as a SCREENER, the subject can be asked if he/she has used any alcohol in the last 15 minutes. If the response is negative, test the subject immediately. Otherwise, wait 15 minutes before

20

TO EXPEDITE CLEAN UP, HAVE THE SET BUTTON DEPRESSED WHEN INSTRUMENT IS NOT IN USE.

OTHER APPLICATIONS OF THE ALCO-SENSOR III

DETECTION OF ALCOHOL USING ACCESSORIES:

• **Quick Draw – Passive Alcohol Adapter** – This accessory easily attaches to your Alco-Sensor III and allows the instrument to perform a passive screening test to determine the presence of alcohol in the air surrounding a subject or an open container. (This adapter can also be used to sample an unconscious person).

FOR: Repairs
 Supplies
 Mouthpieces
 Batteries
 Calibration Equipment

CONTACT Intoximeters:

8110 Lackland Road
St. Louis, Missouri 63114 USA
www.intox.com

Telephone: (314) 429-4000
Fax: (314) 429-4170
Toll Free: 800-451-8639

22

testing. If the test result is positive, wait 2 to 5 minutes and take a second test. A similar result indicates true blood alcohol level. A much lower result strongly suggests mouth alcohol was present at the time of the first test.

If the Alco-Sensor III is being used EVIDENTIALLY, a 15 minute observation period prior to testing is recommended.

BATTERY REPLACEMENT

A 888 display indicates that the battery is not strong enough to support an accurate reading and needs replacing.

PROCEDURE:

- A. Slide battery door open.
- B. Remove old battery and disconnect.
- C. Connect new battery (use only 9-volt alkaline batteries) and replace.
- D. Close battery door.
- E. Check calibration of unit.

SMOKING

Under no circumstances should raw smoke be blown into the instrument. Cigarette and cigar smoke will shorten the life of the fuel cell and increase the cost of maintenance.

STORAGE

Storage in cold or moderately hot environments will not harm the Alco-Sensor III. Avoid extreme humidity or very dry storage areas for prolonged periods. The more extreme the storage temperature, the longer it will take to get the unit adjusted to proper temperature.

21

NOTES

23

5



STATE OF INDIANA

Indiana State Department of Toxicology

Certification of Record

I, Ed Littlejohn, of the Indiana State Department of Toxicology and custodian of its records, hereby attest on 01/11/2021 that the record below is a true and accurate copy of the certification of the following breath test operator on the date(s) listed below.

Name: Roy Tincher, II

Last Breath Test Operator Certification Date: 03/16/2020

Agency: DNR Law Enforcement

Previous breath test operator certification date(s)*: 03/13/2014, 03/17/2016, 03/17/2018

***Records of breath test operator certifications issued prior to the date(s) above may be available from the Indiana State Department of Toxicology.**

[ISDT \(/ISDT/INDEX.HTM\)](#) / INSTRUMENT AND OPERATOR CERTIFICATIONS

Instrument and Operator Certifications

Through action by the Indiana General Assembly during the 2017 session, ISDT is no longer required to mail breath test program certifications to the circuit court clerks since the information is published on the department website. Due to this legislation, ISDT no longer mails breath test instrument or breath test operator certifications to circuit court clerks effective July 1, 2017. Certifications **issued after July 1, 2017**, are available to anyone through an online program at <https://secure.in.gov/apps/isdt/recordsearch/#> (<https://secure.in.gov/apps/isdt/recordsearch/#>). No password is required, nor is there a cost associated with accessing or printing a certified copy of the information. ISDT's objective is that the online program will increase access to this information and be more efficient for everyone. Certifications issued before July 1, 2017, may not be available online and may have to be obtained from circuit court clerks or from ISDT.

Instructions on how to locate all currently certified operators for an agency and their certification dates are located [here \(/isdt/files/How%20to%20locate%20breath%20test%20operator%20certification%20dates%20and%20certification%20of%20records.pdf\)](#).

PRIOR TO SEPTEMBER 17, 2020

BREATH TEST OPERATORS AND INSTRUMENTS Indiana Administrative Code

260 IAC 2-4-2 Approved method for Intox EC/IR II breath analysis

Authority: IC 9-30-6-5

Affected: IC 9-30-6-5

Sec. 2. (a) The approved method that shall be followed in making an analysis of breath for ethanol using the Intox EC/IR II breath test instrument is as follows:

STEP ONE: The person to be tested must:

- (A) have had nothing to eat or drink;
- (B) not have put any foreign substance into his or her mouth or respiratory tract;
and
- (C) not smoke;

within fifteen (15) minutes before the time the first breath sample is taken or at any time from the taking of the first breath sample until after the taking of the final breath sample.

STEP TWO: Verify that the instrument is in ready mode, as indicated by the instrument display.

STEP THREE: Press "Enter" key to start subject test.

STEP FOUR: Insert identification card into the barcode reader, or press the "Enter" key and use the keyboard to enter the breath test operator information requested by the instrument display.

STEP FIVE: When requested by the instrument display, enter the beginning date and time of the fifteen (15) minute period described in STEP ONE.

STEP SIX: When requested by the instrument display, select "Y" or "N" to indicate whether the breath test operator is the officer with control of the subject during the fifteen (15) minute period described in STEP ONE.

STEP SEVEN: If "N" is selected in STEP SIX, when requested by the instrument display, enter the information of the officer with control of the subject during the fifteen (15) minute period described in STEP ONE.

STEP EIGHT: Enter incident information requested by the instrument display.

STEP NINE: Enter subject information by:

(A) inserting the subject's driver/operator license or identification card into the barcode reader; or

(B) pressing the "Enter" key and using the keyboard to enter the available subject information requested by the instrument display.

STEP TEN: When "Please blow" appears on the instrument display, place a new mouthpiece in the breath tube. Instruct the subject to deliver a breath sample. Remove mouthpiece when prompted by the instrument display and discard.

STEP ELEVEN: When "Please blow" appears again on the instrument display, place a new mouthpiece in the breath tube. Instruct the subject to deliver a breath sample. Remove mouthpiece when prompted by the instrument display and discard.

STEP TWELVE: Print the instrument report and remove it from the printer; check the instrument report for the numerical value of the subject's breath ethanol concentration and the correct date and time and sign the instrument report where indicated.

(b) If any of the following messages appear on the instrument display or report, proceed as follows:

(1) If "Please blow" appears on the instrument display after completion of STEPS ONE through ELEVEN, perform an additional breath test, beginning with STEP ELEVEN. If "No 0.020 Agreement" is printed on the instrument report after this additional breath test:

(A) perform an additional breath test, beginning with STEP TWO and proceeding through STEP TWELVE;

(B) obtain an alternate chemical test for ethanol; or

(C) perform a breath test on another breath test instrument.

(2) If "Interfering Substance" is printed on the instrument report, perform an additional breath test, beginning with STEP ONE and proceeding through STEP TWELVE. If "Interfering Substance" is printed on the instrument report after this additional breath test:

(A) obtain an alternate chemical test for ethanol;

(B) perform a breath test on another breath test instrument; or

(C) if a numerical value for the subject's breath ethanol concentration is printed on any instrument report, check the instrument report for the correct date and time and sign the instrument report where indicated.

(3) If "RFI Detected" is printed on the instrument report, locate and remove the source of the interference and perform an additional breath test, beginning with STEP TWO and proceeding through STEP TWELVE. If "RFI Detected" is printed on the instrument report after this additional breath test:

- (A) obtain an alternate chemical test for ethanol;
- (B) perform a breath test on another breath test instrument; or
- (C) if a numerical value for the subject's breath ethanol concentration is printed on any instrument report, check the instrument report for the correct date and time and sign the instrument report where indicated.

(4) If "Mouth Alcohol" is printed on the instrument report, perform an additional breath test, beginning with STEP ONE and proceeding through STEP TWELVE. If "Mouth Alcohol" is printed on the instrument report after this additional breath test:

- (A) obtain an alternate chemical test for ethanol;
- (B) perform a breath test on another breath test instrument; or
- (C) if a numerical value for the subject's breath ethanol concentration is printed on any instrument report, check the instrument report for the correct date and time and sign the instrument report where indicated.

(5) If "Insufficient Sample" or "Time Out" is printed on the instrument report, perform an additional breath test, beginning with STEP TWO and proceeding through STEP TWELVE. If "Insufficient Sample" or "Time Out" is printed on the instrument report after this additional breath test:

- (A) obtain an alternate chemical test for ethanol;
- (B) perform a breath test on another breath test instrument; or
- (C) if a numerical value for the subject's breath ethanol concentration is printed on any instrument report, check the instrument report for the correct date and time and sign the instrument report where indicated.

If an "Insufficient Sample" or "Time Out" message is caused by the lack of cooperation of the subject, the breath test operator should record that the test was refused and, if a numerical value for the subject's breath ethanol concentration is printed on any instrument report, check the instrument report for the correct date and time and sign the instrument report where indicated. (*State Department of Toxicology; 260 IAC 2-4-2; filed Jan 9, 2014, 9:29 a.m.: 20140205-IR-260130344FRA*)

AFTER SEPTEMBER 17, 2020

ARTICLE 2.5. BREATH TEST OPERATORS AND INSTRUMENTS

Rule 1. Definitions

260 IAC 2.5-1-1 Applicability

Authority: IC 9-30-6-5
Affected: IC 9-30-6-5

Sec. 1. The definitions in this rule apply throughout this article. *(State Department of Toxicology; 260 IAC 2.5-1-1; filed Sep 17, 2020, 10:35 a.m.: 20201014-IR-260200017FRA)*

260 IAC 2.5-1-2 "Breath test instrument" defined

Authority: IC 9-30-6-5
Affected: IC 9-30-6-5

Sec. 2. "Breath test instrument" means equipment selected by the department for performing evidentiary breath tests for alcohol. *(State Department of Toxicology; 260 IAC 2.5-1-2; filed Sep 17, 2020, 10:35 a.m.: 20201014-IR-260200017FRA)*

260 IAC 2.5-1-3 "Department" defined

Authority: IC 9-30-6-5
Affected: IC 10-20-2-1

Sec. 3. "Department" means the state department of toxicology established by IC 10-20-2-1. *(State Department of Toxicology; 260 IAC 2.5-1-3; filed Sep 17, 2020, 10:35 a.m.: 20201014-IR-260200017FRA)*

260 IAC 2.5-1-4 "Director" defined

Authority: IC 9-30-6-5
Affected: IC 10-20-2-2

Sec. 4. "Director" means the director of the department. *(State Department of Toxicology; 260 IAC 2.5-1-4; filed Sep 17, 2020, 10:35 a.m.: 20201014-IR-260200017FRA)*

260 IAC 2.5-1-5 "Law enforcement agency" defined

Authority: IC 9-30-6-5
Affected: IC 9-30-6-5

Sec. 5. "Law enforcement agency" means an agency or department with authority to apprehend criminal offenders. *(State Department of Toxicology; 260 IAC 2.5-1-5; filed Sep 17, 2020, 10:35 a.m.: 20201014-IR-260200017FRA)*

260 IAC 2.5-1-6 "Reference material" defined

Authority: IC 9-30-6-5
Affected: IC 9-30-6-5

Sec. 6. "Reference material" means a traceable material or substance having known properties. *(State Department of Toxicology; 260 IAC 2.5-1-6; filed Sep 17, 2020, 10:35 a.m.: 20201014-IR-260200017FRA)*

Rule 2. Selection, Training, and Certification of Breath Test Operators

260 IAC 2.5-2-1 Selection

Authority: IC 9-30-6-5
Affected: IC 9-30-6-5

BREATH TEST OPERATORS AND INSTRUMENTS

Sec. 1. Only a person employed by a law enforcement agency may be certified as a breath test operator. *(State Department of Toxicology; 260 IAC 2.5-2-1; filed Sep 17, 2020, 10:35 a.m.: 20201014-IR-260200017FRA)*

260 IAC 2.5-2-2 Training

Authority: IC 9-30-6-5

Affected: IC 10-20-2-5

Sec. 2. (a) The breath test operator training course for certification shall consist of training in the following:

- (1) The pharmacology and toxicology of alcohol.
- (2) The legal aspects of breath testing for alcohol.
- (3) The theory, operation, and care of breath test equipment.
- (4) The use of a breath test instrument using reference materials.

(b) To successfully complete the training course, a person must pass all examinations and demonstrate competence in the administration of breath tests on a breath test instrument. *(State Department of Toxicology; 260 IAC 2.5-2-2; filed Sep 17, 2020, 10:35 a.m.: 20201014-IR-260200017FRA)*

260 IAC 2.5-2-3 Certification and recertification of breath test operators

Authority: IC 9-30-6-5

Affected: IC 9-30-6-5

Sec. 3. (a) A person who:

- (1) is employed by a law enforcement agency; and
- (2) successfully completes the breath test operator training course;

will be certified as a breath test operator.

(b) Any person certified as a breath test operator must be recertified by examination at least every two (2) years from the month of certification or recertification. Reasonable deviations from this schedule may be approved by the director.

(c) Any person seeking recertification as a breath test operator must demonstrate competence in the performance of evidentiary breath tests by passing an examination approved by the department.

(d) Any person who fails the recertification examination may be given a second recertification examination, provided that the previous certification has not been expired for more than thirty (30) days. During the time period between the first and second recertification examinations, the person is not certified as a breath test operator.

(e) The department shall issue identification cards to certified and recertified breath test operators.

(f) The director may suspend or revoke the certification of any breath test operator at any time the director determines such suspension or revocation to be in the best interest of the breath test program. *(State Department of Toxicology; 260 IAC 2.5-2-3; filed Sep 17, 2020, 10:35 a.m.: 20201014-IR-260200017FRA)*

260 IAC 2.5-2-4 Authorization of certified breath test operators

Authority: IC 9-30-6-5

Affected: IC 9-30-6-5

Sec. 4. Certified and recertified breath test operators are authorized to:

- (1) administer breath tests; and
- (2) make replacements and adjustments to breath test instruments excluding instrument calibration adjustments.

(State Department of Toxicology; 260 IAC 2.5-2-4; filed Sep 17, 2020, 10:35 a.m.: 20201014-IR-260200017FRA)

260 IAC 2.5-2-5 Breath test operators certified or recertified under repealed rule

Authority: IC 9-30-6-5

Affected: IC 9-30-6-5

Sec. 5. The certifications of breath test operators who were certified or recertified under 260 IAC 2-2 before its repeal shall

be valid until the date they would have expired under 260 IAC 2-2 before its repeal. (*State Department of Toxicology; 260 IAC 2.5-2-5; filed Sep 17, 2020, 10:35 a.m.: 20201014-IR-260200017FRA*)

Rule 3. Selection, Inspection, and Certification of Breath Test Instruments and Chemicals

260 IAC 2.5-3-1 Selection of breath test equipment

Authority: IC 9-30-6-5

Affected: IC 9-30-6-5

Sec. 1. (a) The department shall select breath test equipment for use for evidentiary breath testing to ensure the accurate analysis of breath specimens for the determination of breath alcohol concentrations. The department shall select breath test equipment that meets the following criteria:

- (1) The equipment shall analyze breath samples and report a numerical value expressed as grams of alcohol per two hundred ten (210) liters of breath.
- (2) The equipment shall be:
 - (A) capable of calibration for the purpose of certification with a reference material in accord with section 2 of this rule;
 - (B) able to analyze a reference material within the limits specified by section 2 of this rule separate from calibration for certification; and
 - (C) equipped with sufficient features to prevent unauthorized alteration, tampering, or manipulation to safeguard the breath sampling process and alcohol concentration analysis.

(b) The breath test instruments for which approved methods are provided in 260 IAC 2.5-4 shall constitute the list of breath test equipment selected by the department. (*State Department of Toxicology; 260 IAC 2.5-3-1; filed Sep 17, 2020, 10:35 a.m.: 20201014-IR-260200017FRA*)

260 IAC 2.5-3-2 Inspection of breath test instruments

Authority: IC 9-30-6-5

Affected: IC 9-30-6-5

Sec. 2. (a) A person authorized by the department shall inspect each breath test instrument deployed for evidentiary use at the instrument's established location at least once every one hundred eighty (180) days. If the location of a breath test instrument is changed, the instrument must be inspected and certified under this rule prior to use for evidentiary testing.

(b) The inspection shall include at least one (1) test demonstrating that the breath test instrument:

- (1) is in good operating condition; and
- (2) satisfies the accuracy requirements in subsection (e).

(c) The inspection shall include tests using reference materials certified to contain a specific concentration of ethanol with a measurement uncertainty at a stated level of confidence.

(d) The numerical analytical results of inspection tests shall be expressed to the third decimal place.

(e) The numerical analytical results of Intox EC/IR II breath test instruments shall not deviate more than five percent (5%) or five-thousandths (0.005) grams per two hundred ten (210) liters, whichever is greater, from the value of the reference material or the value of the reference material as adjusted for the ambient barometric pressure. (*State Department of Toxicology; 260 IAC 2.5-3-2; filed Sep 17, 2020, 10:35 a.m.: 20201014-IR-260200017FRA*)

260 IAC 2.5-3-3 Certification of breath test instruments

Authority: IC 9-30-6-5

Affected: IC 9-30-6-5

Sec. 3. (a) The department shall certify each breath test instrument deployed for evidentiary use as to compliance with the standards in section 2 of this rule at least once every one hundred eighty (180) days.

(b) The certification of breath test instruments shall be in writing by the department.

(c) The certification shall be based on information provided by persons authorized by the department to inspect breath test

BREATH TEST OPERATORS AND INSTRUMENTS

instruments. (State Department of Toxicology; 260 IAC 2.5-3-3; filed Sep 17, 2020, 10:35 a.m.: 20201014-IR-260200017FRA)

260 IAC 2.5-3-4 Breath test instruments certified under repealed rule

Authority: IC 9-30-6-5
Affected: IC 9-30-6-5

Sec. 4. The certifications of breath test instruments inspected and certified under 260 IAC 2-3 before its repeal shall be valid until the date they would have expired under 260 IAC 2-3 before its repeal. (State Department of Toxicology; 260 IAC 2.5-3-4; filed Sep 17, 2020, 10:35 a.m.: 20201014-IR-260200017FRA)

260 IAC 2.5-3-5 Selection and certification of chemicals

Authority: IC 9-30-6-5
Affected: IC 9-30-6-5

Sec. 5. Chemicals used as reference materials in the performance of evidentiary breath tests shall be certified to contain a specific concentration of ethanol with a measurement uncertainty at a stated level of confidence. (State Department of Toxicology; 260 IAC 2.5-3-5; filed Sep 17, 2020, 10:35 a.m.: 20201014-IR-260200017FRA)

Rule 4. Approved Method for Administering Breath Tests

260 IAC 2.5-4-1 Approved method for Intox EC/IR II breath analysis

Authority: IC 9-30-6-5
Affected: IC 9-30-6-5

Sec. 1. (a) The approved method that shall be followed in making an analysis of breath for alcohol using the Intox EC/IR II breath test instrument is as follows:

(1) The person to be tested must:

- (A) have had nothing to eat or drink;
- (B) not have put any foreign substance into his or her mouth or respiratory tract; and
- (C) not smoke;

within fifteen (15) minutes before the time the first breath sample is taken or at any time from the taking of the first breath sample until after the taking of the final breath sample.

(2) Use the following STEPS:

STEP ONE: Verify that the instrument is in ready mode, as indicated by the instrument display.

STEP TWO: Press "Enter" key to start subject test.

STEP THREE: Insert identification card into the barcode reader, or press the "Enter" key and use the keyboard to enter the breath test operator information requested by the instrument display.

STEP FOUR: When requested by the instrument display, enter the beginning date and time of the fifteen (15) minute deprivation period described in subdivision (1).

STEP FIVE: When requested by the instrument display, select "Y" or "N" to indicate whether the breath test operator had control of the subject during the fifteen (15) minute deprivation period described in subdivision (1).

STEP SIX: If "N" is selected in STEP FIVE, when requested by the instrument display, enter the information of the officer with control of the subject during the fifteen (15) minute deprivation period described in subdivision (1).

STEP SEVEN: Enter incident information requested by the instrument display.

STEP EIGHT: Enter subject information by:

- (A) inserting the subject's driver/operator license or identification card into the barcode reader; or
- (B) pressing the "Enter" key and using the keyboard to enter the available subject information requested by the instrument display.

STEP NINE: When "Please blow" appears on the instrument display, place a mouthpiece on the breath tube. Instruct the subject to deliver a breath sample. Remove mouthpiece after delivery of a breath sample or when prompted by the instrument

BREATH TEST OPERATORS AND INSTRUMENTS

display. Repeat as prompted by the instrument display.

STEP TEN: Print the instrument report and remove it from the printer; verify that there is a numerical value for the subject's breath alcohol concentration reported as the "RESULT" on the instrument report and sign the instrument report where indicated.

(b) If any of the following status messages is printed on the instrument report, proceed as follows:

(1) If "Interfering Substance" or "Mouth Alcohol" is printed on the instrument report:

(A) obtain a blood sample for a chemical test; or

(B) repeat the fifteen (15) minute deprivation period described in subsection (a)(1) and perform an additional breath test, beginning with STEP ONE in subsection (a)(2). If "Interfering Substance" or "Mouth Alcohol" is printed on the instrument report after this additional breath test:

(i) obtain a blood sample for a chemical test; or

(ii) sign all instrument reports where indicated if a numerical value for the subject's breath alcohol concentration is reported as the "RESULT" on any instrument report.

(2) If a status message not listed in this rule, excluding "Test Complete", is printed on the instrument report:

(A) obtain a blood sample for a chemical test; or

(B) perform an additional breath test, beginning with STEP ONE in subsection (a)(2). If a status message not listed in this rule, with the exception of "Test Complete", is printed on the instrument report after this additional breath test:

(i) obtain a blood sample for a chemical test; or

(ii) sign all instrument reports where indicated if a numerical value for the subject's breath alcohol concentration is reported as the "RESULT" on any instrument report.

(c) If a subject refuses a test, the breath test operator should record that the test was refused and sign all reports where indicated. (*State Department of Toxicology; 260 IAC 2.5-4-1; filed Sep 17, 2020, 10:35 a.m.: 20201014-IR-260200017FRA*)

*

Chemical Tests for Intoxication

Training Course for Breath Test Operator Certification

**Indiana State Department of Toxicology
550 West 16th Street
Indianapolis, Indiana 46202
Telephone: 317-921-5000
Fax: 317-925-9430
www.in.gov/isdt**

Table of Contents

Schedule.....	3
State Department of Toxicology (Course Schedule, Requirements, Course Staff).....	4
Indiana Administrative Code Title 260.....	5
Pharmacology and Toxicology of Alcohol.....	7
Legal Aspects of Breath Testing for Alcohol.....	24
Instrumentation and Approved Method for Breath Analysis for Alcohol.....	28
Care and Service of the Intox EC/IR II.....	29
Laboratory Exercises.....	44
260 IAC 2.5-4-1 Approved method for Intox EC/IR II breath analysis.....	45

**Chemical Tests for Intoxication
Training Course for Breath Test Operator Certification**

Schedule

- 0800 – 0810 ILEA Welcome / Orientation
- 0810 – 0830 Dept. of Toxicology / Indiana Administrative Code (IAC) 260
- 0830 – 0930 Pharmacology and Toxicology of Alcohol / Evidence Submission
- 0930 – 0935 Break
- 0935 – 1030 Legal Aspects of Breath Testing for Alcohol / Recent Case Law
- 1030 – 1145 Instrumentation and Approved Method for Breath Test Analysis
- 1145 – 1300 LUNCH
- 1300 – 1700 Laboratory Exercises / Evaluations / Written Examination / Final Laboratory Exercise

Breaks will be provided between blocks of instruction as time permits.

**Chemical Tests for Intoxication
Training Course for Breath Test Operator Certification**

State Department of Toxicology (Course Schedule, Requirements, Course Staff)

Course Schedule

(See Course Schedule – page 3)

Requirements:

Must be present for entire course

Must obey ILEA Rules

Course Staff:

Inspectors

Tom Pierce
Lou Brown
Dwight Holbrook

Breath Test Program Supervisor

Dana Bors, PhD
dbors@isdt.in.gov

General Counsel

Teri Kendrick
tkendrick@isdt.in.gov

Indiana Administrative Code Title 260

Objective:

To provide the training required under 260 IAC 2.5-2-2 for breath test operator certification.

Duties of the Department:

IC 10-20-2 (enacted 2011)

- Conduct analyses for poisons, drugs, and alcohols upon human tissues and fluids
- Report analytical findings of the department
- Consult with Indiana coroners regarding interpretation of analytical findings
- Furnish expert testimony
- Provide instruction in toxicology to law enforcement officers
- Certify law enforcement officers as required by law for administration of breath chemical tests
- Provide instruction and technical assistance to prosecutors and defense counsel regarding ISDT lab results
- Provide instruction to judges on toxicology and alcohol and drug testing

IAC 260 (See Article 2.5 of Title 260 for current provisions)

A complete copy of Title 260 is available at: http://www.in.gov/legislative/iac/iac_title?iact=260

IAC Title 260 regulates:

- Selection, training, certification, and recertification of breath test operators
- Selection, inspection, and certification of breath test instruments and chemicals used in the performance of evidentiary breath tests
- Approved methods for administering breath alcohol tests

Reference: IC 9-30-6-5

260 IAC 2.5-2-1 Selection of breath test operators

- Must be employed by a law enforcement agency
 - “Law enforcement agency” means an agency or department with authority to apprehend criminal offenders

260 IAC 2.5-2-2 Training of breath test operators

Required training:

- Pharmacology and toxicology of alcohol

- Legal aspects of breath testing for alcohol
- Theory, operation, and care of breath test equipment
- Use of a breath test instrument using reference materials

260 IAC 2.5-2-3 Recertification of breath test operators

- Must be recertified at least every two years from month of certification or recertification.
Your operator card expires on the last day of the month.
- Must demonstrate competence by passing an examination approved by ISDT
- A person who fails the recertification exam may be given a second exam if previous certification has not been expired for more than 30 days
 - **During time between first and second exams, person is not certified**
- Director may suspend or revoke certification at any time

260 IAC 2.5-2-4 Authorization of certified breath test operators

- Administer breath tests
- Make replacements and adjustments to breath test instruments excluding calibration adjustments

260 IAC 2.5-3-1 Selection of breath test equipment

- The department shall select breath test equipment for use for evidentiary breath testing to ensure the accurate analysis of breath specimens for the determination of breath alcohol concentrations.
- Equipment selected by the department must analyze breath samples and report a numerical value expressed as grams of alcohol per two hundred ten (210) liters of breath.

260 IAC 2.5-3-2 Inspection of breath test instruments

- ISDT must inspect each instrument at least every 180 days
- If the location of the instrument is changed, the instrument must be inspected and certified prior to use
 - Moving an instrument past the length of its electrical cord is a location change
- The numerical analytical results of Intox EC/IR II breath test instruments shall not deviate more than 5% or 0.005 g/210L, whichever is greater, from the value of the reference material or the value of the reference material as adjusted for ambient barometric pressure
 - Reference material: traceable material or substance having known properties

*****Permitted deviation is plus or minus 5% or 0.005, whichever is greater.**

Example: If the “dry gas target” is 0.077, the instrument reading of the ethanol content of the dry gas must fall within the range of 0.072 to 0.082.

Indiana Code

- ISDT publishes certifications of breath test operators and instruments on its website.
- IC 9-30-6-5(b): Failure to publish a certificate does not invalidate any test.
- ISDT maintains records of certifications at its administrative office.

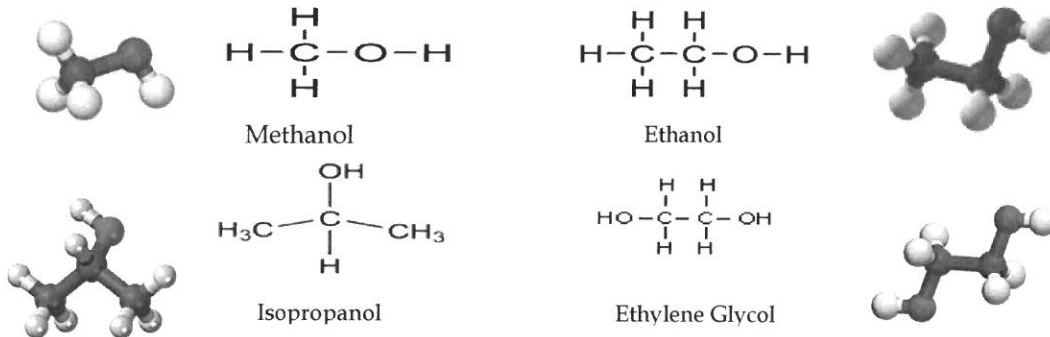
Pharmacology and Toxicology of Alcohol

History of Alcohol Testing

- **Sir Edward Mellanby (1884 - 1955):**
Established relationship between BAC and intoxication. (1919)
- **Erik M.P. Widmark (1889 - 1945):**
Described mathematical terms (rho and beta) for alcohol distribution and elimination. (1932)
- **Goran Liljestr and (1889 - 1968):**
Determined that expired air contained an ethanol concentration ~ 1/2000 that of blood. (1931)
- **Rolla N. Harger (1890 - 1983):**
Developed first practical breath test instrument: Drunkometer (1938)
- **Robert Forney (1916 - 1997):**
First Director of State Department of Toxicology. (1957)
- **Robert Borkenstein (1912 – 2002):**
Creator of the Breathalyzer (1954); conducted first study to demonstrate relationship between BAC and the likelihood of being in a motor-vehicle accident: Grand Rapids Study (1964) supported changing the legal blood alcohol content for vehicle operation from 0.10 to 0.08.

Types of Alcohols

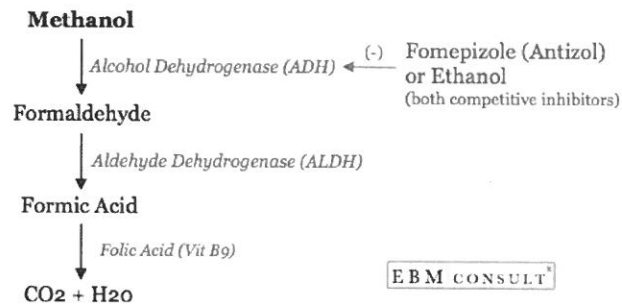
Alcohols are characterized as a chemical class of molecule having a carbon atom bound to an oxygen-hydrogen (-OH) bond.



Methanol

- Wood alcohol
- All types of alcohol can cause central nervous system (CNS) impairment
 - Methanol intoxication symptoms mirror those of ethanol
- Extremely toxic even at low doses (0.02-0.03 g/100mL)

Methanol Metabolism



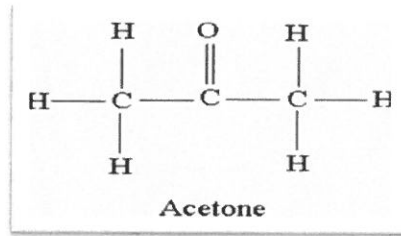
Isopropanol

- Rubbing alcohol
- All types of alcohol can cause central nervous system impairment
 - Isopropanol intoxication symptoms mirror those of ethanol
- Toxic (>0.04%) – metabolized to acetone
 - Acetone causes central nervous system impairment as well

Isopropanol Metabolism



Acetone (ketone)



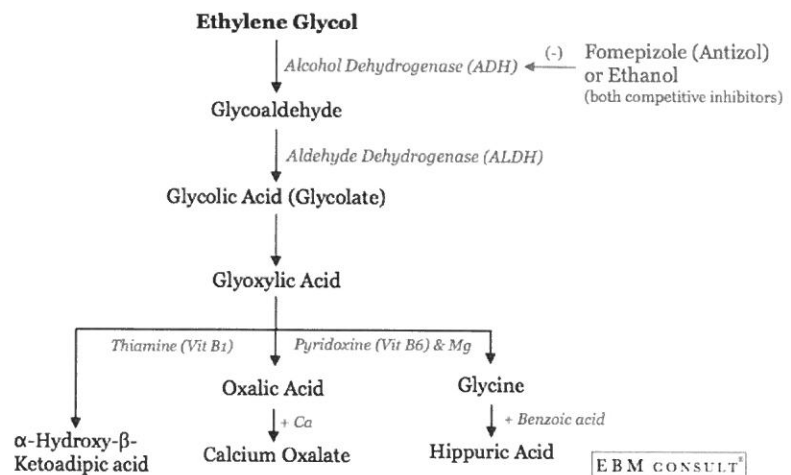
Sources of Acetone

- Metabolite of Isopropanol
- Solvent
- Compromised liver function
- Diabetic Ketoacidosis
- Starvation Ketoacidosis

Ethylene Glycol

- Component in antifreeze
- Can also cause central nervous system impairment
- Extremely toxic
 - Metabolites lead to severe acidosis
 - Metabolites also lead to acute renal failure

Ethylene Glycol Metabolism



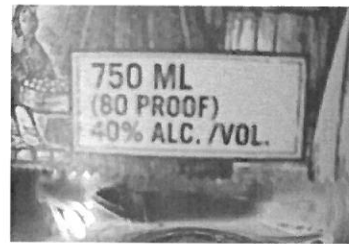
Ethanol

Proof:

Spirit	Alcohol Content (%)	Proof
Vodka	40-50	80-100
Tequila	45-50	90-100
Whiskey	40-75	80-150
Gin	40-85	80-170
Rum	40-95	80-190

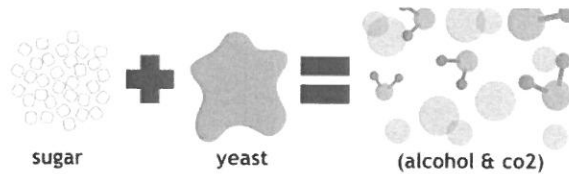
Uses:

- Flavoring: extracts
- Disinfectant: hand sanitizer, mouthwash
- Fuel: E85



Fermentation

A biological process in which sugars such as glucose, fructose, and sucrose are converted into cellular energy—this conversion produces ethanol and carbon dioxide.



Distillation

A physical process by which ethanol is separated and purified from a mixture.

Alcoholic Beverages

These beverages contain the **same amount** of alcohol:

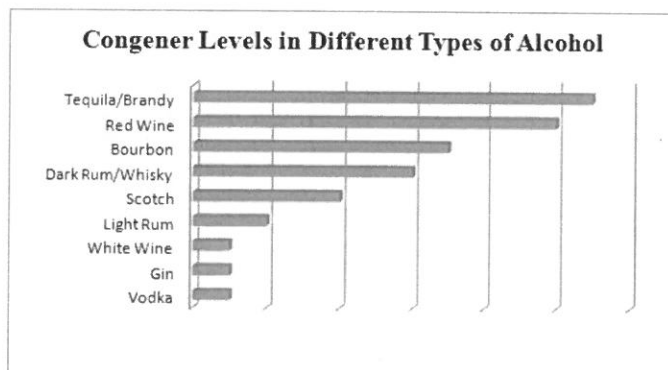
- One beer (12 oz, 4.5%)
- One glass of wine (4.5 oz, 12%)
- One mixed drink (containing 1.5 oz, 80 proof)



The total amount of alcohol consumed, not the type of beverage, is important.

Congeners

A minor chemical constituent, especially one that gives distinctive character to a wine or liquor or is responsible for some of its physiological effects; produced during fermentation or added during production (e.g. methanol, fusel oil, tannins, acetaldehyde).



Pharmacology

Study of mechanisms by which drugs alter biological systems in an attempt to improve health and alleviate disease.

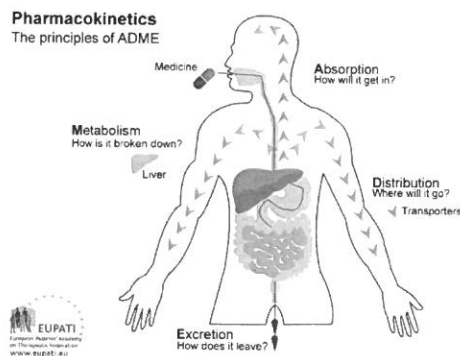
Pharmacokinetics of Alcohol = what the body does to the drug.

Absorption: how it gets in

Distribution: where it goes

Metabolism: what happens to it

Elimination: where/how it leaves



Absorption

Routes of absorption: Mouth - Esophagus - Stomach - Intestine

Mouth:

- Alcohol can be absorbed from the mouth, but very slowly; not significant.
- A mouth rinsed with a solution containing alcohol will be alcohol-free in about 10-12 minutes (MOUTH ALCOHOL).

Stomach:

- Alcohol can be absorbed directly from the stomach.
- The stomach normally absorbs about 20% of ingested alcohol.
- Stomach has thick lining, not really designed for absorption.
 - Small size of alcohols permit passage via diffusion.

Intestine:

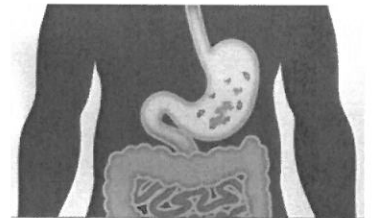
- The upper intestine normally absorbs about 80% of ingested alcohol.
- The lower intestine and lower bowel readily absorb alcohol; however, most alcohol is absorbed from the upper GI tract before it reaches the lower intestine.
- **ABSORPTION** primarily occurs in the **INTESTINES**

Skin:

- Alcohol has not been demonstrated in the blood as a result of absorption through the skin. If it is absorbed, the rate is lower than the rate of metabolism.
- Alcohol absorption defense: absorption rate through the skin < elimination rate = NO net BAC accumulation

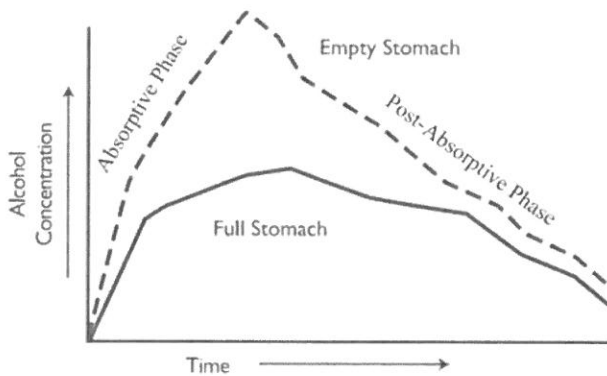
Factors that affect rate of alcohol absorption:

- Presence of food in the stomach - *****Most Important*****
 - Most foods will delay gastric emptying - ↓ absorption
- Exercise – Effects vary; some studies show no effect
 - Mild exercise can increase gastric emptying - ↑ absorption
 - Strenuous exercise can decrease gastric emptying - ↓ absorption
- Excitement of fear - ↓ absorption
- Drugs – Effects vary
- Smoking - ↓ absorption
- GI pathologies – Effects vary, depending on the pathology



The rate of alcohol absorption depends on the rate of gastric emptying. Increased gastric emptying will increase absorption of alcohol and result in higher peak blood/breath alcohol concentrations. Decreased gastric emptying will decrease absorption of alcohol and result in lower peak blood/breath alcohol concentrations.

Impact of Food on Alcohol Absorption

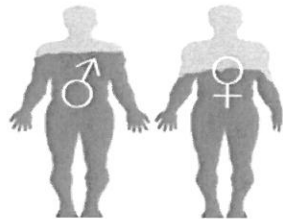


- Food in the stomach delays absorption.
 - Lower peak BAC.
- Peak occurs when the amount being absorbed equals the amount being eliminated (both occurring simultaneously)

Distribution

- Alcohol is soluble in water and is distributed throughout the body based on water content.
- Tissues and organs that have the highest concentration of water will have the highest concentration of alcohol.
- Widmark's rho (or Widmark's r): The available water content of an average male is 68%; of an average female, 55%.

For the same amount of alcohol per body weight, a woman will have a higher concentration of alcohol.



Metabolism



- Alcohol is metabolized by both the stomach and by the liver; **primarily by the liver**.
- Some alcohol is metabolized by these organs before reaching the general circulation.
- Approximately 90 - 95 % of absorbed alcohol is metabolized by the body prior to elimination, mostly in the liver.
- The rest is excreted unchanged in urine, sweat, tears, milk, and breath.

Effects of Pathological Conditions on Ethanol Metabolism

- Fatty Change (steatosis)
- Alcoholic Hepatitis

- Cirrhosis of the Liver
- Diabetes

Elimination

- Alcohol disappears from the blood at a constant rate, known as Widmark's β (beta) factor ("burn off rate").
- Rate varies between individuals:
 - Average rate: 0.015-0.019 g/100mL per hour (or g/210L per hour)
 - Range: 0.010-0.025 g/100mL per hour (or g/210L per hour)
 - Alcoholics and binge drinkers: up to 0.035 g/100mL per hour (or g/210L per hour)

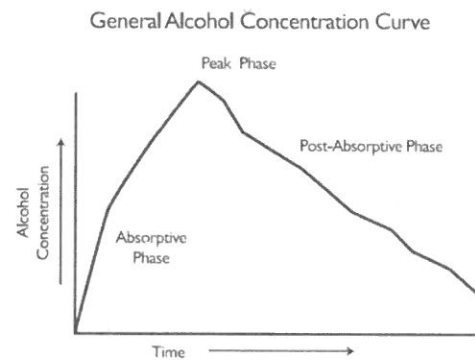
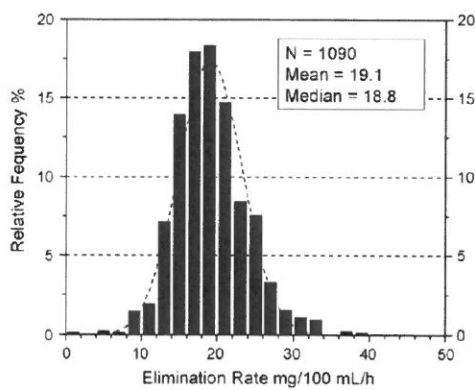


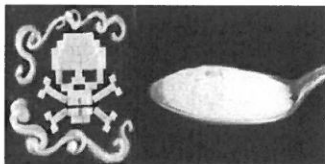
Fig. 10. Relative frequency distribution of elimination rates of alcohol from blood in apprehended drivers derived from double blood samples taken ~1 h apart [16].

Jones, A. W. (2010). "Evidence-based survey of the elimination rates of ethanol from blood with applications in forensic casework." *Forensic Sci Int* 2010(1-3): 1-20.

Toxicology

Study of the adverse effects of chemicals on living organisms.

Principle: "All substances are poisons; there is none that is not a poison. The right dose differentiates a poison from a remedy." Paracelsus

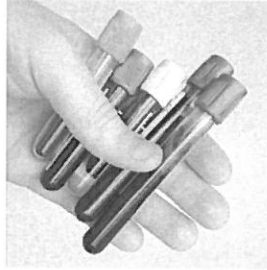


Toxicity Rating	Dose (mg/kg b.w.)	For Average Adult
1. Practically non-toxic	More than 15,000	More than 1 quart
2. Slightly Toxic	5000-15,000	1 pint-1 quart
3. Moderately Toxic	500-5000	1 ounce-1 pint
4. Very Toxic	50-500	1 teaspoon-1 ounce
5. Extremely Toxic	5-50	7 drops-1 teaspoon
6. Supertoxic	Less than 5	Less than 7 drops

Forensic Toxicology

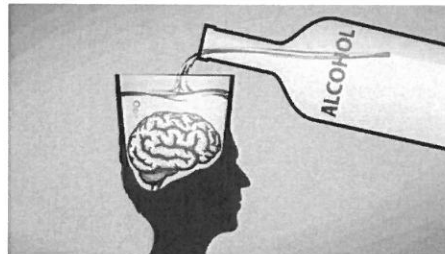
Study of the effects of chemical substances on criminal behavior or results.

- **Substances:**
 - Alcohol
 - Other Drugs
 - Poisons
- **Testing:**
 - Laboratory
 - Breath alcohol
- **Interpretation:**
 - OVWI
 - Postmortem



Toxicology of Alcohol

- **Alcohol is a CNS Depressant**
- CNS = Central Nervous System
Depressant = slows function
- Even though impairment has been correlated to blood and breath alcohol concentrations, impairment is caused by alcohol in the **BRAIN**.



Four Primary Types of Impairment

1. Loss of judgment and self-control
2. Impairment of vision and hearing
3. Clumsiness of voluntary muscles
4. Decreased awareness of surroundings

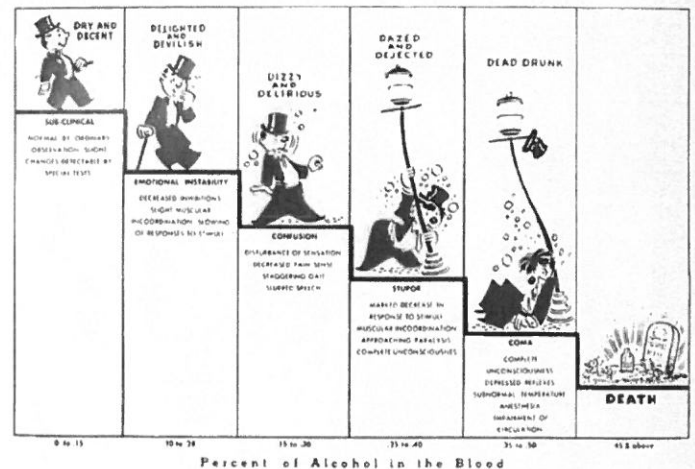
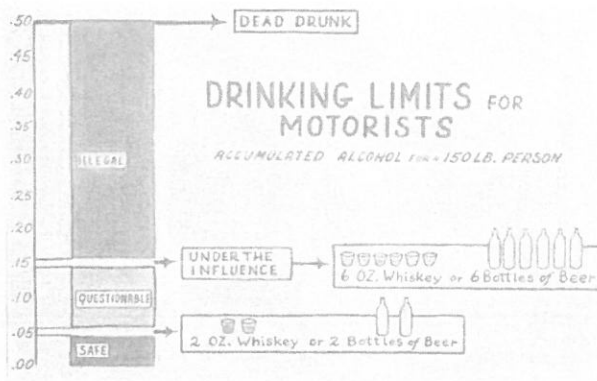


Fig. 2

STAGES OF ACUTE ALCOHOLIC INFLUENCE/INTOXICATION

BLOOD-ALCOHOL CONCENTRATION grams/100 mL	STAGE OF ALCOHOLIC INFLUENCE	CLINICAL SIGNS/SYMPTOMS
0.01-0.05	Subclinical	Influence/effects usually not apparent or obvious Behavior nearly normal by ordinary observation Impairment detectable by special tests
0.03-0.12	Euphoria	Mild euphoria, sociability, talkativeness Increased self-confidence; decreased inhibitions Diminished attention, judgment and control Some sensory-motor impairment Slowed information processing Loss of efficiency in critical performance tests
0.09-0.25	Excitement	Emotional instability; loss of critical judgment Impairment of perception, memory and comprehension Decreased sensory response; increased reaction time Reduced visual acuity & peripheral vision; and slow glare recovery Sensory-motor incoordination; impaired balance; slurred speech; vomiting; drowsiness
0.18-0.30	Confusion	Disorientation, mental confusion; vertigo; dysphoria Exaggerated emotional states (fear, rage, grief, etc) Disturbances of vision (diplopia, etc.) and of perception of color, form, motion, dimensions Increased pain threshold Increased muscular incoordination; staggering gait; ataxia Apathy, lethargy
0.25-0.40	Stupor	General inertia; approaching loss of motor functions Markedly decreased response to stimuli Marked muscular incoordination; inability to stand or walk Vomiting; incontinence of urine and feces Impaired consciousness; sleep or stupor
0.35-0.50	Coma	Complete unconsciousness; coma; anesthesia Depressed or abolished reflexes Subnormal temperature Impairment of circulation and respiration Possible death
0.45+	Death	Death from respiratory arrest

KURT M. DUBOWSKI, Ph.D., D.A.B.C.C., D.A.B.F.T.
 The University of Oklahoma
 Department of Medicine
 Oklahoma City, Oklahoma

Copyright© 2006 by Kurt M. Dubowski, Ph.D.
 All Rights Reserved

Tolerance

- The ability of an organism to adapt.
- There are two forms of alcohol tolerance, including:
 - (1) Psychological: Increased ability to alter behavior in order to not appear intoxicated.
 - (2) Biochemical: Increased rate of degradation of alcohol to inactive metabolites.

With practice, the brain can learn to function better under the influence of alcohol. People vary in their abilities to handle alcohol, not just as a result of inherent differences, but as a result of experience.

Ethanol Involvement in Auto Crashes

<u>% BAC</u>	<u>Enhancement Factor</u>
0.01-0.04	0.9x
0.05-0.09	1.5x
0.10-0.14	5x
0.15-0.19	14x
0.20-0.24	24x

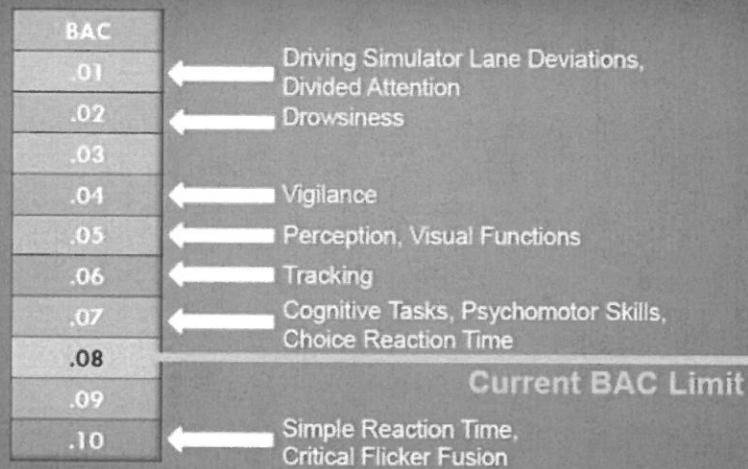
Grand Rapids Study: Borkenstein, et al. 1964

Latest reanalysis of Borkenstein and other data reveals:

at 0.08 %	Chances are 4x
at 0.15 %	Chances are 25x
at 0.20 %	Chances are >100x



Driving-Related Performance



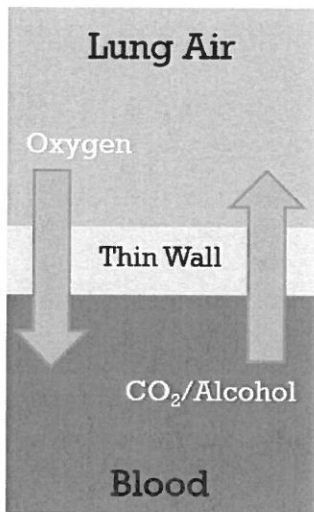
(From Moskowitz and Fiorentino, 2000)

NTSB

Breath Alcohol Determination

- As the blood passes through the lungs, alcohol will leave and become part of the expired breath.
- Alcohol's distribution between blood and breath obeys Henry's Law.

Henry's Law - in a closed container, at a given temperature and pressure, a material in solution will be in equilibrium with the air in the space above.



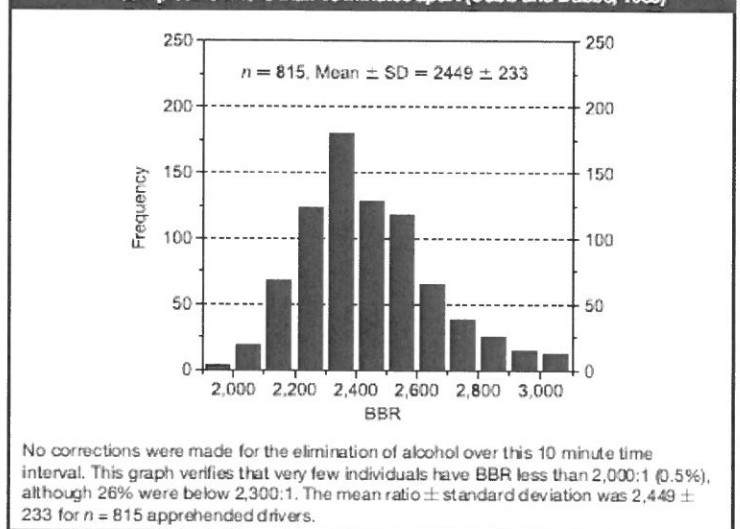
Body temp = 37° C (98.6° F)

Breath temp = 34° C (93.2° F)

- The ratio between the concentration of alcohol in the blood and that in the breath from the deepest part of the lung (alveolar air) is called the partition coefficient. The accepted ratio is 2100:1 in the United States.
- This ratio means that 2100 mL (2.1 Liters) of alveolar air will contain the same amount of alcohol as does 1 mL of blood.
- The amount of alcohol in deep (alveolar) lung air is directly related to the amount present in the blood.

- Most of the population has a breath: blood ratio greater than 2100:1.
- Breath test instruments in Indiana are calibrated at a ratio of 2100:1.
- For most of the population, Indiana breath test instruments underestimate the BAC.
- A breath test should not produce a higher result than a blood test.

Figure 5.1: Frequency distribution of BBRs of alcohol in drivers apprehended in the UK (data from the Paton Report) where blood and breath were sampled not more than 10 minutes apart (Cobb and Dabbs, 1985)



Jones, A.W. "The Relationship between blood alcohol concentration (BAC) and breath alcohol concentration (BrAC): a review of the evidence." *Road safety web publication* 15 (2010).

Alcohol reporting units:

Blood – g/100 mL
Breath – g/210 L

Breath to blood ratio : alcohol in 2100 mL (2.1 L) of alveolar air is equivalent to the alcohol in 1 mL of blood.

2.1 L of alveolar air = 1 mL of blood
210 L of alveolar air = 100 mL of blood

Common Challenges to Breath Test Results

Subject vomited or burped:

The argument may be that a subject who burped or vomited while a high concentration of alcohol existed in the stomach would exhibit falsely elevated breath alcohol levels.

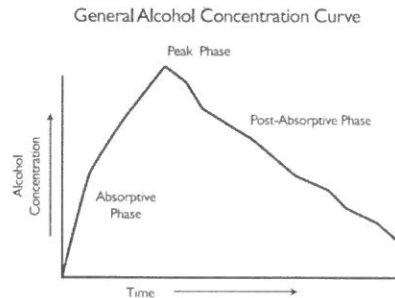
Observe carefully during the 15-minute deprivation period. Record your observations, including “nothing unusual.”

Unable to give a sufficient sample due to pulmonary disorders:

Claim that may be made in response to breath test operator indicating that subject refusal resulted in Insufficient Sample or Time Out.
Cases in which this would be true are rare.

Subject was not impaired at the time of the incident:

The argument is that the subject had recently consumed an alcoholic beverage and was still absorbing alcohol at the time of the incident.
(Rebuttal of 3-hour presumption. This is usually addressed by a toxicologist.)



Approved Method was not followed:

The argument is that the officer did not follow the Approved Method in the administration of a breath test.

MUST follow the Approved Method step-by-step for admissibility of the test (IC 9-30-6-5).

Lab Alcohol Measurement

- Indiana statutes are based on concentrations in **whole blood** and breath.
 - ISDT Lab tests whole blood and serum/plasma.
 - Most hospital labs test serum or plasma, with some exceptions.
- Other sample types can be tested, but may have no evidentiary value in Indiana (blood = impairment vs. urine = use)
- Ratio of alcohol in other fluid to that in whole blood:

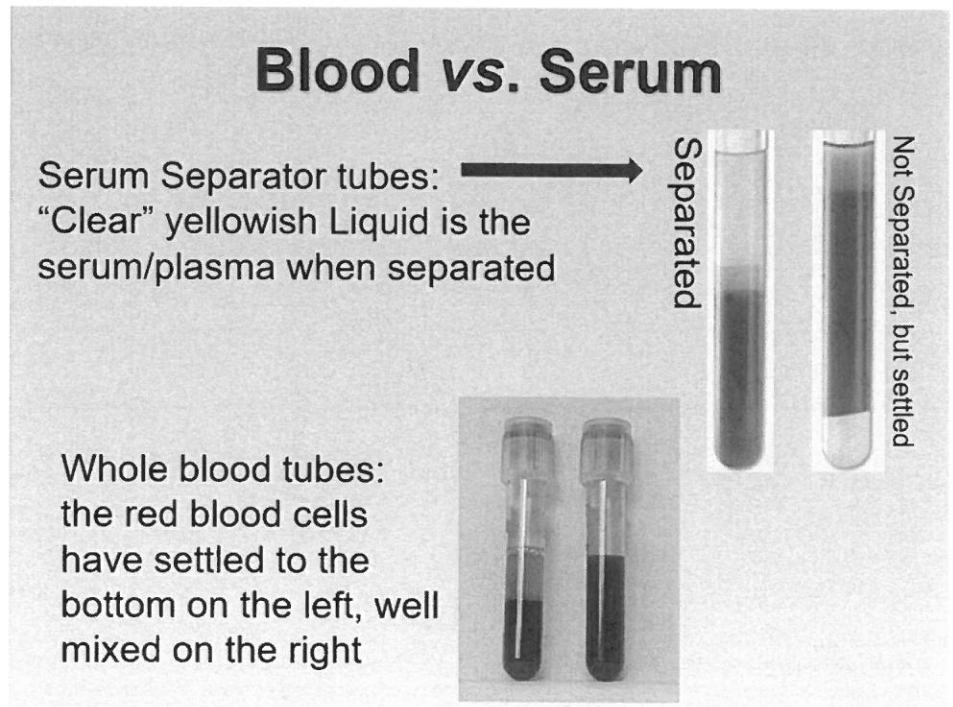
serum/plasma 1: 1.04- 1.26

saliva 1: 1.10

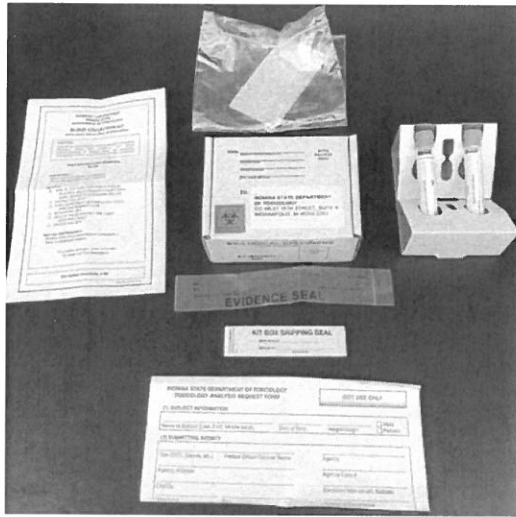
urine variable

Serum vs. Blood

Serum is an amber-colored, protein-rich liquid that separates out when blood coagulates.



Indiana State Department of Toxicology
Chemical Tests for Intoxication
Training Course for Breath Test Operator Certification



Send requests for evidence kits to:
toxkits@isdt.in.gov

Available for pick-up at ISDT or
shipment to departments

**INDIANA STATE DEPARTMENT OF TOXICOLOGY
TOXICOLOGY ANALYSIS REQUEST FORM**

ISDT USE ONLY

(1) SUBJECT INFORMATION

Name of Subject (Last, First, Middle Initial) _____ Date of Birth _____ Height/Weight _____ Male Female

(2) SUBMITTING AGENCY

Title (SGT, Deputy, etc.) _____ Printed Officer/Coroner Name _____ Agency _____
 Agency Address: _____ Agency Case # _____
 City/Zip _____ Electronic Mail (email) Address _____
 Telephone _____ Fax _____ County of Occurrence _____

(3) TESTS REQUESTED

Alcohol **ISDT only performs testing on whole blood, serum, or plasma specimen:**
 Drugs* Specify the drugs suspected in your case: _____
*Refer to www.IN.gov/ink for a listing of drugs included in our blood drug panel. Please contact ISDT to make arrangements for additional drug testing to be completed at the expense of the requesting agency.

(4) TYPE OF CASE

Traffic: <input type="checkbox"/> Fatal Crash <input type="checkbox"/> SBI Crash <input type="checkbox"/> PI Crash	PD Crash <input type="checkbox"/> OUVI <input type="checkbox"/> Other _____	Involvement: <input type="checkbox"/> Driver <input type="checkbox"/> Passenger <input type="checkbox"/> Pedestrian <input type="checkbox"/> Juvenile	Subject: <input type="checkbox"/> Injured <input type="checkbox"/> Not Injured <input type="checkbox"/> Deceased
Non-Traffic: <input type="checkbox"/> Homicide <input type="checkbox"/> Suicide <input type="checkbox"/> Sexual Assault <input type="checkbox"/> Other (Specify) _____	Involvement: <input type="checkbox"/> Victim <input type="checkbox"/> Accused <input type="checkbox"/> Elderly <input type="checkbox"/> Juvenile	DRE EVALUATION PERFORMED <input type="checkbox"/> YES <input type="checkbox"/> NO DRE officer: _____ Email: _____	

(5) EVIDENCE COLLECTION AND CHAIN OF CUSTODY INFORMATION

Specimen Collection Notes: _____

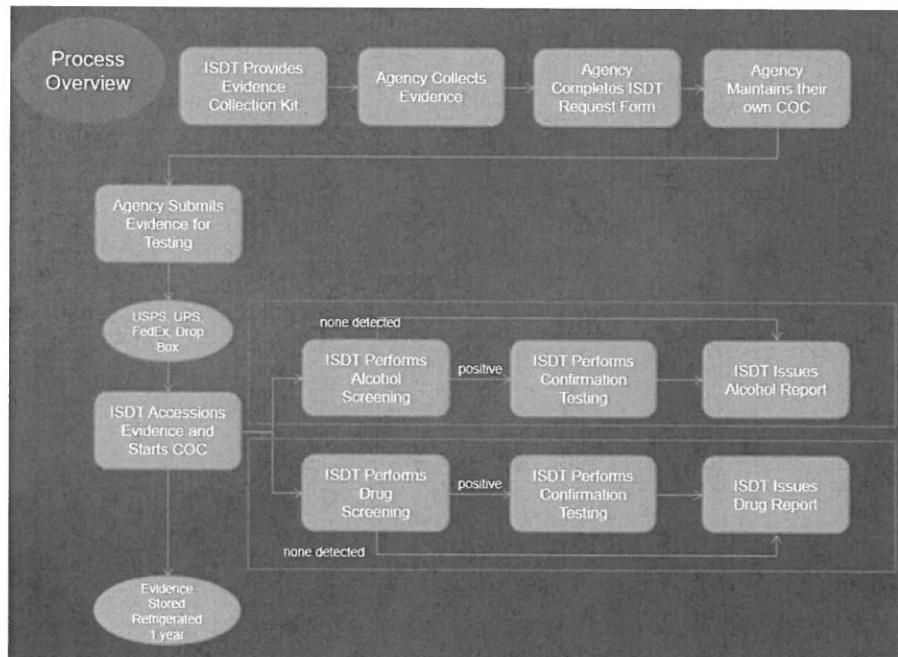
Specimen Collected By: _____ (Print Name) Collection Facility: _____ (Print Facility Name)

Date Collected: _____ Time Collected: _____ am/pm Witness: _____

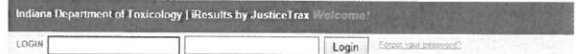
Received From	Released To	Purpose	Date	Time (am/pm)

By submitting evidence to ISDT, the submitting agency agrees to allow ISDT to select the appropriate method of analysis, authorize deviations from a test method, outsource analysis, and destroy submitted specimens 1 YEAR after analysis is completed.

550 W. 16th Street Indianapolis, IN 46202 (T) 317-921-5000 (F) 317-925-9430



Indiana State Department of Toxicology
Chemical Tests for Intoxication
Training Course for Breath Test Operator Certification



Reports on cases received after September 25, 2011 are available in iResults. For reports on cases prior to September 25, 2011, please contact the Department (317-921-5000). In iResults, search requests by individual are all under the selectable criteria "subject name". In cases where analysis has been outsourced, results received after April 1, 2014 are available by clicking the view related images "Mona Lisa" icon. For outsourced reports prior to April 1, 2014, please contact the Department. Agency staff no longer in your employment can be deactivated by unchecking the Active box in the user's details. Staff given logins that leave your employment and are not deactivated can access your agency's reports.

Powered by JusticeTrax. © 2001-2010 JusticeTrax, Inc. All rights reserved.

ISDT Testing Policy

- All positive screening results will be confirmed
 - No need to request confirmation testing
- All testing requested will be performed
- Exceptions:
 - Urine alcohol and urine drug analysis
 - Drugs outside ISDT panel
- iResults: web-based results retrieval

Compound Name	Drug Classification	Confirmation Drug Class	Alternate Name	Screen cutoff	Screening Technique	Confirmation cutoff	Confirmation Technique
1 Acetone	Volatile	Volatile	Acetone	0.010 g/100 mL	HS-GC	0.010 g/100 mL	HS-GC *The lower of the two confirmations will be used for reporting volatile results.
2 Ethanol	Volatile	Volatile	Beer, Wine, Spirits				
3 Isopropanol	Volatile	Volatile	Rubbing Alcohol				
4 Methanol	Volatile	Volatile	Wood Alcohol				
Compound Name	Drug Classification	Confirmation Class	Trade/Alternate Name	Screen cutoff	Screening Technique	Confirmation cutoff	Confirmation Technique
1 7-Aminoclonazepam	Benzodiazepine	Benzodiazepine-Z-drug	Clonazepam metabolite	10 ng/mL	LC-TOF	5 ng/mL	LC-QQQ
2 Alprazolam	Benzodiazepine	Benzodiazepine-Z-drug	Xanax, Zannies, Z-bars	10 ng/mL	LC-TOF	10 ng/mL	LC-QQQ
3 Clonazepam	Benzodiazepine	Benzodiazepine-Z-drug	Klonopin, Rivotril	10 ng/mL	LC-TOF	10 ng/mL	LC-QQQ
4 Desalkylflurazepam	Benzodiazepine	Benzodiazepine-Z-drug	Norflurazepam	10 ng/mL	LC-TOF	10 ng/mL	LC-QQQ
5 Diazepam	Benzodiazepine	Benzodiazepine-Z-drug	Valium, Diastat	10 ng/mL	LC-TOF	50 ng/mL	LC-QQQ
6 Lorazepam	Benzodiazepine	Benzodiazepine-Z-drug	Ativan	10 ng/mL	LC-TOF	10 ng/mL	LC-QQQ
7 Midazolam	Benzodiazepine	Benzodiazepine-Z-drug	Versed	10 ng/mL	LC-TOF	10 ng/mL	LC-QQQ
8 Nordiazepam	Benzodiazepine	Benzodiazepine-Z-drug	Nordaz, Stiny, Madar, Vegesan, Calmday, Diazepam metabolite	10 ng/mL	LC-TOF	50 ng/mL	LC-QQQ
9 Oxazepam	Benzodiazepine	Benzodiazepine-Z-drug	Serax, Zaxepam, Diazepam metabolite	10 ng/mL	LC-TOF	50 ng/mL	LC-QQQ
10 Temazepam	Benzodiazepine	Benzodiazepine-Z-drug	Restoril, diazepam metabolite	10 ng/mL	LC-TOF	50 ng/mL	LC-QQQ
11 Zolpidem	Sedative Hypnotic	Benzodiazepine-Z-drug	Ambien	10 ng/mL	LC-TOF	10 ng/mL	LC-QQQ
12 α-Hydroxyalprazolam	Benzodiazepine	Benzodiazepine-Z-drug	Alprazolam metabolite	10 ng/mL	LC-TOF	10 ng/mL	LC-QQQ
13 THC	Cannabinoid	Cannabinoid	Marijuana	1 ng/mL	GC-MS	1 ng/mL	GC-MS
14 THC-COOH	Cannabinoid	Cannabinoid	Marijuana metabolite	10 ng/mL	LC-TOF	5 ng/mL	GC-MS
15 Benzoylcegonine	Stimulant	Cocaine and Cocaine Metabolite	Cocaine metabolite	20 ng/mL	LC-TOF	20 ng/mL	GC-MS
16 Cocaine	Stimulant	Cocaine and Cocaine Metabolite	Coke, White, Snow, Speedball	10 ng/mL	LC-TOF	20 ng/mL	GC-MS
17 6-Monoacetylmorphine	Narcotic Analgesic	Opioids	6-MAM, 6-acetylmorphine, 6-AM, Heroin metabolite	--	--	5 ng/mL	LC-QQQ
18 Acetylfentanyl	Narcotic Analgesic	Opioids	Fentanyl analog	1 ng/mL	LC-TOF	0.5 ng/mL	LC-QQQ
19 Codeine	Narcotic Analgesic	Opioids	Codeine	10 ng/mL	LC-TOF	5 ng/mL	LC-QQQ
20 Dihydrocodeine	Narcotic Analgesic	Opioids	Drocode, Paracodeine and Parzone	10 ng/mL	LC-TOF	5 ng/mL	LC-QQQ
21 Dextromethorphan	Narcotic Analgesic	Dextro-Levo Methorphan	Delsym, Robitussin, Zicam, DDM, DM	10 ng/mL	LC-TOF	5 ng/mL	LC-QQQ
22 EDDP	Narcotic Analgesic	Opioids	Methadone metabolite	10 ng/mL	LC-TOF	10 ng/mL	LC-QQQ
23 Fentanyl	Narcotic Analgesic	Opioids	Duragesic, Abstral, Subsys	1 ng/mL	LC-TOF	0.5 ng/mL	LC-QQQ
24 Hydrocodone	Narcotic Analgesic	Opioids	Vicodin, Lortab, Lorcet, Norco, Verdoret	10 ng/mL	LC-TOF	5 ng/mL	LC-QQQ
25 Hydromorphone	Narcotic Analgesic	Opioids	Dilaudid	10 ng/mL	LC-TOF	5 ng/mL	LC-QQQ
26 Methadone	Narcotic Analgesic	Opioids	Dolophine, Methadose	10 ng/mL	LC-TOF	10 ng/mL	LC-QQQ
27 Morphine	Narcotic Analgesic	Opioids	Duramorph, DepoDur, Astamorph, Heroin metabolite	10 ng/mL	LC-TOF	5 ng/mL	LC-QQQ
28 Norfentanyl	Narcotic Analgesic	Opioids	Fentanyl metabolite	1 ng/mL	LC-TOF	0.5 ng/mL	LC-QQQ
29 O-Desmethyltramadol	Narcotic Analgesic	Opioids	Tramadol metabolite	10 ng/mL	LC-TOF	10 ng/mL	LC-QQQ
30 Oxycodone	Narcotic Analgesic	Opioids	Oxycotin, Percodan, Percocet	10 ng/mL	LC-TOF	5 ng/mL	LC-QQQ
31 Oxycodone	Narcotic Analgesic	Opioids	Opana, Numorphan, Numorphone	10 ng/mL	LC-TOF	5 ng/mL	LC-QQQ
32 Propoxyphene	Narcotic Analgesic	Opioids	Darvon, Darvocet	10 ng/mL	LC-TOF	10 ng/mL	LC-QQQ
33 Tramadol	Narcotic Analgesic	Opioids	Ultram, ConZip, Ryzolt	10 ng/mL	LC-TOF	10 ng/mL	LC-QQQ
34 Amphetamine	Stimulant	Stimulants	Adderal, Methamphetamine metabolite	10 ng/mL	LC-TOF	5 ng/mL	LC-QQQ
35 Ephedrine	Stimulant	Stimulants	Bronkaid, Primatene	10 ng/mL	LC-TOF	5 ng/mL	LC-QQQ
36 MDA	Stimulant	Stimulants	Tenamfetamine	--	--	5 ng/mL	LC-QQQ
37 MDEA	Stimulant	Stimulants	MDE, Eve	10 ng/mL	LC-TOF	10 ng/mL	LC-QQQ
38 MDMA	Stimulant	Stimulants	Ecstasy	10 ng/mL	LC-TOF	5 ng/mL	LC-QQQ
39 Methamphetamine	Stimulant	Stimulants	Desoxy, Meth, Speed, Crystal, Glass, Ice, Crank, Yaba	10 ng/mL	LC-TOF	10 ng/mL	LC-QQQ
40 Phencyclidine	Dissociative anesthetic	Stimulants	PCP, Angel dust, Sernyl	10 ng/mL	LC-TOF	5 ng/mL	LC-QQQ
41 Phentermine	Stimulant	Stimulants	Adipex-P, Suprenza	10 ng/mL	LC-TOF	20 ng/mL	LC-QQQ
42 Phenylpropionolamine	Stimulant	Stimulants	Propalin, Proin, PPA, Norephedrine, Norpseudoephedrine, Cathine	10 ng/mL	LC-TOF	5 ng/mL	LC-QQQ
43 Pseudoephedrine	Stimulant	Stimulants	Sudafed	10 ng/mL	LC-TOF	5 ng/mL	LC-QQQ

Indiana State Department of Toxicology
Chemical Tests for Intoxication
Training Course for Breath Test Operator Certification

44	Amobarbital	Sedative Hypnotic	Barbiturates	Amylobarbitone, Amytal	200 ng/mL	LC-TOF	Outsourced to NMS
45	Butabarbital	Sedative Hypnotic	Barbiturates	Butisol	200 ng/mL	LC-TOF	
46	Butalbital	Sedative Hypnotic	Barbiturates	Fioricet, Fiorinal	200 ng/mL	LC-TOF	
47	Pentobarbital	Sedative Hypnotic	Barbiturates	Nembutal	200 ng/mL	LC-TOF	
48	Phenobarbital	Sedative Hypnotic/ Anticonvulsant	Barbiturates	Luminal, Solfoton	200 ng/mL	LC-TOF	
49	Secobarbital	Sedative Hypnotic/ Anticonvulsant	Barbiturates	Seconal	200 ng/mL	LC-TOF	
50	Buprenorphine	Narcotic Analgesic	Buprenorphine	Suboxone, Buprenex	10 ng/mL	LC-TOF	
51	Norbuprenorphine	Narcotic Analgesic	Buprenorphine	Buprenorphine metabolite	10 ng/mL	LC-TOF	
52	Carisoprodol	Muscle Relaxant	Carisoprodol	Soma	500 ng/mL	LC-TOF	
53	Megrobamate	Muscle Relaxant	Carisoprodol	Carisoprodol metabolite	500 ng/mL	LC-TOF	
54	Cyclobenzaprine	Muscle Relaxant	Cyclobenzaprine	Flexeril, Amrix, Fecmid	10 ng/mL	LC-TOF	
55	Flunitrazepam	Benzodiazepine	Flunitrazepam	Rohypnol	10 ng/mL	LC-TOF	
56	Naloxone	Narcotic Analgesic	Opioids	Narcan, Evzio, (Zubsolv, Suboxone)	1 ng/mL	LC-TOF	
57	Naltrexone	Narcotic Analgesic	Opioids	Vivitrol	1 ng/mL	LC-TOF	
58	Zaleplon	Sedative Hypnotic	Zaleplon	Sonata	10 ng/mL	LC-TOF	
59	Zopiclone	Sedative Hypnotic	Zopiclone	Lunesta	10 ng/mL	LC-TOF	

Alcohol, Benzodiazepines, Sedative Hypnotics, Anticonvulsants, Narcotic Analgesics, Cannabinoids, and Muscle Relaxants are all Central Nervous System Depressants.

NOTE: All positive screening results will be confirmed and quantified, if possible. Analytes may be reported qualitatively if quantification is not possible.

GC/MS = Gas Chromatography / Mass Spectrometry LC-TOF = Liquid Chromatography / Time of Flight

HS-GC = Headspace - Gas Chromatography / Flame Ionization LC-QQQ = Liquid Chromatography / Tandem Mass Spectrometry

Cutoff = Lowest concentration of drug that will be reported

Alternate Name = Not meant to be comprehensive / inclusive; only meant to provide an example of alternate drug name

Updated: 08/04/20

SPECIMEN GUIDANCE:

Blood: Gray top preferred, but not required. Analytes may be performed on other types of tubes.

Urine: No longer analyzed by ISDT

Other: Consult ISDT Toxicologist

Negative alcohol result



INDIANA STATE DEPARTMENT OF TOXICOLOGY
TOXICOLOGY REPORT - Alcohol Analysis

ISDT CASE #: 19-XXXXX Date of Report: October 16, 2019

Submitting Officer Name: _____
Submitting Agency Name: _____
Submitting Agency Address: _____
City, IN Zip: _____

Subject Name: JOHN DOE
Agency Case: _____
Submitting Agency Case #: _____
County: _____
County of Occurrence: _____

Received: 02/16/2019
Delivered By: DROP BOX
Item Descriptions:
Item # 1: ISDT KIT
Item # 1-A: Blood Tube
Item # 1-B: Blood Tube

Screening Method: GC/MS
Screening Begin On: 09/30/2019
Items Screened: 1-A

None Detected

Analysis by GC/MS includes the following analytes: Ethanol, Acetone, Isopropanol, and Methanol.
Unless noted otherwise, the limit of detection for each analyte is 0.010 g/100 mL.

This report has been authorized by 437861!
If this case has been reviewed and an inaccurate result has not been reported, please notify the laboratory immediately.
Specimens will be destroyed one year after testing unless ISDT is notified in writing to retain the specimens for a longer period of time.

550 W 16th Street Indianapolis, IN 46202
Phone No: 317-421-5000 Fax No: 317-425-9430
Website: www.IN.gov/isdt

Page 1 of 1

Positive alcohol result



INDIANA STATE DEPARTMENT OF TOXICOLOGY
TOXICOLOGY REPORT - Alcohol Analysis

ISDT CASE #: 19-XXXXX Date of Report: October 31, 2019

Submitting Officer Name: _____
Submitting Agency Name: _____
Submitting Agency Address: _____
City, IN Zip: _____

Subject Name: JOHN DOE
Agency Case: _____
Submitting Agency Case #: _____
County: _____
County of Occurrence: _____

Received: 10/21/2019
Delivered By: DROP BOX
Item Descriptions:
Item # 1: Envelope
Item # 1-A: Blood Tube
Item # 1-B: Blood Tube

Screening Method: GC/MS
Screening Begin On: 10/20/2019
Items Screened: 1-A

Confirmation Results

Analyte	Result	Item	Confirmation Method	Analysis Date	Analyst
Ethanol	0.322 ± 0.023 g/100 mL	1-A	GC/MS	10/24/2019	Cheryl Anderson

Quantitative results are reported as
Result ± Measurement Uncertainty at a coverage probability of 99.73%.

Analysis by GC/MS includes the following analytes: Ethanol, Acetone, Isopropanol, and Methanol.
Unless noted otherwise, the limit of detection for each analyte is 0.010 g/100 mL.

This report has been authorized by 758742!
If this case has been reviewed and an inaccurate result has not been reported, please notify the laboratory immediately.
Specimens will be destroyed one year after testing unless ISDT is notified in writing to retain the specimens for a longer period of time.

550 W 16th Street Indianapolis, IN 46202
Phone No: 317-421-5000 Fax No: 317-425-9430
Website: www.IN.gov/isdt

Page 1 of 1

Positive drug result



INDIANA STATE DEPARTMENT OF TOXICOLOGY
TOXICOLOGY REPORT - Drug Analysis

ISOT CASE: 19-XXXXX Date of Report: October 22, 2019

Submitting Officer Name: _____
Submitting Agency Name: _____
Submitting Agency Address: _____
City, IN, Zip: _____

Subject Name: JOHN DOE
Agency Case: _____
County: _____

Received: 09/16/2019
Delivered By: USPS
Item Description:
Item # 1: ISOT KIT
Item # 1-A: Blood Tube
Item # 1-B: Blood Tube

Screening Method: LC-TOF
Screening Began On: 09/23/2019
Item(s) Screened: 1-A

Analyte	Confirmation Results			Analysis Date	Analyst
	Result	Item	Method		
Amphetamine	85 ± 16 ng/mL	1-A	LC/MS MS	10/10/2019	Megan DeSmet
Methamphetamine	> 200 ng/mL	1-A	LC/MS MS	10/10/2019	Megan DeSmet
Other		1-A			See NMS Report*

*Analysis performed by NMS Labs, Willow Grove, PA

Quantitative results are reported as
Result ± Measurement Uncertainty at a coverage probability of 95-95%

A list of drugs included in screening and confirmation testing is available at
www.in.gov/isd/2330.htm

This report has been authorized by LAWRENCE
If this case has been resolved and all relevant billing has not been completed, please notify the laboratory immediately.
Documents will be destroyed one year after testing unless DOJ is notified in writing to retain the specimens for a longer period of time.

550 W. 10th Street Indianapolis, IN 46202
Phone No: 317-421-5000 Fax No: 317-425-5430
Website: www.in.gov/isd

Page 1 of 1

Legal Aspects of Breath Testing for Alcohol

Implied Consent

A person who operates a vehicle impliedly consents to submit to a chemical test as a condition of operating a vehicle in Indiana.

Chemical test means an analysis of a person's blood, breath, urine, or other bodily substance for the determination of the presence of alcohol, a controlled substance or its metabolite, or a drug or its metabolite.

Implied Consent Advisement

If the person refuses to submit to a chemical test, you **shall** inform the person that refusal will result in the suspension of the person's driving privileges.

Indiana cases: *State v. Schulze* (Court of Appeals of Indiana, 2014)

Burnell v. State (Supreme Court of Indiana, 2016)

Miranda Warning

- Miranda warning must be given when suspect is in custody AND is being interrogated.
- Miranda warning is often given after the suspect fails the breath test.

- Once subject is in custody, officer should not question subject about vehicle operation, impairment, crash details, etc., until *Miranda* warning is given.

In custody

- Gray area – Not clearly delineated
- Handcuffing suspect is placing “in custody.”
- Putting suspect in police car may constitute “in custody.”
- Traffic stop and asking subject to get out of car, in and of itself, is not “in custody.”

Sobriety checkpoints: *State v. Brown* (Supreme Court of Indiana, 2017)

Interrogation

- Neither Portable Breath Tests (PBT) nor Field Sobriety Tests (FST) are statements. They alone, therefore, do not constitute an interrogation.
- If you administer a PBT or FST’s without interrogating the suspect, you are not required to give the *Miranda* warning.

Similarly, breath and blood samples do not require *Miranda* warning. The implied consent advisement is not interrogation, and IC 9-30-6-3(b) specifically provides that a person’s refusal to submit to a chemical test is admissible into evidence.

Field Sobriety Tests

Ackerman v. State (Court of Appeals of Indiana, 2002)

PBTs

State v. Whitney (Court of Appeals of Indiana, 2008)

Administering a Breath Test

- Deprivation time (use same timepiece throughout)
 - Insufficient samples
- Hurley v. State* (Supreme Court of Indiana, 2017)

Preparation for Testimony

- Review case file
- Discuss case with other officers who witnessed or assisted
- Mentally organize elements of offense and supporting evidence
- Revisit the scene if appropriate
- Discuss case with assigned prosecutor

During Testimony

- Provide specific descriptive details
- Avoid vague language

Testimony regarding the breath test

- Describe administering the Approved Method
 1. Deprivation time
 2. Instructions given
 3. Subject cooperation or lack of cooperation
 4. How results are expressed

Testimony about training

- Dates of your certification
 - Verify dates of certification with your identification card covering the period in question.
 - Keep current identification card with you and save all old/expired cards.
- Topics taught in Training Course for Breath Test Operator Certification
 - **This course has covered the areas required by 260 IAC 2.5-2-2:**
 - (1) The pharmacology and toxicology of alcohol
 - (2) The legal aspects of breath testing for alcohol
 - (3) The theory, operation, and care of breath test equipment
 - (4) The use of a breath test instrument using reference materials

Questions officers lack expertise to answer in testimony

- Certification process
 - How instruments are certified
 - When instrument was last certified
 - Any questions regarding instrument certification materials or process
- Expert testimony regarding pharmacology/toxicology of alcohol
 - Effect of alcohol
 - How much alcohol results in impairment
- Mechanics of instrument operation and maintenance
 - How the instrument operates
 - How/when maintenance is done
 - Any other questions relating to repair and/or maintenance of instrument
- “I don’t know.”

Do not volunteer more information than necessary to answer questions asked.

Focus on answering questions succinctly

Other Issues/Relevant Statutes

- IC 9-30-5 and prima facie evidence of intoxication
 1. 0.08 gram of alcohol per 100 milliliters of blood or 210 liters of breath
 2. 0.15 gram of alcohol per 100 milliliters of blood or 210 liters of breath
- If a chemical test was administered within 3 hours of the time probable cause was developed, the Indiana code establishes a rebuttable presumption that the breath or blood alcohol content test result is the subject's breath or blood alcohol content at the time of vehicle operation.

The law also establishes a rebuttable presumption that a person who operates a vehicle with at least 0.080 breath or blood alcohol content is intoxicated. Because this presumption is rebuttable, however, evidence in addition to the chemical test result is required to prove the impairment element of the charge of operating a vehicle while intoxicated.

- IC 9-30-7 – implied consent for accident involving serious injury or death

“A law enforcement officer shall offer a portable breath test or chemical test to any person who the officer has reason to believe operated a vehicle that was involved in a fatal accident or an accident involving serious bodily injury.”
(IC 9-30-7-3)

- Blood search warrants

Metzger v. State, 6 N.E.3d 485 (Indiana Court of Appeals, 2014)

IC 34-47-3-1 Disobedience of process or order

Missouri v. McNeely (U.S. Supreme Court, 2013)

- IC 9-30-6-6(a) Subpoenas for hospital blood samples/test results

If medical personnel take a sample during the course of normal treatment, the sample or test results shall be provided to an officer who requests them as part of a criminal investigation **even if the patient does not consent.**

Indiana law exempts medical personnel from civil and criminal liability for providing law enforcement with a sample or test result under these circumstances.

Instrumentation and Approved Method for Breath Analysis for Alcohol

Intox EC/IR II

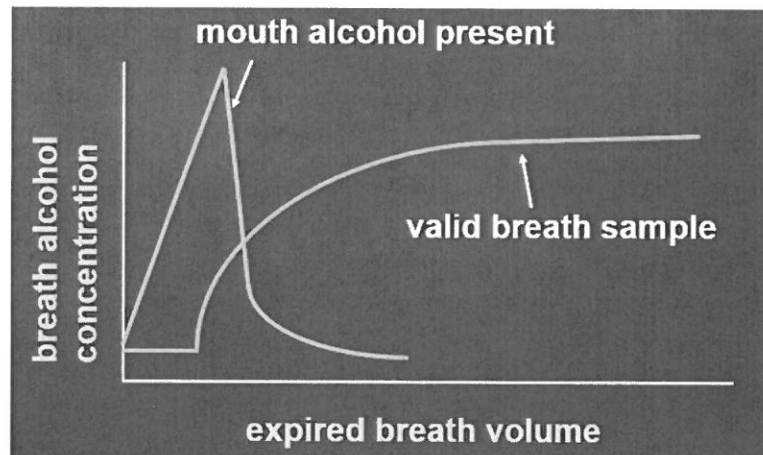
NHTSA-approved as an evidentiary breath alcohol instrument.

Theory of Operation

- EC = Electrochemical (fuel cell)
- IR = Infrared
 - Intox EC/IR II uses fuel cell technology to measure amount of alcohol in a sample
 - Intox EC/IR II uses infrared technology to detect mouth alcohol

The infrared system tracks the alcohol concentration in the sample in near real time to detect the presence of mouth alcohol, but does not produce a BrAC measurement.

- If mouth alcohol is present, the IR system will detect that there is a higher alcohol concentration in the subject's mouth air than in the subject's deep lung air.



Intox EC/IR II

- When a breath sample containing alcohol is introduced into the fuel cell sample port, an electrochemical reaction occurs.
- Measurement of the electrical current produced indicates the amount of alcohol consumed by the fuel cell.
- The fuel cell is specific to alcohol, but not specific to ethanol.
 - Intox EC/IR II detects methanol and isopropanol (alcohols other than ethanol) as interferences.

- Acetone is not a fuel for the fuel cell, so the fuel cell does not react to it.

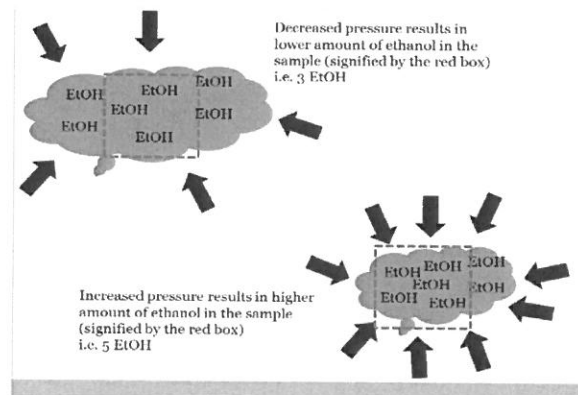
Accuracy Checks

- The Intox EC/IR II performs a calibration (accuracy) check before and after each breath test by testing a sample from an internal dry gas tank containing a certified value of ethanol.
- Instrument will disable if result of each calibration check is not within 0.005 or 5%, whichever is greater, of the dry gas target.

Dry gas target = the certified value of the ethanol in a reference material (dry gas in the instrument's internal tank) adjusted for the ambient barometric pressure

- Ethanol molecules in dry gas are affected by ambient barometric pressure: high pressure keeps the molecules closer together, resulting in a higher ethanol measurement; low pressure allows the molecules to spread, resulting in a lower ethanol measurement.

*****The target is listed on the instrument report as "Dry Gas Target."**



The Intox EC/IR II adjusts for this effect by measuring the ambient barometric pressure to determine a target for itself when it measures the ethanol in its internal dry gas tank.

Care and Service of the Intox EC/IR II

- Instrument should be left turned on 24/7.
 - Any person can turn instrument on or off***
***This should only be done if absolutely necessary
- Only persons authorized by director of ISDT may make instrument calibration adjustments.
- The instrument should not be operated in environments heavy with alcohol vapor, cigarette smoke, high levels of radio frequencies, or magnetic interference.

- Intox EC/IR II is designed so that none of these environmental conditions will affect test results.
- Prolonged exposure to these conditions may shorten the life of the fuel cell.
- Instrument displays a status message indicating the condition when:
 - it fails a calibration check
 - it malfunctions
 - the dry gas tank is low
 - If this occurs, notify ISDT.

Instrument Service

To request service of an instrument, complete and email the service request form on the State Department of Toxicology website or call ISDT at 317-921-5008.

- Provide the following information:
 - Officer's name (or name of contact person at instrument location)
 - Instrument location
 - Instrument serial number
 - Description of any issues and status messages displayed or printed on instrument reports.

An inspector will be notified as soon as possible and may contact the agency.

Approved method for Intox EC/IR II Breath Analysis

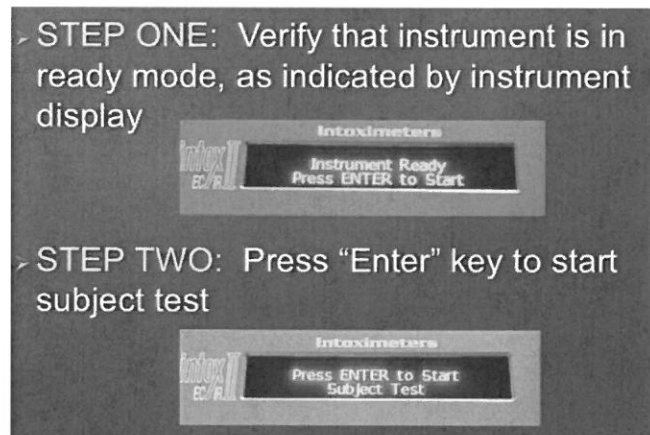
The **approved method** that **shall be followed** in making an analysis of breath for alcohol using the Intox EC/IR II breath test instrument has ten steps. (260 IAC 2.5-4-1)

***These are rules, not guidelines.**

- Person to be tested must:
 - have had nothing to eat or drink,
 - not have put any foreign substance into mouth or respiratory tract, and
 - not smoke within 15 minutes before time first breath sample is taken or at any time from first breath sample until after final breath sample.
- Fifteen-minute deprivation period can begin before subject arrives at testing site.

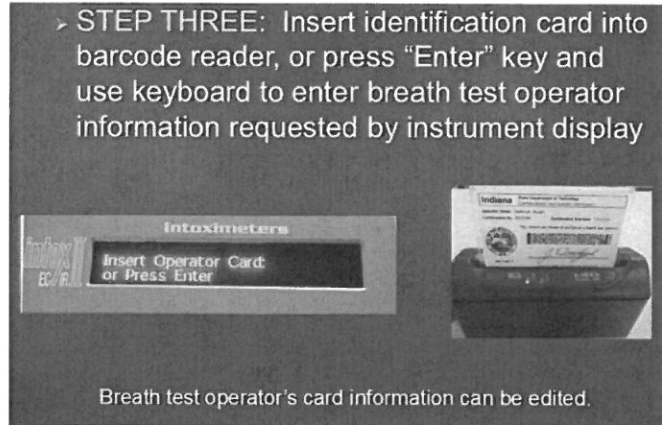
One of the common challenges to breath test results is that the subject burped or vomited prior to the test, causing an elevated breath alcohol level. Observe the subject during the 15-minute deprivation period, and record your observations, including “nothing unusual.” If the subject burps or vomits during the 15-minute period, begin a new 15-minute period, or take the subject for a blood test.

- STEP ONE: Verify that instrument is in ready mode, as indicated by instrument display.
 - Check to see that the printer is online and has paper.
- STEP TWO: Press “Enter” key to start subject test.



- STEP THREE: Insert identification card into barcode reader, or press “Enter” key and use keyboard to enter breath test operator information requested by instrument display.

All of the information scanned from the operator ID card may be edited by using the instrument keyboard. Any text that is highlighted on the instrument display may be edited; e.g., a last name change or a department change.

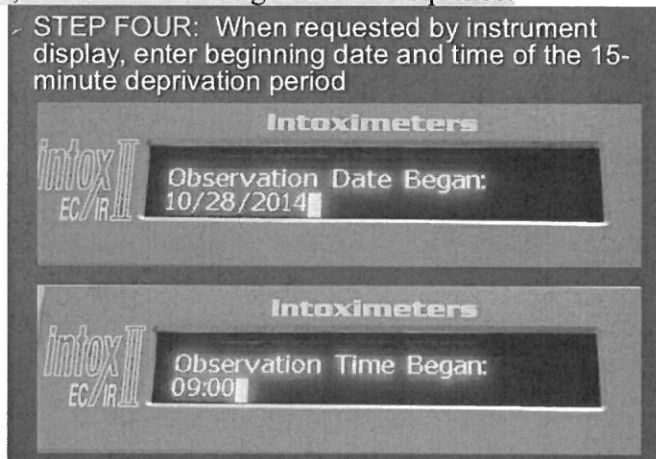


- STEP FOUR: When requested by instrument display, enter beginning date and time of the 15-minute deprivation period.

Format for date is MM/DD/YYYY

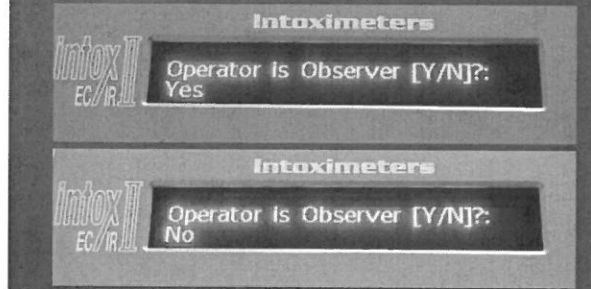
Format for time is HH:MM (military time)

Instrument will calculate 15 minutes from the beginning time entered by the operator. If the beginning time entered was not ≥ 15 minutes ago, instrument will delay start of test sequence until 15 minutes have elapsed from the beginning time entered. Examples: If beginning time entered was 10 minutes ago, instrument will wait for 5 minutes before starting the test sequence. If beginning time entered was 30 minutes ago, instrument will begin the test sequence.



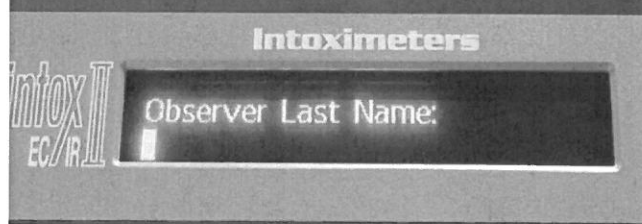
- STEP FIVE: When requested by instrument display, select "Y" or "N" to indicate whether operator had control of the subject during the 15-minute deprivation period.

➤ STEP FIVE: When requested by instrument display, select “Y” or “N” to indicate whether operator had control of the subject during the 15-minute deprivation period



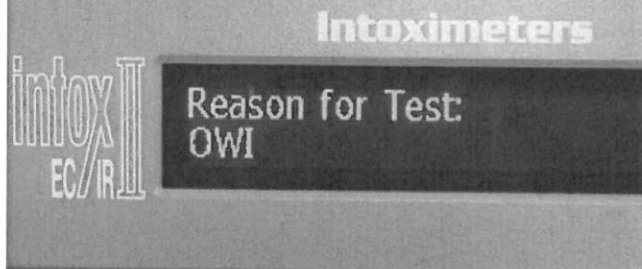
- STEP SIX: If “N” is selected in STEP FIVE, when requested by instrument display, enter information of officer with control of subject during the 15-minute deprivation period.

➤ STEP SIX: If “N” is selected in STEP FIVE, when requested by instrument display, enter information of officer with control of subject during the 15-minute deprivation period



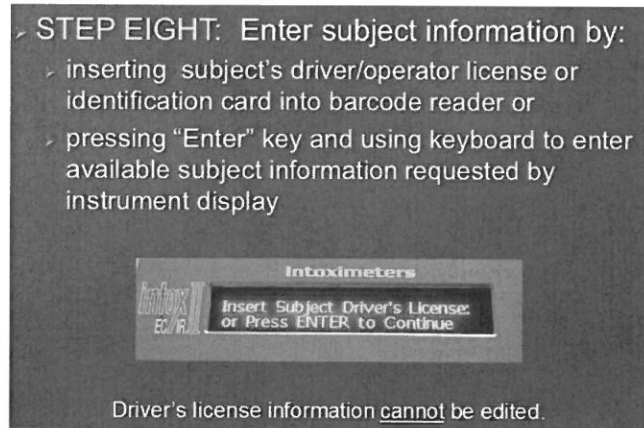
- STEP SEVEN: Enter incident information requested by instrument display. Use spacebar to move between “Reason for Test:” options.

➤ STEP SEVEN: Enter incident information requested by instrument display



- STEP EIGHT: Enter subject information requested by instrument display by:
 - inserting subject's driver/operator license or identification card into barcode reader or
 - pressing "Enter" key and using keyboard to enter available subject information requested by instrument display.

Scanned DL info cannot be edited by keyboard.



- STEP NINE: When "Please blow" appears on instrument display, place mouthpiece on breath tube. Instruct subject to deliver a breath sample. Remove mouthpiece after delivery of sample or when prompted by instrument display. Repeat as prompted by instrument display.

Do not allow the test subject to handle the breath tube.

Instruct the subject: "Take a deep breath, make a tight seal around the tip of the mouthpiece, and then blow long, strong, and continuously until I tell you to stop."

If minimum flow is not reached within 3 minutes from time that "Please blow"/"Press 'R' for refusal" is displayed, instrument will display "Refusal? [Y/N]." The 3-minute timer resets after each "Insufficient Sample." If this occurs 3 times, test sequence ends.

Removal of Mouthpiece: Failure to comply with the requirement to remove the mouthpiece could result in a failed Blank Check.

After delivery of the first sample there is a 2-minute delay before the next "Purging Remove Mouthpiece" prompt.

- STEP TEN: Print instrument report and remove from printer; check report for numerical value of subject's breath alcohol concentration reported as "RESULT" and sign report where indicated.

Two-test sequence with 0.020 agreement

Intox EC/IR-II: Subject Test

ISDT 550 W. 16th Street Indianapolis, IN 46202

Serial Number: 011082 Test Number: 47
Test Date: 08/07/2013 Test Time: 10:50 EDT

Operator Name: Bunion, Paul R
Operator Certification Number: G99999
Agency Name: Skyville
Observation Began: 08/07/2013 at 10:40
Observer Name: Bunion, Paul R
Driver License Number: 123456789
Subject Name: Sober, Stone
Subject D.O.B.: 05/31/1961

Dry Gas Target: 0.077
Lot Number: AG317601 Tank Number: 4 Exp Date: 06/05/2015

System Check: Passed ← internal diagnostics

Test	g/210L	Time	
BLK	0.000	11:00	blank check
CHK	0.076	11:01	calibration check
BLK	0.000	11:02	blank check
SUBJ	0.120	11:03	1 st subject sample test
BLK	0.000	11:06	blank check
SUBJ	0.118	11:06	2 nd subject sample test
BLK	0.000	11:07	blank check
CHK	0.076	11:08	calibration check
BLK	0.000	11:09	blank check

Test Status Sample Complete

RESULT: 0.118 g/210L — subject's breath alcohol content
11:06 EDT, (the lower of the two results)
08/07/2013

ALCOHOL READINGS ARE EXPRESSED AS
GRAMS OF ALCOHOL PER 210 LITERS OF
BREATH

Operator Signature

“System Check” is a set of internal diagnostics that looks at the baselines of all the instrument sensors. Although only the first system check appears on the instrument report, the instrument performs a system check before each function in the test sequence (i.e., before every blank check, every accuracy check, every subject test).

You may use this instrument report.

Approved method for Intox EC/IR II Breath Analysis (260 IAC 2.5-4-1)

- If the BrAC results of the two tests in the sequence are not within 0.020 of each other, the instrument prompts for an additional test by displaying, “Please blow.”

Three-test sequence with 0.020 agreement

[text omitted]
Dry Gas Target: 0.077
Lot Number: AG317601 Tank Number: 4 Exp Date: 06/05/2015

System Check: Passed

Test	g/210L	Time	
BLK	0.000	11:00	
CHK	0.076	← 11:01	blank check
BLK	0.000	11:02	
SUBJ	0.130	← 11:03	1 st subject sample test
BLK	0.000	11:06	
SUBJ	0.100	← 11:06	2 nd subject sample test
BLK	0.000	11:07	
SUBJ	0.102	← 11:08	3 rd subject sample test
BLK	0.000	11:09	
CHK	0.076	11:10	
BLK	0.000	11:11	

Test Status Sample Complete

RESULT: 0.100 g/210L ← subject's BrAC
[text omitted] (lower of the two results
within 0.020 of each other is
reported)

Three-test sequence with no 0.020 agreement

[text omitted]
Dry Gas Target: 0.077
Lot Number: AG317601 Tank Number: 4 Exp Date: 06/05/2015

System Check: Passed ◀internal diagnostics

Test	g/210L	Time	
BLK	0.000	11:00	blank check
CHK	0.076	11:01	calibration check
BLK	0.000	11:02	blank check
SUBJ	0.130	11:03	1 st subject sample test
BLK	0.000	11:06	blank check
SUBJ	0.105	11:06	2 nd subject sample test
BLK	0.000	11:07	blank check
SUBJ	0.083	11:08	3 rd subject sample test
BLK	0.000	11:09	blank check
CHK	0.076	11:10	calibration check
BLK	0.000	11:11	blank check

Test Status No 0.020 Agreement

RESULT: * ~~***~~ g/210L — no BrAC reported
[text omitted]

You may not use this instrument report to determine subject BrAC.

Approved method for Intox EC/IR II Breath Analysis (260 IAC 2.5-4-1)

- If “Interfering Substance” or “Mouth Alcohol” is printed on the instrument report:
 - obtain a blood sample for a chemical test; or
 - repeat the 15-minute deprivation period and perform an additional breath test, beginning with STEP ONE.
- If “Interfering Substance” or “Mouth Alcohol” is printed on instrument report from an additional breath test:
 - obtain a blood sample for a chemical test; or
 - sign all instrument reports where indicated if a numerical value for the subject’s breath alcohol concentration is reported as “RESULT”

Test sequence with Interfering Substance on first subject sample

[text omitted]
Dry Gas Target: 0.077
Lot Number: AG317601 Tank Number: 4 Exp Date: 06/05/2015

System Check: Passed ← internal diagnostics

Test	g/210L	Time	
BLK	0.000	11:00	blank check
CHK	0.076	11:01	calibration check
BLK	0.000	11:02	blank check
SUBJ	*.***	11:03	1 st subject sample test
BLK	0.000	11:04	blank check
CHK	0.076	11:05	calibration check
BLK	0.000	11:06	blank check

Test Status *.*** Interfering Substance

RESULT: *.*** g/210L no BrAC reported
[text omitted]

If you get an “Interfering Substance” on the first test of a sequence, the sequence will end, and the result will be “Interfering Substance.”

You may not use this instrument report.

Test sequence with Interfering Substance on second subject sample

[text omitted]
Dry Gas Target: 0.077
Lot Number: AG317601 Tank Number: 4 Exp Date: 06/05/2015

System Check: Passed internal diagnostics

Test	g/210L	Time	
BLK	0.000	11:00	blank check
CHK	0.076	11:01	calibration check
BLK	0.000	11:02	blank check
SUBJ	0.120	11:03	1 st subject sample test
BLK	0.000	11:06	blank check
SUBJ	*.***	11:06	2 nd subject sample test
BLK	0.000	11:07	blank check
CHK	0.076	11:08	calibration check
BLK	0.000	11:09	blank check

Test Status *.*** Interfering Substance

RESULT: 0.120 g/210L subject's BrAC
[text omitted]

You may not use this instrument report unless you complete a second breath test as specified in the Approved Method, beginning with a 15-minute deprivation period.

Test sequence with Mouth Alcohol on first subject sample

[text omitted]
Dry Gas Target: 0.077
Lot Number: AG317601 Tank Number: 4 Exp Date: 06/05/2015

System Check: Passed internal diagnostics

Test	g/210L	Time	
BLK	0.000	11:00	blank check
CHK	0.076	11:01	calibration check
BLK	0.000	11:02	blank check
SUBJ	*.***	11:03	1 st subject sample test
BLK	0.000	11:04	blank check
CHK	0.076	11:05	calibration check
BLK	0.000	11:06	blank check

Test Status *.*** Mouth Alcohol

RESULT: *.*** g/210L no BrAC reported
[text omitted]

If you get a "Mouth Alcohol" on the first test of a sequence, the sequence will end, and the result will be "Mouth Alcohol." You may not use this instrument report.

Test sequence with Mouth Alcohol on second subject sample

Intox EC/IR-II: Subject Test

ISDT 550 W. 16th Street Indianapolis, IN 46202

Serial Number: 011082 Test Number: 47
Test Date: 08/07/2013 Test Time: 10:50 EDT

Operator Name: Bunion, Paul R
Operator Certification Number: G99999
Agency Name: Skyville
Observation Began: 08/07/2013 at 10:40
Observer Name: Bunion, Paul R
Driver License Number: 123456789
Subject Name: Sober, Stone
Subject D.O.B.: 05/31/1961

Dry Gas Target: 0.077
Lot Number: AG317601 Tank Number: 4 Exp Date: 06/05/2015

System Check: Passed internal diagnostics

Test	g/210L	Time	
BLK	0.000	11:00	blank check
CHK	0.076	11:01	calibration check
BLK	0.000	11:02	blank check
SUBJ	0.120	11:03	1 st subject sample test
BLK	0.000	11:06	blank check
SUBJ	*.***	11:06	2 nd subject sample test
BLK	0.000	11:07	blank check
CHK	0.076	11:08	calibration check
BLK	0.000	11:09	blank check

Test Status *.*** Mouth Alcohol

RESULT: 0.120 g/210L subject's BrAC
11:03 EDT,
08/07/2013

ALCOHOL READINGS ARE EXPRESSED AS GRAMS OF
ALCOHOL PER 210 LITERS OF BREATH

Operator Signature

You may not use this instrument report unless you complete a second breath test as specified in the Approved Method, beginning with a 15-minute deprivation period.

Approved method for Intox EC/IR II Breath Analysis (260 IAC 2.5-4-1)

- If a status message not listed in the rule, excluding “Test Complete,” is printed on the report:
 - obtain a blood sample for a chemical test; or
 - perform an additional breath test, beginning with STEP ONE.

Another 15-minute deprivation period is not required.

- If a status message not listed in the rule, excluding “Test Complete,” is printed on the report from an additional breath test:
 - obtain a blood sample for a chemical test; or
 - sign all instrument reports where indicated if a numerical value for the subject’s breath alcohol concentration is reported as the “RESULT” on any instrument report.

If “Insufficient Sample” or “Time Out” is caused by subject’s lack of cooperation, operator should record that test was refused.

Test sequence with Insufficient Sample on first subject sample

[text omitted]
Dry Gas Target: 0.077
Lot Number: AG317601 Tank Number: 4 Exp Date: 06/05/2015

System Check: ~~Passed~~ internal diagnostics

Test	g/210L	Time	
BLK	0.000	11:00	blank check
CHK	0.076	11:01	calibration check
BLK	0.000	11:02	blank check
SUBJ	*.***	11:03	1 st subject sample test
BLK	0.000	11:04	blank check
CHK	0.076	11:05	calibration check
BLK	0.000	11:06	blank check

Test Status *.*** Insufficient Sample

RESULT: *.*** g/210L no BrAC reported
[text omitted]

If you get an “Insufficient Sample” or “Time Out” on the first test of a sequence, the sequence will end, and the result will be “Insufficient Sample” or “Time Out.” You may not use this instrument report.

Test sequence with Insufficient Sample on second subject sample

Intox EC/IR-II: Subject Test

ISDT 550 W. 16th Street Indianapolis, IN 46202

Serial Number: 011082 Test Number: 47
Test Date: 08/07/2013 Test Time: 10:50 EDT

Operator Name: Bunion, Paul R
Operator Certification Number: G99999
Agency Name: Skyville
Observation Began: 08/07/2013 at 10:40
Observer Name: Bunion, Paul R
Driver License Number: 123456789
Subject Name: Sober, Stone
Subject D.O.B.: 05/31/1961

Dry Gas Target: 0.077
Lot Number: AG317601 Tank Number: 4 Exp Date: 06/05/2015

System Check: Passed internal diagnostics

Test	g/210L	Time	
BLK	0.000	11:00	blank check
CHK	0.076	11:01	calibration check
BLK	0.000	11:02	blank check
SUBJ	0.120	11:03	1 st subject sample test
BLK	0.000	11:06	blank check
SUBJ	*.***	11:06	2 nd subject sample test
BLK	0.000	11:07	blank check
CHK	0.076	11:08	calibration check
BLK	0.000	11:09	blank check

Test Status *.*** Insufficient Sample

RESULT: 0.120 g/210L subject's BrAC
11:04 EDT,
08/07/2013

ALCOHOL READINGS ARE EXPRESSED AS GRAMS OF
ALCOHOL PER 210 LITERS OF BREATH

Operator Signature

You may not use this instrument report unless you complete a second breath test as specified in the Approved Method. Another 15-minute deprivation period is not required.

Alternate Test

- This is a blood test. The sample must be taken by a medical person, but a hospital is not needed.
- The drawing of the subject's blood should be witnessed by an officer.

Maximum BrAC Result

- Intox EC/IR II measures up to 0.440 BrAC
- If subject BrAC is > 0.440, instrument will display "Sample Over Range"
- Obtain a blood sample if this occurs

Print Last Test

- Press "P" (for "Print")
- Type in Password "OPER"
- Press "Enter" key
- Press "Space" bar to print

Will print only the last test in the instrument memory.

Laboratory Exercises

You are required to submit the following instrument reports at the completion of these exercises:

Exercise 1: Personal breath test with duplicate copy

Exercise 2: Subject breath test

Exercise 3: Subject (instructor) breath test

Exercise 1: Complete a personal breath test by delivering two acceptable breath samples during a subject test sequence. Print and sign the instrument report. **Print a duplicate of this instrument report by use of the password protected “Print Last Test” command.**

Exercise 2: Complete a subject test sequence acting as the breath test operator and instructing another student in the delivery of two acceptable breath samples during a subject test sequence.** Print and sign the instrument report.

After completion of the above exercises, turn in your instrument reports to an ISDT instructor, and report to the classroom to take the written examination.

After your completed written examination is graded by an ISDT instructor, report to the laboratory to complete the final laboratory exercise below:

Exercise 3: Complete a subject test sequence acting as the breath test operator and instructing an ISDT instructor in the delivery of two acceptable breath samples during the subject test sequence.** Print, sign, and turn in the instrument report.

**** Emphasis should be placed on coaching the test subject on delivery of the samples in order to minimize the occurrence of “Insufficient sample” test results.**

260 IAC 2.5-4-1 Approved method for Intox EC/IR II breath analysis

Sec. 1. (a) The approved method that shall be followed in making an analysis of breath for alcohol using the Intox EC/IR II breath test instrument is as follows:

(1) The person to be tested must:

(A) have had nothing to eat or drink;

(B) not have put any foreign substance into his or her mouth or respiratory tract; and

(C) not smoke;

within **fifteen (15) minutes** before the time the first breath sample is taken or at any time from the taking of the first breath sample until after the taking of the final breath sample.

(2) Use the following STEPS:

STEP ONE: Verify that the instrument is in ready mode, as indicated by the instrument display.

STEP TWO: Press "Enter" key to start subject test.

STEP THREE: Insert identification card into the barcode reader, or press the "Enter" key and use the keyboard to enter the breath test operator information requested by the instrument display.

STEP FOUR: When requested by the instrument display, enter the beginning date and time of the fifteen (15) minute deprivation period described in subdivision (1).

STEP FIVE: When requested by the instrument display, select "Y" or "N" to indicate whether the breath test operator had control of the subject during the fifteen (15) minute deprivation period described in subdivision (1).

STEP SIX: If "N" is selected in STEP FIVE, when requested by the instrument display, enter the information of the officer with control of the subject during the fifteen (15) minute deprivation period described in subdivision (1).

STEP SEVEN: Enter incident information requested by the instrument display.

STEP EIGHT: Enter subject information by:

(A) inserting the subject's driver/operator license or identification card into the barcode reader; or

(B) pressing the "Enter" key and using the keyboard to enter the available subject information requested by the instrument display.

STEP NINE: When "Please blow" appears on the instrument display, place a mouthpiece on the breath tube. Instruct the subject to deliver a breath sample. Remove mouthpiece after delivery of a breath sample or when prompted by the instrument display. Repeat as prompted by the instrument display.

STEP TEN: Print the instrument report and remove it from the printer; verify that there is a numerical value for the subject's breath alcohol concentration reported as the "RESULT" on the instrument report and sign the instrument report where indicated.

(b) If any of the following status messages is printed on the instrument report, proceed as follows:

(1) If "Interfering Substance" or "Mouth Alcohol" is printed on the instrument report:

(A) obtain a blood sample for a chemical test; or

(B) repeat the fifteen (15) minute deprivation period described in subsection (a)(1) and perform an additional breath test, beginning with STEP ONE in subsection (a)(2). If "Interfering Substance" or "Mouth Alcohol" is printed on the instrument report after this additional breath test:

(i) obtain a blood sample for a chemical test; or

(ii) sign all instrument reports where indicated if a numerical value for the subject's breath alcohol concentration is reported as the "RESULT" on any instrument report.

(2) If a status message not listed in this rule, excluding "Test Complete", is printed on the instrument report:

(A) obtain a blood sample for a chemical test; or

(B) perform an additional breath test, beginning with STEP ONE in subsection (a)(2). If a status message not listed in this rule, with the exception of "Test Complete", is printed on the instrument report after this additional breath test:

(i) obtain a blood sample for a chemical test; or

(ii) sign all instrument reports where indicated if a numerical value for the subject's breath alcohol concentration is reported as the "RESULT" on any instrument report.

(c) If a subject refuses a test, the breath test operator should record that the test was refused and sign all reports where indicated.

Section Five

Blinding Them With Science: Some Quick Tips on Blood Test Cases

Deandra M. Grant
Hamilton Grant
Dallas, Texas
deandragrant@gmail.com

Section Five

**Blinding Them With Science: Some
Quick Tips on Blood Test Cases..... Deandra M. Grant**

PowerPoint Presentation

Subpoena Duces Tecum Request – Criminal

DUI DEFENSE
LAWYERS ASSOCIATION



Blinding Them With Science: Some Quick Tips on Blood Test Cases

**Impaired Driving Defense
101**

Indianapolis, IN

March 26, 2021

By Deandra Grant, JD, GC, MS



Lawyer-Scientist Program at Axion Labs in Chicago







Create a Blood Timeline

- Time of last drink if given
- Time of driving
- Time of warrant signing
- Time of blood draw
- Time of log in to property room refrigerator
- Date of transfer to lab
- Date of testing



Blood Tubes

They leave the manufacturer:

- Sterile
- Sealed
- Appropriate vacuum





The powder keeps blood from clotting and rotting.

BD Vacutainer®
Sodium Fluoride /
Potassium Oxalate
100 mg / 20 mg

BD, Franklin Lakes, NJ USA Sterile 8012429

10 mL

REF 367001 LOT 2003631 Exp 2014-01

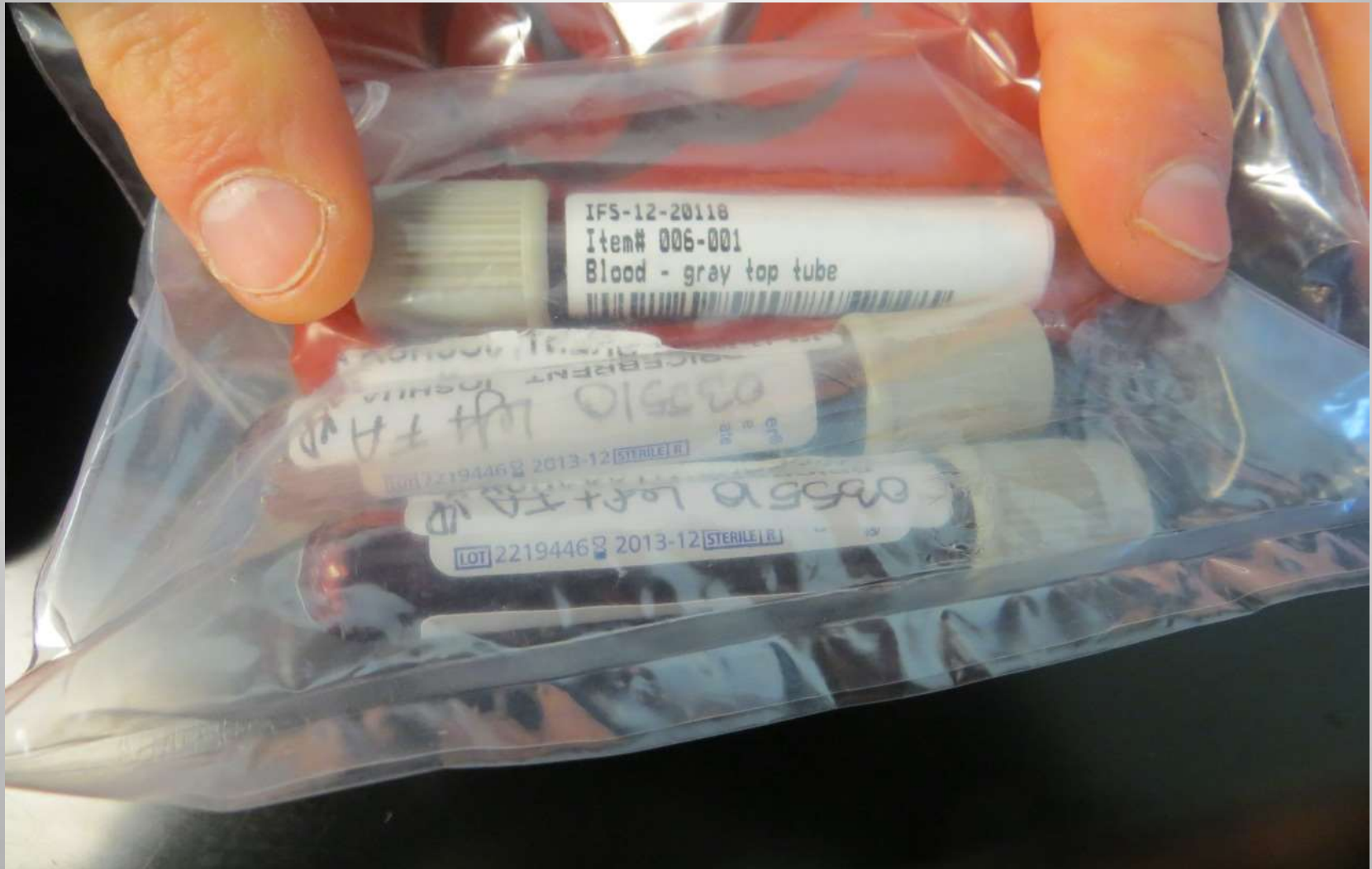
BD Vacutainer®
Sodium Fluoride
30 mg

BD, Franklin Lakes, NJ USA Sterile 8012437

7 mL

REF 367720 Lot: B210861 Exp: 2010-03

These are 4 ml "grey top" BD tubes that only contain 8 mg potassium oxalate/10 mg sodium fluoride - not enough and not in the right ratio.





Gray



- Potassium oxalate/
sodium fluoride 8
- Sodium fluoride/Na₂ EDTA 8
- Sodium fluoride (serum tube) 8

For glucose determinations. Oxalate and EDTA anticoagulants will give plasma samples. Sodium fluoride is the antiglycolytic agent. Tube inversions ensure proper mixing of additive and blood.



Lavender



- Liquid K₃EDTA (glass) 8
- Spray-coated K₂EDTA (plastic) 8

K₂EDTA and K₃EDTA for whole blood hematology determinations. K₂EDTA may be used for routine immunohematology testing and blood donor screening.*** Tube inversions prevent clotting.

Lavender/purple top tubes are used for routine blood tests, including situations when whole blood is required for complete blood counts (CBC) and blood smears or blood typing. These tube tops include the additive EDTA to prevent clotting.



Blood Tubes have expiration dates.

According to the manufacturer:

The expiration date on the tube label is stated as a month and year. The tubes expire at the end of the month that is stated on the label.





The expiration date applies to the integrity of the vacuum seal – not the chemicals inside the tube.

Gray top tubes:

- preservative **sodium flouride** (should have 100 mg)
- anti-coagulant **potassium oxalate** (should have 20 mg)



According to the manufacturer:

At what temperature should the BD Blood Collection Tubes be stored?

BD tubes should be stored at 4-25°C (39-77°F).





Blood Storage

Blood should be stored between 2-8 degrees Centigrade.

Can the State prove refrigeration? How many days between the blood draw and the day the blood was tested? Can they account for the blood storage during that time?

Measurement Techniques



■ Direct measurements

- Directly measure the property
 - Mass on a scale

■ Indirect measurements

- Measure another property and relate it to the property of interest through a calibration
 - Expansion of liquid in a tube to determine temperature



Reported BAC is a result of a calculation of the ratio of the ethanol peak and the n-Propanol (internal standard) peak

- Too much IS? IS and BAC is adjusted down
- Too little IS? IS and BAC is adjusted up





Sample Preparation



Pipette

A narrow, usually calibrated glass tube into which small amounts of liquid are suctioned for transfer or measurement. Were they calibrated?



Calibration Certificate

Certificate #: 6649822F



Calibration Performed By:
 ALDINGER CO
 1440 PRUDENTIAL
 DALLAS, TX 75235

For:
 SOUTHWESTERN INST OF FORENSIC SCIENCES
 2355 N. STEMMONS
 DALLAS, TX 75235

Equipment Information
 I.D.: 278
 Manufacturer: EPPENDORF
 Gage Type: PIPETTE
 Temp/RH: 74 F / 46 %
 Cal Date: 8/28/2012
 Department: TOX
 Description: PIPETTE

Serial Number: 2865035
 Model Number: 2100
 Performed By: 664
 Location: TOX
 Cal. Due Date: 08/28/2013
 As Found Condition: Out of Tolerance
 As Left Condition: In Tolerance

Calibration Notes

Test Points

Seq.	Description	Standard	Tolerance	Tolerance*	As Found	As Left *	Uncertainty	Unit
1	Ch1 TP1 Mean 100ul	100.000	99.400	100.600	97.869	100.527 A	0.31	uL
2	Ch1 TP1 % Inaccuracy	0.000	-0.600	0.600	-2.131	0.527 A		%
3	Ch1 TP1 % Imprecision	0.000	-0.200	0.200	0.052	0.018		%

*In "As Left" column "A" denotes an adjusted test point and "F" denotes a failed test point. Blank denotes an acceptable value.

Standards Used	ID	Description	Last Cal.	Cal. Due Date	Traceability #
RICE LAKE	664A	WEIGHT SET	3/7/2012	9/30/2012	209603
CONTROL COMPAN	664BP	TEMP/HUM/BP	10/14/2011	10/31/2013	201278

Procedure Used	Procedure Name	Description	Revision Level	Revision Date
ALDINGER CO	PPCA201	PIPETTE	5	7/14/2011

Technician Signature Tyler Smeade

Aldinger Co. certifies that the instrument listed above has been tested, calibrated (if necessary), and meets the criteria established in the associated test procedure unless otherwise noted. The standards used are traceable to the National Institute of Standards and Technology (NIST). Aldinger Co. calibration and control system meets the general requirements for the competence of calibration and testing laboratories (ISO/IEC 17025-2005 & ANSI/NCSL Z540-1-1994). The uncertainty calculation includes the UUT. In tolerance conditions are based on test results falling within specified limits with no reduction by the uncertainty of the measurement. This uncertainty represents an expanded uncertainty expressed at approximately 95% confidence level using a coverage factor of k=2. This report shall not be reproduced, except in full, without the written approval of Aldinger Co. *The uncertainty value is listed in the same unit as the test point.

Cal. Due Date: 08/28/2013
 As Found Condition: Out of Tolerance
 As Left Condition: In Tolerance
 The calibration interval has been specified by the customer. Any number of factors may cause the calibration to drift out of tolerance before the recommended interval has expired.

Calibration Certificate

Certificate #: 410342



Calibration Performed By:

ALDINGER CO
1440 PRUDENTIAL
DALLAS, TX 75235

For:

TEXAS DEPT OF PUBLIC SAFETY
402 W. IH 30
GARLAND, TX 75043

Equipment Information

I.D.: P4K2069006
Manufacturer: DENVER
Gage Type: BALANCE-1
Temp./RH: 72 F / 34 %
Cal Date: 1/25/2016
Department:
Description: BALANCE - TOP LOADER

Serial Number: P4K2069006

Model Number: P4002

Performed By: 561

Location:

Cal. Due Date: 01/25/2017

As Found Condition: Out of Tolerance

As Left Condition: In Tolerance

The calibration interval may cause the calibration to drift out of tolerance before the recommended interval has expired.

Calibration Notes



Calibration Performed By:

ALDINGER CO
1440 PRUDENTIAL
DALLAS, TX 75235

For:

TEXAS DPS GARLAND
402 W. IH 30
GARLAND, TX 75043

Equipment Information

I.D.: P4K2069006
Manufacturer: DENVER
Gage Type: BALANCES-29
Temp./RH: 74 F / 39 %
Cal Date: 1/27/2017
Department:
Description: BALANCE - TOP LOADER
Event Type: FIELD CALIBRATION

Serial Number: P4K2069006

Model Number: P4002

Performed By: 635

Location:

Cal. Due Date: 01/27/2018

As Found Condition: Out of Tolerance

As Left Condition: In Tolerance

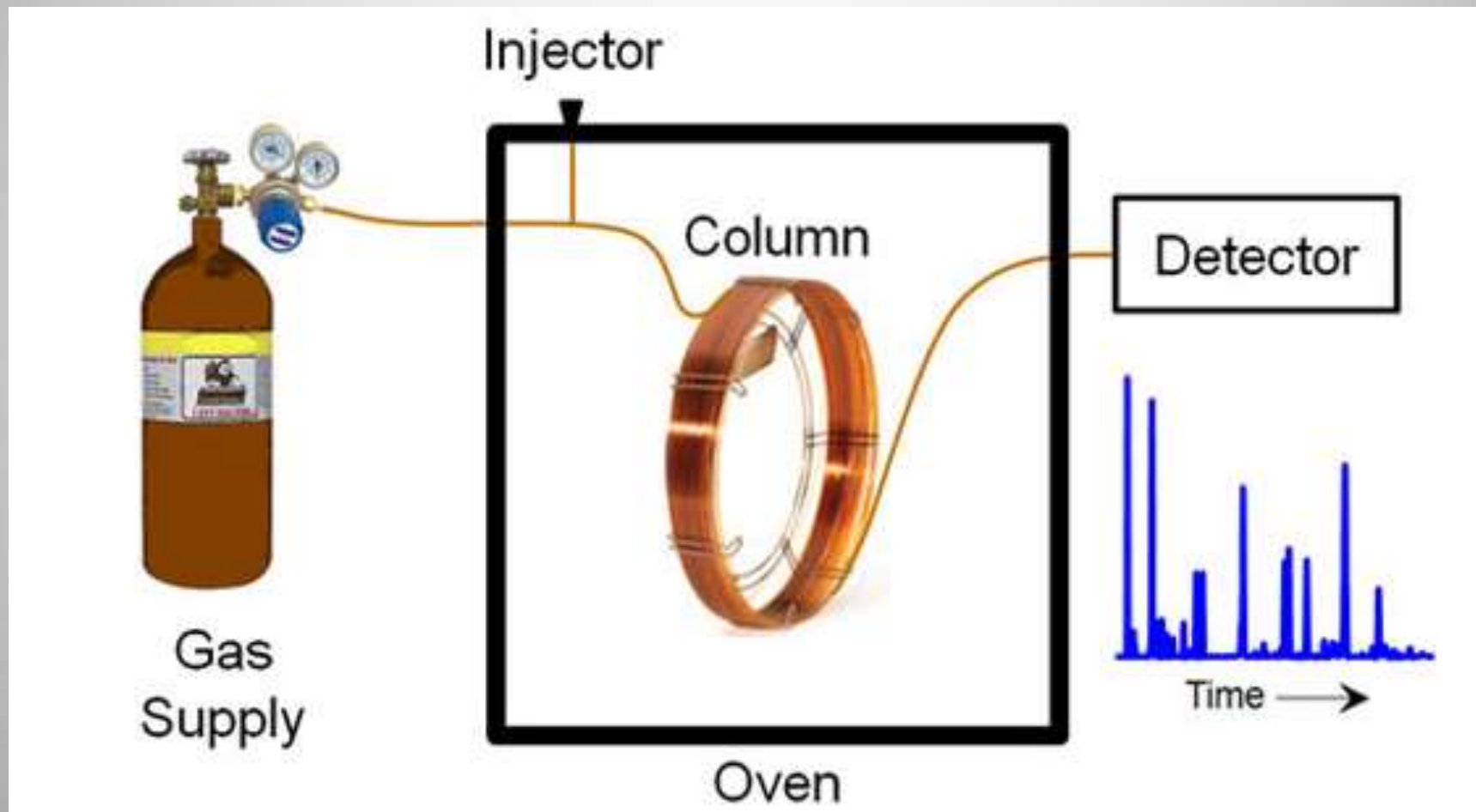
The calibration interval may cause the calibration to drift out of tolerance before the recommended interval has expired.



- All the vials are exactly alike
- The only identifying information is a number
- MANY samples are run in a batch
- It is up to the analyst to put them in the right order









Gas Chromatography is a Separation Science

Slide 3

Injector  **Flow of Mobile Phase**  **Detector**

T=0



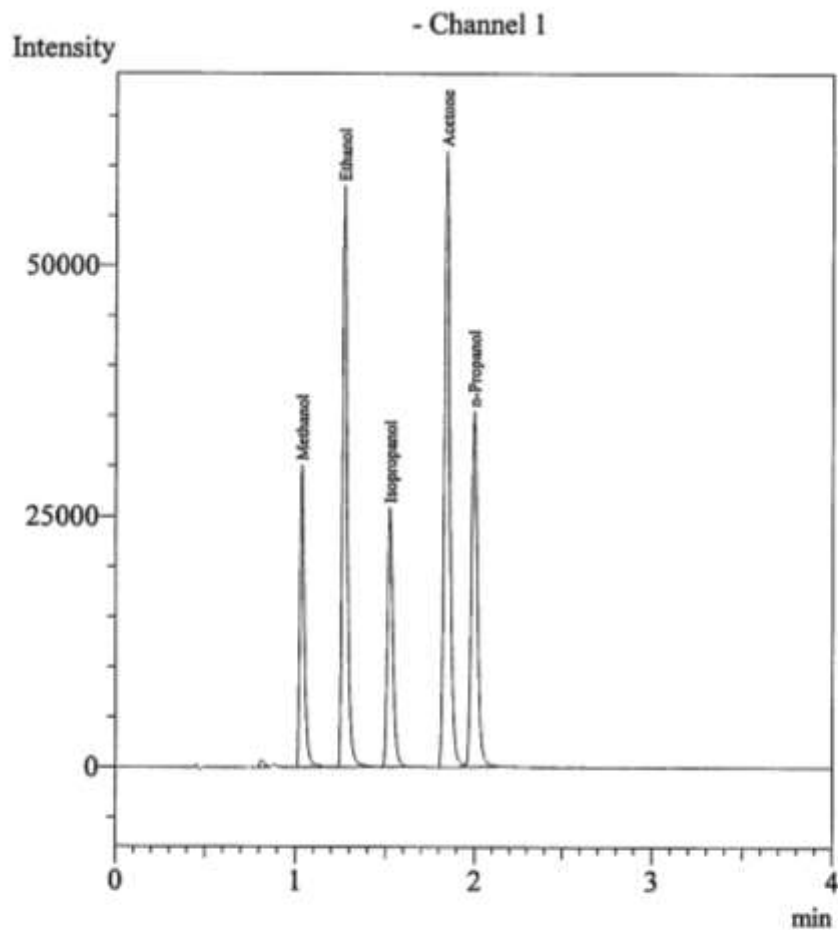
T=10'



T=20'

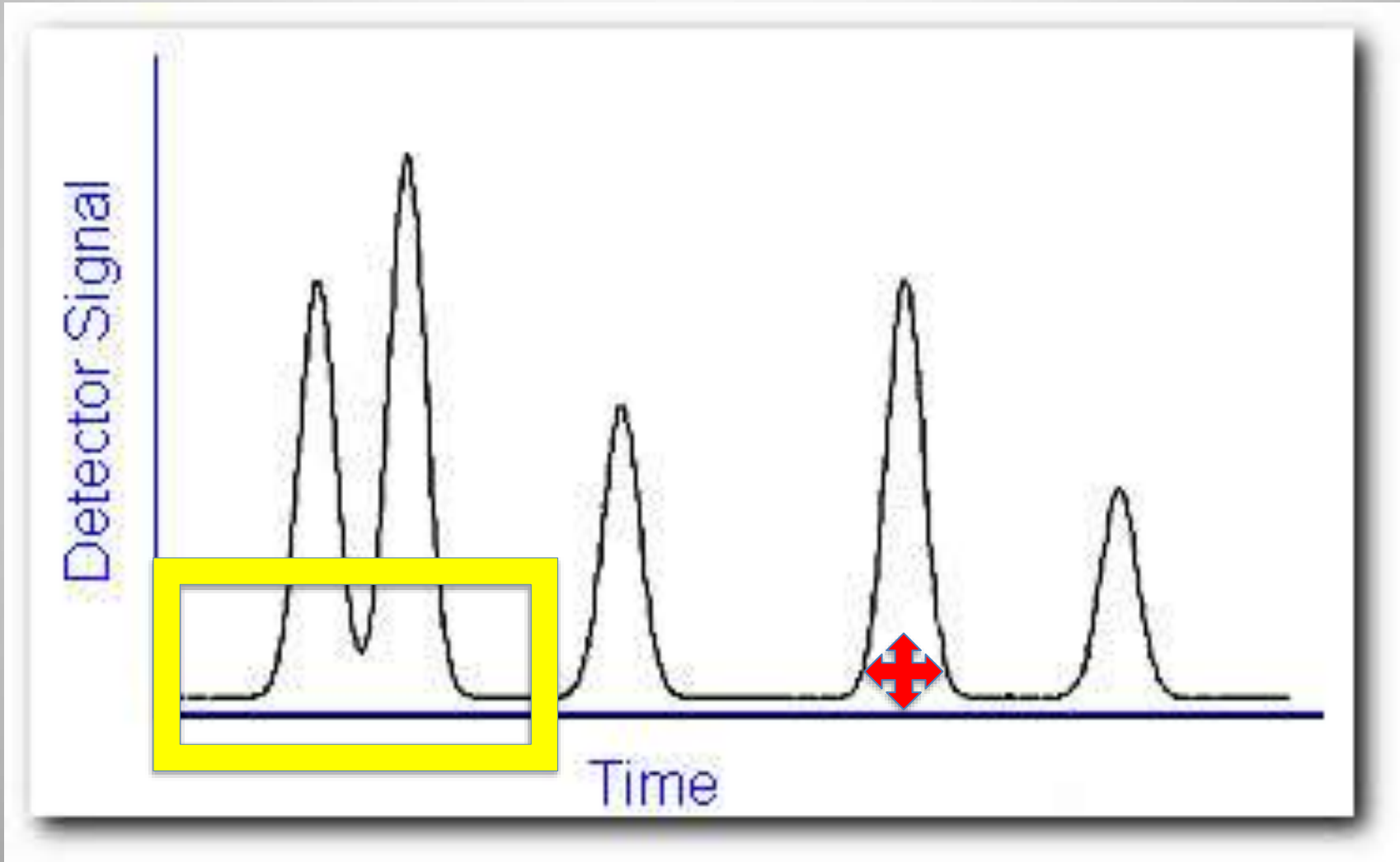


Most Interaction with Stationary Phase **Least**



Name	Ret. Time	Area	Conc.	Units
Methanol	1.034	51805	0.497	%
Ethanol	1.268	107686	0.496	%
Isopropanol	1.522	53815	0.124	%
Acetone	1.840	135519	0.124	%
n-Propanol	1.997	83470	0.000	%

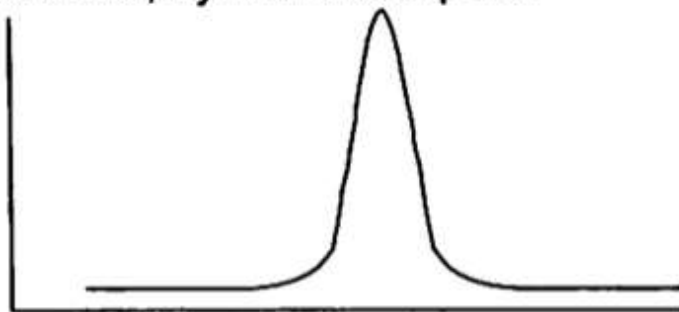
STD-0005



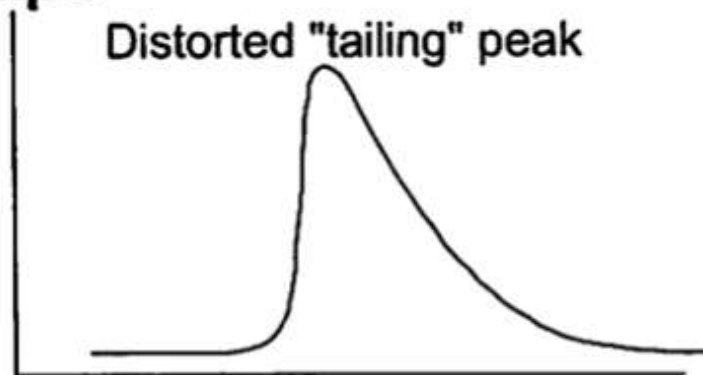


4. Distortion of Peak Shape

Normal, symmetrical peak

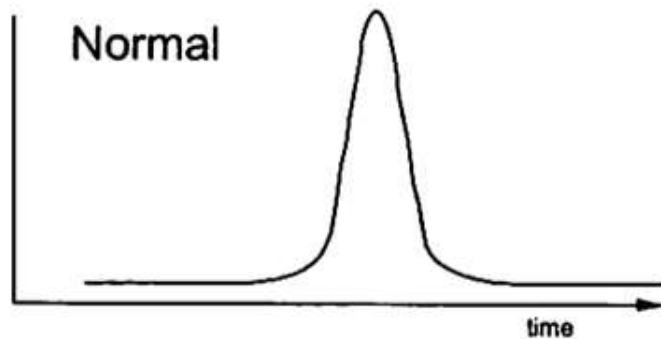


Distorted "tailing" peak

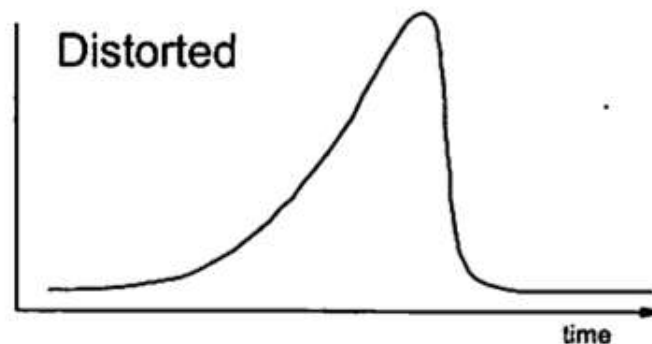


5. Distortion of Peak Shape: Fronting Peak

Normal



Distorted



Contamination

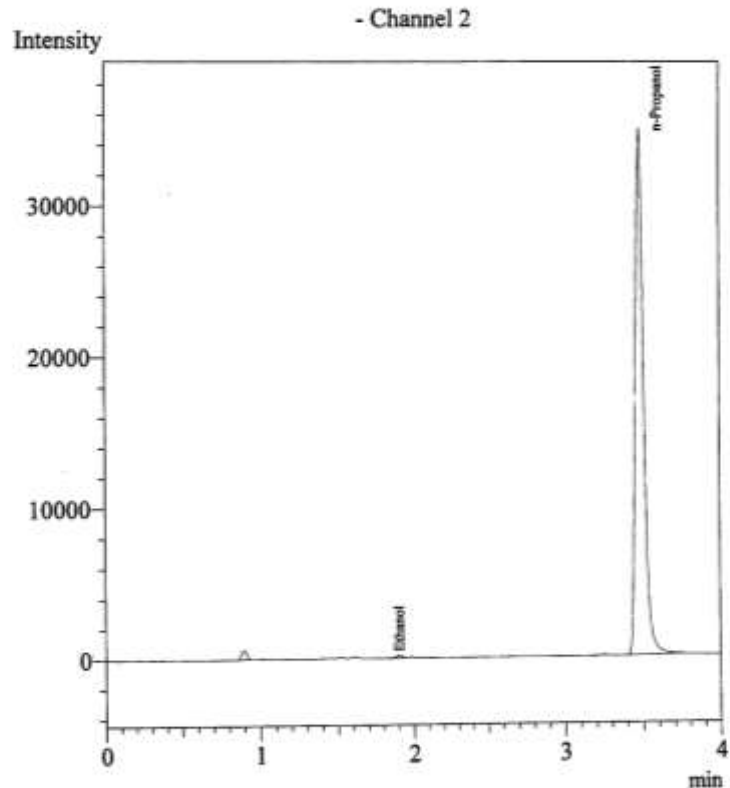




NEG CTRL

Instrument B

Analysis Date & Time : 9/27/2010 4:18:55 PM
Vial# : 31
Tray Number : TRAY 1 ES
Level# : 1
Data Name : C:\GCsolution\Inst B Data\2010 DATA\SEP27A\NEG CTRL_2.g
Original Data Name : C:\GCsolution\Inst B Data\2010 DATA\SEP27A\NEG CTRL_2.g
Method Name : C:\GCsolution\Bld Alc\BldAlc.gcm
Batch Name : C:\GCsolution\Sequence\2010 SEQUENCE\SEP27A.gcb



Name	Ret. Time	Area	Conc.	Units
Methanol	0.000	0	0.000	%
Ethanol	1.901	624	0.007	%
Acetone	0.000	0	0.000	%
Isopropanol	0.000	0	0.000	%
n-Propanol	3.484	128499	0.000	%

NEG CTRL

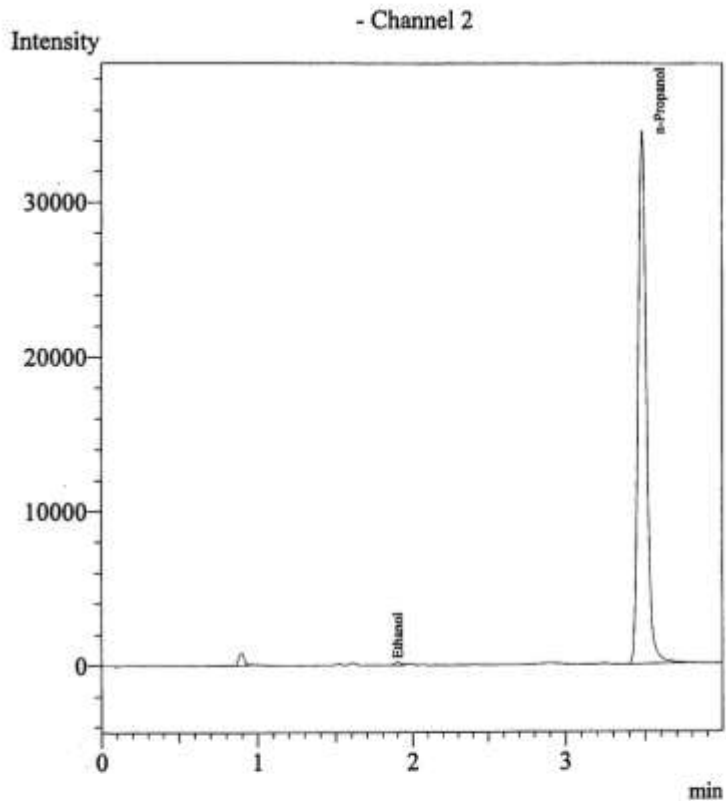
3



NEG CTRL

Instrument B

Analysis Date & Time : 9/28/2010 1:57:05 PM
Vial# : 31
Tray Number : TRAY 1 ES
Level# : 1
Data Name : C:\GCsolution\Inst B Data\2010 DATA\SEP28A\NEG CTRL_1.g
Original Data Name : C:\GCsolution\Inst B Data\2010 DATA\SEP28A\NEG CTRL_1.g
Method Name : C:\GCsolution\Bld Alc\BldAlc.gcm
Batch Name : C:\GCsolution\Sequence\2010 SEQUENCE\SEP28A.gcb



Name	Ret.Time	Area	Conc.	Units
Methanol	0.000	0	0.000	%
Ethanol	1.901	567	0.007	%
Acetone	0.000	0	0.000	%
Isopropanol	0.000	0	0.000	%
n-Propanol	3.483	127635	0.000	%

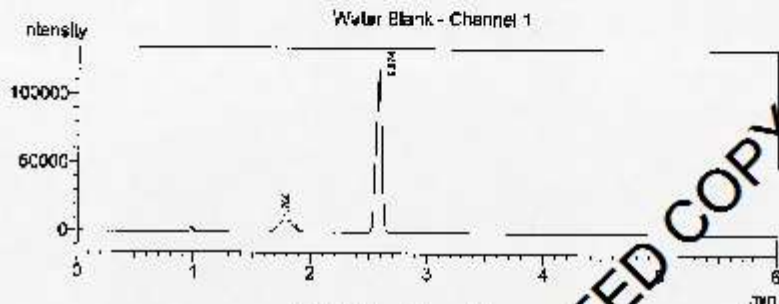
NEG CTRL

W3

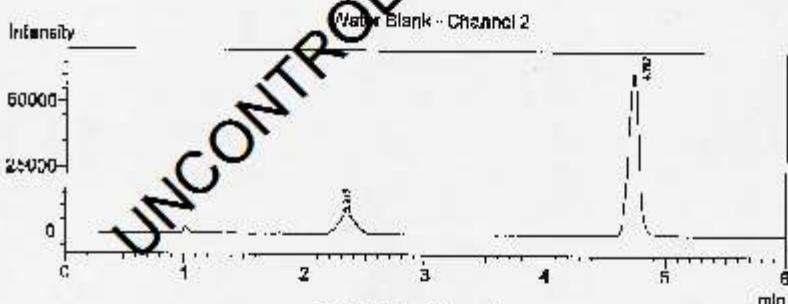


Analysis Date & Time : 1/15/2009 1:45:48 PM
Instrument : #20
Vial# : 2
Sample Name : Water Blank
Injection Volume : 1.00
STD Amount : (1)=1
Sample Amount : 1
Date Name : C:\GCsolutions\Data\Project1\Jan15\Jan15_002.gcd
Method Name : C:\GCsolutions\Data\BAC 2008.gcm
Batch Name : C:\GCsolutions\Data\Project1\Jan15\Jan15.gcb
Description :

M



Peak#	Name	Ret. Time	Area	Conc.
1		1.785	78708	0.0000
2	N-propanol	2.574	418269	0.0000

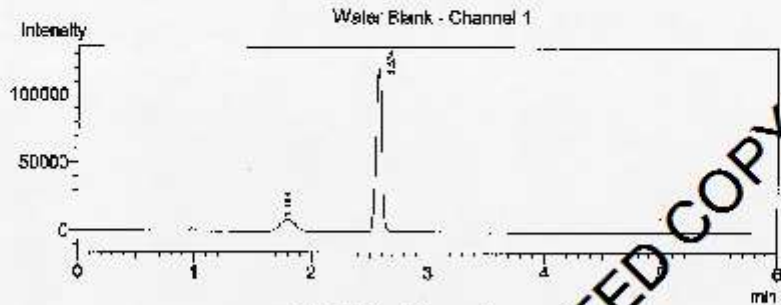


Peak#	Name	Ret. Time	Area	Conc.
1	Ethanol	2.347	75343	0.0384
2	N-Propanol	4.727	387879	0.0000

UNCONTROLLED PRINTED COPY

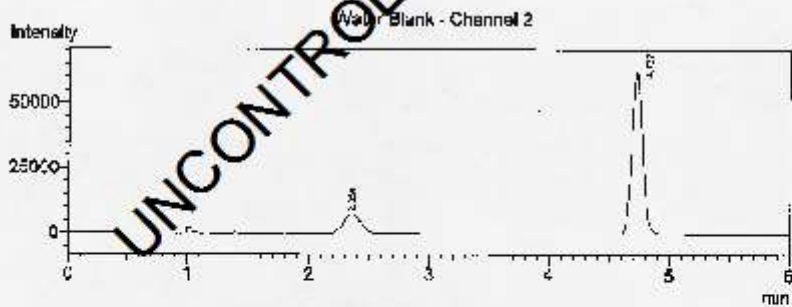


Analysis Date & Time : 1/16/2009 8:13:26 AM
Instrumental : #70
Vial# : 2
Sample Name : Water Blank
Injection Volume : 1.00
ISTD Amount : [1.00]
Sample Amount : 1
Data Name : C:\GC\evolution\Date\Project\Usm\16\Jan16.003.gcd
Method Name : C:\GC\evolution\Date\BAC 2008.gcm
Batch Name : C:\GC\evolution\Date\Project\Usm\16\Jan16.gcb
Description :



Peak Table - Channel 1

Peak#	Name	Ret Time	Area	Conc
1		1.795	80444	0.0000
2	N-propanol	2.674	420590	0.0000



Peak Table - Channel 2

Peak#	Name	Ret Time	Area	Conc
1	Ethanol	2.354	77044	0.0383
2	N-Propanol	4.727	391180	0.0000





NOV 30 2009
60

ALCOHOL SCREEN

Data File Name NOV17A

Instrument (A) / B (circle one)

Date: 11/17/09

Analyst: EJ

Tray/Vial #s	Case #	Specimen	Results	Comments
1 / 1	0 20	CONTROL	0.192	
1 / 2	0 08	CONTROL	0.080	
1 / 3	090 2022	A	0.187	
1 / 4	2023	A	0.114	
1 / 5	2024	A	0.136	
1 / 6	2025	A	0.199	
1 / 7	2026	A	0.074	
1 / 8	2032	A	0.175	
1 / 9	2033	A	⊖	
1 / 10	2034	A	0.257	
1 / 11	2035	A	0.263	
1 / 12	2036	A	0.231	
1 / 13	2037	A	0.196	
1 / 14	2038	A	0.139	
1 / 15	2039	A	0.179	
1 / 16	2040	A	0.035	
1 / 17	2041	A	⊖	
1 / 18	2042	A	0.177	
1 / 19	2043	A	0.164	
1 / 20	2044	A	0.140	
1 / 22	2046	A	0.171	
1 / 23	2047	A	0.214	
1 / 25	2049	A	0.255	

Tray/Vial #s	Case #	Specimen	Results	Comments
1 / 26	2050	A	0.184	
1 / 27	2051	A	0.218	
1 / 28	2052	A	0.322	
1 / 29	2053	A	0.316	
1 / 30	2054	A	0.147	
1 / 31	2055	A	0.208	
1 / 32	0.08	CTRL	0.079	
2 / 1 ³⁰	NEG	CTRL	⊖	
2 / 2				
2 / 3				
2 / 4				
2 / 5				
2 / 6				
2 / 8				
2 / 9				
2 / 10				
2 / 11				
2 / 12				
2 / 13				
2 / 14				
2 / 15				
2 / 16				
2 / 17				
2 / 18				



1 / 22 2046 A 0.171
1 / 23 2047 A 0.214

Sloppy Work

MIX Results: 0.05 / 0.10 (circle one)
Methanol _____
Ethanol _____
Isopropanol _____
Acetone _____



ALCOHOL SCREEN

Data File Name NOV18A

Instrument A / B (circle one)

Date: 11/18/09

Analyst: EJ

NOV 30 2009
6D

Tray/Vial #s	Case #	Specimen	Results	Comments
1 / 1	020	CONTROL	0.198	
1 / 2	008	CONTROL	0.080	
1 / 3	0902053	A	*	
1 / 4	2054	A	0.148	
1 / 5	2053	B	*	
1 / 6	2052	B	*	
1 / 7	2051	A	*	
1 / 8	2050	B	*	
1 / 9	2049	B	*	
1 / 11	2047	B	0.147	
1 / 12	2046	B	0.140	
1 / 14	2044	B	*	
1 / 15	2043	B	0.173*	
1 / 16	2042	B	0.173	
1 / 17	2041	B	(-)	
1 / 18	2040	B	0.034	
1 / 19	2039	B	*	
1 / 20	2038	B	0.141	
1 / 21	2037	B	*	
1 / 22	2036	B	*	
1 / 23	2035	B	*	
1 / 24	2034	B	*	
1 / 25	2033	B	(-)	

Tray/Vial #s	Case #	Specimen	Results	Comments
1/26	2032	B	0.196	
1/27	2026	B	0.074	
1/28	2025	B	*	
1/29	2024	B	0.036	
1/30	2023	B	0.115	
1/31	2022	B	*	
1/32	0.08	CTRL	0.080	
2/1 ³³ ₀₅	NEG	CTRL	(-)	
2/2				
2/3				
2/4				
2/5				
2/6				
2/7				
2/8				
2/9				
2/10				
2/11				
2/12				
2/14				
2/15				
2/16				
2/17				
2/18				



* = Channel 2 > .01 from Channel 1.
Tubes will be repeated.

MIX Results: 0.05 / 0.10 (circle one)

Methanol _____

Ethanol _____

Isopropanol _____

Acetone _____





Other Mistakes

Requested Analysis: Examine for alcohol and drug content

Submission Information:

01 Small White Box on August 15, 2012 by Cox, Sara VIA In Person

Evidence Description, Results of Analysis and Interpretation:

01 : Properly Sealed Small White Box

01-01 : Purple top tube with blood from [REDACTED] :

0.211 grams of alcohol per 100 milliliters of blood.

Note: No drug analysis due to the alcohol concentration. We are unable to retain the evidence. make arrangements to pick up this evidence at your earliest convenience.



Dallas County Institute of Forensic Sciences
2355 North Stemmons Freeway
Dallas, TX 75207

CHAIN OF CUSTODY REPORT

IFS-12-20118 Request #0005

ITEM #: 006 OTHER ID #:

Description: Biohazard bag
Analyst Description: Biohazard bag

Date of Transfer	From	To	Additional Information
12/10/2012	Irving Police Department	Shirley Wynn	Lockbox AGENCY RF-LB C Unsealed, sealed by lab
12/10/2012	Shirley Wynn	Toxicology Storage	
12/20/2012	Toxicology Storage	Sylvia Reyes	
12/20/2012	Sylvia Reyes	Toxicology Storage	Sealed
05/02/2013	Toxicology Storage	Shuronda Swan	Sealed
05/02/2013	Shuronda Swan	ER - Refrigerator/Freezer Vault	Sealed

ITEM #: 006-001 OTHER ID #:

Description: Blood - gray top tube
Analyst Description: Blood - gray top tube

Date of Transfer	From	To	Additional Information
12/10/2012	Irving Police Department	Shirley Wynn	Lockbox AGENCY RF-LB C Unsealed, sealed by lab
12/10/2012	Shirley Wynn	Toxicology Storage	
12/10/2012	Toxicology Storage	Justin D Schwane	
12/10/2012	Justin D Schwane	Toxicology Storage	
12/11/2012	Toxicology Storage	Justin D Schwane	
12/11/2012	Justin D Schwane	Toxicology Storage	
12/20/2012	Toxicology Storage	Sylvia Reyes	
12/20/2012	Sylvia Reyes	Toxicology Storage	Sealed
05/02/2013	Toxicology Storage	Shuronda Swan	Sealed
05/02/2013	Shuronda Swan	ER - Refrigerator/Freezer Vault	Sealed

ITEM #: 006-002 OTHER ID #:

Description: Blood - gray top tube
Analyst Description: Blood - gray top tube

Date of Transfer	From	To	Additional Information
12/10/2012	Irving Police Department	Shirley Wynn	Lockbox AGENCY RF-LB C Unsealed, sealed by lab
12/10/2012	Shirley Wynn	Toxicology Storage	
12/10/2012	Toxicology Storage	Justin D Schwane	
12/10/2012	Justin D Schwane	Toxicology Storage	
12/11/2012	Toxicology Storage	Sarah R Olive	
12/11/2012	Sarah R Olive	Toxicology Storage	
12/20/2012	Toxicology Storage	Sylvia Reyes	
12/20/2012	Sylvia Reyes	Toxicology Storage	Sealed



Dallas County Institute of Forensic Sciences

CHAIN OF CUSTODY REPORT

IFS-12-20118 Request 0005

Chain of Custody continued for Item#: 006-002

05/02/2013	Toxicology Storage	Shuronda Swan	Sealed
05/02/2013	Shuronda Swan	ER - Refrigerator/Freezer Vault	Sealed

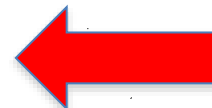
ITEM #: 006-003

OTHER ID #:

Description: Blood - gray top tube

Analyst Description: Blood - gray top tube

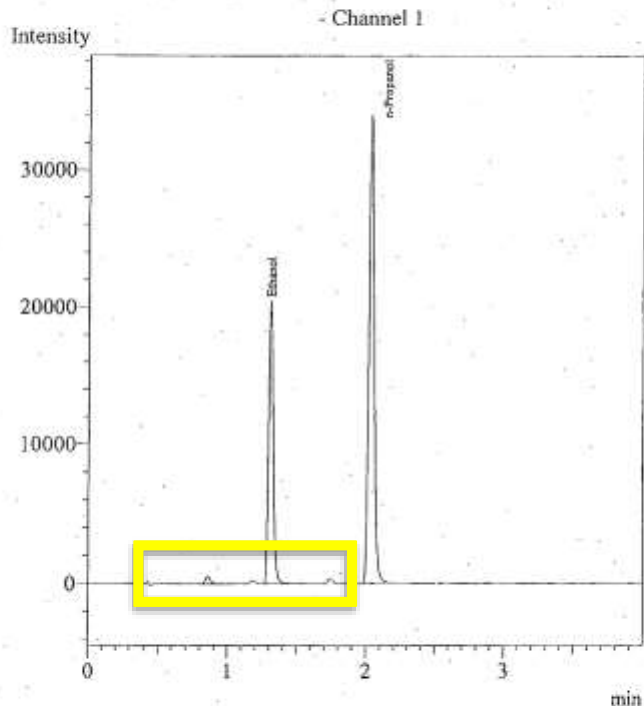
<u>Date of Transfer</u>	<u>From</u>	<u>To</u>	<u>Additional Information</u>
12/10/2012	Irving Police Department	Shirley Wynn	Lockbox AGENCY RF-LB C Unsealed, sealed by lab
12/10/2012	Shirley Wynn	Toxicology Storage	
12/20/2012	Toxicology Storage	Sylvia Reyes	
12/20/2012	Sylvia Reyes	Toxicology Storage	Sealed
05/02/2013	Toxicology Storage	Shuronda Swan	Sealed
05/02/2013	Shuronda Swan	ER - Refrigerator/Freezer Vault	Sealed



0.20 Contol

Instrument B
741

Analysis Date & Time : 12/10/2012 2:04:58 PM
 Vial# : 1
 Tray Number : Tray 1 JS
 Level# : 1
 Data Name : C:\GCsolution\Inst B Data\2012 Data\Dec10B\0.20 Contol_1.gcd
 Original Data Name : C:\GCsolution\Inst B Data\2012 Data\Dec10B\0.20 Contol_1.gcd
 Method Name : C:\GCsolution\Bld Alc\BldAlc.gcm
 Batch Name : C:\GCsolution\Sequence\2012 Sequence\DEC10B.gcb



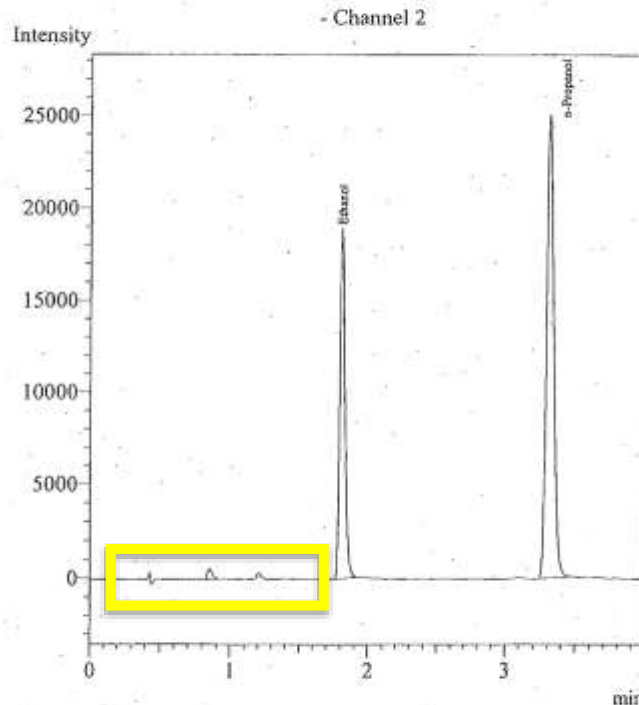
Name	Ret.Time	Area	Conc.	Units
Methanol	0.000	0	0.000	%
Ethanol	1.308	47905	0.196	%
Isopropanol	0.000	0	0.000	%
Acetone	0.000	0	0.000	%
n-Propanol	2.035	91021	0.000	%

0.20 Contol

0.20 Contol

Instrument B
741

Analysis Date & Time : 12/10/2012 2:04:58 PM
 Vial# : 1
 Tray Number : Tray 1 JS
 Level# : 1
 Data Name : C:\GCsolution\Inst B Data\2012 Data\Dec10B\0.20 Contol_1.gcd
 Original Data Name : C:\GCsolution\Inst B Data\2012 Data\Dec10B\0.20 Contol_1.gcd
 Method Name : C:\GCsolution\Bld Alc\BldAlc.gcm
 Batch Name : C:\GCsolution\Sequence\2012 Sequence\DEC10B.gcb



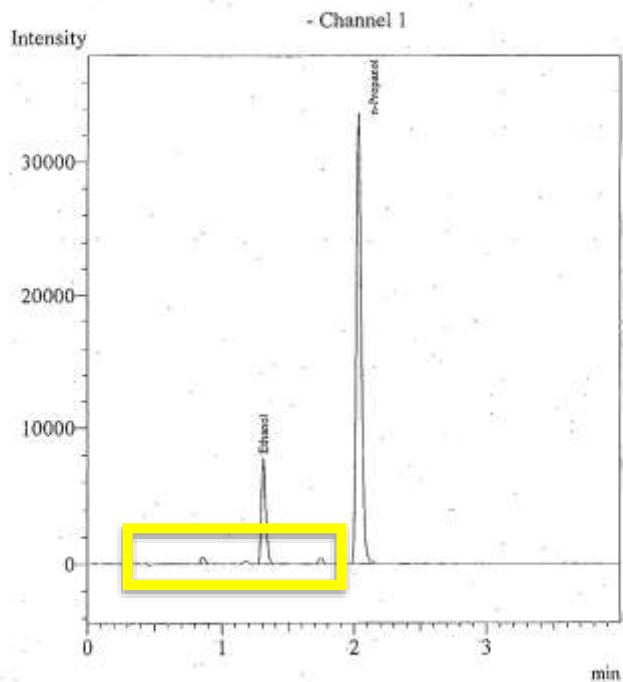
Name	Ret.Time	Area	Conc.	Units
Methanol	0.000	0	0.000	%
Ethanol	1.814	48509	0.194	%
Acetone	0.000	0	0.000	%
Isopropanol	0.000	0	0.000	%
n-Propanol	3.321	90070	0.000	%

0.20 Contol

0.08 Control

Instrument B
741

Analysis Date & Time : 12/10/2012 2:09:47 PM
 Vial# : 2
 Tray Number : Tray 1 JS
 Level# : 1
 Data Name : C:\GCsolution\Inst B Data\2012 Data\Dec10B\0.08 Control_1.gcd
 Original Data Name : C:\GCsolution\Inst B Data\2012 Data\Dec10B\0.08 Control_1.gcd
 Method Name : C:\GCsolution\Bld Ale\BldAle.gcm
 Batch Name : C:\GCsolution\Sequence\2012 Sequence\DEC10B.gcb



Name	Ret.Time	Area	Conc. Units
Methanol	0.000	0	0.000 %
Ethanol	1.308	18360	0.076 %
Isopropanol	0.000	0	0.000 %
Acetone	0.000	0	0.000 %
n-Propanol	2.035	89958	0.000 %

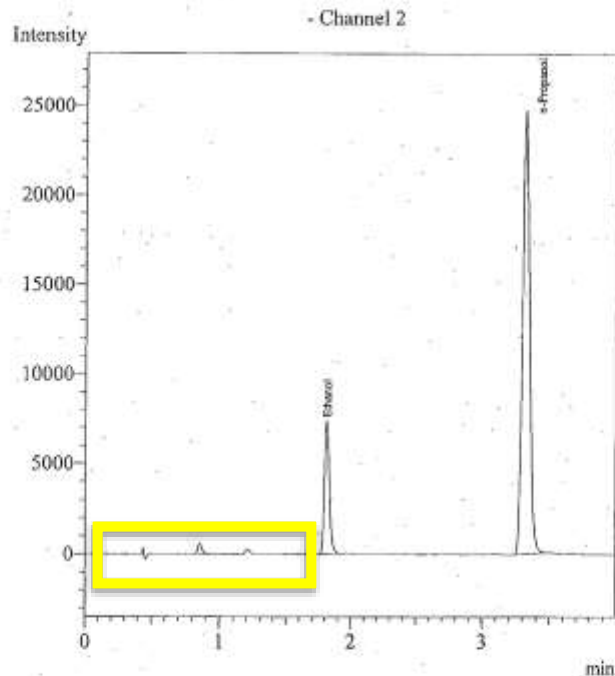
0.08 Control

12-20118 36 OF 51

0.08 Control

Instrument B
741

Analysis Date & Time : 12/10/2012 2:09:47 PM
 Vial# : 2
 Tray Number : Tray 1 JS
 Level# : 1
 Data Name : C:\GCsolution\Inst B Data\2012 Data\Dec10B\0.08 Control_1.gcd
 Original Data Name : C:\GCsolution\Inst B Data\2012 Data\Dec10B\0.08 Control_1.gcd
 Method Name : C:\GCsolution\Bld Ale\BldAle.gcm
 Batch Name : C:\GCsolution\Sequence\2012 Sequence\DEC10B.gcb



Name	Ret.Time	Area	Conc. Units
Methanol	0.000	0	0.000 %
Ethanol	1.815	19314	0.078 %
Acetone	0.000	0	0.000 %
Isopropanol	0.000	0	0.000 %
n-Propanol	3.321	88892	0.000 %

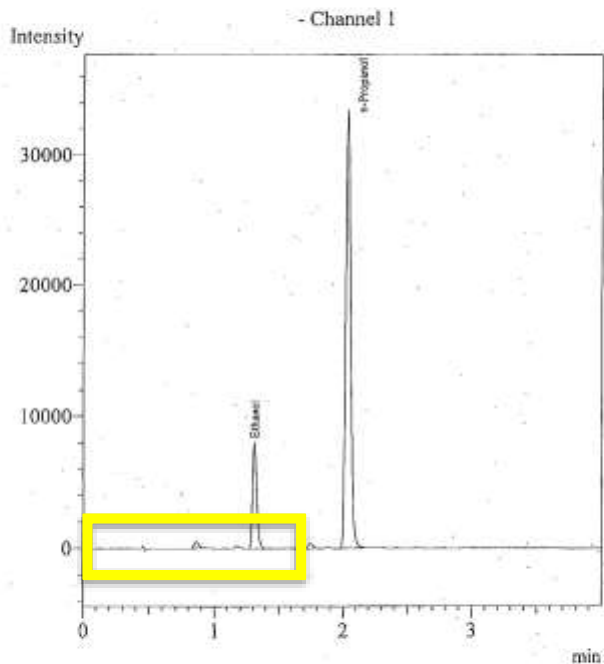
0.08 Control

12-20118 37 OF 51

0.08 Control

Instrument B
741

Analysis Date & Time : 12/10/2012 3:12:32 PM
 Vial# : 15
 Tray Number : Tray 1 JS
 Level# : 1
 Data Name : C:\GCsolution\Inst B Data\2012 Data\Dec10B\0.08 Control_2.gcd
 Original Data Name : C:\GCsolution\Inst B Data\2012 Data\Dec10B\0.08 Control_2.gcd
 Method Name : C:\GCsolution\Bld Alc\BldAlc.gcm
 Batch Name : C:\GCsolution\Sequence\2012 Sequence\DEC10B.gcb



Name	Ret. Time	Area	Conc. Units
Methanol	0.000	0	0.000 %
Ethanol	1.308	18956	0.079 %
Isopropanol	0.000	0	0.000 %
Acetone	0.000	0	0.000 %
n-Propanol	2.035	89335	0.000 %

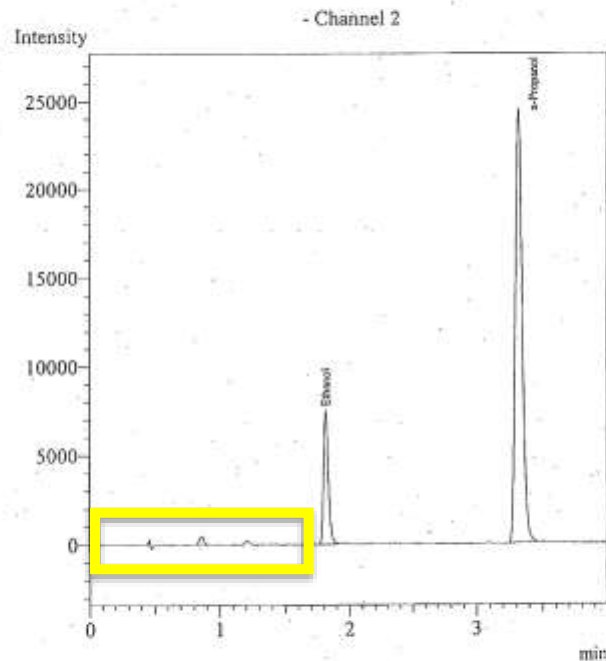
0.08 Control

12-20116 40 OF 51

0.08 Control

Instrument B
741

Analysis Date & Time : 12/10/2012 3:12:32 PM
 Vial# : 15
 Tray Number : Tray 1 JS
 Level# : 1
 Data Name : C:\GCsolution\Inst B Data\2012 Data\Dec10B\0.08 Control_2.gcd
 Original Data Name : C:\GCsolution\Inst B Data\2012 Data\Dec10B\0.08 Control_2.gcd
 Method Name : C:\GCsolution\Bld Alc\BldAlc.gcm
 Batch Name : C:\GCsolution\Sequence\2012 Sequence\DEC10B.gcb



Name	Ret. Time	Area	Conc. Units
Methanol	0.000	0	0.000 %
Ethanol	1.815	19750	0.080 %
Acetone	0.000	0	0.000 %
Isopropanol	0.000	0	0.000 %
n-Propanol	3.321	88342	0.000 %

0.08 Control

12-20116 41 OF 51

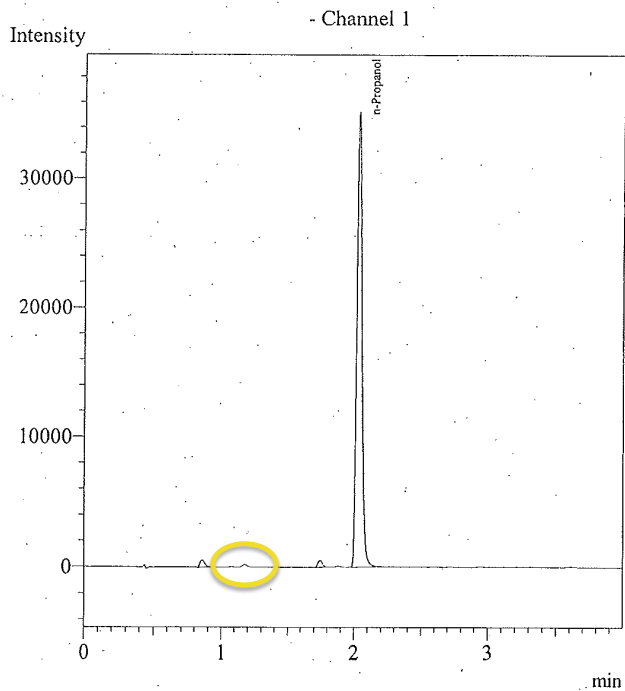


Blanks

Negative

Instrument B
741

Analysis Date & Time : 12/10/2012 3:07:42 PM
Vial# : 14
Tray Number : Tray 1 JS
Level# : 1
Data Name : C:\GCsolution\Inst B Data\2012 Data\Dec10B\Negative_1.gcd
Original Data Name : C:\GCsolution\Inst B Data\2012 Data\Dec10B\Negative_1.gcd
Method Name : C:\GCsolution\Bld Alc\BldAlc.gcm
Batch Name : C:\GCsolution\Sequence\2012 Sequence\DEC10B.gcb



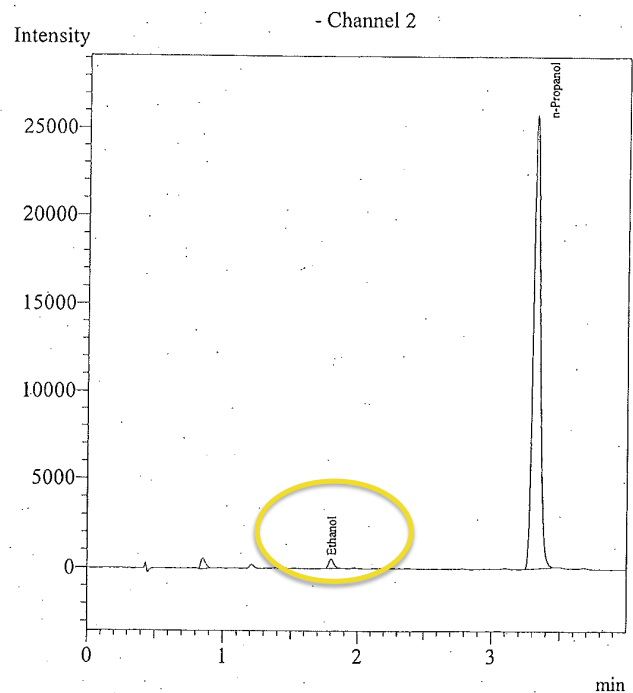
Name	Ret.Time	Area	Conc. Units
Methanol	0.000	0	0.000 %
Ethanol	0.000	0	0.000 %
Isopropanol	0.000	0	0.000 %
Acetone	0.000	0	0.000 %
n-Propanol	2.035	93838	0.000 %

Negative

Negative

Instrument B
741

Analysis Date & Time : 12/10/2012 3:07:42 PM
Vial# : 14
Tray Number : Tray 1 JS
Level# : 1
Data Name : C:\GCsolution\Inst B Data\2012 Data\Dec10B\Negative_1.gcd
Original Data Name : C:\GCsolution\Inst B Data\2012 Data\Dec10B\Negative_1.gcd
Method Name : C:\GCsolution\Bld Alc\BldAlc.gcm
Batch Name : C:\GCsolution\Sequence\2012 Sequence\DEC10B.gcb



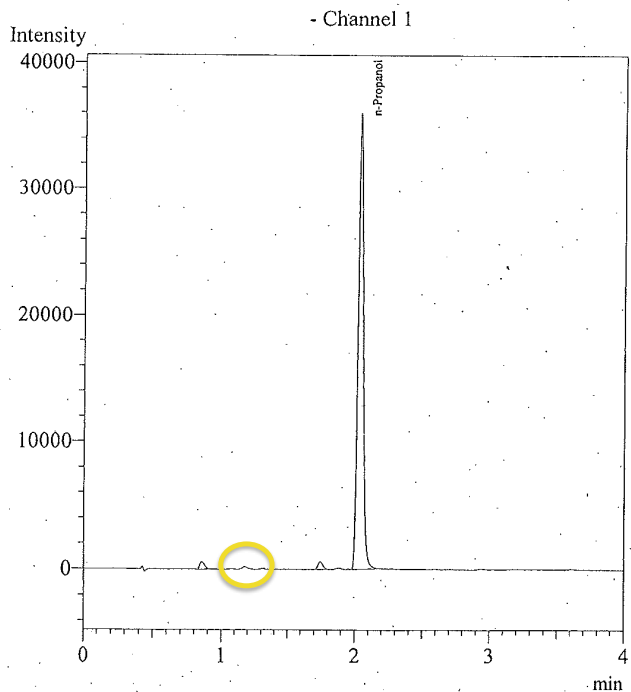
Name	Ret.Time	Area	Conc. Units
Methanol	0.000	0	0.000 %
Ethanol	1.804	1346	0.005 %
Acetone	0.000	0	0.000 %
Isopropanol	0.000	0	0.000 %
n-Propanol	3.320	92567	0.000 %

Negative

Negative

Instrument B
741

Analysis Date & Time : 12/10/2012 4:20:02 PM
Vial# : 29
Tray Number : Tray 1 JS
Level# : 1
Data Name : C:\GCsolution\Inst B Data\2012 Data\Dec10B\Negative_2.gcd
Original Data Name : C:\GCsolution\Inst B Data\2012 Data\Dec10B\Negative_2.gcd
Method Name : C:\GCsolution\Bld Alc\BldAlc.gcm
Batch Name : C:\GCsolution\Sequence\2012 Sequence\DEC10B.gcb



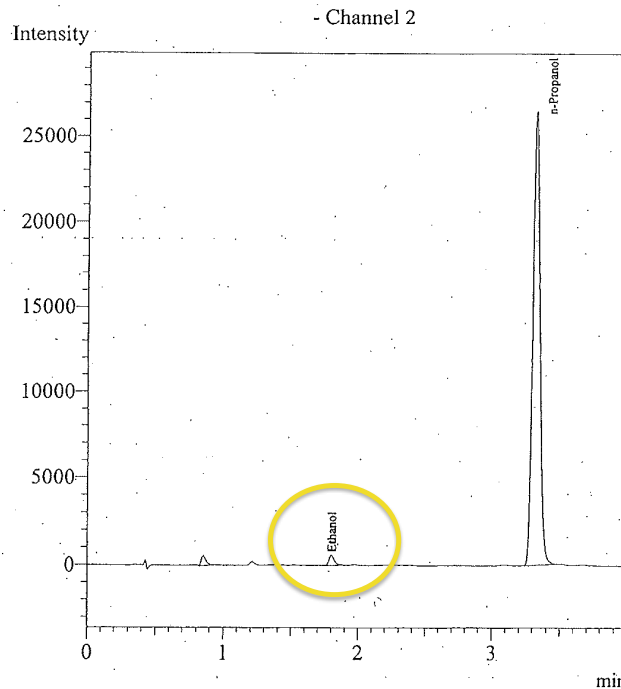
Name	Ret.Time	Area	Conc. Units
Methanol	0.000	0	0.000 %
Ethanol	0.000	0	0.000 %
Isopropanol	0.000	0	0.000 %
Acetone	0.000	0	0.000 %
n-Propanol	2.035	96134	0.000 %

Negative

Negative

Instrument B
741

Analysis Date & Time : 12/10/2012 4:20:02 PM
data Vial# : 29
Tray Number : Tray 1 JS
Level# : 1
Data Name : C:\GCsolution\Inst B Data\2012 Data\Dec10B\Negative_2.gcd
Original Data Name : C:\GCsolution\Inst B Data\2012 Data\Dec10B\Negative_2.gcd
Method Name : C:\GCsolution\Bld Alc\BldAlc.gcm
Batch Name : C:\GCsolution\Sequence\2012 Sequence\DEC10B.gcb



Name	Ret.Time	Area	Conc. Units
Methanol	0.000	0	0.000 %
Ethanol	1.805	1656	0.006 %
Acetone	0.000	0	0.000 %
Isopropanol	0.000	0	0.000 %
n-Propanol	3.321	95038	0.000 %

Negative



ALCOHOL SCREEN



DATA FILE NAME Dec10B

Date 12/12

Instrument: 742 / (741) (circle one)

Analyst TTA

Vial #	Case #	Specimen	Results	Comments
1/1	0.20	Control	0.196	EtOH
1/2	608	Control	0.076	EtOH
1/3	12-20078	11	0.188	EtOH
1/4	12-20081	11	0.205	EtOH
1/5	20118	61	0.189	EtOH
1/6	20181	11	0.248	EtOH
1/7	20182	11	0.232	EtOH
1/8	20183	11	-	
1/9	20184	11	0.182	EtOH
1/10	20186	11	-	
1/11	20187	11	0.168	EtOH
1/12	20189	11	0.183	EtOH
1/13	20190	11	0.256	EtOH
1/14	Neg	-	-	
1/15	0.08	Control	0.0809	EtOH
1/16			*	
1/17				
1/18				
1/19				
1/20				
1/21				
1/22				
1/23				
1/24				
1/25				

Vial #	Case #	Specimen	Results	Comments
1/26				
1/27				
1/28				
1/29				
1/30				
1/31				
1/32				
2/1				
2/2				
2/3				
2/4				
2/5				
2/6				
2/7				
2/8				
2/9				
2/10				
2/11				
2/12				
2/13				
2/14				
2/15				
2/16				
2/17				
2/18				

110	20186	11	-	
111	20187	11	0.168	EtOH

GCsolution\Inst B Data\2
 GCsolution\Bld Alc\BldA
 GCsolution\Sequence\201
 - Channel 2

MIX Results: Methanol _____ EtOH _____ Isopropanol _____ Acetone _____

Alcohols & Acetone Worklist #1
 SWIFS - Toxicology Laboratory
 Issuing Authority: Section Chief

Page 1 of 1
 Effective: 11.06.12
 Tox-F-020



2/11				
2/12				
2/13				
2/14				

ay 1 JS

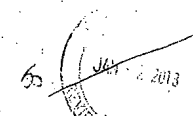
\GCsolution\Inst B Data\20
 \GCsolution\Inst B Data\20
 \GCsolution\Bld Alc\BldA
 \GCsolution\Sequence\201

Channel 2



ALCOHOL SCREEN

DATA FILE NAME Dec 10B



Date 6 Dec 12

Instrument: 742 1(741) (circle one)

Analyst 77A

Vial #	Case #	Specimen	Results	Comments
1/1		Control		
1/2		Control		
1/3				
1/4				
1/5				
1/6				
1/7				
1/8				
1/9				
1/10				
1/11				
1/12				
1/13				
1/14				
1/15				
1/16	0.20	Control	0.196	EtoH
1/17	0.08	Control	0.079	EtoH
1/18	12-20110	12	0.259	EtoH
1/19	20189	12	0.182	EtoH
1/20	26187	12	0.174	EtoH
1/21	20186	12	-	
1/22	20184	12	0.181	EtoH
1/23	20183	12	-	
1/24	20187	12	0.230	EtoH
1/25	20181	12	0.249	EtoH

Vial #	Case #	Specimen	Results	Comments
1/26	2018	6-2	0.189	EtoH
1/27	20081	11	0.215	EtoH
1/28	20078	11	0.192	EtoH
1/29	Na	-	-	
1/30	008	Control	0.078	EtoH
1/31				
1/32				
2/1				
2/2				
2/3				
2/4				
2/5				
2/6				
2/7				
2/8				
2/9				
2/10				
2/11				
2/12				
2/13				
2/14				
2/15				
2/16				
2/17				
2/18				

MIX Results: Methanol _____ ETOH _____ Isopropanol _____ Acetone _____

Alcohols & Acetone Worklist #1
 SWIFS - Toxicology Laboratory
 Issuing Authority: Section Chief

Page 1 of 1
 Effective: 11.06.12
 Tox-F-020

Knowledge Can Take You Far

Garriott's Medicolegal Aspects of Alcohol, 5th ed and 6th ed.

Garriott's
Medicolegal
Aspects of Alcohol
Fifth Edition
Edited by James C. Garriott



Lawrence & Jarboe
Publishing Company, Inc.

Garriott's
Medicolegal
Aspects of Alcohol
Sixth Edition

Edited by
Yule H. Caplan, Ph.D.
Bruce A. Goldberger, Ph.D.

Lawrence & Jarboe
Publishing Company, Inc.

*Understanding DUI
Scientific Evidence*

Phlebotomy Essentials

Texas DWI Manual

INSIDE THE MINDS™

UNDERSTANDING DUI
SCIENTIFIC EVIDENCE

LEADING LAWYERS AND SCIENTISTS ON RECENT
DEVELOPMENTS IN FORENSIC SCIENCE, UNDERSTANDING
CHEMICAL AND FIELD SOBRIETY TESTING PROCEDURES,
AND ANALYZING THE VALIDITY OF TEST RESULTS

2011 EDITION

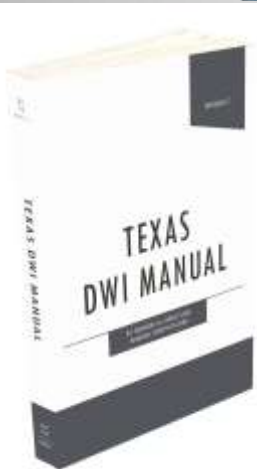


ASPATORE

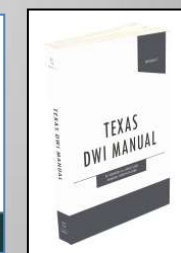
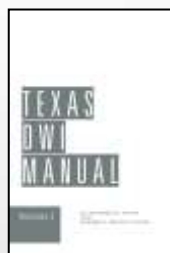
David Clark, MD, JD, Forensic Science, Ph.D., Ed.
John J. Goldberger, Ph.D., Ed., Ed.
Yule H. Caplan, Ph.D., Forensic Science, Forensic
Toxicology, Dr. Bruce Goldberger, Ed.
Robert J. Schmitt, A., Ed., Ed., Ed., Ed., Ed., Ed., Ed.
Thomas J. Wickham, Ph.D., Ed.

Phlebotomy
Essentials

Barb E. McGill - Carolee M. Teskenley



AV-rated attorney **Deandra Grant's** practice is focused on DWI defense in Texas. She is a partner with the law firm of Hamilton Grant. A graduate of Trinity University in San Antonio, TX, and Southern Methodist University's School of Law, she is a national speaker on DWI law and science and the co-author of The Texas DWI Manual (James Publishing). Deandra is a Standardized Field Sobriety Testing Instructor and has completed the Drug Recognition Overview course. She was the first attorney in Texas to pass the Forensic Sobriety Assessment Certification exam. In addition, she has completed coursework in DWI forensic blood and urine testing and was trained as an operator and maintenance technician of the Intoxilyzer 5000. Deandra has certificates in *Forensic Chromatography: Theory & Practice (2011 & 2015)*, *Forensic Analysis of Solid Drugs (2014)* and *Forensic Principles of DUID (2015)* issued by Axion Labs and the American Chemical Society. In 2015, Deandra earned the distinction of being named an ACS-CHAL Forensic Lawyer-Scientist. Deandra is a member of the Texas Criminal Defense Lawyers Association (Board Member & DWI Committee), the Dallas Bar Association, the Collin County Criminal Defense Lawyers Association and the Dallas Criminal Defense Lawyers Association (Board Member since 2007). In addition, Deandra is a Charter Member, President-Emeritus and Executive Director of the DUI Defense Lawyers Association. She is also a member of the American Chemical Society and the American Academy of Forensic Science. D Magazine has named Deandra to its list of Best Women Lawyers and Best Lawyers in Dallas. She's been named a "Texas Super Lawyer" and one of Texas' Top-Rated Lawyers. *Best Lawyers in Dallas* named her one of the Top 10 DWI Lawyers in Dallas. Fort Worth Magazine has named her a Top Lawyer in Fort Worth. In 2016, Deandra completed a Graduate Certificate in Forensic Toxicology through the University of Florida College of Veterinary Medicine and a Masters in Pharmaceutical Science - Concentration in Forensic Science from the UF College of Pharmacy. In 2019 she joined the faculty of Axion Labs in Chicago as an Assistant Chromatography Instructor. She has also served on the faculty of the Borkenstein Drug Course.



Deandra M. Grant, BS, JD, GC, MS

Deandra@HGTexas.com * HamiltonGrant.Lawyer * DeandraGrantConsulting.com

SUBPOENA DUCES TECUM REQUEST – CRIMINAL

NAME AND ADDRESS OF PARTY TO BE SERVED:

CASE NO.: _____

STYLE OF CASE: State of Texas v. _____ (Lab No. _____)

DATE OF APPEARANCE: _____

TIME OF APPEARANCE: 9 am

PLACE OF APPEARANCE: _____

TESTIFY IN BEHALF OF: Defendant

ARTICLES TO BE DELIVERED TO ATTORNEY:

The Following Items Concern General Matters:

1. Any accreditation certificates for the laboratory in effect at the time of the blood analysis and a copy of the lab's last complete inspection and final accreditation audit.
2. Any internal, external, annual or reaccreditation reviews or reports since the lab's last complete accreditation audit and any internal, external, annual, or reaccreditation audits since the time of the test in this case.
3. All documents reflecting the failure of the laboratory to comply, at any point, with any essential, important, or desirable criteria for accreditation, or reaccreditation and all documents evidencing subsequent satisfaction of any essential, important, or desirable criteria for accreditation or reaccreditation.
4. The laboratory's standard or general policies, protocol, and procedures concerning testing, quality control, quality assurance, calibration, achievement of the calibration curve, and administrative or technical review, if applicable to all disciplines within the laboratory.
5. The laboratory's policies, protocols and procedures as to testing, quality control, quality assurance, calibration, achievement of the calibration curve, and administrative or technical review of all samples, solutions and equipment used in or related to the testing of the sample, solutions, and equipment used in this case.

6. The laboratory's policies, protocols, and procedures concerning the sample selection criteria used in this particular case.
7. The testimonial evaluation forms of each laboratory employee involved in the testing process.

The Following Items Concern Pre-analytical Matters:

8. Validation studies, both internal and external, that prove the validation in this case of the method, equipment, and instructions used.
9. The identification and source of all internal standards, standard mixtures (separation matrix), verifiers, blanks, and controls that were run in the same batch as the sample in this case as well as all certificates relating to the foregoing obtained from outside vendors.
10. All records reflecting internal testing and verification and ongoing quality control testing of all solutions, reagents, or standard mixtures used as part of, or in relation to calibrators, internal standards, controls, standard mixtures, or standards in the batch in which the sample in this case was run.
11. All refrigeration logs for all refrigerated items related to the testing in this case, including the blood tested by the lab, that were stored by the lab, for one year before and after the date of the test in this case.
12. All proficiency testing results for any person involved in sample preparation, analysis, or administrative or technical review in this case. This specifically includes the summary report of expected results for the proficiency testing and the manufacturer's information sheet against which the proficiency test results are judged.
13. Balance quality control records on any balance instrument used in relation to the calibrators, samples, controls, internal standards, mixtures or other solutions used in the preparation of knowns or unknowns used in the blood alcohol testing of the samples in this case. This includes the records reflecting the calibration of weights on any balance related to the solutions, mixtures, or equipment used in relation to this case as well as any control charts, for six (6) months before and at any time after the testing of the sample in this case.
14. Pipette quality control records on any pipette used in relation to the calibrators, samples, controls, internal standards, mixtures or other solutions, or used in the preparation of knowns or unknowns used in the blood alcohol testing of the samples in this case for six (6) months

before and at any time after the testing of the sample in this case.

15. The employee training records, **corrective action reports**, **quality action plans**, curriculum vitae, and resume for any person involved in sample preparation, analysis, or administrative or technical review in this case.
16. All maintenance and repair records for all equipment used in relation to the testing in this case for six (6) months before and after the test in this case.

The Following Items Concern Analytical Matters:

17. The identity, make, model, and brand or manufacturer of all equipment (GS, MS, and Auto Sampler) and other supporting equipment (i.e. balance, pipette) used during the analysis and/or preparation of the samples in this case and the variables used in its installation and operation.
18. If a Gas or Liquid Chromatograph is used, the reporting of t0 time (time zero) according to the method.
19. The calibration curve and chromatograms for this test and all chromatograms generated in the batch in which the sample in this case was tested.
20. All logs, spreadsheets, or other documents reflecting the sequence, order and/or analytical results of all calibrators, samples, standards, controls, and blanks in the batch containing the sample in this case.
21. Documentation of all machine parameters, settings, variables, and integration criteria in relation to the batch in which the sample in this case was tested.

The Following Items Concern Reporting Matters:

22. The particular records maintained for this testing and calibration event.
23. All documents and bench notes contained within the folder or file for the sample in this case including any note or notation on the sample folder or file. These documents shall be segregated from all other documents produced.
24. If the lab received more than one vial or container of blood or other substance, records reflecting which vial was tested in this case.

25. The full reporting and the underlying validation of the valuation of the uncertainty measurement (UM) in the ultimate reported result.
26. All chain of custody logs or reports related to the sample.
27. Any quality action plan or corrective action plan, and any deviation documentation related to the type of testing, equipment, or personnel involved in this case for six (6) months before and after the test in this case.
28. If a Mass Spectrometer was used, then the following additional materials should be provided:
 - 28.1 If a spectral library was used to examine and elucidate spectra, the identity of the group or organization publishing or creating the library and the identification of the source of the spectra used in the sample in this case.
 - 28.2 The hit list and the hit histogram, or quality match, for the testing.
 - 28.3 All “tune” reports that were run within 90 days, including quality assurance and quality control records, for the machine used in this case.

FIRM: Law Office of Deandra M. Grant PC, Attorney Deandra M. Grant, 800 E. Campbell Road, Ste. 110, Richardson, TX 75081, (972) 943-8500 Office, (972) 432-7547 Fax

ITEMS MAY BE TURNED OVER TO ATTORNEY PRIOR TO COURT DATE IN LIEU OF A COURT APPEARANCE.

SIGNATURE: _____

Section Six

The Alphabet Soup: SFST, ARIDE, and DRE

Charles J. Rathburn, Jr.
Rathburn Law Office
Indianapolis, Indiana
CJR@rathburnlaw.com

Section Six

**The Alphabet Soup: SFST,
ARIDE, and DRE..... Charles J. Rathburn, Jr.**

PowerPoint Presentation

Impaired Driving 101

The Alphabet Soup: SFST, ARIDE, and DRE

Charles James Rathburn, Jr., ICLEF March 26, 2021

Impaired Driving 101

The Alphabet Soup: SFST, ARIDE, and DRE

1. Standardized Field Sobriety Tests (SFST)
2. Advanced Roadside Impaired Driving Enforcement (ARIDE)
3. Drug Recognition Experts (DRE)

Impaired Driving Defense 101

The Alphabet Soup: SFST, ARIDE, and DRE

Standardized Field Sobriety Tests

1. Vehicle in Motion
2. Personal Contact
3. Pre-Arrest Screening
4. Arrest Decision

Impaired Driving Defense 101

The Alphabet Soup: SFST, ARIDE, and DRE

Standardized Field Sobriety Tests

1. Horizontal Gaze Nystagmus
2. Walk and Turn
3. One Leg Stand

Impaired Driving Defense 101

The Alphabet Soup: SFST, ARIDE, and DRE

Advanced Roadside Impaired Driving Enforcement

1. It is the bridge between SFSTs and DRE
2. This course will train law enforcement officers to observe, identify, and articulate the signs of impairment related to drugs, alcohol, or a combination of both in order to reduce the number of impaired driving incidents, serious injury, and fatal crashes.

Impaired Driving Defense 101

The Alphabet Soup: SFST, ARIDE, and DRE

Drug Recognition Expert

1. Twelve Step DRE Evaluation Matrix
2. Seven Categories of Drugs

Impaired Driving Defense 101

The Alphabet Soup: SFST, ARIDE, and DRE

12-Step DRE Evaluation Matrix

1. Breath Alcohol Test
2. Interview of Arresting Officer
3. Preliminary examination
4. Eye Examination
5. Divided Attention Test
6. Vital Signs
7. Dark Room Checks (Pupil Size)
8. Check for Muscle Tone
9. Check for Injection Sites
10. Interrogation of Subject-observations

Impaired Driving Defense 101

The Alphabet Soup: SFST, ARIDE, and DRE

Seven Categories of Drugs

1. Central Nervous System (CNS) Depressants
2. Central Nervous System (CNS) Stimulants,
3. Hallucinogens,
4. Dissociative Anesthetics,
5. Narcotic Analgesics,
6. Inhalents
7. Marijuana

Impaired Driving Defense 101

The Alphabet Soup: SFST, ARIDE, and DRE

Dr. Lance Platt

<https://impaireddrivingexpert.com>



<https://www.duiexpertwitness.com>

Tony Corroto



Impaired Driving 101

The Alphabet Soup: SFST, ARIDE, and DRE

<https://www.duiexpertwitness.com/links.htm>

Section Seven

Discovery Basics

Jennifer A. Sturges
Rolfes Garvey Walker & Robbins
Greensburg, Indiana
jennifer.sturges.rgwr@gmail.com

Section Seven

Discovery Basics..... Jennifer A. Sturges

PowerPoint Presentation..... 1

Forms

FOIA Request – Machine Records	22
Medical Disclosure Release	24
Motion Demand for Cross Examination	26
Motion to Take Depositions at County Expense	27
Motion for Discovery and Request for Rule 404 and 405 Evidence.....	28
<i>Ex Parte</i> Motion for Order Authorizing Expert at Public Expense	33
Motion for <i>Ex Parte</i> Determination of Defendant’s Motion for Appointment of Experts	37
Motion to Preserve Evidence.....	41
Motion for Specific Discovery	45
Notice of Depositions.....	47
Order Authorizing Taking Depositions at Court Expense	48
Order for Discovery and Request for Rule 404 and 405 Evidence	49
Order Granting Funds for Expert and Investigative Assistance	50
Order Preserving Evidence	51
Request for Production of Documents and Things	52
Non-Party Request for Production.....	58
Subpoena	63

DISCOVERY BASICS

Impaired Driving Defense 101

Jennifer A. Sturges

Discovery for Impaired Driving Cases

- Scope of Discovery
- Defendant's Duty
- Types of Discovery
- Indigent Request for Funds for Experts
- Sample Forms

Scope of Discovery

- Scope is governed by Trial Rule 26(B)
 - Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject-matter...whether it relates to the claim or defense... *In re WTHR-TV, State v Cline*, 693 NE2d 1, 5-6 (Ind. 1998).
 - Even if otherwise inadmissible if “reasonably calculated to lead to discovery of admissible evidence.” *Id.*
 - *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, Jena I. Turner & Allison D. Redlich,
<https://scholarlycommons.law.wlu.edu/wlulr/vol73/iss1/7>

Scope of Discovery

- TIP! Indiana Criminal Rule 21 provides that Trial Rules are generally applicable to all criminal proceedings
- TIP! Constitutionalize your arguments – Compulsory Process Clause of 6th Amendment
- Applicable to the States through Due Process Clause of 14th Amendment

Defendant's Duty

- TIP! Defense counsel has duty to seek out discovery, even when told it doesn't exist.
 - *Rompilla v Beard* 545 US 374; 125 S.Ct. 2456, 2466 (2005)

Defendant's Duty

- TIP! Evidence that could affect credibility of a government witness could be construed as *Brady* material – request production of personnel files of government witnesses to review for impeachment evidence. *Brady v Md*, 373 US 83 (1963).
- Evidence useful to the defense for impeachment purposes falls within *Brady* rule just as exculpatory evidence does.
 - *US v Bagley*, 473 US 667 (1985).

Types of Discovery

- Oral Depositions
- Depositions Upon Written Questions
- Production of Documents & Things
 - General & Specific
- 3rd Party RFP/Subpoena Duces Tecum
 - Toxicology Results
 - Breathalyzer Machine Calibration/Testing
 - Training & Experience

Types of Discovery

- ORAL DEPOSITIONS – TR 30
 - Law Enforcement Officers
 - Witnesses (vehicle passengers, bystanders, etc)
 - Medical Personnel (EMT, ER staff)
 - Lab Technicians
 - Toxicologists

Types of Discovery

- Depositions Upon Written Questions –TR 31
- NOTE – Court denied defendant's request to take oral depositions in Florida at state expense where TR31 is available.
 - *Haskett v State*, 386 NE2d 1012 (Ind. Ct. App. 1979)

Types of Discovery

- Production of Documents & Things –TR 34
 - Police Reports
 - Facts, identities of persons, existence of documents
 - Police personnel files
 - Scientific, Medical Reports, Other Evidence
 - Photographs
 - Standardized Field Sobriety Test Manuals

Police Reports

- NOTE – some police reports are protected by work product rule
- Trial court does not have inherent power to order production of verbatim copies of police reports over timely work product objection by prosecutor. *State ex re. Keaton v Circuit Court of Rush Co.*, 475 NE2d 1146 (Ind. 1985).

Police Reports

- **Police Diagrams** discoverable when requested with reasonable particularity and is material to defense. *Sexton v State*, 276 NE2d 836 (Ind 1972)
- **Used to Refresh Memory** – if LEO is going to use to refresh memory when testifying then discoverable. IR 612(b); *Gault v State* 878 NE2d 1260 (Ind. 2008) (citing 28 *Charles Alan Wright & Victor James Gold, Federal Practice and Procedure* § 6183, at 450 (1993)).

Police Reports

- **Verbatim Witness Statements** contained in police report— not shielded by work product doctrine. *Robinson v State*, 693 NE2d 548 (Ind. 1998).

Items Tested By Police

- Defendant has the right to examine all physical evidence in the hands of prosecutor. *Turnpaugh v State*, 521 NE2d 690 (Ind. 1988) (citing *Miller v Pate*, 386 US 1 (1967)).
- See - Recertification of breathalyzer before defendant could inspect required suppression of breath test results. *Mahrtdt v State*, 629 NE2d 244 (Ind. Ct. App.1994).
- Not absolute right to have defense expert tests when already tested by LEO and ability to CX witness who performed tests. *Frias v State*, 547 NE2d 809 (Ind. 1989).

Motions to Non-Parties

- Request For Production (RFP)
- Subpoena Duces Tecum
- Criminal Rule 2
- Ask Prosecutor to waive 15 day notice
- Must give responding party at least 30 days to produce

Motions to Non-Parties

- Motion to Non-Party must contain:
 - List of items to be inspected, described with reasonable particularity
 - Statement that witness or person to whom directed is entitled to security against damages or payment of damages resulting from such request and may respond to such request by:
 - Submitting to it's terms,
 - By proposing different terms,
 - By objecting specifically or generally to the request by serving a written response to the party making the request within 30 days, or
 - By moving to quash as permitted by Rule 45(B).

Subpoena Duces Tecum

- SDT compels production of documents, records, or other physical evidence. CR2
- May command the person to produce the books, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may:
 - (1) quash or modify the subpoena if it is unreasonable and oppressive;
 - (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, documents, or tangible things; ...

RFP/SDT

- Possible Third Parties:
 - Indiana State Police Lab
 - Indiana State Department of Toxicology
 - Local Hospital – phlebotomist – blood draw protocols
 - Manufacturer of blood draw kits
 - Out of State confirmation lab (GC/MS)

Indigent Request for Funds

- Depositions
- Investigators
- Experts
- Not just for public defender
 - *Beauchamp v State*, 788 NE2d 881 (Ind. Ct. App. 2003)

Practice Tips

- Evidentiary issues
 - (1) The initial stop – bodycam/dashcam/sfst/pbt
 - (2) Probable cause testing – breath vs blood
 - (3) 3rd party requests for discovery take time
- Calendar discovery response deadlines
- Formal Discovery helps preserve issues for appeal
- May seek inadmissible evidence if relevant and could lead to discovery of admissible evidence
- Requests should be specific and describe relevance
- Attempt “informal” discovery before compelling discovery
- Defense counsel has duty to seek even if told it doesn’t exist
- Don’t forget to file Motion to preserve early
- Remember you may also be subject to disclosure
- Consider petitioning for funds for experts, investigators

Sample Forms

- FOIA Request – Machine Records
- Motion Demand for Cross Examination
- Medical Disclosure Release
- Motion for Discovery with 404/405
- Motion for Specific Discovery
- Motion to Preserve Evidence
- Motion to Request Funds Ex parte
- Motion to Take Depositions at County Expense
- Notice of Deposition
- Order for Deposition Funds
- Order for Discovery
- Order Expert Funds
- Order to File Ex parte request for Funds
- RFP nonparty with Subpoena Duces Tecum
- Subpoena

(Date)

State Department of Toxicology
950 N. Meridian Street, Ste. 960, Mailbox 20
Indianapolis, Indiana 46204

VIA CERTIFIED MAIL

Dear Department of Toxicology:

I am making a request pursuant to I.C. § 5-14-3-1 et seq. (Freedom of Information Act) for the following information concerning BAC DataMaster, Instrument Number (**Machine Number**), thermometers, including NIST thermometers, and any simulators and simulator solutions used to

calibrate and maintain this BAC DataMaster.

- 1) A copy of all data ever collected as to this BAC DataMaster, from (**Beginning Date**) to present, including, but not limited to, all data to establish that this breath alcohol test device meets, or did not meet, the requirements of precision and accuracy established by the Breath Test Division of the State Department of Toxicology.
- 2) All of the data from all of the records for all of the files that are downloaded from this breath alcohol test device for the time period from (**Beginning Date**) to present. This request includes, but is not limited to:
 - a. Subject files;
 - b. Maintenance files;
 - c. Diagnostic files;
 - d. Calibration Factors;
 - e. Calibration files;
 - f. Operational error files; and
 - g. Instrument files.

NOTE: File names may not be exactly as requested but the intent of this item is to receive any transferred files. Any data fields, records or files that are not provided must be clearly identified.

- 3) A copy of any procedures from (**Beginning Date**) to present used by the Breath Test Division, including but not limited to its inspectors, for the breath alcohol-testing program. This request includes, but is not limited to:
 - a. Standard operating procedures for Calibration and Inspection of this BAC DataMaster (SOP's);
 - b. Policy and procedure manuals;
 - c. Notes; memorandums or any other documents that describe the requirements and/or guidelines for the breath testing program and equipment maintenance.

Included in this request is documentation explaining:

- a. What is to be tested and when?;
- b. How testing is to be conducted?; and
- c. Documentation detailing any and all data manipulations, calculations and/or reporting formats that are used by the Breath Test Division. (e.g.: What is the procedure for checking equipment prior to initial placement in the field; what

testing and/or maintenance is required on a regular basis, how are the various data fields measured or calculated on the instrument, preparation of maintenance reports and the reporting of errors found.)

- 4) All internal memorandum issued to inspectors of this BAC DataMaster, from **(Beginning Date)** to present concerning the retention or destruction of any and all data, notes, memoranda, notes to inspectors, print outs, or other documentation of any kind, including computer data, which would or could show that this DataMaster was not working properly whenever it was inspected.
- 5) All laboratory data reflecting the analysis or verification of the concentration of the alcohol-water and acetone solutions used with this BAC DataMaster during the time period from **(Beginning Date)** to present.
- 6) The complete maintenance and calibration history for all thermometers used to calibrate simulators that are then used to calibrate the BAC DataMaster from **(Beginning Date)** to present.
- 7) The complete maintenance and calibration history for all simulators that are used to calibrate the BAC DataMaster from **(Beginning Date)** to present.
- 8) All training records, certifications, and re-certifications for the breath alcohol device operator, **(Name of the Officer performing the test)** of the **(Name of Police Dept.)** Police Department.

Indiana Law allows you to charge up to \$0.10 per page for such requests. Please send such information according to statute with appropriate billing to the address below:

According to Statute you have seven (7) days to respond since this letter was sent via mail.

Thank you for your assistance on this matter.

Very truly yours,

(Name of Attorney)

(Attorney's initials/your initials)

AUTHORIZATION TO DISCLOSE HEALTH INFORMATION

Patient Name: _____ Health Record Number _____
Date of Birth: _____

1. I authorize the use or disclosure of the above named individual's health information as described below:
2. The following individual or organization is authorized to make the disclosure:

[Insert medical provider and address]

3. The type and amount of information to be used or disclosed is as follows: (include dates where appropriate).

- problem list
- medication list
- list of allergies
- immunization record
- most recent history and physical
- most recent discharge summary
- laboratory results from (date) _____ to (date) _____
- x-ray and imaging reports from (date) _____ to (date) _____
- consultation reports from (doctors' names) _____
- entire record
- Other

4. I understand that the information in my health record may include information relating to sexually transmitted disease, acquired immunodeficiency syndrome (AIDS), or human immunodeficiency virus (HIV). It may also include information about behavioral or mental health services, and treatment for alcohol and drug abuse.

5. This information may be disclosed to and used by the following individual or organization:

[insert law office]
Address: [insert address]
for the purpose of Legal Representation

6. I understand I have the right to revoke this authorization at any time. I understand if I revoke this authorization I must do so in writing and present my written revocation to the health information management department. I understand the revocation will not apply to information that has already been released in response to this authorization. I understand the revocation will not apply to my insurance company when the law provides my insurer with the right to contest a claim under my policy. Unless otherwise revoked, this authorization will expire on the following date, event or condition. If I fail to specify an expiration date, event or condition, this authorization will expire in six months.
7. I understand that authorizing the disclosure of this health information is voluntary. I can refuse to sign this authorization. I need not sign this form in order to assure treatment. I understand I may inspect or copy the information to be used or disclosed, as provided in CFR 164.524. I understand any disclosure of information carries with it the potential for an unauthorized re-disclosure and the information may not be protected by federal confidentiality rules. If I have questions about disclosure of my health information, I can contact (insert HIM director, privacy officer, or other office or individual's name or contact information).

Signature of Patient or Legal Representative

Date

If Signed by Legal Representative, Relationship to Patient Signature of Witness

REFERENCES

45 C.F.R. 164.508 (specifying the requirements for an authorization to be valid).

IN THE SUPERIOR COURT OF *** COUNTY**

STATE OF INDIANA

STATE OF INDIANA	)	CAUSE NO. XXXXXX
Plaintiff)	
)	
v.)	
)	
XXXXXXXXXXXXXXXXXX)	
Defendant.)	

DEMAND FOR CROSS EXAMINATION

Comes now Defendant, by counsel, and in response to the State’s Notice of Intention to Introduce Laboratory Report, files his demand for cross examination of any of the State’s witnesses in regard to said Laboratory report, including but not limited to the individual who prepared the laboratory report, as per I.C. 35-36-11-3.

Respectfully Submitted,

/s/ Jane Doe

Jane Doe, Attorney for Defendant
Attorney XXXXXX
Address block

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Demand for Cross Examination has been served upon the Prosecutor by e-mail at the time of e-filing.

/s/ Jennifer A. Sturges

Jennifer A. Sturges

IN THE SUPERIOR COURT OF * COUNTY**

STATE OF INDIANA

STATE OF INDIANA,	)	CAUSE NO. _____
Plaintiff,)	
)	
v.)	
)	
XXXX,)	
Defendant.)	

MOTION TO TAKE DEPOSITIONS AT PUBLIC EXPENSE

The Defendant, by counsel, respectfully requests this Court for an Order directing the State to produce the following witnesses: XXXXXXXXXXXXX for deposition. In support of this Motion, the Defendant states the following:

1. Under Trial Rule 30, the Defendant has a right to depose witnesses for the purpose of preparing his case for trial.
2. Undersigned counsel has advised the Defendant that in order to provide his effective representation she must take the depositions of the State's witnesses.
3. There is no paramount State interest in not allowing Defendant to take the requested depositions.
4. The Defendant is indigent and has no funds to pay the costs of the depositions necessary to prepare for trial.

WHEREFORE, the Defendant, by counsel, moves this Court for an Order directing the above depositions be taken at public expense and for all other relief just and proper in the premises.

Respectfully Submitted,

/s/ Jane Doe

Jane Doe, Attorney for the Defendant

CERTIFICATE OF SERVICE:

I hereby certify that I have served the foregoing Motion to Take Depositions at Public Expense upon the XXX County Prosecuting Attorney via E-Service at the time of E-filing.

/s/ Jane Doe

IN THE SUPERIOR COURT OF *** COUNTY**

STATE OF INDIANA

STATE OF INDIANA	)	CAUSE NO. XXXXXX
Plaintiff)	
)	
v.)	
)	
XXXXXXXXXXXXXXXXXX)	
Defendant.)	

MOTION FOR DISCOVERY AND REQUEST FOR RULE 404 AND 405 EVIDENCE

The Defendant, by counsel, moves the State of Indiana to produce the following with regard to the above captioned cause of action to-wit:

1. The names and last known addresses of persons whom the State of Indiana intends to call as witnesses together with their written statements, recorded or taped statements, video taped statements, memoranda containing substantially verbatim reports of their oral statements and memoranda reporting or summarizing their oral statements, including but not limited to the person referred to as a "confidential informant" in the amended probable cause affidavit.

2. The names and last known addresses of persons known by the State of Indiana to have knowledge pertinent to this cause of action but who the State of Indiana does not intend to call as witnesses.

3. Any and all written or recorded statements and the substance of any oral statements made by the Defendant, or by any other person alleging statements made by the Defendant, regardless of whether the State of Indiana intends to call such persons as a witness or indicates the person is a confidential informant, and a list of witnesses to the making and acknowledgment of such statements.

4. Any and all reports or statements of experts or other individuals who conducted any test, experiment, examination, or comparison, made in connection with this particular case, including results of

physical or mental examinations and of scientific tests, experiments or comparisons, whether the State intends to use these reports or statements or not.

5. The names and last known addresses of persons not intended to be called as the State of Indiana's witnesses but who have been questioned or interviewed by the State of Indiana or its agents in preparation of this case, together with their relevant written or recorded statements, including memoranda reporting or summarizing their oral statements and any record of prior criminal convictions.

6. A summary of any statement or conversation made by or engaged in by the Defendant and overheard by any persons known to the State of Indiana and a list of any witnesses who overheard such statements or conversations, together with any and all reports, documents, correspondence and/or videotapes made or received, together with a statement in writing as to whether there has been any electronic surveillance or recordings of conversation to which the Defendant was a party.

7. A statement as to whether any telephone calls were made by the Defendant following her arrest and whether the calls were taped or overheard by any persons known to the State of Indiana. If the call was taped, produce the tape recording or if the conversation was overheard, then produce a memorandum of the conversation overheard together with the names and addresses of all persons overhearing such conversation or conversations.

8. All phone records, books, papers, records, tapes, documents, photographs, video tapes and other tangible objects and evidence which the State of Indiana may use in the prosecution of this matter or which were obtained from or belonged to the Defendant, or any witness, whether as substantive or demonstrative evidence.

9. All body cam, dash cam, or other electronically recorded video or audio from the law enforcement officers on the date of the alleged offense.

10. All dispatch logs from the alleged date of the offense with regard to any law enforcement officers involved in the alleged offense.

11. A record of arrests, criminal convictions and juvenile records which may be used of any witness who may be called by the State of Indiana, including but not limited to, the Defendant.

12. A record of arrests, criminal convictions and juvenile records which may be used of any witness who is listed on the defense witness list, including but not limited to, the Defendant.

13. True copies of all written case reports and all other written reports, notes, memoranda, maps, drawings or diagrams, written, drawn or otherwise prepared by the County Sheriff's Department, City Police Department, Indiana State Police Department, the Federal Bureau of Investigation, the County Medical Examiner's Office, and any other law enforcement agency or any private individual in connection with or pertaining to the investigation of the crime charged against the Defendant.

14. A statement as to whether or not the Defendant, any vehicle in which he had an interest or his residence were searched following his arrest either with or without a Search Warrant and, if so, a statement of information contained and the items seized as a result of the search. In addition, if the search was made pursuant to a Court authorized Search Warrant, produce a copy of the Search Warrant together with a copy of the Return. Further a statement regarding all areas searched in the investigation of this case, and a statement of information contained and the items seized as a result of the search. If the search was made by a court authorized search warrant, produce a copy of the warrant together with a copy of the return and a transcription of testimony at the probable cause hearing to obtain the search warrant. If any search was made by consent, produce a copy of the consent to search form. With regards to all searches made in connection with this investigation, produce all reports, receipts, inventories, documents, tapes, and other tangible objects and evidence collected, along with a statement concerning where the evidence is currently stored.

15. Any and all evidence in the possession or control of the State of Indiana or its agents which may be favorable to the Defendant and material to the issue of guilt or punishment or could reasonably weaken or affect any evidence proposed to be introduced against the Defendant or is relevant

to the subject matter or the charge filed herein or which in any manner may aid the Defendant in the ascertainment of the truth.

17. Any and all demonstrative exhibits prepared by the State, its agents or experts, including but not limited to animations, charts, experiments, maps, reenactments.

18. Pursuant to Rule 404 of the Indiana Rules of Evidence, you are requested to state the general nature of any evidence of other crimes, wrongs, or acts of the Defendant or any anticipated defense witness which the State intends to offer for any purpose, and state which exception the State would rely upon as contained in the Indiana Rules of Evidence Rule 404(b), for its admission. You are also requested to supply the names and last known addresses of all witnesses that may be called to testify as to any evidence of other crimes, wrongs or acts of the Defendant or any defense witness, and specify the other crime, wrong or act to which each witness may be testifying.

19. Pursuant to Rule 404 of the Indiana Rules of Evidence, you are requested to state the general nature of any evidence of other crimes, wrongs, or acts of any witness which the State may call to testify in this matter for any purpose.

20. Pursuant to Rule 405 of the Indiana Rules of Evidence you are requested to provide the undersigned with any and all relevant specific instances of conduct to be used by the State in cross examination relative to evidence of character or a trait of character of any person which is material to any of the criminal charges in this cause.

The disclosure and production shall be made without regard to whether the evidence to be disclosed and produced is deemed admissible at the trial herein. All responses shall be reasonably supplemented, corrected or amended when additional and/or different information and material becomes available.

RESPECTFULLY SUBMITTED;

By _____
Jane Doe
Attorney for Defendant

Doe Law Firm
123 Main St
Greensburg, Indiana 47240-0468
Telephone: (812) xxx-xxxx
jdoe@greatlawfirm.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Discovery was served upon the Prosecuting Attorney by E-service at the time of E-filing through IEFS.

Jane Doe
Attorney for Defendant

IN THE XXXXXXXX COURT OF * COUNTY**

STATE OF INDIANA

STATE OF INDIANA,	)	CAUSE NO. _____
Plaintiff,)	
)	
v.)	
)	
XXXX,)	
Defendant.)	

EX PARTE MOTION FOR ORDER AUTHORIZING EXPERT AT PUBLIC EXPENSE

**THIS MOTION IS FILED EX PARTE
AND MUST BE MAINTAINED UNDER SEAL**

The Defendant, by counsel, respectfully requests this Court to authorize counsel to retain the services of XXXXXXXXXXXXXXXX , and directing that the costs of such expert assistance be paid by the county. This Motion is made pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; and Art. I, Sec. 12, 13, and 23 of the Indiana Constitution. In support of this Motion, the Defendant states the following:

1. The Defendant is indigent and is represented by appointed counsel. This Court has previously ordered that all applications for funds for expert and investigative assistance shall be made by *ex parte* motion to the Court, considered *in camera*, and that any records and transcripts regarding such motions shall be under seal. The disclosures made in this motion are made in reliance upon the order and counsel's understanding that nothing set out in this motion will be revealed to the prosecution, the press, or the public.

2. The Defendant is charged with XXXXXXXXXXXXX as a Level X Felony. In particular, Defendant is accused of XXXXXXXXXXXX. In order to support its case, the State obtained [describe the scientific evidence you need to examine]. The Defendant has reason to believe that the State also has in its possession data obtained from XXXXXXXXXXXX. Even though it has been almost four (4) months since the Defendant's arrest, none of this evidence has been turned over to defense counsel for examination. It is imperative that the Defendant be able to analyze this evidence in order to rebut the accusations. The best way

to ensure Due Process is to allow the Defendant to conduct his own independent analysis of the evidence. In a case involving highly technical data, the Defendant should not have to solely rely upon his court-appointed counsel to conduct such evidentiary analysis in the face of the State having access to the [Indiana State Police or other] experts to conduct its investigation and expert analysis of the data.

3. Assistance of this nature is critical to the Fact-Finder's determination of Defendant's guilt and to the determination of penalty at sentencing if found guilty of such serious charges. XXXXXXXXXX is a key element of all of the crimes as charged. Factors such as XXXXXXXXXX all contribute to the element of XXXXXXXXXX.

4. A XXXXXXXXXX expert is also crucial to defense counsel to analyze the State's evidence in order to be able to raise foundational challenges to its admission, prepare properly for cross examination of the State's experts, and to provide defense expert testimony regarding alternative interpretations of the data evidence.

5. Defendant reasonably believes that the [Indiana State Police] will be the lab that conducts the evidentiary forensics on behalf of the State and cannot be considered a neutral or unbiased examiner such that the Defendant could rely solely upon the analytical reports produced by the State's experts. It is reasonable for the Defense to believe that time constraints and costs may affect the scope and the type of search that would be involved in the State's expert examination. There is no guarantee that the State's lab will seek out potentially exculpatory evidence, but rather, will limit its search only to incriminating evidence to support its charges in this case.

6. Undersigned counsel desires to retain the services of XXXXXXXX who is an expert in the area of XXXXXXXX for the purposes of producing her own independent analysis of the data, consulting with counsel with regard to the validity of the findings of the state's expert, and helping prepare for cross-examination, testimony in rebuttal, development of potential defenses, and also providing direct expert testimony if appropriate.

7. XXXXXXXXXX resume is appended to this motion and is hereby incorporated by reference.

It sets out in detail XXXXXXXX qualifications and particular experience in the area of XXXXXXXXXX, including doctoral work at XXXXXXXX, and a previous work history with the XXXXXXXXXX

8. XXXXXXXXXXXX estimates that the scope of work in examining the data in this case will be between six (6) and ten (10) hours, however, it is impossible to precisely predict as she has had no access to any of the State's data. The cost for XXXXXXXX is \$200 per hour to conduct the examination. If she needs to travel between Lafayette and Indianapolis to collect the cell phone, she would charge \$50 per hour plus 57.5 cents per mile. If she is required to testify at trial, she would charge the \$50 per hour plus mileage for travel between Lafayette and Greensburg, and \$200 per hour for the trial time. My estimate of total expenses ranges from \$1,500.00 up to \$5,000.00 if required to testify as an expert at trial.

9. Neither Defendant nor counsel is sufficiently knowledgeable in XXXXXXXXXX to determine the validity of the opinions reached by the state's expert. Moreover, because of the need for specialized training and expertise in this area, it will be impossible for Defendant to present any evidence on this issue without the services of an expert.

10. The requested expert assistance is essential for Defendant to have a fair trial. The services of a cyber forensics expert are necessary to enable Defendant to prepare effectively for trial, to present evidence on his own behalf, and to cross-examine the state's witnesses. Were it not for Defendant's poverty, counsel would retain the expert requested. Defendant must be provided with the requested expert assistance in order to protect his right to confront the State's witnesses (U.S. Const. 6th Amend; Ind. Const., Art. I, Sec. 13), his right to effective assistance of counsel (U.S. Const. 6th Amend; Ind. Const., Art. I, Sec. 13), his right to present a defense (U.S. Const. 6th Amend; Ind. Const., Art. I, Sec. 12 & 13), his right to call witnesses on his own behalf (U.S. Const. 6th Amend; Ind. Const., Art. I, Sec. 13), his due process right to a fair trial (U.S. Const. 5th & 14th Amend., Ake v. Oklahoma, 470 U.S. 68 (1985); Ind. Const., Art. I, Sec. 13), the equal protection of the laws (U.S. Const. 14th Amend; Ind. Const., Art. I, Sec. 23), and the protection against cruel and unusual or disproportionate punishments (U.S. Const. 8th & 14th Amend; Ind. Const., Art. I, Sec. 16). In these circumstances, the Constitutions of the United

States and Indiana require that funds for expert assistance be provided.

WHEREFORE, the Defendant, by counsel, respectfully requests that this Court grant his motion for an order authorizing hiring of XXXXXXXXX as a XXXXXXXXXX expert at the County's expense, and for all other relief just and proper in the premises.

Respectfully Submitted,

/s/ Jane Doe

Jane Doe
Attorney for the Defendant

IN THE XXXXXX COURT OF * COUNTY**

STATE OF INDIANA

STATE OF INDIANA,	)	CAUSE NO. _____
Plaintiff,)	
)	
v.)	
)	
XXXX,)	
Defendant.)	

MOTION FOR EX PARTE DETERMINATION OF DEFENDANT'S MOTION FOR APPOINTMENT OF EXPERTS

The Defendant, by counsel, respectfully requests this Court to 1) permit the Defendant to file an *Ex Parte Motion For Appointment of Experts and Memorandum of Facts and Law in Support Thereof Ex Parte Motion* under seal, 2) conduct an *ex parte* hearing upon the Motion, and 3) order the court reporter and all other court personnel to maintain all pleadings and hearings concerning the Defendant's application for appointment of experts confidential and not discuss or disclose to any person including the prosecutor or any of his/her agents. In support of the Motion, the Defendant states the following:

1. The Defendant is indigent and unable to retain experts necessary to assure him a fair trial.
2. The Defendant is entitled to an *ex parte* proceeding on his application for appointment of experts under Ake v. Oklahoma , 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).
3. A trial court may, upon a showing of good cause, permit an *ex parte* request for funds for assistance. Stevens v. State, 770 N.E.2d 739, 759 (Ind. 2002). Further, the Indiana Supreme Court has amended Criminal Rule 24, effective January 1, 2001, to specifically authorize *ex parte* hearings on funds applications in capital cases. There is no reason why *ex parte* hearings in non-capital cases should be considered improper.
4. The appointment of experts in this case is necessary to an adequate defense, a showing which Defendant is prepared to make if this motion is granted.

5. To effectively show the need for assistance and enable his Court to make informed decisions, defense counsel must reveal to this Court his theory of defense, attorney-client confidences, work product material and other information. The best way to protect against unnecessary expenditures for investigative and expert defense assistance is for defense counsel to explain what his investigation has revealed which makes him believe that use of further investigative or expert assistance is necessary, and what indications make it probable that the particular assistance sought will be useful. See Scott v. State, 593 N.E.2d 198 (Ind. 1992).

6. Denial of this motion would force the Defendant to an adversarial hearing on his application for appointment of experts. Forcing the Defendant to make his request for funds in a public, adversarial hearing would restrict his ability to make a detailed showing of need and would deprive this court of information necessary to make its decisions regarding expenditure of funds.

7. An adversarial hearing would violate the provisions of Indiana Trial Rule 26(B)(4), which is based on the work-product privilege and provides that counsel need not disclose the names and opinions of experts unless and until the defense decides that these experts will be called as witnesses at trial. American Bldgs. Co. v. Kokomo Grain Co., Inc., 506 N.E.2d 56 (Ind. App. 1987); Marcovich Land Co. v. J.J. Newberry Co., 413 N.E.2d 935 (Ind. App. 1980).

8. A defendant with sufficient funds to hire his/her own experts would not be required to disclose the names of experts used for consultation and investigation unless and until it was determined that these experts would be called as witnesses at trial. It is impossible to state at this point in the investigation whether the experts the accused seeks will be called as witnesses at trial. This is a decision that can be made only after they conduct their tests, evaluations and investigation.

9. Granting a wealthy defendant the protection afforded by the work product privilege while denying an indigent the same protection solely because of his/her economic status violates equal protection, as guaranteed by the United States Constitution, Fourteenth Amendment and the Indiana Constitution, Art. 1, Sect. 23. In Beauchamp v. State, 788 N.E.2d 881 (Ind.Ct.App. 2003), the Court of Appeals rejected an equal protection challenge to the denial of *ex parte* funds requests, finding a rational

basis for requiring a specific showing of need for expert assistance. However, the Beauchamp Court did not address the equal protection implications of requiring an indigent Defendant make this showing in open court, revealing work product and other information to the prosecution. The Defendant does not object to the requirement of making a specific showing of need for expert expenditures, but rather objects to the requirement that he make this showing in open court, revealing work product and otherwise protected information to the prosecution.

10. The Defendant has no voice in the selection of expert witnesses by the state and law enforcement officials who assist the prosecution in preparing the case against him. To allow the prosecution to have a voice in preparation of the defense case would violate principles of fundamental fairness.

12. The denial of this Motion would violate the Defendant's rights to fundamental fairness, to the effective assistance to counsel, to present evidence, to be free from compulsory self incrimination, to confront witnesses, to compulsory process, and to equal protection of the laws as guaranteed by the United States Constitution, Fifth, Sixth, Eighth, and Fourteenth Amendments, and the Indiana Constitution, Art. 1, Sections. 12, 13, 14, 19 and 22.

13. The *Ex Parte Motion For Appointment of Experts and Memorandum of Facts and Law in Support Thereof Ex Parte Motion* would be filed under seal and would not be served upon the Prosecuting Attorney. The Motion and Memorandum would be sealed and preserved as part of the record in this case for future appellate review should such review be necessary.

14. The hearing on the *Ex Parte Motion For Appointment of Experts and Memorandum of Facts and Law in Support Thereof Ex Parte Motion* would be recorded by the Court Reporter, transcribed and sealed for purposes of appellate review should such review be necessary.

WHEREFORE, the Defendant, by counsel, respectfully requests that this Court conduct the proceedings on the Defendant's application for appointment of experts *ex parte*, without the presence or participation of the Prosecuting Attorney or any of his agents, and for all other relief just and proper in the premises. Respectfully Submitted,

/s/ Jane Doe

Jane Doe
Attorney for the Defendant

STATE OF INDIANA	)	IN THE DECATUR SUPERIOR COURT
	) SS:	
COUNTY OF DECATUR	)	CAUSE NO. XXXXXX
STATE OF INDIANA)	
)	
v.)	
)	
XXXXXXXXXXXX)	

MOTION TO PRESERVE EVIDENCE

The Defendant, by counsel, moves this Court to direct the Greensburg Police Department, the Decatur County Prosecutor’s Office, and any other law enforcement agency involved in this matter to preserve and produce any possible exculpatory evidence, including but not limited to, audio/visual/digital recordings and other tangible evidence that is commonly destroyed after a certain time. In support of this Motion, the Defendant states the following:

1. The crime herein is alleged to have been committed on September 23, 2014.
2. The information in this matter was filed on May 23, 2015.
3. In reading the information and the probable cause affidavit filed with it, it appears that the action taken by the Greensburg Police Department relative to this offense was initiated on or about September 23, 2014 when Greensburg Police Department Officers conducted searches of property on or about 601 W. McKee Street, 419 W. Mill Street, 500 Block of W. Main Street, 600 block of W. Park Road, and 410 Park Road, all in Greensburg, Decatur County, Indiana and seized certain items including but not limited to tools and other physical evidence, interviewed witnesses, as well as prepared reports regarding the investigation or other relevant information.
4. This information may have been relayed to other law enforcement personnel by persons whose names are not known to the Defendant at this time.
5. The Greensburg Police Department may have in its possession electronic/digital/taped recordings of these communications, or written transcriptions of these descriptions or statements, the contents of which purportedly provided other law enforcement personnel

with a description of the alleged offender, as well as other probable cause to identify and apprehend the Defendant as the offender.

6. Thus, Defendant requests the State preserves and produces:
 - A. All physical evidence, and any written reports, notes, memoranda, maps, drawings, diagrams written, drawn or otherwise, or photographs taken of such physical evidence, in connection with or pertaining to the investigation of the crimes charged against the Defendant herein.
 - B. All written reports, notes, memoranda, maps, drawings or diagrams written, drawn or otherwise prepared by any law enforcement agency or individual, in connection with or pertaining to the investigation of the crimes charged against the Defendant herein.
 - C. Any and all reports, laboratory or otherwise, or statements of experts made in connection with this particular case, including results of physical or mental examination and of scientific tests, experiments or comparisons by any agents of the State of Indiana, or private individuals.
 - D. Any and all recording or documents that would be related to whether Defendant, the initial caller, or any other suspect that may have been considered to have committed the acts apparently described by the initial caller,
 - (1) appeared in a line-up or show-up;
 - (2) been made to speak for identification by witnesses to the said offense;
 - (3) been fingerprinted;
 - (4) been photographed;
 - (5) had specimens of materials taken from under his/her fingernails;
 - (6) had samples of blood, hair, breath or other materials of his/her body taken which involve an intrusion thereof;
 - (7) provided specimen of handwriting;
 - (8) submitted to physical or medical inspection of his/her body; or

(9) had his/her photograph shown to any witness to the alleged crime, and if so, a copy of such photograph and any others shown to any such witness(es).

7. The Defendant's constitutional right to be provided all evidence favorable to his defense could be irreparably damaged if he were required to ask for the production of these recordings routinely through the regular discovery sequence.
8. The Defendant is entitled to any and all evidence in possession and control of the State of Indiana, or its agents which may be favorable to the Defendant and material to the issue of guilt or punishment or could reasonably weaken or affect any evidence proposed to be introduced against the Defendant or is relevant to the subject matter of this cause of action, or in any manner may aid this Defendant in the ascertainment of the truth. Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). Failure to preserve material evidence may result in a reversal or dismissal of a conviction. Roberson v. State, 766 N.E.2d 1185 (Ind.Ct.App. 2002); Mahrtdt v. State, 629 N.E.2d 244 (Ind.Ct.App. 1994).
9. In the interests of justice, methods of discovery may be used in any sequence and shall not operate to delay any other party's discovery (Indiana Trial Rule 26 (D)).

WHEREFORE, the Defendant by counsel respectfully requests this Court to direct the Greensburg Police Department, the Decatur County Prosecutor, and any other law enforcement agency involved in this matter to preserve and produce any possible exculpatory evidence, including but not limited to, audio/visual/digital recordings and other tangible evidence that is commonly destroyed after a certain time.

Respectfully Submitted,

ROLFES, GARVEY, WALKER & ROBBINS

Jennifer A. Sturges
Attorney for the Defendant, Gregory S. Powers

Jennifer A. Sturges, Attorney No. 31526-16
ROLFES, GARVEY, WALKER & ROBBINS
132 E. Washington Street, PO Box 468
Greensburg, IN 47240
(812) 663-4441

CERTIFICATE OF SERVICE

I hereby certify that I have served upon Brian Clark, Deputy Prosecutor, the forgoing Motion to Preserve Evidence by E-Service at the time of E-Filing via IEFS.

Jennifer A. Sturges

IN THE SUPERIOR COURT OF * COUNTY**

STATE OF INDIANA

STATE OF INDIANA,	)	CAUSE NO. _____
Plaintiff,)	
)	
v.)	
)	
XXXX,)	
Defendant.)	

MOTION FOR SPECIFIC DISCOVERY

COMES NOW the Defendant, by counsel, and respectfully requests the State provide counsel for the Defendant with the following specific discovery:

1. The entire data packet for analysis generated by the Indiana State Department of Toxicology in the above-referenced cause, also known as the Litigation Packet, which includes but is not limited to calibration data on the devices used to examine the specimen in this cause, quality control data, actual analytical data testing of the specimen, and the entire chain of custody for the specimen tested in this case, which includes an external an internal chain of custody. This would also include copies of the actual chromatograms and produced from the testing of this sample, and the other compounds run during this test.
2. Cheryl Anderson, the lab analyst in this case, was also the analyst in State v. Uland, 53C03-1311-FC-001137, and has previously produced the same requested materials, so she should be familiar with the requested materials.

WHEREFORE, the Defendant, respectfully requests this Court order the State to provide the requested documentation to counsel for the Defendant within thirty (30) days, and for all other relief just and proper in the premises.

Respectfully submitted,

/s/ Jane Doe

Jane Doe, Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon XXXXX County Prosecutor's Office via E-Service at the time of E-filing through IEFS.

/s/ Jane Doe

IN THE SUPERIOR COURT OF *** COUNTY**

STATE OF INDIANA

STATE OF INDIANA	)	CAUSE NO. XXXXXX
Plaintiff)	
)	
v.)	
)	
XXXXXXXXXXXXXXXXXX)	
Defendant.)	

NOTICE OF DEPOSITION

To: XXXXX County Prosecutor
Anytown, Indiana

You are hereby notified that on the [date], commencing at [time] at the offices of [attorney name and address], the Defendant herein by counsel, intends to take the deposition of the following:

- | | |
|---------------|---|
| 1. 10:00 a.m. | XXXXXX |
| 2. 10:30 a.m. | Deputy XXXXXXXX
XXXX County Sheriff's Department |
| 3. 1:00 p.m. | Deputy XXXXXXXX
XXXX County Sheriff's Department |
| 4. 2:00 p.m. | Deputy XXXXXX
XXXXXX County Sheriff's Department |

You have been given notice and may take part as you deem fit and proper.

Respectfully submitted,

Jane Doe
Attorney block

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon XXXX County Prosecutor's Office via xxxxxx

/s/ Jane Doe

IN THE SUPERIOR COURT OF *** COUNTY**

STATE OF INDIANA

STATE OF INDIANA	)	CAUSE NO. XXXXXX
Plaintiff)	
)	
v.)	
)	
XXXXXXXXXXXXXXXXXX)	
Defendant.)	

ORDER AUTHORIZING TAKING DEPOSITIONS AT COURT EXPENSE

COMES NOW the Defendant, by counsel, upon his request to take depositions at the Court's expense. And the Court having examined said motion and being duly advised in the premises now FINDS that said motion should be granted.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that defense counsel is authorized to proceed with the taking of depositions in this cause, and the Court shall bear the expense of depositions.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Decatur County Prosecutor is to produce for the State the following persons on the date and time agreed to for the taking of depositions by the Defendant: XXXXXX, and any other persons that the state has spoken to in the course of its investigation of this matter.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant and the State shall select a licensed stenographer, as they shall agree, to record and transcribe the depositions. Defense counsel shall contact the prosecuting attorney to determine the location of the depositions.

IT IS FURTHER, ORDERED, ADJUDGED, AND DECREED that defense shall promptly submit the invoice for the cost of said depositions to the Court in order to facilitate payment.

DATED: _____

Hon. XXXXXXXX, Judge
XXXXXX Superior Court

Distribution:
Jane Doe, Attorney for Defendant
State

IN THE SUPERIOR COURT OF *** COUNTY**
STATE OF INDIANA

STATE OF INDIANA	)	CAUSE NO. XXXXXX
Plaintiff)	
)	
v.)	
)	
XXXXXXXXXXXXXXXXXX)	
Defendant.)	

ORDER FOR DISCOVERY AND REQUEST FOR RULE 404 AND 405 EVIDENCE

The Defendant, through counsel, having filed his Motion for Discovery and Request for Rule 404 and 405 Evidence, and the Court, having reviewed the Motion which is in the following words and figures, to-wit:

(H.I.)

The Court now finds that the prayer therein should be GRANTED.

It is hereby ORDERED, ADJUDGED, and DECREED that the XXXXX County Prosecutor's Office shall produce to the Defendant the requested discovery and 404 and 405 Evidence as set forth in his Motion for Discovery and Request for 404 and 405 Evidence as incorporated by reference herein within Thirty (30) days of the date of this order.

SO ORDERED this date: _____.

Hon. XXXXX, Judge
XXXXX Circuit Court

DISTRIBUTION:
Jane Doe
Prosecutor

IN THE XXXXXXXX COURT OF * COUNTY**

STATE OF INDIANA

STATE OF INDIANA,	)	CAUSE NO. _____
Plaintiff,)	
)	
v.)	
)	
XXXX,)	
Defendant.)	

ORDER GRANTING FUNDS FOR EXPERT AND INVESTIGATIVE ASSISTANCE

Comes Now Defendant, by counsel, on sealed record on his Ex parte Motion for Order Authorizing Expert at Public Expense, having previously been granted permission to proceed under seal by Court Order, and the Court being sufficiently advised, The Motion is hereby GRANTED with regard to Defendant's request for Funds to retain xxxxxxxxxxx, for such assistance necessary to prepare the defense of this case.

the Clerk shall not permit any person, other than the Court and counsel for the defendant, to examine said motion, this order, and any further filings regarding such applications for funds. These motions shall be segregated for the remainder of the file in the case and shall be locked securely so that no unauthorized access is allowed.

The Clerk, the Sheriff, and any deputies from his office, the Court Reporter, and the Auditor and any of her agents are hereby restrained under penalty of contempt for disclosing to anyone the nature of any motion or order relating thereto, any testimony or colloquy adduced at any hearing on such motions, the text of any transcript, or any other information disclosed in such proceedings.

Furthermore, all county personnel who are necessary for the processing of paperwork associated with this ex parte request for funds and disbursement of those funds are hereby ordered under penalty of contempt that should they become aware of any violation of this order they are to immediately notify this court of such violation.

So ordered this date: xxxx.

ORDER PRESERVING EVIDENCE

The Defendant, having filed his *Motion to Preserve Evidence*, and the Court, having reviewed the Motion which is in the following words and figures, to-wit:

(H.I.)

The Court now finds that the prayer therein should be GRANTED.

It is hereby ORDERED, ADJUDGED, and DECREED that [INSERT PROSECUTOR'S OFFICE] shall preserve all physical evidence related to the above-captioned cause held by all law enforcement agencies for possible future testing, inspection or admission into a hearing or trial.

So ordered this _____ day of _____ 201_.

Judge

IN THE XXXXX COURT OF XXXXXXXX COUNTY

STATE OF INDIANA

THE STATE OF INDIANA,	)	CAUSE NO. XXXXXXXXXXX
Plaintiff,)	
)	
vs.)	
)	
XXXXXXXXXX,)	
Defendant.)	

REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS

TO: TERRI KENDRICK, STAFF ATTORNEY
 INDIANA STATE DEPARTMENT OF TOXICOLOGY
 550 W. 16TH STREET
 INDIANAPOLIS, INDIANA 46202

The Defendant, by counsel, requests the production of the following documents or information concerning Intox EC/IR-II, Instrument Number 011025, and any simulators and simulator solutions used to calibrate and maintain this Instrument, pursuant to this Request and Subpoena Duces Tecum accompanying this Request. This information/documentation should be produced at the offices of XXXXXXXXXXXXXXXX on or before THIRTY (30) DAYS from the mailing of this request, to wit:

- 1) The enclosed Affidavit, completed and signed by an appropriate person with knowledge of production of document.

- 2) A copy of all data ever collected as to this Intox EC/IR-II, from the date it was acquired and/or placed into service to [DATE], including, but not limited to, all data to establish that this breath alcohol test device meets, or did not meet, the requirements of precision and accuracy established by 260 IAC 2-4-2.

- 3) All of the data from all of the records for all of the files that are downloaded from this breath alcohol test device for the time period from the date it was acquired and/or placed into service to January 30, 2017. This request includes, but is not limited to:
 - a. Subject files;
 - b. Maintenance files;
 - c. Diagnostic files;
 - d. Calibration Factors;
 - e. Calibration files;
 - f. Operational error files;
 - g. Internal Standards records from November 01, 2016 through January 30, 2017. and
 - h. Instrument files.

NOTE: File names may not be exactly as requested but the intent of this item is to receive any transferred files. Any data fields, records or files that are not provided must be clearly identified.

- 4) A copy of the owner's and/or user's manual for data acquisition/management program, that the Breath Test Division of the Indiana State Department of Toxicology is using, or has ever used, for the acquisition and/or management of the tests conducted on this breath alcohol test device.
- 5) A listing of all codes, shorthands, messages, and/or acronyms used in the computer data files. (e.g. 'INV' indicates mouth alcohol, 'RFI' indicates radio frequency interference.)
- 6) A copy of all procedures (including the Breath Test Policy & Procedure Manual) used by the Breath Test Division, including but not limited to its inspectors, in administering the breath test program. This request includes, but is not limited to:
 - a. All past and present policy and procedure manuals, and any revisions thereto and the standard operating procedures (SOP), including but not limited to those effective during the month of January, 2017.
 - b. Policy and procedure manuals;
 - c. Notes; memorandums or any other documents that describe the requirements and/or guidelines for the breath testing program and equipment maintenance.
- 7) Experiments and informal studies both in the ordinary course of research and in response to new or unique court challenges to the accuracy and/or reliability of the Intox EC/IR-II;
- 8) All internal memorandum, notes, minutes, training records, or similar such records issued to inspectors or other employees of the State Department of Toxicology concerning the Intox EC/IR-II used in Indiana, since it was acquired and/or placed into service to [DATE];
 - a). Concerning the retention, destruction and/or turning off the ability of the Intox EC/IR-II so that it can or cannot or will not retain data;
 - b) Concerning the destruction or failure to save or retain the data contained in the Intox EC/IR-II;
- 9) The Database:
 - a) All Data collected by this Intox EC/IR-II from [DATE RANGE] on every breath test performed on it, including all the data entries made by the operator at the time of the administration of the test to Defendant on [DATE]
 - b) The occurrences of error codes and certain maintenance contained within the memory chip or that is capable of being downloaded and/or has been downloaded.
- 10) A copy of the quality assurance program that is utilized by the State Department of Toxicology for any and all aspects of the breath alcohol-testing program.
- 11) Identification of the source for the alcohol reference standards (simulator solutions or dry gas) used and the quality assurance measures taken during the preparation, analysis and handling of the standards.

- 12) Identification of the source for the interferent test solution(s) used and the quality assurance measures taken during the preparation, analysis and handling of the interferent test solution(s).
- 13) Identification of all steps taken by the Indiana State Department of Toxicology to verify the concentration of the alcohol reference standards used for the calibration of this Intox EC/IR-II.
- 14) All laboratory data reflecting the analysis or verification of the concentration of the alcohol reference standard(s) used with this Intox EC/IR-II during the time period [DATE]
- 15) The complete instrument history file for this Intox EC/IR-II. This request includes, but is not limited to:
 - A) Maintenance and testing conducted at the Breath Test Division of the Indiana State Department of Toxicology or any other laboratory/service center;
 - B) Maintenance, repairs or calibrations conducted by the manufacturer or other laboratory/service center; and
 - C) Any computer data collected and transferred, via modem or other means, to the Indiana State Department of Toxicology Breath Test Division or other monitoring agency for diagnostic and/or troubleshooting purposes, as well as any reported errors and/or error codes.
- 16) The complete maintenance history for all simulators used with this Intox EC/IR-II during the time period of [DATE RANGE]. Specifically, this item is asking for documentation that verifies that any and all simulators used in connection with this breath alcohol test device have been maintained and calibrated as per the manufacturers specifications and/or State regulations. [If dry gas was utilized, comparable documentation for the gauges, flow detectors and pressure sensors would be expected. If dry gas was used, the calibration history of the barometric pressure sensor is also requested]
- 17) The basic practical and educational requirements for the person(s) holding the position(s) responsible for the maintenance and the calibration of breath alcohol test device. Included in this request are the identification of any and all basic training requirements and all annual or periodic refresher-training requirements for the person(s) responsible for the maintenance and calibration of the breath testing equipment.
- 18) An outline of the course-work and the results of any proficiency testing performed by the people responsible for the maintenance and the calibration of this breath alcohol device.
- 19) A copy of the maintenance, calibration and operators manuals for this Intox EC/IR-II and any other materials utilized in training the Breath Test Division Staff of the Indiana State Department of Toxicology on:
 - a. The basic calibration;
 - b. Preventive maintenance; and
 - c. Operation of the device.
- 20) A copy of all training materials used for training inspectors concerning the Intox EC/IR-II.

21) Copies of any and all notices to the individuals who have ever performed inspection, maintenance, calibration and/or repairs to this or any other Intox EC/IR-II advising these individuals to turn over their notes and/or records concerning Intox EC/IR-II that these individuals may have inspected, maintained, calibrated and/or repaired from [DATE RANGE]

This Request for Production of documents and Things is made in accordance with Trial Rule 34 of the Indiana Rules of Civil Procedure. You are advised that you, as the entity to whom this Request for Production is directed, are entitled to security against damages resulting from this Request.

Respectfully Submitted;

/s/ Jane Doe

Jane Doe, Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that at the date and time of filing, personal service of a copy of the foregoing was made upon Prosecuting Attorney via E-Service using IEFS on [DATE].

/s/ Jane Doe

Jane Doe, Attorney for Defendant

IN THE XXXXXXXX COURT of XXXXXX COUNTY

STATE OF INDIANA

THE STATE OF INDIANA,	)	CAUSE NO. XXXXXXXX
Plaintiff,)	
)	
vs.)	
)	
XXXXXXXXXX,)	
Defendant.)	

AFFIDAVIT

COMES NOW, _____, Affiant herein, and after being duly sworn upon his/her oath, does hereby state the following:

1. That Affiant is an employee with INDIANA STATE DEPARTMENT OF TOXICOLOGY and currently holds the position of _____.

2. That Affiant's business address and telephone number are:

_____.

3. That Affiant herein is the custodian of records and/or has personal knowledge that the attached documents including reports, records, notes, correspondence and any other documents of any nature attached hereto are originals or true and accurate copies of the originals.

4. That the attached documents were kept in the course of a regularly-conducted business activity of practice of the Indiana Department of Toxicology, and it was the regular practice of the Indiana Department of Toxicology to make such documents.

5. That the attached documents were made at or near the time reflected on such documents, by or from information transmitted by, a person with knowledge thereof.

6. That the documents attached hereto consist of _____ number of pages.

7. That further Affiant sayeth not.

I AFFIRM UNDER PENALTIES OF PERJURY THE ABOVE AND FOREGOING REPRESENTATIONS ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

Signature of Affiant

IN THE XXXXXX COURT OF XXXXXXXX COUNTY

STATE OF INDIANA

THE STATE OF INDIANA,) CAUSE NO. XXXXXXXX
Plaintiff,)
)
vs.)
)
XXXXXXX,)
Defendant.)

SUBPOENA DUCES TECUM

YOU ARE HEREBY COMMANDED to produce the documents and records referred to in Respondent's Request for Production of Documents and Things, attached hereto, to XXXXXXXXXXXXXXXX [NAME ADDRESS], within thirty (30) days from the receipt of Request for Production of Documents and this Subpoena.

Date: XXXXXXXXXXXX

/s/ Jane Doe
[Attorney block]

IN THE XXXXXX COURT OF XXXX COUNTY

STATE OF INDIANA

THE STATE OF INDIANA,	)	CAUSE NO. XXXXXXXX
Plaintiff,)	
)	
vs.)	
)	
XXXXXXXXXXXXXXXXXX,)	
Defendant.)	

NON-PARTY REQUEST FOR PRODUCTION

TO: Teri Kendrick, General Counsel
Indiana State Department of Toxicology
550 W 16th Street
Indianapolis IN 46202

The Defendant, by counsel, pursuant to Trial Rule 34 hereby requests production of the following documents and records for inspection and copying by Defendant’s attorney, Jane Doe, at XXXXXXXXXX, Any Town, IN XXXXXXXXXX, within thirty (30) days after the receipt of this Request for Production:

1. The enclosed Affidavit, completed and signed by an appropriate person with knowledge of production of documents.
2. Any and all records or documents that were created and/or refer or relate to Laboratory/Toxicology Case Number XXXXXXXXXX, Agency Case Number XXXXXXXXXX, including but not limited to, all chain of custody logs or reports in relation to the samples and the case file or folder related to the samples in this case, all bench notes, and other data/results, notes, drawings, or other information related to this case.
3. The names, addresses, and telephone numbers of all technicians, analysts, supervisors, Scientists, or other employees or independent contractors who provided services or consultations with regard to this case.
4. A copy of any accreditation certificates for the laboratory that were in effect at the time of the analysis and a copy of the lab’s last complete inspection and final accreditation audit.

5. A copy of any internal, external, annual or reaccreditation, reviews, or reports, since the time of the lab's last complete accreditation audit and any internal, external, annual, or reaccreditation audits since the time of the testing in this case.

6. The laboratory's standard or general policies, protocol, and procedures concerning testing, quantity control, quality assurance, calibration, and administrative or technical review of all samples, solutions and equipment used in or related to the testing of the samples, solutions, and equipment used in this case.

7. Copies of the validation studies (both internal and external) that prove the validation of the method, equipment, and instructions used.

8. The employee training records and proficiency testing results from the prior two years and curriculum vitae for any person listed on the chain of custody documents in this case or who performed analysis in this case.

9. The identity, make, model and brand or manufacturer of all equipment and supporting equipment used during the analysis and/or preparation of the samples in this case and the variables used in its installation and operation.

Definitions and Instructions

A. A document that "refers or relates to" any given subject matter means any document that constitutes, contains, embodies, identifies, states, refers to, deals with, pertains to, or in any way, directly or indirectly, bears upon or deals with that subject including, without limitation, documents concerning the preparation of other documents.

B. Pursuant to Trial Rule 34(C), said Defendants serve simultaneously herewith a Subpoena Duces Tecum upon the party for the above-referenced documents.

C. This request for production is made pursuant to Trial Rule 34(C). Pursuant to that rule, you are entitled to a security deposit against damages or payment of damages resulting from this Request. You may respond to this Request by submitting to its terms, by proposing different terms, by objecting specifically or generally to the request by serving a written response to Defendant's attorney at the address above within thirty (30) days, or by moving to quash as permitted by Indiana Rule of Procedure 45(B).

Should you fail to respond to this request for production or object to it or move to quash it, as provided by the applicable Indiana Rules of Trial Procedure, within ten (10) days from receipt, you may then be subject to sanctions for failure to provide discovery pursuant to Indiana Rule of Trial Procedure 37.

Respectfully Submitted,

Jane Doe, Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that at the date and time of filing, e-service of a copy of the foregoing was made upon XXXX County Prosecuting Attorney at the time of e-filing through the Indiana Electronic Filing System.

Jane Doe

IN THE XXXXXX COURT OF XXXXX COUNTY

STATE OF INDIANA

THE STATE OF INDIANA,	)	CAUSE NO. XXXXXXXXX
Plaintiff,)	
vs.)	
)	
XXXXXXXXXX,)	
Defendant.)	

AFFIDAVIT

COMES NOW, _____, Affiant herein, and after being duly sworn upon his/her oath, does hereby state the following:

1. That Affiant is an employee with Indiana State Department of Toxicology and currently holds the position of _____.
2. That Affiant’s business address and telephone number are:
_____.
3. That Affiant herein is the custodian of records and/or has personal knowledge that the attached documents including reports, records, notes, correspondence and any other documents of any nature attached hereto are originals or true and accurate copies of the originals.
4. That the attached documents were kept in the course of a regularly-conducted business activity of practice of Indiana State Department of Toxicology, and it was the regular practice of Indiana State Department of Toxicology to make such documents.
5. That the attached documents were made at or near the time reflected on such documents, by or from information transmitted by, a person with knowledge thereof.
6. That the documents attached hereto consist of _____ number of pages.
7. That further Affiant sayeth not.

I AFFIRM UNDER PENALTIES OF PERJURY THE ABOVE AND FOREGOING REPRESENTATIONS ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

Date

Signature of Affiant

IN THE XXXXXX COURT OF XXXXXX COUNTY

STATE OF INDIANA

THE STATE OF INDIANA,	)	CAUSE NO. XXXXXXXX
Plaintiff,)	
vs.)	
)	
XXXXXXXXXXXXXXXXXX,)	
Defendant.)	

SUBPOENA DUCES TECUM

YOU ARE HEREBY COMMANDED to produce the documents and records referred to in Defendant’s Request for Production of Documents to a Non-Party, attached hereto, to **XXXXXXXXXXXXXXXXXX** within thirty (30) days from the receipt of Request for Production of Documents and this Subpoena.

Date: _____

Jane Doe, Attorney No. XXXX
Address
Telephone
Email

STATE OF INDIANA	)	IN THE XXXXXX CIRCUIT COURT
	) SS:	
COUNTY OF DECATUR	)	CAUSE NO. XXXXXXXX
STATE OF INDIANA)	
)	
v.)	
)	
XXXXXXXXXX,)	
Defendant.)	

SUBPOENA

TO: name
address
Greensburg, IN 47240

You are hereby commanded to appear at XXXXXXXXXX, located at 150 Courthouse Square, Greensburg, IN 47240 on FEBRUARY 12, 2019 at 11:00 A.M. to testify on behalf of the defendant at a Deposition in the above entitled action.

Jane Doe
Attorney for the Defendant

CERTIFICATES OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Subpoena was served in person upon [Name] on _____ at _____ AM.

Jane Doe

I hereby certify that the foregoing Subpoena was served upon XXXXX, Chief Deputy Prosecutor in person on _____.

Jane Doe

Section Eight

Plea Negotiations

L. Scott Pejic
Pejic Law Group
Michigan City, Indiana
scott@pejiclaw.com

Section Eight

Plea Negotiations..... L. Scott Pejic

I.	Operation of Vehicle	1
II.	Reason for Stop or Contact with Vehicle	1
III.	Endangerment.....	1
IV.	Stop	2
V.	Personal Contact.....	2
VI.	Intoxication	3
VII.	Refusal	4
VIII.	License Issues.....	4
IX.	Sentencing.....	4

Impaired Driving 101 Plea Negotiations

The following is an outline I use as a quick reference guide. It is not an exhaustive outline of issues.

- I. Operation of Vehicle
 - A. Ind. Code § 9-13-2-117.5
“Operate” means to navigate or otherwise be in **actual physical control** of a vehicle, motorboat, off-road vehicle, or snowmobile.
 - B. *Winters v. State*, 132 N.E.3d 46 (Ind. Ct. App. 2019).
 - C. *Henderson v. State*, 108 N.E.3d 407 (Ind. Ct. App. 2018)

- II. Reason for Stop or Contact with Vehicle
 - A. Officer observation
 - 1. Consensual encounter
State v. Augustine, 851 N.E.2d 1022 (Ind. Ct. App. 2006)
 - 2. Traffic Infraction – Mistaken Belief
State v. Rhodes, 950 N.E.2d 1261 (Ind. Ct. App. 2011)
 - 3. Traffic Infraction – Mistake of Law
Heien v. North Carolina, 574 U.S. 54 (2014).
Williams v. State, 28 N.E.3d 293 (Ind. Ct. App. 2015)
 - 4. Traffic Infraction - Reasonable Suspicion
Marshall v. State, 117 N.E.3d 1254 (Ind. 2019)
 - 5. Crime - Reasonable Suspicion – Impairment
Potter v. State, 912 N.E.2d 905 (Ind. Ct. App. 2009)
 - B. Known Informant - Concerned Citizen
Russell v. State, 993 N.E.2d 1176 (Ind. Ct. App. 2013)
 - C. Unknown Informant - Anonymous Tipster
State v. Glass, 769 N.E.2d 629 (Ind. Ct. App. 2002)
Segar v. State, 937 N.E.2d 917 (Ind. Ct. App. 2010)
Bogetti v. State, 723 N.E.2d 876 (Ind. Ct. App. 2000)

- III. Endangerment
 - A. *Temperly v. State*, 933 N.E.2d 558 (Ind. Ct. App. 2010)
 - B. *Outlaw v. State*, 929 N.E.2d 126 (Ind. 2010)

- C. *Poortenga v. State*, 99 N.E.3d 691 (Ind. Ct. App. 2018)
- D. *Vanderlinden v. State*, 918 N.E.2d 642 (Ind. Ct. App. 2009)

IV. Stop

- A. React to lights/siren appropriately?
- B. Decreased speed?
- C. Use turn signal?
- D. Pulled over smoothly/safely?
- E. Pull over to appropriate place?
- F. Hit anything?
- G. Any furtive movements?

V. Personal Contact

A. Initial Contact

1. Put vehicle in gear?
2. Roll window down?
3. Turn off radio?
4. Seat Belt on?
5. Demeanor?
6. Polite?
7. Speech?
8. Answered questions?
9. Provided documentation?
10. Eye contact?
11. Eyes?
12. Visible alcohol containers?
13. Smoking?
14. Vaping?
15. Chewing tobacco?
16. Chewing gum?
17. Mints?
18. Mouthwash?
19. Open door?
20. Exit vehicle?
21. Appropriate clothing?

B. Field Sobriety Tests

1. Consent?
Ackerman v. State, 774 N.E.2d 970 (Ind. Ct. App. 2002)
Citizen may refuse field sobriety tests

2. Standardized
 - a. Horizontal Gaze Nystagmus
 - b. Walk & Turn
 - c. One Leg Stand
 - d. *Smith v. State*, 751 N.E.2d 280 (Ind. Ct. App. 2001)
 - e. *Cooper v. State*, 761 N.E.2d 900 (Ind. Ct. App. 2002)

3. Non-Standardized
 - a. Romberg Test
 - b. Finger-to-nose touch
 - c. Finger count
 - d. Recite alphabet backwards
 - e. Count backwards from large number
 - f. Hand pat test

4. Portable Breath Test
 - State v. Whitney*, 889 N.E.2d 823 (Ind. Ct. App. 2008)
 - Smith v. State*, 751 N.E.2d 280 (Ind. Ct. App. 2001)

VI. Intoxication

A. Ind. Code § 9-13-2-86

“**Intoxicated**” means under the influence of:

- (1) alcohol;
- (2) a controlled substance (as defined in IC 35-48-1);
- (3) a drug other than alcohol or a controlled substance;
- (4) a substance described in [IC 35-46-6-2](#) or [IC 35-46-6-3](#);
- (5) a combination of substances described in subdivisions (1) through (4); or
- (6) any other substance, not including food and food ingredients (as defined in [IC 6-2.5-1-20](#)), tobacco (as defined in [IC 6-2.5-1-28](#)), or a dietary supplement (as defined in [IC 6-2.5-1-16](#));

so that there is an **impaired condition of thought and action** and the **loss of normal control of a person’s faculties**.

B. *Curtis v. State*, 937 N.E.2d 868 (Ind. Ct. App. 2010)

C. Chemical Test

1. Breath Test

- a. Instrument Certification / I.C. 9-30-6-5
- b. Officer Certification / I.C. 9-30-6-5
- c. Approved Method / 260 IAC 2.5-4-1
- d. *Christian v. State*, 710 N.E.2d 582 (Ind. App. Ct. 1999).
Repairs made to breath test machine admissible.

- e. Uncertainty of Measurement
- f. Biological variability
- g. Breath/Body Temperature
- h. Breathing patten

2. Blood Test

- a. Collection of Blood
 - i. Hospital Protocol
 - ii. Convert Serum/Plasma to Whole Blood
 - iii. *Newcomb v. State*, 758 N.E.2d 69 (Ind. Ct. App. 2001)
 - iv. *Artigas v. State*, 122 N.E.3d 1003 (Ind. Ct. App. 2019)
Sufficiency of evidence (Range of BAC).
- b. Storage of Blood
- c. Hospital Blood – Serum/Plasma – Enzymatic Immunoassay Test
- d. Lab - Whole Blood - Gas Chromatography

VII. Refusal

- A. Ind. Code 9-30-6-2
- B. *Tyner v. State*, 503 N.E.2d 444, 449 (Ind. Ct. App. 1987) – Three hour limit retains it vitality on implied consent liability.
- C. Petition for Judicial Review / I.C. 9-30-6-10.
 - 1. Probable Cause challenge – *Hassfurther v. State*, 988 N.E.2d 811 (Ind. Ct. App. 2013).
 - 2. Refusal challenge – *Burnell v. State*, 56 N.E.3d 1146 (Ind. 2016)

VIII. License Issues

- A. Ignition Interlock Device in Lieu of Suspension – I.C. 9-30-6-8(d)
- B. Specialized Driving Permit – I.C. 9-30-16-1(d)
- C. Early Trial Request / Reinstatement of driving privileges 90 days after Initial Hearing – I.C. 9-30-6-18

IX. Sentencing

- A. I.C. 35-50-2-7(c) (Misdemeanor treatment for Level 6 Felony).
- B. I.C. 9-30-5-15 (Minimum jail time or community service).

Section Nine

Voir Dire

Charles J. Rathburn, Jr.
Rathburn Law Office
Indianapolis, Indiana
CJR@rathburnlaw.com

Section Nine

Voir Dire..... Charles J. Rathburn, Jr.

Impaired Driving Defense 101

Voir Dire

Impaired Driving Defense 101

Voir Dire

Indiana Rules of Trial Procedure 47(D)

(D) Examination of jurors. The court shall permit the parties or their attorneys to conduct the examination of prospective jurors, and may conduct examination itself. The court's examination may include questions, if any, submitted in writing by any party or attorney. If the court conducts the examination, it shall permit the parties or their attorneys to supplement the examination by further inquiry. The court may impose an advance time limitation upon such examination by the parties or their attorneys. At the expiration of said limitation, the court shall liberally grant additional reasonable time upon a showing of good cause related to the nature of the case, the quantity of prospective jurors examined and juror vacancies remaining, and the manner and content of the inquiries and responses given by the prospective jurors. The court may prohibit the parties and their attorneys from examination which is repetitive, argumentative, or otherwise improper but shall permit reasonable inquiry of the panel and individual prospective jurors.

Impaired Driving Defense 101

Voir Dire

Indiana Rules of Trial Procedure 47(D)

(D) Examination of jurors. The court shall permit the parties or their attorneys to conduct the examination of prospective jurors, and may conduct examination itself. The court's examination may include questions, if any, submitted in writing by any party or attorney. If the court conducts the examination, it shall permit the parties or their attorneys to supplement the examination by further inquiry. The court may impose an advance time limitation upon such examination by the parties or their attorneys. At the expiration of said limitation, the court shall liberally grant additional reasonable time upon a showing of good cause related to the nature of the case, the quantity of prospective jurors examined and juror vacancies remaining, and the manner and content of the inquiries and responses given by the prospective jurors. The court may prohibit the parties and their attorneys from examination which is repetitive, argumentative, or otherwise improper but shall permit reasonable inquiry of the panel and individual prospective jurors.

Impaired Driving Defense 101

Voir Dire

Indiana Rules of Trial Procedure 47(D)

(D) Examination of jurors. The court shall permit the parties or their attorneys to conduct the examination of prospective jurors, and may conduct examination itself. The court's examination may include questions, if any, submitted in writing by any party or attorney. If the court conducts the examination, it shall permit the parties or their attorneys to supplement the examination by further inquiry. The court may impose an advance time limitation upon such examination by the parties or their attorneys. At the expiration of said limitation, the court shall liberally grant additional reasonable time upon a showing of good cause related to the nature of the case, the quantity of prospective jurors examined and juror vacancies remaining, and the manner and content of the inquiries and responses given by the prospective jurors. The court may prohibit the parties and their attorneys from examination which is repetitive, argumentative, or otherwise improper but shall permit reasonable inquiry of the panel and individual prospective jurors.

Impaired Driving Defense 101

Voir Dire

Indiana Rules of Trial Procedure 47(D)

(D) Examination of jurors. The court shall permit the parties or their attorneys to conduct the examination of prospective jurors, and may conduct examination itself. The court's examination may include questions, if any, submitted in writing by any party or attorney. If the court conducts the examination, it shall permit the parties or their attorneys to supplement the examination by further inquiry. The court may impose an advance time limitation upon such examination by the parties or their attorneys. At the expiration of said limitation, the court shall liberally grant additional reasonable time upon a showing of good cause related to the nature of the case, the quantity of prospective jurors examined and juror vacancies remaining, and the manner and content of the inquiries and responses given by the prospective jurors. The court may prohibit the parties and their attorneys from examination which is repetitive, argumentative, or otherwise improper but shall permit reasonable inquiry of the panel and individual prospective jurors.

Impaired Driving Defense 101

Voir Dire

Indiana Rules of Trial Procedure 47(D)

(D) Examination of jurors. The court shall permit the parties or their attorneys to conduct the examination of prospective jurors, and may conduct examination itself. The court's examination may include questions, if any, submitted in writing by any party or attorney. If the court conducts the examination, it shall permit the parties or their attorneys to supplement the examination by further inquiry. The court may impose an advance time limitation upon such examination by the parties or their attorneys. At the expiration of said limitation, the court shall liberally grant additional reasonable time upon a showing of good cause related to the nature of the case, the quantity of prospective jurors examined and juror vacancies remaining, and the manner and content of the inquiries and responses given by the prospective jurors. The court may prohibit the parties and their attorneys from examination which is repetitive, argumentative, or otherwise improper but shall permit reasonable inquiry of the panel and individual prospective jurors.

Section Ten

First Person Opening Statements Creative – but not too Crazy

Timothy Huey
Huey Defense Firm
Columbus, Ohio

Section Ten

First Person Opening Statements

Creative – but not too Crazy..... Timothy Huey

What we are told about opening statements	1
Why I used to hate opening statements.....	1
I use to start out something like this	2
The problems Criminal Defense Lawyers face with opening statements	3
Should you just waive opening?	3
What’s a poor Criminal Defense Lawyer to do?	4
Then I met Professor / Dr. Sunwolf.....	4
And then I met Dr. Paul Homoly	5
And then I found 1 st Person Openings	5
First Person Openings That I Do Not Do.....	5
What is a 1 st Person Opening?	6
Creative – But Not Too Crazy-Opening Statements.....	6
Show Me Don’t Tell Me	7
Some Simple Guidelines.....	7
Don’t start out introducing yourself.....	7
Do talk about your client – use her name – tell her story – make them care	8
Don’t start out thanking jurors.....	8
Skip the preambles and preliminaries – come out firing	8
Get their attention – wake them up	9
Go kick some – Arse.....	9

First Person Opening Statements

Creative - but not too Crazy

Tim Huey
DUI & Criminal Defense Lawyer
Columbus Ohio
Cell 614-519-3133
DTHLAW@gmail.com
Office 614-487-8667

What we are told about opening statements

1. Tell them what you believe the evidence will show.

Is what the judge thinks you are supposed to do and what law school professors probably told you – if they got around to talking about something as practical as actual trial stuff.

2. Come out strong – be passionate - establish a theme – tell your story.*

Is what the gurus tell us.

3. Don't argue your case – don't argue the law.

Is what the judge always said if the prosecutor objected when I tried to follow the gurus' advice.

Why I used to hate opening statements

I used to hate opening statements. Well maybe not hate them so much find myself confused as to what the heck a defense lawyer is supposed to do in opening statements, especially when the defense is not likely to put on any evidence.

All the above wisdom seemed contradictory to me.

*Plus – what story?

If I were truthful, my story usually would go like this “Ladies and gentlemen, they can't prove their case. Thank you.”

While I might not have “hated” doing opening statements; it was certainly my least favorite part of most DUI trials and it certainly was where I felt most unsure.

This is not to say I did them poorly (but maybe I did, who knows?)

But if I (periodically) did them well, it was because (I felt) that I was getting away with something; I was doing more argument than we probably are supposed to do.

And it is easier for a prosecutor or judge to shut you down if you think you are just getting away with something in the first place.

I rarely ever “told a story.”

Most of the time I was pretty certain my client was not taking the stand and even when I thought she might I was always hoping that would not be necessary.

How could I tell her story?

I use to start out with something like this.

It always seems strange to me that I am supposed to get up here and tell you what the evidence will show when, as we talked about in voir dire, the burden is completely on the government and they (pointing) are the ones who will have to present evidence that establishes beyond all reasonable doubt that Joe is guilty of being a drunk driver. And I can tell you that that is not going to happen. Because Joe is not guilty of drunk driving.

Now Mr. Jones (the prosecutor) is a very good lawyer and I think he'd make a very good salesman because what he just said was a great sales job. He told you a story that sounded good and supported his case, the problem is that is not 'the truth, the whole truth and nothing but the truth.' And by the way, this is the same story he and Officer Smith are getting ready to tell you again.

As we talked about in voir dire this case will start off with is Mr. Jones carefully leading Officer Smith through a version of what happened on April 1st of last year. But that version of the facts—a version they have gone over together again and again- will not tell you the full truth about what happened. In fact it is probably pretty much the same story they tell in every drunk driving case. So they very likely told his story dozens of times.

What you won't hear during that dog and pony show is 'the truth, the whole truth and nothing but the truth'. In particular you will not hear about all the evidence that shows that Joe was **not impaired**, and there is a lot of it. Will you ever hear that evidence? I think you will. But that will not be during their rehearsed act.

When will you hear the truth? Well, if you think back to our discussions just a bit ago each of you agreed that the truth is more likely to come out when the person is being questioned, perhaps even grilled, not when he is giving a rehearsed statement.

And you each promised that you would not jump to the gun and start to form opinions about the case at least until I had a chance to question the government's witnesses – right? (Nodding.)

That is very important, the judge just said so in his instructions; if you are going to be fair in this case, as you have all promised to be, you can't start making judgements now based upon the story you just heard.

In fact, as the judge said, what he (pointing to the prosecutor) just said is not evidence. Indeed, if the presumption of innocence means anything you have to assume everything you just heard is false. What you should have been saying in your mind was "prove it." Your job is to make sure they prove each and every thing beyond all reasonable doubt.

So I will ask y'all again to wait for cross-examination. Wait until I have a chance I have had a chance to ask Officer Smith about the things Mr. Jones does not want him to discuss.

If Officer Smith is truthful, and I hope he will be, you will hear about a lot of things that they will not tell you about during their rehearsed routine.

During cross-examination, in addition to hearing evidence that is not consistent with Joe being drunk, you will hear about some mistakes that Officer Smith and his fellow officers made in this case. You will hear about flaws in Mr. Jones' theory of this case. And ultimately after hearing all those things you will conclude that the government simply has not proven its case beyond all reasonable doubt.

Now I don't expect you to take my word for it and so I am not going to get up here and try to sell you a story like they did. I want you to listen and listen hard – it is up to you to decide what the truth is. But I expect you to listen the hardest when the witness is not being asked softball questions. That is when the real story will come out.

I will tell you about some of the things to listen for. And if you are listening and paying close attention here are things to listen for.

Then I'd go through and hit the high points for us, the low points for them and some of the flaws in the state's case.

The problems Criminal Defense Lawyers face with opening statements

1. Reasonable doubt is often what my case is all about, e.g. "their case sucks - that's my story."
2. By and large we are not presenting any evidence; "story, what story?" (See 1, above.)
3. The last thing we want to do is rehash what the prosecutor just said.
4. If we do have witnesses and evidence to present we don't want to just jump to talking about them and leave what the prosecutor just said about her evidence unchallenged – do we? (But see 3 above.)

Should you just waive opening?

Hell _____ no!

Any lawyer who has paid the least amount of attention knows about “primacy and recency” e.g. that people tend to remember the first and last parts of any presentation, commercial, story, speech or lecture. And the system already unfairly gives the prosecution two legs up on you (I address this in voir dire and closing).

Thus, unless you have a very specific strategy and really good reason for doing so, never waive Opening Statements. (We can discuss some of those strategies and reasons but I will be doing a presentation on Opening Statements – not on Waiving Opening Statements.)

You cannot start the game down points.

If you score points in voir dire, because they like you, think you are smarter than the prosecutor and/or think you are more personable than the prosecutor, they will mostly evaporate if the prosecutors tells a solid story consistent with conviction and you don’t do something to derail that.

In short, a good voir dire followed by a week or no opening statement will result in the jury thinking you are a nice, funny, smart guy – with a crappy case.

Finally - you simply cannot start the case with the other side’s “story” on the jurors’ minds.

What’s a poor Criminal Defense Lawyer to do?

The example of one of my previous Openings above shows the ways I used to try to deal all these issues.

While I might try different tacks, in general I’d mostly repeat the themes from voir dire as long as I could get away with it.

Then, once shut down (usually after third objection) I’d perhaps start talking a little about how those themes will apply to the “facts” of the case. (Usually selected facts.) And eventually get back into persuasion. If I timed it right I could end on what I hoped would be a very persuasive point before the prosecutor objected again.

I guarantee you I was passionate. And often (in my mind) I was effective. But ultimately, when I was successful at accomplishing my goal, all I really did was repeat voir dire in a more organized and directed format.

When I wasn’t effective – I wasn’t effective.

Then I met Professor / Dr. Sunwolf

Dr. Sunwolf. (When I first met her she had not completed her doctorate.)

I can’t summarize all of what I have learned from Dr. Sunwolf, what I can tell you is: **Google her**; read her blogs, buy (or borrow) her books, buy (or borrow) her tapes.

Dr. Sunwolf's expertise is juries, jurors and jury dynamics.

Dr. Sunwolf says you have to tell a story or stories.

We remember stories not lectures.

And then I met Dr. Paul Homoly

Dr. Homoly also teaches that stories, especially those in present tense and in first person, draw our interest, make us listen.

If you want to get better at speaking to a group of folks (jurors, judges, whoever) consider taking a class from Dr. Homoly. Google Him too.

I have seen him make good speaker much better and give poor speakers tips that raised their level of confidence so they could become effective speakers.

And then I found 1st Person Openings

I believe the first person I ever saw do a 1st Person Opening was Francisco (Paco) Duarte. Paco is an instructor at the Trial Lawyer's College (founded by Gerry Spence.) The TLC does regional seminars and, of course, training at the Thunderhead Ranch in Wyoming where one can learn some of the most creative approaches to trial skills. My goal is to get to the ranch in the next few years, now that my last baby bird is out of the nest.

While I have not been able to get to The Ranch I have had the great fortune to serve as a trial skills instructor at other (non-TLC) seminars and training sessions with several TLC instructors including Marge Russell, Rafe Foreman, and Joe Lowe, and Frank Mungo. In those particular trial skills training sessions I learned much more than I taught.

I highly recommend any program that includes any of these folks.

Every March I oversee a 3 day Advanced DUI Defense Seminar for the Ohio Association of Criminal Defense Lawyers (OACDL), one day of that is focused on Trial Skills including small group break outs. Often we will have someone with TLC training lead that session.

If interested in that similar or just the Trial Skills session

Go to www.OACDL.org and look for

Advanced DUI Seminar, Columbus Ohio – March

For more info email me at DTHLAW@gmail.com

First Person Openings That I DO NOT Do

When lawyers hear about creative examples of 1st Person Openings sometimes the most creative (some say crazy) examples are what is discussed.

I have seen demonstrations of where folks tell a story from the view point of:

1. A lamppost watching an alleged drug sale.
2. A cat riding in a car that was involved in an accident.
3. A breath test machine.

Creative –yes. Something most of us would consider using – probably not.

I have not done anything like that – yet.

So that is not what I am talking about in my presentation.

What is a 1st Person Opening?

The simple fact is that anytime you use a “first person narrative” you are doing a 1st person Opening.

A first-person narrative is telling a story from the viewpoint of a specific “character.” Thus if you use the “I” form you are telling the story in the first person. E.g. “I waked down the hall.” Or “we walked down the hall.”

By the way, you had better start thinking of everyone in your case as a “character” in a story. Otherwise you can’t tell a story –and you MUST tell a story.

Contrast that with a third person narrative which is telling the story from the omniscient point of view. In it you use the “he-she form.” “He walked down the hall.”

All the gurus tell us that the 1st person narratives are more likely to get the jurors attention and more likely to stay in their memories.

Narration gets boring, especially when you have a short attention span – take a kid to see *March of the Penguins* if you don’t believe me.

Creative –But Not Too Crazy- Opening Statements

Currently I use a 1st Person elements in my Opening Statements in just about every case.

I do not usually do the whole opening as a character and I almost always assume the role of several characters.

Thus perhaps it would describe these a 1st Person Segments rather than 1st Person Openings.

I often do 1st Person Segments of witnesses who may not testify in the case.

Examples:

- The backup or supervising cop(s)

- The breath testing supervisor

These folks are usually on the government's witness list but often will not be called.

Other example

- My client
- My lay witnesses
- My expert

I talk a lot in voir dire about the fact that we (the defense) do not have to put on a case. I talk about how it costs the Suzie (the client) money every hour we are in trial and that experts cost money. Money that Suzie (and her kids) can't well afford to part with and money the government will not pay back when she is found not guilty.

Thus I sent up for the fact that we may not call any witnesses -even where we have them available.

The simple fact that a witness "may not" be called does not stop me from doing an opening segment about or in the character of that person, because that means they "may" be called.

Show Me Don't Tell Me

This phrase sums up what Dr. Sunwolf will tell you should be the guiding principle in crafting your Openings Statement.

Thus I am going to stop telling you about some of the things I do and will try to show you them in my presentation.

I have also included a transcript in my materials.

Some Simple Guidelines

I will leave you with my simple guidelines for preparing and doing an effective Opening Statement. I emphasize that these are guidelines I have adopted for myself. Thus they aren't rules, so periodically I will break them.

And they are my guidelines for myself (most of which I probably stole) you can take them or leave them.

jkBut here they are.

- **Don't start out introducing yourself**

You did that in voir dire. The judge probably introduced you at the beginning of the case. Don't do it again.

It sounds stupid.

It sounds like "lawyer formalities." The jurors hear "blah, blah, blah."

Do you want to start your case with “blah, blah, blah”? Hell no!

If you do introduce yourself make it a quick segue into introducing and talking about your client.

Example:

Again I am Tim Huey and I have an awesome responsibility today, I am here to help an innocent person, Suzie Que, fight to save her reputation, future and livelihood which has been put in jeopardy by false charges of Drunk Driving being levied against her.

To be clear; Suzie is not a drunk driver and I will talk about the evidence which will show that in a minute. What Suzie is a normal, average person. She is not perfect. She is trying the best she can. She is working two jobs to try to support her two children and on this given night she had a “night off.” etc.”

If the truth comes out in this case, the truth the whole truth and nothing but the truth, here is what I think you will hear.

- **Do talk about you client – use her name – tell her story – make them care**

At some point you have to talk about your client; whether you do it as the major part of an introduction or find a better way to do it.

The jurors have to care about your client to some extent. Or at least they have to care about the person you portray your client to be.

- **Don't start out thanking jurors**

Jurors just see this as lawyer speak. The judge thanked them the prosecutor thanked them and it meant nothing. If you feel the need to thank them –do it at the end of your opening in thanking them in advance for living up to their promise to listen to all the evidence and especially the evidence that comes out when YOU are asking the officer questions.

- **Skip the preambles and preliminaries - come out firing**

If the judge puts time limits on openings you are wasting time. Even if he doesn't you are missing your chance.

The jurors walked into the courtroom before hearing the first word assuming “the defendant” (your client) is guilty.

They just heard the prosecutor outline a pretty good case for conviction.

If they are allowed to take notes they probably just wrote down all the prosecutor's strong points.

The conviction train is rolling down the track.

Do something now to start derailing it or at least slowing it down!

- Get their attention – wake them up

Often the jurors seemed lulled into a coma by the end of the prosecutor's opening.

If you can start your "story" with a loud noise or something else to get their attention – do it.

"Bam! I was driving down the road and Bam! My tire blew out." That is what Suzie Que told Officer Jones when he asked her what happened. But he did not listen

Suzy also tried to tell him other things that night but he just didn't seem to have the time to listen.

If Officer Jones would have listen this is what Suzy was trying to tell him

"I was out earlier with my friends. It was my first night out in a long while because I am raising two kids on my own. Great kids. etc.

Go kick some – Arse

Good luck

Tim Huey

1 AFTERNOON SESSION

2 October 8, 2013

3 - - -

4 THE COURT: This is the City of Columbus versus
5 Miles Horton, 2013 TRC 105492. It is October 8th. We're
6 back to recommence the jury trial that we began yesterday
7 afternoon.

8 And, on behalf of the State of Ohio, Ms. Caswell,
9 something we need to talk about?

10 MS. CASWELL: Thank you, Your Honor.
11 Mary Lynn Caswell, Supreme Court Number 0066389, on behalf
12 of the City.

13 I just wanted the Court to maybe procedurally
14 clear up for me who counsel of record is and maybe have all
15 the parties enter their appearance. I'm a little confused.
16 I know Ms. Bogrees entered as counsel of record, and
17 Mr. Mallory did the motion hearing, and then yesterday, at
18 2:00, Mr. Huey appeared. So the State would be asking for
19 all of those parties to sort of enter their appearance for
20 the record, if the Court's going to allow that.

21 And then, also, I'd kind of like to have some
22 understanding of what the Court's ruling is as far as the

23 test. We had a motion hearing on it. The defendant,
24 through counsel, waived any issues as to the specific
25 concerns about the test, but the State would -- If the

130

1 defense is that there is something specific wrong with the
2 machine, we, pursuant to the discovery rules, feel like we
3 would be entitled to know what that is, what the thought
4 process is there and then how exactly they're planning on
5 challenging the test.

6 THE COURT: Okay.

7 MR. HUEY: So --

8 THE COURT: Hold on. Let's do one thing at a
9 time.

10 I know, Ms. Caswell, that you are counsel of
11 record for the plaintiff and Mr. Steinberg is assisting you
12 with the trial.

13 MS. CASWELL: Correct.

14 MR. STEINBERG: Steve Steinberg, 0067506, on
15 behalf of the City.

16 THE COURT: Thank you.

17 MR. STEINBERG: Thank you.

18 THE COURT: And I suppose, just to clarify on
19 behalf of Mr. Horton, Counsel, I will let you handle the
20 entering of appearances here today.

Horton JT day 2 opening

21 MR. HUEY: Thank you, Your Honor. Timothy Huey,
22 0023598. I have agreed to enter for Mr. Horton as lead
23 trial counsel in this case.

24 THE COURT: Okay. And I think maybe the question
25 with Ms. Caswell was because you had not previously been any

131

1 attorney of record.

2 MR. HUEY: That's correct, Your Honor.

3 THE COURT: So thank you for that.

4 And also --

5 MR. MALLORY: To clarify, I'm not sure if I
6 have previously entered my appearance in the case, but
7 Chase Mallory, 0084728.

8 THE COURT: I think you entered at the motion
9 trial stage, and I believe that you were copied on the
10 motion.

11 MR. MALLORY: I filed a motion to suppress in
12 this case too, so ...

13 THE COURT: Okay. And --

14 MS. BOGREES: Laura Bogrees, 0079286, I have
15 continually been counsel for Miles Horton.

16 THE COURT: Thank you.

17 Does that sufficiently clear up your question

18 Horton JT day 2 opening
there, Ms. Caswell?

19 MS. CASWELL: Thank you, Your Honor, as to
20 counsel of record, yes.

21 THE COURT: All right. So with regard to the
22 test itself, I will just let any one of you state what the
23 intention is there with regard to the test.

24 MR. HUEY: Thank you, Your Honor.

25 It sounds to me -- I don't know whether or not

↑

132

1 the State is actually filing a motion in limine asking about
2 these issues, but our position on the test is, number one,
3 that Miles has not waived anything. You held a motion
4 hearing, and the motion -- and the Court determined that
5 the --

6 THE COURT: Hold on.

7 Can you shut the door?

8 (Discussion held off the record.)

9 MR. HUEY: So filed a motion to suppress the
10 breath test under the Ohio Department of Health Rules and
11 Regulations, as required under French, State versus French.

12 At the motion hearing it was determined that,
13 save the Court, based at the time of hearing the evidence,
14 that waived issues as to the periodic instrument checks, the
15 weekly instrument checks of the test.

Horton JT day 2 opening

16 Under State versus French that simply indicates
17 that the defendant cannot challenge the test on the basis
18 that the State hasn't shown that the test was done in
19 compliance with the Ohio Administrative Code. State versus
20 French says if you don't raise that in a motion to suppress,
21 you lose those issues. But it also says you can still
22 challenge the test as to relevancy, adequacy, all the rules
23 of evidence; so it remains that you can continue to
24 challenge the test.

25 I think there's -- I think there's a

↑

133

1 misunderstanding as to the understanding of what -- the word
2 challenge. There's two different meanings to it. One
3 challenge would be to keep the test out, and that would be
4 under either alleging that the Ohio Department of Health
5 regulations were not properly met, or if you were to bring a
6 Daubert challenge and the Court would entertain a Daubert
7 challenge. Those would be things to keep the test out.

8 In this situation, I think it's clear that we
9 haven't abandoned the constitution in DUI cases and that the
10 jurors are the ultimate people to decide what -- whether the
11 test is reliable and accurate based on all the information
12 that they hear; and, specifically, the jurors can hear about

Horton JT day 2 opening

13 this particular test, how this test was done, and make their
14 determination as to whether or not, in light of all the
15 evidence, they believe that it's an accurate and reliable
16 result.

17 And I think that we are enable -- we are able to
18 talk about things that were done in regard to this
19 particular test and, quite frankly, things that were not
20 done in regard to this particular test.

21 And so our ultimate goal, our ultimate intention
22 in this case is simply to have the jurors apply the same
23 standard that they would apply in any case and determine
24 whether or not they believe that the State has proven that
25 this test is reliable and accurate beyond a reasonable

↑

134

1 doubt.

2 State versus Vega, which has, of course, been
3 looked at by a number of judges recently as to whether or
4 not -- what it actually means. Judge Liston, most
5 particularly in State versus Lancaster, has a great decision
6 about what Vega means and that what everyone thinks Vega
7 means is not what it means, and it's contradictory to the
8 actual terms of Vega. But State versus Vega still says that
9 you can specifically challenge specific portions of
10 individual tests.

Horton JT day 2 opening

11 All the statute does, the statute 4511.19(D) now,
12 (D)(2), says that the Court may admit the test. So if they
13 meet all the standards with regard to the Administrative
14 Code, the Court may admit that test without requiring the
15 State to bring on any proof of experts as to how it were --
16 you know, how to rule on the reliability of these different
17 machines. That's all that the statute was ever intended to
18 do.

19 It's not -- And it's a heck of a bonus that the
20 State doesn't have to bring in scientific experts or anybody
21 else. They get to bring in that test machine and say this
22 is our test and we complied with these regulations. But
23 that doesn't mean that the defendant can't question that
24 test. If they couldn't question that test, we would never
25 have a jury trial on a test case. So we're simply going to

↑

135

1 hold the State to its burden of proof beyond a reasonable
2 doubt relative to the breath test.

3 THE COURT: All right.

4 Ms. Caswell, does that satisfy your request?

5 MS. CASWELL: No. Specifically, if he has that
6 there is something specifically wrong or some other
7 information --

8 Horton JT day 2 opening
Rob, would you mind shutting the door, please?

9 THE BAILIFF: (Complies.)

10 MS. CASWELL: If he has some specific knowledge
11 of a specific problem with this test, which he may or may
12 not have, I'm not sure, it seems to me that that is
13 reciprocal discovery to which the State has been provided
14 zero reciprocal discovery from defense counsel. I don't
15 know whether he has that or he doesn't have that. If he's
16 also -- I think if he's attacking the general reliability of
17 the test, I don't think that's appropriate either.

18 Now if he wants to talk specifically or
19 procedurally about how these officers administered this
20 particular test and how this machine, procedurally they went
21 through that, that seems fine to me.

22 MR. HUEY: That's what we --

23 MS. CASWELL: But what I don't want to get
24 into --

25 MR. HUEY: That's pretty much --

↑

136

1 MS. CASWELL: Excuse me, Mr. Huey.
2 What I don't want to get into is a situation
3 where we're blindsided with all of a sudden they have this
4 information. Mr. Steinberg and I aren't in the business of
5 obtaining convictions, we're in the interest of pursuing

6 justice. So that would be information that we would not
7 only be entitled to but they would be required to give us.

8 And I think -- But, more importantly, what I
9 think is inappropriate is to say that this breath test, in
10 general, are inherently unreliable machines. They need an
11 expert to do that. That's not appropriate to do here. That
12 should have been done at a motion hearing, if there was a
13 specific problem with the test, or they should have an
14 expert if they're going to do that. It's my understanding
15 they have none of those things.

16 So if they want to go through the procedures and
17 what procedures we followed on this test, I'm fine with
18 that, but I don't know where we are going with this. And I
19 don't think it's appropriate for us to get sort of cornered
20 on something which, again, with all due respect to Mr. Huey,
21 I found out about -- Ms. Bogrees mentioned to me and
22 Mr. Mallory mentioned to me in the morning on Monday that he
23 was coming into the case. Nobody's talked to me about that.
24 He and I haven't had any plea negotiations about the case,
25 and all of a sudden he's lead counsel.

137

1 I'm certainly flexible enough to allow him into
2 the case, whatever he wants to do. I'm not making a big

Horton JT day 2 opening
3 stink about that. But I don't think it's fair that we're
4 not information sharing, and I think that's specifically
5 what Discovery Rules 16 were amended to do.

6 THE COURT: All right.

7 MR. HUEY: Your Honor --

8 THE COURT: Is there anything specific about this
9 machine or the test at all, or is it just the administration
10 of the test?

11 MR. HUEY: What we do not have is any documentary
12 evidence that we would be trying to produce, which would be
13 the Rules of Discovery, any -- nothing that falls into the
14 Rules of Discovery that we'd be presenting as some sort of
15 surprise evidence directly related to this particular test.
16 And we're not talking about breath tests in general. We are
17 going to be talking about this particular test with this
18 particular individual with this machine with these officers.
19 And so that -- And so that would be the issues that we'd be
20 raising. And, quite frankly, all I would say to the State
21 is, you know, be prepared to just show that the test will
22 prove your case.

23 THE COURT: All right. And I have noticed that,
24 Mr. Huey, you have used the terms reliable and accurate kind
25 of interchangeably here. I was listening closely to that to

↑

Horton JT day 2 opening

1 make sure we can distinguish between the accuracy of this
2 particular test with regard to the procedure following
3 versus the reliability of the machine which we're not into.

4 MR. HUEY: Correct, Your Honor.

5 THE COURT: Anything else, Ms. Caswell?

6 MS. CASWELL: No, I -- So are they going to ask
7 any questions specifically using manuals from the Department
8 of Health as it relates to this test? Because, again, as
9 Mr. Huey said, under French, we think that should have been
10 litigated in a motion hearing.

11 MR. HUEY: Your Honor, the only manuals we might
12 refer to would be -- We assume that these officers have a
13 certain amount of knowledge. We assume that because they
14 were given a certain amount of training. And if we're going
15 to be talking about their procedures and the procedures they
16 use, we might ask them about things they learned in their
17 training. But I can't tell you whether the officer might
18 say, hey, I don't remember; I don't remember what manual I
19 used.

20 You know, if I had my way, then we would have all
21 of their manuals from all of their officers about everything
22 they have ever been trained on, and we'd have those before
23 trial. We don't have those. This isn't a civil case where
24 I get to do full discovery and do depositions and know all

25 this stuff in advance.

↑

139

1 I'm assuming they have a certain level of
2 knowledge, and I will be asking them about that level of
3 knowledge. They can either say, yes, that's in my manual;
4 yes, I remember it; I don't know, I didn't take that course,
5 which they should of if they had their license. So we're
6 not going to be introducing any manuals, Your Honor.

7 THE COURT: Okay. Does that answer the question?

8 MS. CASWELL: It does.

9 And I have one last little thing. Mr. Mallory
10 indicated to me that he was going to ask some questions that
11 had already been sort of litigated in the motion hearing
12 about the certification of Officer Scott as it relates to
13 whether he completed an in-service training program or not
14 an in-service training program, and it would be our position
15 that the Court's already ruled on that and it's not a
16 question of fact for the jury.

17 THE COURT: That sounds like a motion in limine.

18 MS. CASWELL: Yes.

19 THE COURT: Okay. What about that, Mr. Mallory?
20 Is that something you were planning on doing?

21 MR. MALLORY: Your Honor, absolutely. I believe

22 what Your Honor had ruled was that the State had
23 demonstrated substantial compliance with whatever he needed
24 to do to get his license. I'm not going to sit and argue he
25 didn't have a valid license. But I do want to ask about

↑

140

1 what training he went through. I think that's absolutely
2 relevant to this specific test. What training he went
3 through related to this specific test I think is absolutely
4 relevant, and it has nothing to do with whether it should be
5 suppressed or not.

6 THE COURT: I know that City's Exhibit A was the
7 original operator permit that covered the period of time
8 when this test was administered. And if I'm remembering
9 that properly, that is the original permit that he had, not
10 a renewal, and so an in-service course is not relevant to
11 that.

12 MR. MALLORY: Your Honor, we may be -- That's not
13 the way I remember it. That would mean that that was his
14 first certificate ever. I mean, he would have been a police
15 officer for a year --

16 THE COURT: But not a senior operator.
17 Do you remember it that way?

18 MS. CASWELL: I don't have any recollection.

19 THE COURT: I got it.

20 MS. CASWELL: And, again, my point is, I think
21 Mr. Mallory's free to cross-examine him on his
22 qualifications, but he wants to ask a specific question
23 about an ODH regulation, about whether that renewal class is
24 an in-service class or an at-home study course, and that's a
25 question on ODH regulations for the Court in a motion

141

1 hearing, for which the Court's already ruled. It's not a
2 question of fact for the jury. It doesn't go to the weight
3 or credibility of it because it's already been admitted.

4 Now, whether he wants to say, did you get the
5 permit, did you renew it, are you in compliance with it,
6 that's a fine question; but I don't think he gets to ask,
7 did you comply with this particular ODH regulation.

8 MR. MALLORY: I think it would be proper for me
9 to ask if he's done any in-service courses to renew his
10 license. And why? Because we're arguing to the jury that
11 he is the one that gave Mr. Horton the test here. What did
12 he do to learn how to operate this machine, this specific
13 test?

14 Mr. Huey and I are not going to be arguing
15 general testing issues. We're not going to argue about the
16 general science. But we are going to argue that the guy

Horton JT day 2 opening
17 that gave him this test, we just want to know -- and this is
18 for the jury to decide -- whether or not he knows what he is
19 doing. It's specific to this test, not breath test in
20 general.

21 THE COURT: Well, the law has changed now. This
22 doesn't require an in-service course.

23 MR. MALLORY: You're right.

24 THE COURT: And I'm trying to remember when that
25 date of change was. Do you know?

↑

142

1 MR. MALLORY: It was about two months ago.

2 THE COURT: That's kind of what I remembered.

3 MR. MALLORY: I won't talk about the
4 Administrative Code.

5 THE COURT: Well, the -- Well, this happened
6 January 21, and Exhibit B, that we had at the motion
7 hearing, was the renewal from March 31st of this year. It's
8 current now to March 31st of next year. So that was when, I
9 believe, you were arguing the in-service course wasn't done.
10 But that -- that renewal certificate that is Exhibit B
11 really isn't relevant to this case.

12 MR. MALLORY: I would agree.

13 THE COURT: I think that the intention in
14 admitting it was to show that he is still --

Horton JT day 2 opening

15 MS. CASWELL: Current.

16 THE COURT: -- the senior operator --

17 MS. CASWELL: Yes.

18 THE COURT: -- currently. So I think that's
19 irrelevant as far as this test that we talked about in our
20 case.

21 MR. MALLORY: His renewal permit, correct. But
22 maybe whatever he did to obtain his first permit, the permit
23 before that --

24 THE COURT: Yes. So the first question I have is
25 whether this Exhibit A, which is the permit that was in

143

1 effect at the time the test was administered, whether that
2 was a renewal or an original, because the criteria is
3 different for getting the permit. So what I'm hearing is,
4 it's your intention to question about that.

5 MR. MALLORY: I just want to know what he did to
6 get his permits. I won't question the validity of them or
7 anything. I just want the jury to hear what he did.

8 THE COURT: Okay.

9 And, Ms. Caswell, you are saying that that's not
10 appropriate for the trial?

11 MS. CASWELL: Right. And the Court's already

Horton JT day 2 opening

12 ruled that he was in substantial compliance with the Ohio
13 Department of regulations as a senior operator and that --
14 that he was able to do the test, he was able to administer
15 the test.

16 THE COURT: Okay. Well --

17 MR. HUEY: And our argument would be, in so
18 doing -- Mary Lynn talked about credibility versus
19 admissibility and seems to be lumping them together. You
20 determined that the test is admissible and that we certainly
21 can't argue that the Director of Health didn't certify
22 him as a senior operator.

23 THE COURT REPORTER: I'm sorry. Can or can't --

24 MR. HUEY: We cannot argue that the Director of
25 Health is not properly certified by the Director of Health

144

1 [sic] in terms of that would be an issue that would be
2 determined prior to trial to determine the admissibility of
3 the test as well as whether or not he was qualified under
4 those regulations.

5 But in terms of what he did -- what training he
6 has, that is a matter of -- that's what Vega itself says,
7 you can still question that officer's training. Simply
8 because he has a certificate and maybe says that he took a
9 class doesn't mean that we can't ask him questions about

Horton JT day 2 opening

10 what did you learn in that class, what do you know, and that
11 sort of thing. I think that's what Mr. Mallory wants to do.

12 THE COURT: Okay. So I'm not hearing that the --
13 that the permit itself will be questioned. In looking at
14 the motion in limine, I'm going to allow questioning about
15 the renewal of the -- I'm going to allow questioning about
16 the permit. I think it's helpful also for the jury to hear
17 that he was trained to do this and what he did to be given
18 this permit to do it. But the validity of the permit, I'm
19 hearing that's not going to be questioned, so that it will
20 be allowed to ask questions regarding the permit but not
21 questions of validity of it.

22 All right. Anything else, Ms. Caswell?

23 MS. CASWELL: No, Your Honor. Thank you.

24 THE COURT: Okay. On behalf of Mr. Horton,
25 anything we should talk about before bringing the jury back?

↑

145

1 MR. HUEY: Your Honor, can I have a quick
2 rest-room break before we begin?

3 THE COURT: Sure.

4 (Brief recess taken.)

5 MR. MALLORY: Your Honor, quick question. Did we
6 ask for a separation of witnesses?

Horton JT day 2 opening

7 THE COURT: I think you're right, we did not
8 address that before. Court will order a separation of any
9 witnesses. So if anybody is coming into the courtroom that
10 is expecting to be testifying, just -- we'll stop the
11 proceedings and have them wait elsewhere.

12 Yes.

13 MS. CASWELL: Could Officer Jenkins relay that to
14 my witnesses in the back or wherever they are?

15 MR. HUEY: Before you do that, I wanted to make
16 sure, also, Your Honor, that -- I think we have worked out
17 the issues related to the videotape and some things that we
18 all agree would be inadmissible and objectionable if they
19 were on the tape. I think we want to make sure that we get
20 across to the officers what those issues are as well so they
21 don't slip into that relative to their testimony as well.
22 So we might as well go over those issues so we can instruct
23 the officers to stay away from those issues. Particularly
24 I'm talking about anything regarding, requesting or offering
25 Mr. Miles Horton the PBT, anything that would relate to a

↑

146

1 prior OVI, and I believe -- I believe that it would be
2 Officer -- Sergeant Myers probably doesn't have any
3 knowledge of either of those.

4 MS. CASWELL: Well, they do now. They all read

Horton JT day 2 opening

5 the same page from the same report, yeah.

6 MR. HUEY: So it would be there was a couple --
7 There was a request and/or offer to do a PBT that was made
8 somewhere during the SFSTs, and then there was an offer or a
9 request after he placed him under arrest. And then there
10 was mention -- I think the only time they mentioned the
11 prior is when he's in the vehicle and he's talking about
12 what to do with the vehicle and my last arrest they messed
13 up my car, or something like that.

14 MS. CASWELL: The defendant mentioned the
15 prior --

16 MR. HUEY: Yes.

17 MS. CASWELL: -- not the officers.

18 I did instruct the officers as to PBT; I did not
19 as to the prior. Mr. Steinberg indicates he's willing to do
20 that.

21 I would say that -- Having worked with
22 Mr. Mallory, it's our understanding that we are going to
23 play the tape from the beginning -- or the DVD from the
24 beginning to 2:43:13, prior to any conversation about a PBT.
25 A PBT was offered initially, but that's off camera, not on

↑

147

1 the video. And then there was a subsequent PBT offered

Horton JT day 2 opening
2 which the defendant took upon his arrest, so that's no
3 problem.

4 I am a little unclear as to what the Court's
5 ruling is as to once the defendant has been Mirandized, then
6 they interview him and he talks to them, and he tells them
7 things about how he had been drinking two beers and he
8 had -- or he had a beer, then he had vodka, and he was at
9 the Union Station drinking before, and different medications
10 that he's taking, that -- We have a Mirandized form, which,
11 you know, the officers said that they read him the Miranda
12 rights, but I don't think we covered that in the motion
13 hearing, but it probably would be worth covering now.

14 MR. HUEY: And that form -- And I wasn't at the
15 motion hearing. That form is not signed by Mr. Horton.
16 There is a place for his signature, and there is no
17 signature from him on that form.

18 THE COURT: Well, I'm not as concerned about the
19 form as whether or not the rights were administered, but I'm
20 remembering that they were.

21 MS. CASWELL: That's correct.

22 THE COURT: So as far as any statements, since we
23 didn't address it at the motion hearing, that would have
24 been the time to do it, as far as suppressing any statements
25 made, so they'll be allowed.

↑

1 MS. CASWELL: Thank you, Your Honor.

2 THE COURT: Okay. Except for mentioning the
3 prior --

4 MS. CASWELL: The prior, right.

5 THE COURT: -- with regard to feeding the car on
6 the rollback since it ...

7 THE COURT REPORTER: I'm sorry. Except for --

8 THE COURT: Except for mentioning the prior -- or
9 making reference to a prior offense, and that was in the
10 context of asking that the car be placed on a rollback
11 instead of behind a conventional tow truck, because there
12 were problems before; again, that was referencing the prior
13 case. It wouldn't necessarily have to be, but I think it's
14 enough of a -- enough of a red flag there that we'll exclude
15 that.

16 Do we have it straightened out with regard to the
17 video stuff?

18 MS. CASWELL: Mr. Mallory, are you in agreement
19 with that?

20 MR. HUEY: 2:43 --

21 MS. CASWELL: 2:43:13 is what I have as a
22 stopping point.

23 THE COURT: There was some reference this morning

Horton JT day 2 opening

24 to eight minutes ten seconds.

25 MS. CASWELL: Well, I'm reading on a different

149

1 clock. Mr. Mallory and Mr. Steinberg agree that that top
2 clock is more accurate, so that's the one we're going with.

3 THE COURT: Okay. So the 2:43 is referenced in
4 the realtime?

5 MS. CASWELL: Yes.

6 MR. MALLORY: Yes.

7 THE COURT: Okay. Any other preliminary matters?

8 MR. HUEY: No, Your Honor.

9 THE COURT: Once we bring them in, I still have
10 to finish the preliminary instructions.

11 MR. HUEY: That's right.

12 THE COURT: Then we'll go into the opening
13 statements. And we need to recess close to 4:30 today
14 because I have a 5:00 commitment elsewhere. So we will do
15 it as close as we can to that.

16 MR. MALLORY: Are we off tomorrow?

17 THE COURT: Let's see how far we get today. What
18 I may end up doing is just having another Judge convene the
19 committee meeting that I'm supposed to be doing. So let's
20 see how far we get.

Horton JT day 2 opening

21 MR. STEINBERG: I have one request, which is
22 based on something that I just sort of thought of while I
23 was back there, which is, I went back there and instructed
24 the officers about what they're supposed to say -- what
25 we're not going to talk about, specifically not talking

↑

150

1 about PBT, we're not going to talk about anything with prior
2 convictions or anything that the defendant said, and also
3 that we're not going to -- there's been a separation, we're
4 not going to have them talk with each other about anything
5 that's said in the courtroom.

6 So after I did that, I walked back into the
7 courtroom and realized I just told them that in that jury
8 room and there are jurors sitting with the door shut in the
9 other jury room. So I would ask that the Court just make
10 sure that the perspective jurors didn't hearing anything
11 about the case. Does that make sense? Just because I
12 realized what I just went and did. I don't think they heard
13 because the door is shut, but just -- I want to make sure.

14 THE COURT: Okay. I will do that.

15 - - -

16 Thereupon, the jury entered the courtroom.

17 - - -

18 THE COURT: Everyone please be seated.

Horton JT day 2 opening

19 Ladies and gentlemen, welcome back. I'm glad you
20 all remembered where you were sitting yesterday. And the
21 first thing I will do this afternoon is apologize for the
22 delay in bringing you back up here and having you in the
23 courtroom.

24 A lot of times there are delays that are
25 inevitable at trials. The larger part of today was our

151

1 morning docket that we didn't complete nearly as soon as I
2 would have liked to, so we had a delay that way and also
3 some legal discussions. So that's why we didn't have you
4 promptly up here when I requested you be back down to the
5 Jury Commissioner's office.

6 And also you were brought up and you had an
7 opportunity to be sitting in the deliberation room right
8 behind the courtroom here. And while you were there, we
9 were talking about some other things about the case. And
10 I'd like to ask you, some things were said in the next room
11 over, while you were behind the courtroom here waiting, did
12 any of you hear any discussions about this case at all?

13 JUROR SCANLON: No.

14 JUROR GOOLSBY: No.

15 JUROR SHARP: No.

16 Horton JT day 2 opening
(Other jurors responded negatively.)

17 THE COURT: We know the door was shut, but we
18 just wanted to make sure that there weren't any discussions
19 that were overheard about the case.

20 Having confirmed that with everybody, the next
21 thing I'd like to do is continue on with some preliminary
22 instructions about the trial that is commencing here today.

23 So it is important that you be fair and attentive
24 throughout this trial. Do not discuss the case among
25 yourselves or with anyone else. I know you have heard that

↑

152

1 before, but you will hear it several other times. Also do
2 not permit anyone else to discuss it with you or in your
3 presence. Do not form or express any opinion on the case
4 until it is finally submitted to you.

5 More difficult for you to understand is that you
6 may not discuss this case among yourselves until it is
7 finally submitted to you. You will receive the opening
8 statements, the evidence, the arguments of law in that
9 order. It would be unfair to discuss the case among
10 yourselves before you receive everything necessary for your
11 decision, and that's the reason why.

12 You must also explain this rule to your family
13 and friends. When the trial is over, you will be released

Horton JT day 2 opening

14 from this instruction and you will be free to discuss the
15 case. But until that time, you are -- you are prohibited
16 from discussing the case with anyone or even among
17 yourselves.

18 Do not talk to the attorneys, the parties or any
19 of the witnesses during the trial; likewise, the
20 participants in the trial must not talk to you. So if you
21 see any one of the participants, don't be offended if they
22 seem to be ignoring you, because that's what the
23 requirements are. If anyone should attempt to discuss the
24 case with you, please report the incident to the Court or to
25 the bailiff immediately.

↑

153

1 You may not investigate or attempt to obtain
2 additional information on this case outside of the
3 courtroom. This would include any research on the Internet,
4 in libraries, in newspapers, or in any other way make an
5 investigation on this case on your own. Do not visit or
6 view any place discussed in this case. Do not use Internet
7 maps or Google Earth or any other program or device to
8 search for or to view any place discussed in the testimony.

9 Also do not research any information about this
10 case, the law or the people involved, including the parties,

Horton JT day 2 opening

11 the witnesses, the lawyers or the judge by using a computer,
12 a smart phone, an iPad or any other device or application
13 that accesses the Internet or any social media such as
14 Facebook, Twitter or Myspace, or any of the other
15 applications that are out there that I probably don't even
16 know exists.

17 And I thought that I would give you some insight
18 as to why this is required. In case somebody doesn't like
19 what happens during this trial and any decisions that are
20 made, there is a right to appeal, in certain situations,
21 what happened. When the Court of Appeals hears a case, they
22 look at a transcript of what's happening here, which is why
23 a court reporter is present, and that's why we make an
24 entire record of the case. And if there is anything outside
25 of this courtroom that any of you would use to influence a

154

1 decision, that information would be not -- would not be
2 available to the Court of Appeals, so they would not be able
3 to properly review this case. So that is the reason why.

4 Also do not read any news stories or articles in
5 print, on the Internet, or on any blog about the case or
6 about anyone involved in it, or listen to any radio or
7 television reports about it or about anyone involved in it,
8 or let anyone tell you anything about any of that. If you

Horton JT day 2 opening

9 want, you can have your spouse or a friend clip out any
10 stories, set them aside. After the trial is over, if there
11 would happen to be any media attention on a case like this,
12 I assure you that when you have heard all the evidence, you
13 will know more about this case than anyone would ever learn
14 through any media, and it will be more accurate also.

15 In short, you may not investigate or attempt to
16 obtain additional information on this case outside of the
17 courtroom. Like I have said before, it is highly improper
18 for anyone to attempt to do that. Any violation of these
19 orders may cause a new trial or may require a penalty for
20 disobedience.

21 In the event you experience a personal problem,
22 you may explain the matter to the bailiff or the court
23 reporter. The message then will be conveyed to the Court.

24 At each recess I will repeat some of these
25 warnings, as I have done before. But if I should forget to

↑

155

1 do so, please remember them and apply them to your conduct
2 throughout the trial.

3 If at any time you discover you cannot hear or
4 understand a witness or a lawyer, then please speak up so
5 the problem can be corrected. We have right next to the

Horton JT day 2 opening

6 courtroom here the front elevators that sometimes make noise
7 and can hamper hearing. So just let us know if you can't
8 hearing something.

9 Before we hear the opening statements of counsel
10 and begin to take evidence, I believe it would be helpful
11 for you to have some more preliminary instructions to follow
12 in listening to and considering the evidence which you will
13 hear in this case.

14 Later, after you have heard all of the evidence
15 and the closing arguments of counsel, I will give you
16 further instruction covering the law, which you are to
17 follow in the case. It is the duty of me, the Judge, to
18 instruct you in the law, and it is your duty to follow the
19 law as I will state it to you both now and at the conclusion
20 of the evidence.

21 First of all, it is your exclusive duty to decide
22 all questions of fact that are submitted to you. In
23 connection with this duty you must determine the effect and
24 the value of the evidence. You must not be influenced in
25 your decision by sympathy, prejudice or passion towards any

↑

156

1 party, witness or attorney in this case.

2 The attorneys for the parties will, of course,
3 have active roles in the trial. They will make opening

Horton JT day 2 opening

4 statements to you, question witnesses, make objections, and
5 finally will argue the case as a last step before you hear
6 my final instructions and commence your deliberations.

7 Remember that attorneys are not witnesses, and
8 since it is your duty to decide the case solely on the
9 evidence which you see or hear in this case, you must not
10 consider as evidence any statement that an attorney made
11 during the trial. There is one exception, and that is if
12 the attorneys agree to any fact, such agreement, or
13 stipulation as we call it, or admission of fact, will be
14 brought to your attention and you may then regard such fact
15 as being conclusively proved without the necessity of
16 further evidence on that fact.

17 If a question is asked and an objection to the
18 question is sustained, you will not hear the answer, and you
19 must not speculate as to what the answer might have been or
20 as to the reason for the objection. If an answer is given
21 to a question and then the Court grants a motion to strike
22 the answer, you are to completely disregard such question
23 and answer and not consider them for any purpose. A
24 question in and of itself is not evidence and may be
25 considered by you only as it supplies meaning to an answer.

↑

157

Horton JT day 2 opening

1 As jurors, you have the sole and exclusive duty
2 to decide the credibility of witnesses who will testify in
3 this case, which simply means that it is you who must decide
4 whether to believe or disbelieve a particular witness. In
5 determining these questions, you will apply the tests of
6 truthfulness which you apply to your daily lives. These
7 tests include the appearance of each witness on the stand;
8 his or her manner of testifying; the reasonableness of the
9 testimony; the opportunity he or she had to hear, see, and
10 know the things concerning the testimony; the accuracy of
11 memory; frankness, or lack of it; intelligence; interest and
12 bias, if any; together with all the facts and circumstances
13 surrounding the testimony. Applying these tests you will
14 assign to the testimony of each witness such weight as you
15 deem proper.

16 You are not required to believe the testimony of
17 any witness simply because it was given under oath. You may
18 believe or disbelieve all or any part of the testimony of
19 any witness. You should not decide any issue of fact merely
20 on the basis of the number of witnesses who testify on each
21 side of an issue. Rather, the final test in judging
22 evidence should be the force and the weight of the evidence,
23 regardless of the number of witnesses. The testimony of one
24 witness believed by you is sufficient to prove any fact.



1 between his testimony and that of others, if there are any,
2 does not necessarily mean that you should disbelieve the
3 witness, as people commonly forget facts or recollect them
4 erroneously after the passage of time. You are certainly
5 all aware of the fact that two persons who are witnesses to
6 an incident may often see or hear it differently. In
7 considering a discrepancy in a witness's testimony, you
8 should consider whether such discrepancy concerns an
9 important fact or a trivial one.

10 If you concluded that a witness has willfully
11 lied in his or her testimony, you would then have the right
12 to reject all of that testimony, unless from all of the
13 evidence you believe that the probability of truth favors
14 the testimony in other particular ways.

15 This concludes my preliminary instructions to
16 you, and I hope that they will be of some assistance to you
17 in listening to and considering the evidence. Please keep
18 these instructions in mind as you listen to the evidence and
19 the statements of counsel.

20 I may give you additional instructions during the
21 trial. When the evidence and closing arguments are
22 concluded, I will give additional instructions on the law

Horton JT day 2 opening

23 which you are to follow.

24 Members of the jury, I would like at this time to
25 highlight the procedure of the trial. First, each of the

159

1 attorneys will be given an opportunity to tell you what they
2 expect their evidence will be. This part of the trial is
3 called opening statements. The opening statements are not
4 evidence, but they are a preview of the claims of each party
5 designed to help you follow the evidence when it is
6 presented.

7 After the opening statements, the State will be
8 permitted to present its evidence. Then Mr. Horton may
9 offer evidence if he desires. If Mr. Horton presents
10 evidence, the City may present rebuttal evidence.

11 After all of the evidence is presented, then the
12 attorneys will be given an opportunity to make a final
13 argument to you. Then the Court will give you instructions
14 on the law. After that, you will retire to the jury room
15 and deliberate on your verdict.

16 With this understanding of the trial procedure,
17 we will now have the attorneys present their opening
18 statements. Again, these statements are not evidence but
19 are what the attorneys expect the evidence to be.

20 Horton JT day 2 opening
The City of Columbus may go first.

21 MR. STEINBERG: Good afternoon, ladies and
22 gentlemen.

23 (Some jurors responded with greeting.)

24 MR. STEINBERG: January 21st of this year, around
25 2:20 in the morning, Columbus Police Department -- CPD is

160

1 what I call it -- Sergeant Timothy Myers was on High Street.
2 He was driving down High Street and he noticed a black BMW
3 in the right lane impeding traffic. He watched this black
4 BMW, saw that he, himself, was impeded, and signaled to the
5 BMW that he was making a traffic stop. The BMW pulled into
6 the United Dairy Farmers' lot near where it had been
7 impeding traffic.

8 Sergeant Myers approached the BMW and saw the
9 defendant as the driver. And Sergeant Myers noticed that
10 the defendant's eyes were bloodshot, that they were glossy,
11 and he noticed that he smelled alcohol coming from the
12 vehicle. Sergeant Myers had a conversation with the
13 defendant, and Sergeant Myers asked the defendant if he had
14 been drinking, and the defendant stated he had drunk two
15 vodka and tonics about two hours before.

16 Sergeant Myers asked the defendant to recite
17 the alphabet from E to X. Sergeant Myers heard the

Horton JT day 2 opening

18 defendant recite the alphabet from E to U. At that point,
19 Sergeant Myers had the defendant exit the vehicle.

20 Two other Columbus Police Department officers
21 came upon the scene. Those are Officer Jill Woolley and
22 Officer William Scott. They then put the defendant through
23 some field sobriety tests. After they observed the
24 defendant in these field sobriety tests and conferred with
25 Sergeant Myers, they decided the defendant was impaired and

161

1 made a decision to take him off the street and place him
2 under arrest for DUI -- OVI.

3 They took the defendant at that point to Columbus
4 Police Headquarters, and they gave the defendant a breath
5 alcohol test, what you will hear called a BAC test. The
6 defendant took that test and registered .108 grams of
7 alcohol per 210 liters of deep lung breath, which is over
8 the legal limit of .08 grams alcohol per 210 liters of
9 breath. So they cited the defendant for two counts of OVI,
10 the two counts that you have to consider today, the OVI
11 under the influence and the OVI prohibited concentration.

12 I'm confident that when you hear all the
13 evidence, you're going to make a finding of guilty on both
14 counts, and that's what Ms. Caswell and I are going to ask

Horton JT day 2 opening
15 you to do at the close of this trial. Thank you.

16 THE COURT: Thank you, Mr. Steinberg.

17 And on behalf of Mr. Horton.

18 MR. HUEY: Thank you, Your Honor.

19 Good afternoon, ladies and gentlemen. How are
20 you this afternoon?

21 (Some jurors responded with greeting.)

22 MR. HUEY: I disagree with the conclusion that
23 Steve just gave you, that he believes when you hear all the
24 evidence, because you haven't heard any evidence yet, that
25 you will find that Miles is guilty of either of those

162

1 charges. And I'm going to talk to you a little bit about
2 what that evidence, I believe, will be.

3 Now, it's kind of ironic in this type of
4 situation that I'm called upon to ask you what the evidence
5 will show because, as we talked about in voir dire, the
6 evidence is going to come from them primarily, if not
7 exclusively, in this case. They have the burden of proof
8 beyond a reasonable doubt. So it's their evidence, their
9 evidence I'm mostly going to be talking about.

10 And this is not a civil case where I could do
11 depositions and find out exactly what their witnesses are
12 going to testify to and ask them every question I can think

Horton JT day 2 opening

13 of and have that opportunity. So I can't give you chapter
14 and verse of what -- what's actually going to come out of
15 the witness's mouth on the witness stand, but I'm going to
16 try, because I know some of these officers.

17 One of the reasons I disagree with Steve as to
18 what your verdict's going to be is because that conclusion
19 is completely, completely contradicted by the video that's
20 going to be shown in this case; completely contradicted.
21 You notice he didn't talk anything about other than he took
22 some field sobriety tests. Well, how did he do? That's a
23 big question. How did he do?

24 This case, as we talked about at the outset, is
25 about two different charges.

↑

163

1 (At whiteboard) Can everyone see?

2 (Some jurors responded affirmatively.)

3 It's basically about two different charges.

4 Charge one is what we call the typical drunk driving, and
5 charge two is about the breath test (writing on whiteboard).

6 This charge (pointing), I think when you look at it, review
7 it and get down to it -- Mr. Scanlon's and my favorite box
8 (drawing on whiteboard). I think it would be helpful to
9 think about that box as you listen to the evidence in this

10 Horton JT day 2 opening
case about that charge.

11 And you're going to have folks come up to the
12 witness stand and testify as witnesses -- I may here in a
13 second pretend to be one of them or two of them. What you
14 will see on this videotape is evidence that you can look at,
15 rely upon. It's not going to change. It's not going to be
16 at all affected by a person's perception or predilections,
17 which we all have.

18 The officers in this case will give you their
19 testimony. I hope it will be the truth as best as they can
20 remember it. They didn't write down verbatim exactly what
21 happened from the beginning of the encounter with Miles to
22 the end of the encounter with Miles. And, more importantly,
23 they may be viewing it in a different manner.

24 They may be viewing it in a different manner than
25 someone who was neutral out there. They may be viewing it

↑

164

1 in a different manner than someone who is in Miles' shoes.
2 They may have heard different things said than what were
3 actually said, and they may remember them differently than
4 they remembered them back then.

5 But the bottom line I think that it will
6 ultimately come down to is officers, it's 2:00, 2:30 in the
7 morning, were in the Short North, and officers are trained,

Horton JT day 2 opening

8 trained to look at that (pointing) as being that 16; and
9 every time they count this, they come up with 16 boxes.
10 They're not trained to look beyond that and look at what
11 they hear and what they see as being inconsistent with
12 someone being under the influence.

13 Just so you understand, we are not here suing the
14 Columbus police department about this arrest. We're not
15 here complaining about this stop or this arrest. The
16 officers did their job as best they could do it that night,
17 and we're not here complaining about that. They did their
18 job. They will come on the stand and, hopefully, tell the
19 truth as best they can without any intention of which way
20 the verdict goes, because that's up to you folks. The
21 officers have done their job; they did their job back in
22 January. So we're not here complaining about that.

23 We are here for you folks to decide whether the
24 proof as presented to you -- And you look at it from a --
25 not from a neutral basis, but from a basis of Team Innocent,

165

1 presumed to be innocent from the outset to the end of this
2 trial. You have to look at it with those Team Innocent
3 jerseys on, saying, Okay, I hear what they're saying, but is
4 there something consistent with innocence? Have they proven

Horton JT day 2 opening

5 it to me? And I'm telling you that this videotape is going
6 to be the crucial and crux evidence of this case.

7 You will find that -- Well, I will go ahead and
8 back up for a second. So, as we talked about from the
9 beginning, we don't have any burden of putting on any
10 evidence or going forward with any evidence, and, quite
11 frankly, it's very likely that we will not put on any
12 evidence, because I do not believe that their evidence is
13 going to meet the burden of proof beyond a reasonable doubt;
14 and we're not going to put on any evidence, most likely.

15 If we did, or if the truth of this whole
16 situation came out, what you'd hear either from the officers
17 is that on this particular evening Miles was out earlier
18 with friends, he had a couple vodka tonics; he was out from
19 about 4:00 to 8:00. He went home. He lives in the Short
20 North. They were in the Short North. He went home. He
21 went home and watched TV a little bit. He actually took a
22 little nap. And then he gets a call from his friends. They
23 say: Hey, we were here a lot longer than we expected to be.
24 Can you come get us? We don't want to drive. Can you come
25 get us?

↑

166

1 So he comes and he drives down High Street, and
2 he pulls -- First he pulls into the parking lot near where

Horton JT day 2 opening

3 they are at, comes around, gets them ready, okay, I'm here.
4 And the officers will testify to this. He gets in his car.
5 I believe the sergeant saw this. Got in his car, pulled on
6 High Street, stopped momentarily. It's 2:30 in the morning;
7 probably not a whole lot of traffic out there. Stops
8 momentarily. The sergeant drives up and lights him up.

9 He asked him, What are you doing?

10 I'm just picking up my friends.

11 Pull over here.

12 The officer learns that Miles has anxiety issues.
13 So he gets nervous. The police officer also learned that
14 Miles has a little bit of ADD. Miles reminds me a bit of
15 my son in both those regards; he also is dyslexic;
16 triple-header for my family.

17 The officer asked Miles to do something --
18 Sergeant Myers -- Sergeant Myers will testify. And I think
19 Sergeant Myers will come in and testify and basically say,
20 if he's being truthful: The individual that I saw stop on
21 North High Street, I perceived him as being interfering with
22 traffic. He had not driven in any impaired manner that I
23 saw. Prior to that, I saw him come out of the parking lot,
24 make a turn, stop there. When I put on my beacons, he
25 appropriately stopped his vehicle. When I told him to pull

↑

Horton JT day 2 opening

1 around, he pulled around into the parking lot. He acted
2 appropriately in regard to my instructions throughout that
3 evening. I asked him to do something that -- that's sort of
4 a sobriety test but --

5 We have certain sobriety tests. We call them
6 standardized sobriety tests. Now all officers use them.
7 They're done exactly the same way, or supposed to be, and
8 when you do those, you can kind of get a reliability of
9 those.

10 I had him do what we like to call the modified
11 alphabet test, and I had him -- I asked him if he could say
12 his alphabet from D to X.

13 Now I heard what Mr. Steinberg said, that he
14 stopped at U. I believe, from what I understand, that he
15 said U twice. But he started at D, got to X, paused in the
16 middle of U, started again at U, got to X.

17 That's not a recognized sobriety test. It's not
18 something that any agency -- any authority says, well, yes,
19 you should be able to do that when you've been stopped by an
20 officer. The flashing lights are lighting, you're put on
21 the spot, can you do this? There's no agency, no order
22 anywhere that anybody says that has anything to do with
23 sobriety, that there's some kind of correlation beyond being

24 nervous.

25 The officer is going to testify that Miles had

168

1 slurred speech. But I believe that he won't testify that he
2 was the most slurred thing he ever heard. I think he will
3 actually testify, if he testifies truthfully, that he's
4 never heard Miles talk before and that everyone has
5 different speech patterns. And it could be his speech
6 pattern as much as anything else as to what he perceived as
7 slurred speech.

8 But, again, remember, it's 2:00 in the morning,
9 in the Short North. Here's a young man. He's looking for
10 16 (pointing to whiteboard), and he's counting those squares
11 to equal up to 16. He's looking for a drunk driver. He
12 expects to see a drunk driver. And what's he seeing?

13 So he has him go around, park in the parking lot.
14 And then two other officers appear. The two others officers
15 are Officer Woolley and Officer Scott.

16 You'll see on the videotape that Officer Woolley
17 and Officer Scott ask Miles to do standardized field
18 sobriety tests. These are field sobriety tests that they
19 have been trained to use to check the individual's
20 coordination and their ability to divide their attention and
21 their ability to balance.

Horton JT day 2 opening

22 The first test they ask Miles to do is a test
23 called the walk-and-turn test. The walk-and-turn test
24 requires an individual to stand like this (indicating).

25 MS. CASWELL: I'm going to object, Your Honor. I

169

1 don't think it's appropriate for Mr. Huey to do a
2 demonstration.

3 MR. HUEY: I'm telling what the evidence will
4 show, Your Honor.

5 MS. CASWELL: It's fine to tell it, but I don't
6 think it's appropriate for him to do a demonstration.

7 THE COURT: I will sustain that as far as
8 demonstrating the test.

9 MR. HUEY: If I may, Your Honor, on our
10 cross-examination, we are going to be asking the officers
11 these exact questions, so I believe this is the testimony
12 that the officers will give, and I'm supposed to show what I
13 think the evidence will show.

14 THE COURT: Well, you don't need to demonstrate
15 it at this point.

16 MR. HUEY: Okay. Thank you, Your Honor.

17 THE COURT: We'll wait for the testimony for
18 that.

Horton JT day 2 opening
MR. HUEY: Thank you, Your Honor.

19

20

What I ask you to do is look at the evidence.

21

The evidence is on the videotape. You will see how Miles

22

performs on this videotape. You will see that he stands in

23

this very strange position with one foot in front of the

24

other, that we talked about earlier in voir dire, that

25

that's not a normal position for someone to stand in, and he

↑

170

1

does it excellently. He does it, he kills it. He stands

2

there for almost two minutes, better than I think anybody

3

sitting on this jury could do.

4

And then this particular test has eight different

5

clues that the officers are looking for, eight different

6

clues. They don't tell -- The officer will testify that he

7

didn't tell Miles what those clues are, that -- There's lots

8

of clues; he doesn't tell him what they are. He also

9

doesn't tell him that he already started this test when he

10

had that -- those feet standing there. He doesn't tell him

11

that, but he did. And Miles stood there for almost two

12

minutes while the officer gives his instructions.

13

He then tells him to walk nine steps and turn

14

around and come back, and the officer will have to admit

15

that Miles did that almost perfectly. I think he did it

16

perfectly. You look at the videotape. You can decide. I

Horton JT day 2 opening

17 think he did it perfectly. But the officer is going to say
18 that Miles did not touch heel to toe on every single step.
19 Now, the officer will say that a person is allowed to not
20 touch, but if it's more than a half an inch, then you count
21 that as a clue. Never did the officer tell that to Miles.

22 He walks -- The officer's got on these police
23 shoes, the shoes the police officers use. They're patent
24 leather, they've got good support. And you will see the
25 officer each time bangs their heel against their toe.

↑

171

1 That's the way they do it to make sure that they're going
2 heel to toe.

3 Miles is wearing UGGs, and he is not trained to
4 bang heel to toe, and he's doing as best as he can. He's
5 got one foot in front of the other, heel to toe, heel to
6 toe, and he looks fine. I think he looks perfect.

7 When they do the turn, they instruct that there's
8 a certain way you do the turn. They don't tell you that
9 you're judged for that. He does the turn perfectly.

10 When you come back along the line, make sure --
11 if it's more than nine steps, you get nervous, you did more
12 than nine steps, oh, that's a clue. You raise your hands
13 for balance, that's a clue. You don't do this turn exactly

Horton JT day 2 opening

14 the way they tell you to do, that's a clue. You don't count
15 your steps, that -- that divided attention, also remembering
16 all these clues, those are clues.

17 The only clue of those eight clues that they said
18 that Miles may have not done perfectly is not touching heel
19 to toe, exactly heel to toe.

20 The officer will testify that he's trained --
21 There's two officers that actually observed these field
22 sobriety tests and either one of them could testify about
23 it. Those officers will testify that they're trained that
24 if someone has more than two clues, that you should consider
25 them a failure, that they failed. Miles didn't have two

↑

172

1 clues. They will admit he didn't have two clues. He didn't
2 fail those tests. He passed those tests. You could have
3 eight clues. He didn't; he had one clue, maybe.

4 The next test they did was the one-leg stand
5 test. On the one-leg stand test, again it's a divided
6 attention test. They're telling you to stand, raise your
7 foot, and you count in a fashion that none of us have
8 counted since we were in grade school, one one-thousand,
9 two one-thousand, three one-thousand, which is okay until
10 you get to eleven one-thousand, twelve one-thousand,
11 thirteen one-thousand. You'll get confused when you do

Horton JT day 2 opening

12 that; Miles did not. He counted one one-thousand to thirty
13 seconds, whenever he reached that thirty seconds. The
14 officer's timing it. He doesn't tell him, I'm timing. He
15 just tells him to count. He raises his foot. He does it
16 exactly as he's instructed to the T: One one-thousand,
17 two one-thousand. For thirty 30 seconds he stands there,
18 keeps his arms down at his side, didn't know that was a
19 clue. He didn't hop, he didn't move.

20 The officer, I believe, is going to say he
21 swayed. That's a clue. Allegedly. But the officer will
22 not be able to tell you, well, how much of a sway actually
23 counts as a clue. Can everybody look at the same sway and
24 say, oh, that's a clue? The officer can say, well, no, it's
25 just kind of more of a judgment call to me. You guys decide

173

1 whether or not he swayed and whether or not you think that
2 sway is something that's actually caused by impairment by
3 alcohol. You can guys can decide that.

4 So I think -- Use your own eyes. Look at the
5 videotape. When look at this charge, I think you will find
6 not that we told you we're not going to prove anything, but
7 I think the videotape proves to you that he was not drunk,
8 that he was not impaired.

Horton JT day 2 opening

9 This is a drunk driving charge. We have heard
10 that no driving -- there was no bad driving throughout that
11 whole thing, and I think the evidence in front of your face
12 will show you that he was not drunk that evening.

13 Now, we talked about the next -- Oh, I forgot one
14 thing. I forgot one thing. Officer Scott is going to
15 testify about one other test he did. He did this eye test
16 that he did. Now, Officer Scott is going to testify to you
17 that he has been trained somewhat to utilize this particular
18 test. I think he will ultimately indicate that he's really
19 got about four hours of hands-on training doing this eye
20 test.

21 The eye test is allegedly looking for something
22 called nystagmus. He will testify to you that he has been
23 trained that there are 33 different kinds of nystagmus, and
24 he mostly can't tell you the difference between one or the
25 other, and that 32 of those don't have anything to do with

↑

174

1 alcohol. He will testify, I believe, and admit that there's
2 over a hundred different things that can cause nystagmus.

3 Nystagmus is basically as your eye is moving
4 along it slows down a little bit and catches up. All of us
5 have that. The officer will testify that most of us have
6 that at some point in time not caused by alcohol, that

Horton JT day 2 opening

7 40 percent of us will have it at maximum deviation every
8 time. But the officer will testify that he has been trained
9 to potentially use this test as something to make a judgment
10 about when he's trying to determine whether or not to arrest
11 someone.

12 He's not been trained that it's a hundred percent
13 scientific evidence that someone is impaired by alcohol;
14 remotely has he been trained on that. He will admit he is
15 not a doctor, he is not a nurse, he is not an
16 ophthalmologist, he is not an optometrist. I don't know
17 even if he's had a first-aid course recently. He is not
18 someone who's qualified to make the kind of determination
19 that you'd have to make to find Miles guilty of this drunk
20 driving charge based solely on this officer's eye test. And
21 the officer has to do it properly, in a proper manner. And
22 the only way we would know if he did it properly is if he
23 did it on video, and for some reason he doesn't do this test
24 on video.

25 So the same officer is going to testify

↑

175

1 potentially about this breath test, Officer Scott, and he
2 was the officer who had Miles do the breath test. And there
3 may be one or two officers that testify about this breath

Horton JT day 2 opening

4 test and the breath machine. There's an officer called
5 Officer Dave Griffith who is an officer who's in charge of
6 the breath testing devices and keeping the records and all
7 that sort of thing. And then there's Officer Scott who
8 administered the breath test.

9 Now Officer Scott will testify that he is a
10 senior operator and he's gotten a certificate that says he's
11 a senior operator. He will also testify that he has been a
12 police officer for a long time, and he gets training every
13 year. They've got so much training requirements that they
14 have to do year after year after year that the Ohio Peace
15 Officers Training Academy requires them to do, and he's done
16 all that. And almost none of his training has anything to
17 do with that breath machine; almost none has anything to do
18 with that breath machine.

19 As a senior operator he will testify that he
20 probably knows how to plug in this machine, he knows how to
21 turn on the machine, and he knows how -- that he has been
22 instructed that there are certain minimum government
23 standards he has to meet; and he will testify that he tried
24 to meet those minimum government standards and that he
25 believes he did.

↑

176

1 As a senior operator, he also is trained to

Horton JT day 2 opening

2 do a weekly check of this machine. And he -- he or
3 Officer Griffith would potentially testify -- again, I don't
4 know who all is going to testify in this trial --
5 potentially testify that what they do to do that is they use
6 this -- They have a jar of liquid. There's alcohol, water
7 in there, and he can testify about what else and how much
8 alcohol and how much water, but ultimately he takes this jar
9 of magic juice --

10 MS. CASWELL: Objection.

11 MR. STEINBERG: Can we approach?

12 MS. CASWELL: Can we approach?

13 THE COURT: Yes.

14 - - -

15 The following discussion was held at the bench,
16 out of the hearing of the jury:

17 MS. CASWELL: Mr. Steinberg and I objected,
18 probably -- We did without conferring. So let me say what
19 my objection is. My objection is of the words "magic
20 juice." We would ask that the Court strike that and that we
21 give a curative instruction about opening statements by
22 counsel are not evidence to be considered by you.

23 But that's totally inappropriate. It's not
24 factual, and it's exactly what we talked about. It relates
25 to the ODH regulations. He's specifically going into trying

1 to talk about what they are and how they did. The motion
2 hearing was the appropriate place to do that. This is not
3 that place.

4 And I don't know what Mr. Steinberg --

5 MR. STEINBERG: I didn't --

6 MR. HUEY: Number one, you have already given an
7 instruction that this is not evidence, that this is opening
8 statement. I don't think an additional one needs to be
9 done. I'm not talking about the ODH regulations.

10 I don't know who they are going to call. Are
11 they going to call Dave Griffith? Are they going to call
12 the other officer about how this machine is maintained? I
13 would assume so. So I'm telling them what the officer is
14 going to say. I may use my own words. I may use magic
15 juice, I may use simulator solution. This is all I'm
16 testifying to. And then --

17 MS. CASWELL: Yeah, exactly.

18 MR. HUEY: I'm giving what I believe the evidence
19 will ultimately show, certainly will be what I'll say did
20 show at the end of this case if all these people testify.

21 MS. CASWELL: He stated that he most likely will
22 put on no case and he's going to hold us to our burden. And

Horton JT day 2 opening

23 I would submit to you that he 's talking about -- or pinning
24 us in on particular witnesses that we do or do not have to
25 call and what procedurally we did or didn't have to do. And

178

1 I'm saying to you that that specific procedure that he's
2 talking about, whether it was done correctly or incorrectly,
3 is what would relate to Ohio Department of Health
4 regulations.

5 And the characterization by Mr. Huey of this as
6 magic juice is not only legally inaccurate but it's also
7 factually inaccurate. And he is not a witness. If they
8 wanted to call a witness who would call it something other
9 than what it is, that seems to be fine, but they're under no
10 obligation to do so, and they have indicated that they're
11 not going to.

12 MR. HUEY: Your Honor, I could not know who
13 they're going to call as witnesses. And Mr. Steinberg did
14 not tell us who he was going to call as witnesses in his
15 opening statement. If they want to say, I'm not going to
16 call officer so and so to talk about this simulator
17 solution, magic juice, or I'm not going to call
18 Officer Griffith to talk about this --

19 MR. STEINBERG: Lower your voice.

20 THE COURT: Okay. I'm going to sustain the

21 objection as far as referring to it as magic juice.

22 MR. HUEY: Okay.

23 THE COURT: I think we're getting too much into
24 evidence that may never even be presented.

25 MR. HUEY: But it's up to them -- If they want to

179

1 say they're not going to present -- I don't get a reopening.

2 THE COURT: That's okay. If it comes out, you
3 certainly have closing to deal with it.

4 MR. HUEY: Thank you, Your Honor.

5 MS. CASWELL: Thank you, Your Honor.

6 - - -

7 THE COURT: The objection that was made is going
8 to be sustained. And I'm going to ask the ladies and
9 gentlemen of the jury to disregard the statement about the
10 solution for the machine that Mr. Huey was talking about,
11 being referred to as magic juice. This is not evidence.
12 And you were given that instruction before. I don't want
13 you to confuse anything that's being presented now with
14 evidence later on that may or may not be presented. So at
15 this point, the objection is sustained. Please disregard
16 that reference.

17 Mr. Huey, you may continue.

Horton JT day 2 opening

18 MR. HUEY: Thank you very much, Your Honor.

19 So the officer would testify. He would call this
20 simulator solution. So he puts a solution into a jar, and
21 he uses something -- And the jar looks a lot like this
22 (holding a jar). And uses something called a simulator.
23 It's a heated thing that goes on top of here that heats up
24 this solution. And he knows that there's alcohol and water
25 in that solution, but he won't be able to explain why they

180

1 use a 12 percent alcohol solution to try to give you a .10
2 result. I don't think he will be able to do it --

3 MR. STEINBERG: Your Honor, can we approach?

4 THE COURT: No. I'm going to -- I know what
5 you're going to do on that or object about. I will sustain
6 the objection about referring to any of that because it's
7 not -- it may not be evidence that will be introduced later.

8 MR. HUEY: I haven't been instructed as to who
9 they're going to limit their witnesses to, if they're going
10 to limit them, Your Honor, so I have to anticipate what the
11 evidence will be.

12 THE COURT: Mr. Steinberg.

13 MR. STEINBERG: If we're going to argue about
14 this in front of the jurors, then I'm fine to do that, but
15 if the Court prefers we can approach.

Horton JT day 2 opening

16 Our position is quite simple. At opening
17 statements he is allowed to comment on any evidence that
18 they intend -- that they're --

19 THE COURT REPORTER: I'm sorry --

20 MR. STEINBERG: Can we approach? It's probably
21 better. I'm more comfortable.

22 THE COURT: Let's approach.

23 - - -

24 The following discussion was held at the bench,
25 out of the hearing of the jury:

181

1 MR. STEINBERG: I have a couple of objections.
2 One, anything talking about what -- the Ohio Department of
3 Health regulations, whether they're compliant or not,
4 that -- that's not admissible at trial, and really that's
5 what they're getting into here, that's what they're doing.

6 But, additionally, there's really -- when they
7 say, well, we don't know what the State is going to -- what
8 the State is going to present, there's a -- they have to
9 make a reasonable anticipation of what we intend to present
10 and comment on that, not just start presenting their own
11 evidence through Mr. Huey, and that's actually what he is
12 doing.

Horton JT day 2 opening

13 Additionally, everything else that he's doing is
14 essentially a general -- it's what's setting up in general
15 an attack on the reliability of the machine, from referring
16 to it as magic juice to anything else.

17 So from our position, nothing that they're
18 talking about is appropriate to present at trial. Their
19 decision to decide -- Their decision to say, hey, here's
20 what the State's going to present without having any
21 apparent idea what we are going to present, I mean, that's
22 not an interpretation of any reasonably anticipated
23 evidence.

24 MR. HUEY: And with all due respect, that is
25 ludicrous. What is -- I don't know what witnesses they're

↑

182

1 going to call, but I know that I can talk about in opening
2 statement what the evidence is going to show. That's
3 evidence produced on direct as well as cross-examination.

4 In cross-examination we will clearly be able to
5 show that there's a 12 percent solution -- alcohol solution
6 in there. And we'll ask the witness, can you explain how
7 that produces a .10 result. I mean, I'm allowed to
8 comment --

9 Now, if they want to say we're not going to call
10 these witnesses, that's understandable. But I believe I

Horton JT day 2 opening

11 will be able to get the officer to admit and/or drag it out
12 of him this information. I mean, that's -- I can bring the
13 simulator solution, a batch certificate, which we might do,
14 and say, look, can you do the math, it's 12 percent
15 solution. That is all I'm doing. If they're going to bring
16 those officers on to say this is a reliable instrument, then
17 I want to give them an idea of what they actually do.

18 THE COURT: Go ahead.

19 MR. STEINBERG: I think what they actually do is
20 essentially compliant with the Department of Health
21 Regulations, because there are two potential arguments from
22 what he's saying, which is, one, he didn't really comply
23 with the Department of Health regs, which he can't make at
24 trial, or he complied with these Department of Health regs
25 but these regs are just crap and they don't ensure

↑

183

1 reliability, which he can't do either. Both of those -- I
2 mean, it's all right for him to attempt to pick his
3 argument; neither argument is allowable at trial.

4 THE COURT: Yeah, I'm really thinking this should
5 have happened at the motion hearing if we were going to do
6 these kinds of things. I think it has to do with your
7 getting in the area of reliability of the machine in

8 Horton JT day 2 opening
compliance with the department's regulations.

9 MR. HUEY: Okay. I will move along.

10 THE COURT: And if -- You always have closing
11 argument. You can deal with that.

12 MR. HUEY: Okay.

13 - - -

14 THE COURT: Ladies and gentlemen, the objection
15 was made. It's going to be sustained. I don't want this to
16 get far afield and speculate what the evidence might be
17 that's presented later on.

18 And in an effort to maintain some continuity
19 here, Mr. Huey, go ahead.

20 MR. HUEY: Thank you, Your Honor.

21 As we do not know what witnesses the State is
22 going to call relative to this breath testing instrument,
23 all I ask you to do is listen to their witnesses. Because
24 the evidence is going to come through direct testimony,
25 cross-examination. Listen to those witnesses. Listen to

↑

184

1 how they perform the breath test in this case. There are
2 certain things that they will admit are important. We may
3 highlight those things at the end of this trial rather than
4 at this point in time because I don't know who's going to
5 testify.

Horton JT day 2 opening

6 But I will tell you that there are things that
7 are the minimum standard that require compliance, minimum
8 rules, and the officer is going to say they met those
9 minimum rules. There are other things the officers had
10 every opportunity to do, and they didn't do it.

11 Typically in these kind of cases, when you have
12 these charges, the evidence of this (standing at whiteboard)
13 is significant enough or so significant that this (pointing)
14 is really not all that important. So the officers don't
15 really necessarily -- and I think you will find from the
16 officers' testimony that they don't really pay a lot of
17 attention to that.

18 They have something called the 20-minute
19 observation period where the officer is supposed to do a
20 20-minute observation period. It's going to be up to your
21 guess as to which officer actually did that, because they
22 didn't write it down on the start observation time, that
23 he's supposed to do.

24 There will be a number of things that the officer
25 could have done to ensure -- to give you a better feeling

↑

185

1 that this test is an accurate and reliable test, this
2 individual test on Miles. There is something called a

Horton JT day 2 opening
3 diagnostic check, and they can run that before every single
4 test and after every single test to make sure the machine is
5 working right then at that very time. They didn't do that
6 in this case. They didn't run a diagnostic check.

7 The officer will testify that temperature,
8 temperature is important, but he has no idea what Miles'
9 temperature was that evening.

10 The officer will testify that something -- that
11 Miles had a cell phone in his pocket that was on, working.
12 The officer will testify that the minimum requirement is he
13 take one test. But nothing says he can't take two tests.
14 There is no rule, no regulation. The officer will
15 testify -- I believe the officer will testify that he's
16 certified on a newer machine, brand new machine that
17 actually takes two tests, has more requirements. They
18 didn't take two tests in this case.

19 I think ultimately you will find that the
20 evidence on this side (at whiteboard) is -- requires that
21 they prove beyond all reasonable doubt that that result that
22 they want you to believe is accurate. They will say that
23 that result is accurate, .108 grams per 210 liters of
24 breath.

25 Miles couldn't hold 210 liters of breath within

↑

Horton JT day 2 opening

1 him on his best day. That's 105 two-liter bottles.

2 So any error by virtue of the observation period,
3 by virtue of other things would be magnified just
4 tremendously. And I don't think that they're going to prove
5 to you beyond a reasonable doubt that that test is reliable,
6 particularly when you look at the videotape of how Miles
7 performed on the field sobriety tests.

8 Thank you.

9 THE COURT: All right. Thank you, Mr. Huey.
10 First witness for the City.

11 MS. CASWELL: Thank you, Your Honor. The City
12 calls Sergeant Timothy Myers to the stand.

13 - - -

14 Thereupon, the City, to maintain the issues on
15 its part to be maintained, offered and introduced in
16 evidence on its behalf the following testimony:

17 TIMOTHY C. MYERS,
18 called as a witness on behalf of the City, being first duly
19 sworn, testified as follows:

20 THE COURT: You may inquire.

21 MS. CASWELL: Thank you, Your Honor.

22 DIRECT EXAMINATION

23 BY MS. CASWELL:

24 Q. Sir, will you please state your full name for the

25 record, spelling your last.

↑

187

1 A. Sergeant Timothy C. Myers, M-y-e-r-s, Badge 1569.

2 Q. What is your occupation?

3 A. I'm a sergeant with the Columbus Division of
4 Police.

5 Q. How long have you been employed with the Columbus
6 Division of Police?

7 A. It was five years in July.

8 Q. And how long have you been a sergeant, sir?

9 A. One year in July.

10 Q. And what are your duties as a sergeant,
11 specifically with the Columbus Police Department?

12 A. Right now I supervise officers on third shift
13 patrol. I'm in a uniform patrol, which means I still go
14 out. I respond to serious runs like shootings and things
15 like that, but I also do make arrests and issue citations
16 and things like that.

17 Q. In your capacity as a sergeant?

18 A. Yes, ma'am.

19 Q. And in the four years prior, when you were a
20 Columbus police officer, not being of the status of
21 sergeant, what were your duties there?

Horton JT day 2 opening

22 A. My duties were, again, uniform patrol. I work on
23 the west side of the city, and, you know, primarily we take
24 dispatch runs, but then we also deal with traffic
25 enforcement and any crimes that we see committed in our

188

1 presence.

2 Q. And, Sergeant Myers, were you employed with the
3 Columbus Police Department and working on January 21, 2013?

4 A. Yes, ma'am, I was.

5 Q. And were you wearing your uniform and driving a
6 marked cruiser?

7 A. Yes, ma'am.

8 Q. Does your police officer training involve
9 detection and apprehension of impaired drivers?

10 A. It does.

11 Q. What specifically, if you could tell us, is your
12 training?

13 A. Well, in the academy we went through 32 hours of
14 impaired driver training, which includes the use of
15 individuals who have been dosed with alcohol. We then
16 perform the field sobriety test batteries on them, so that
17 we can see what those people's reactions are, and correlate
18 it to what we're seeing in terms of their alcohol.

19 Once I got out on the street, I then did an

Horton JT day 2 opening

20 additional 40-hour course of advanced field sobriety
21 testing; and then about a year later I did an additional
22 40-hour course called Driving Impaired Criminal Enforcement,
23 which involves processing of felony OVI cases, aggravated
24 vehicular assaults, things of that nature.

25 I have also done 16 hours of BAC DataMaster

189

1 training. I'm a senior operator for the BAC DataMaster.
2 And I have also done 16 hours of Advanced Roadside Impaired
3 Driver Enforcement, which is primarily focused on drivers
4 who are under the influence of drugs. So I think, all told,
5 if my math's right, that's 144 hours.

6 Q. And during the course of your professional
7 experience as a police officer, have you dealt with impaired
8 people?

9 A. Yes, ma'am, I have.

10 Q. Any idea how many impaired people you have dealt
11 with?

12 A. It would certainly be in the hundreds, probably
13 the thousands. On third shift, a lot of people are impaired
14 that we deal with.

15 Q. And do you have a regular life experience with
16 dealing with -- just not as a police officer but as a

Horton JT day 2 opening

17 regular person, a lay person dealing -- or in noticing what
18 people are like when they're impaired by alcohol?

19 A. Yes, ma'am, I do. I did my undergraduate work at
20 The Ohio State University, and there are a few impaired
21 people there occasionally.

22 Q. Okay. And what, if anything, did you observe on
23 January 21, 2013, that brings you here in the courtroom
24 today?

25 A. Well, ma'am, I was in a marked cruiser driving

190

1 northbound on High Street in the Short North area. I was in
2 the right-hand lane going northbound, and I had to stop
3 because there was a black BMW that was stopped in the middle
4 of that lane in front of me. I noticed that there were
5 people getting into that car, and the car then drove away
6 northbound. The car had been stopped in front of a bar
7 called Level at the corner of High and Lincoln, and so, like
8 I said, my ability to drive forward was impaired because his
9 car was stopped in the lane in front of me, which is a slow
10 speed violation.

11 Q. Okay. Sergeant Myers, could I ask you, that area
12 on High Street, which you described as the Short North, what
13 city is that located in?

14 A. Columbus, Ohio.

Horton JT day 2 opening

15 Q. And what state?

16 A. Ohio.

17 Q. You said that, Ohio. And what county?

18 A. Franklin County.

19 MR. HUEY: Stipulating, Your Honor.

20 BY MS. CASWELL:

21 Q. And so then you said that you were unable to
22 proceed forward in your lane. Was this vehicle parked or
23 was there someone in the driver's seat? What was the status
24 of the vehicle --

25 A. The car was running. There was someone in the

191

1 driver's seat, and it was not parked. In that section of
2 High Street there are metered spots south of Level, but
3 directly in front of Level, it's a no parking zone, because
4 you can't park that close to another alley; it impairs the
5 ability of the drivers from the cross street to see.

6 So the area directly in front of Level is not
7 somewhere where you can park. And the car -- In order to be
8 legally parked in the City of Columbus you have to have your
9 car within 12 inches of the curb, and the car was in the
10 lane, just as any other car would be.

11 Q. Okay. But not traveling?

12 A. Horton JT day 2 opening
Not traveling, no, ma'am.

13 Q. What time of day was this?

14 A. It was about 2:20 in the morning.

15 Q. Okay. Is your cruiser equipped with video camera
16 as a sergeant's cruiser?

17 A. It is not. Most sergeant's cars aren't equipped
18 with cruiser video.

19 MS. CASWELL: Your Honor, we would request that
20 the witness approach the whiteboard and draw a diagram of
21 the scene.

22 MR. HUEY: No objection, Your Honor.

23 THE COURT: Sure, that's fine.

24 THE WITNESS: (Complies.)

25 BY MS. CASWELL:

↑

192

1 Q. Okay. Sergeant, would you use a different marker
2 and mark your car and this other car that you described for
3 us, one being your car and one being the other car.

4 A. Yes, ma'am. (Complies.) This is my car and this
5 is the black BMW (pointing).

6 Q. Okay. Can you put CPD on your car, please.

7 A. Yes, ma'am.

8 Q. And if you'd remain there, Sergeant. What are
9 those small X's to the far right in the area of Levels

Horton JT day 2 opening

10 along -- on the far right of your diagram?

11 A. Those are parking meters, ma'am.

12 Q. Okay.

13 A. This area here (pointing) is a valet zone earlier
14 in the night, but there are also meters there for when it's
15 not.

16 Q. So at this time, at two o'clock-ish in the
17 morning, was it valet parking or meter parking?

18 A. Meter parking.

19 Q. And you said something about a no parking zone.
20 Where is that located?

21 A. Well, there is no stopping forward of the
22 meters --

23 Q. Okay.

24 A. -- within a -- it's about 30 feet up to this
25 intersection here (pointing).

↑

193

1 Q. And it's your testimony that several people got
2 into that black BMW?

3 A. Yes, ma'am.

4 Q. Do you recall how many?

5 A. I believe three. I don't know that I saw all
6 three get into the car, but I believe there were three in

Horton JT day 2 opening
7 the car when I stopped it.

8 Q. Okay. Was the driver a person that got in the
9 car?

10 A. No, ma'am.

11 Q. So the driver was already seated before any
12 passengers were picked up?

13 A. Yes, ma'am.

14 Q. Okay. Thank you, Sergeant. You can return to
15 your seat.

16 A. (Complies.)

17 Q. Now that cross street that you have listed there
18 is Lincoln. Is that a street or is that an alley?

19 A. It's -- It's an alley. I don't know if they call
20 it a street or not, but it's narrow, it's definitely an
21 alley.

22 Q. Okay. And initially you had indicated -- Strike
23 that.

24 So what did you do when this happened, when
25 you were prohibited from traveling forward to go north on

↑

194

1 High Street because of this black BMW stopped in the street?

2 A. Well, like I said, it's a slow speed violation,
3 so I decided I wanted to stop the driver and talk to him
4 about it. The car continued northbound for about five

Horton JT day 2 opening

5 blocks. I activated my overhead lights, and when I did
6 that, the car turned into the parking lot of the United
7 Dairy Farmers at the southeast corner of High Street and
8 First.

9 Q. And what did you do?

10 A. At that point I called out the stop with the
11 radio and approached the car and made contact with the
12 driver.

13 Q. Okay. Were you able to identify who the driver
14 of that vehicle was that you had stopped in the UDF parking
15 lot?

16 A. Yes, ma'am. I asked him for his Ohio driver's
17 license, and it identified him as Miles Horton.

18 Q. Do you see the driver of the vehicle that you
19 stopped on January 21 at 2:00 in morning in the courtroom
20 today?

21 A. Yes, ma'am.

22 MR. HUEY: We'll stipulate to that, Your Honor.

23 THE COURT: All right. Stipulating to ID.

24 And -- So ladies and gentlemen, there's been an agreement.

25 This is one of those facts you can take as being

↑

195

1 conclusively proven without any other information, that

Horton JT day 2 opening

2 Miles Horton, the defendant in the case, was the driver.

3 MS. CASWELL: Thank you, Your Honor.

4 BY MS. CASWELL:

5 Q. So you identified Mr. Horton as the driver of
6 that BMW. Were there other passengers in the car?

7 A. Yes, ma'am.

8 Q. How many total passengers were in the car, if you
9 recall?

10 A. Is that including the driver?

11 Q. No, the driver would be one person, and the
12 passengers would be the non-drivers.

13 A. I believe there were three other people.

14 Q. Okay. And what, if any, observations did you
15 make as you had contact with the driver?

16 A. As I approached the vehicle, I saw Mr. Horton
17 attempting to put a mint into his mouth, which sort of
18 raised my suspicion a little bit. As I asked him for his
19 driver's license, proof of insurance, I noticed that his
20 eyes were glassy and bloodshot. His facial muscle -- His
21 facial tone was sort of relaxed, his facial muscles were
22 kind of flaccid. He spoke with kind of a thick tongue, a
23 slurred speech. So in addition to that, I also could smell
24 the odor of alcoholic beverage coming out of the car. So,
25 like I said, I asked him for his driver's license, and I

↑

1 suspected at that point that he had been drinking and that
2 he could be impaired.

3 So I asked him if he knew his alphabet. He said
4 that he did. So I asked him to recite part of the alphabet
5 starting with the letter D, as in dog, and ending with the
6 letter X, as in x-ray. He attempted to do that. However,
7 instead of starting with the letter D, as in dog, he started
8 with the letter E, as in Edward, and then as he continued
9 the series, he repeated the letter U twice.

10 At that point I asked him to step out of the car.
11 I wanted to make sure that the odor that I was smelling was
12 coming from him and not from anybody else in the vehicle.

13 Q. Sure.

14 A. So I had him step out of the car and engaged in
15 general conversation with him about, you know, whether he
16 had lived at the address on his license, what he did for
17 work and things like that. And I could still smell a
18 moderate odor of an alcoholic beverage coming off of him
19 that got stronger every time he spoke to me.

20 Q. And this is when he's separated from both the
21 vehicle and the other passengers in the car?

22 A. Yes, ma'am.

23 Q. Outside in the open air?

Horton JT day 2 opening

24 A. Yes, ma'am.

25 Q. Okay. And did you at some point ask him, have

197

1 you had any drinks?

2 A. Yes. I asked him how much he had to drink that
3 night, and he told me he had two vodka and tonics, two hours
4 prior.

5 Q. Okay. And --

6 A. Go ahead.

7 Q. Go ahead. I'm sorry.

8 A. So as we are talking again, I'm just evaluating
9 his demeanor and how he is, and I noticed he was swaying
10 back and forth a little bit as we spoke. And he told me
11 that he was getting nervous and that he was taking
12 medication for anxiety.

13 I asked him how much -- excuse me, what sort of
14 medication he was taking, and he told me he was taking two
15 milligrams of Xanax. I asked him when he had taken the
16 Xanax, and first he told me that he had taken it immediately
17 before going out and picking up his friends, but then later
18 he said, well, actually he took it when he was drinking.

19 Q. So he told you he had taken two milligrams of
20 Xanax while he was drinking, was one time that he gave you;

Horton JT day 2 opening

21 and the other time was -- When did he say that he had taken
22 it the first time?

23 A. Well, when I first asked him -- And perhaps I
24 should back up. He had told me that he had been, I think,
25 at his house. He had been somewhere with the intent to

↑

198

1 remain and then had been called to pick up his friends, and
2 so he said that he had taken the Xanax right before leaving
3 to go pick up his friends.

4 Q. Okay.

5 A. That was the first instance. But then later in
6 our conversation he said that he had actually taken the
7 Xanax when he had been drinking, which he maintained was a
8 couple hours before he started driving.

9 Q. Okay. So he said initially that he had taken it
10 right before he got in the car to drive, and then later he
11 changed his story to say that he had taken that Xanax in
12 conjunction with the alcohol that he drank, which were the
13 two vodka tonics, about two hours prior to you stopping him?

14 A. That's correct, ma'am.

15 Q. Did the defendant tell you anything else about
16 himself?

17 A. He did. During our general back and forth, he
18 told me that he was a law student at Ohio State and was also

Horton JT day 2 opening

19 jointly pursuing his Masters in Business Administration and
20 his Masters in Public Relations and working two jobs.

21 Q. He told you he was doing all that at the same
22 time?

23 A. Yes, ma'am.

24 Q. Joint JD program and an MBA program and two jobs?

25 A. Joint JD, MBA, and Masters in Public Relations,

199

1 and two jobs.

2 Q. Oh, so really like three graduate level programs
3 and two jobs?

4 A. Yes, ma'am.

5 Q. Oh, okay. And what did you say to that?

6 A. Well, as it happened at the time, I had just
7 finished a semester of law school, so it struck me as odd
8 that someone would claim to be involved in that many arduous
9 courses when I know that, you know, just one of those is
10 quite a lot of work.

11 Q. Okay.

12 A. So it struck me as false, and so I followed up --

13 Q. And you, yourself, are working and pursuing a
14 juris doctorate --

15 A. Yes, ma'am.

Horton JT day 2 opening

16 Q. -- or a law degree?

17 A. (Nodding head.)

18 Q. And are you doing your law degree full time?

19 A. Part time, ma'am.

20 Q. And you do your police work full time or part

21 time?

22 A. Full time.

23 Q. Okay. So -- And you have finished -- At this

24 point, on January 21, 2013, how far along are you in the law

25 school program?

↑

200

1 A. I just finished my first semester.

2 Q. Okay. So based on your own personal experience,

3 you found the defendant's statements to be false, and you

4 asked him some additional questions. What were they?

5 A. I asked him what courses he had taken in the

6 fall. Excuse me. First I asked him how his courses in the

7 fall had gone, and he said that they went fine, but, again,

8 gave me a general answer. And I can tell you that among the

9 law students I know, they are acutely aware of how they did

10 in their classes. So the general answer struck me as,

11 again, a little off. So I asked him what courses he had

12 taken in the fall, and he couldn't give me any answer. So I

13 offered a couple examples, you know, contracts, property

Horton JT day 2 opening

14 class, torts.

15 Q. Standard first semester, first year law school
16 classes?

17 A. Yes, ma'am.

18 Q. Okay.

19 A. And it was at that point that the story started
20 to break down for him, and he said, okay, I'm not actually
21 in law school, but, you know, I'm going to apply next year
22 so ...

23 Q. So then he confessed that that was not true.

24 A. Right.

25 Q. So what, based on your training and experience

↑

201

1 with impairment, does that falsification, the grandiosity of
2 his statements, how do those work together or apply?

3 A. Well, alcohol can lower inhibitions, and it can
4 impair judgment, that's what I have learned, you know, both
5 in personal experience and also in the course of my
6 training, and I think that had he given it a moment's
7 thought he would have realized that his answer of pursuing
8 three graduate level programs while working two jobs was too
9 ridiculous to be believed.

10 Q. And in your course as a police officer, are

Horton JT day 2 opening
11 people sometimes untruthful with you?

12 A. They are.

13 Q. Okay. At some point did some other officers come
14 to the scene to offer assistance?

15 A. Yes, ma'am.

16 Q. And who were they?

17 A. Officer Will Scott and Officer Jill Woolley.

18 Q. And why did they come to offer assistance? I
19 mean, you're the sergeant so you're in charge, this is
20 something you can handle, so why are they there?

21 A. Right. Well, as a sergeant, part of my job is to
22 respond to major crime scenes and other incidents of, you
23 know, serious importance, so as a general rule, I'm not
24 supposed to be involved in the processing of an arrest. So,
25 you know, if something did end in arrest, the actual

↑

202

1 transporting process and, you know, eventual slating in the
2 county jail, if that's what it took, an officer would take
3 care of that so that I was free to respond to a shooting
4 scene or something like that.

5 Q. A bigger emergency?

6 A. Correct. Yes, ma'am.

7 Q. Okay.

8 A. Also, it's a matter of routine, officers often

Horton JT day 2 opening

9 stop by other officer's traffic stops to see if they need
10 assistance or not. And seeing as how I suspected that
11 Mr. Horton was impaired, I know that Officers Scott and
12 Woolley are both well trained and have a lot of experience
13 in OVIs, so they were the perfect officers to come help me
14 with the stop.

15 Q. Now, when you say OVI, tell us specifically, what
16 does that mean?

17 A. I'm sorry. OVI is operating a vehicle while
18 impaired. It's our charge for driving while under the
19 influence.

20 Q. Okay. And did you stay on scene then, or were
21 you called away to a different emergency?

22 A. No, I stayed on the scene.

23 Q. And did you watch Officer Woolley and
24 Officer Scott administer any other additional test to the
25 defendant in this case?

↑

203

1 A. Yes, ma'am, I did.

2 Q. Okay. And did you witness the defendant's
3 arrest?

4 A. Yes, ma'am.

5 Q. And was that jointly made by all three of you in

Horton JT day 2 opening
6 the sharing and combining of information?

7 A. Well, when the -- when Officer Scott and
8 Officer Woolley first arrived at the scene, I apprised
9 them -- I told them what I had observed in terms of
10 Mr. Horton's bloodshot and glassy eyes, his slurred speech,
11 the odor of alcoholic beverage coming from his breath, his
12 swaying while he was talking and kind of -- the answers that
13 he was giving me that weren't making a lot of sense. So
14 they were up to speed on everything that had happened up to
15 that point, and so then they did their field sobriety tests
16 and then made the decision to arrest.

17 Q. And you also told them about the Xanax medication
18 and the --

19 A. Yes, ma'am.

20 Q. -- admission of the vodka drinks, correct?

21 A. Correct.

22 Q. Did you witness the defendant being read the
23 Bureau of Motor Vehicles 2255 form?

24 A. I don't recall.

25 Q. Okay. And were you in what's called the BAC room

↑

204

1 at the headquarters when the defendant was there with
2 Officer Scott?

3 A. For most all the time, yes.

Horton JT day 2 opening

4 Q. Okay. Were you an eyewitness to the
5 administration of the breath test?

6 A. I don't think I was back in the alcove.

7 Q. Okay.

8 A. The BAC room is sort of L-shaped, and the BAC
9 machines themselves are back in sort of the short leg of
10 that L, kept in the alcove. It's kind of cramped back
11 there, so I don't think I was back there.

12 Q. Okay. Just to be real clear, Sergeant Myers, the
13 defendant could have legally parked there on High Street to
14 pick up passengers, correct?

15 A. Yes, ma'am.

16 Q. And there's also parking behind the Level bar;
17 isn't that also true?

18 A. I don't know. I have never parked back there.

19 Q. Okay.

20 MS. CASWELL: One moment, Your Honor.

21 THE COURT: Sure.

22 BY MS. CASWELL:

23 Q. And, Sergeant Myers, you turned over the scene to
24 Officers Scott and Woolley so that you would be available if
25 another emergency arose that you needed to go on scene to

↑

Horton JT day 2 opening
1 that. Did another emergency arise? Did you get called
2 away?

3 A. Not that I recall.

4 MS. CASWELL: Thank you. Nothing further,
5 Your Honor.

6 THE COURT: Thank you, Ms. Caswell.

7 Cross-examination.

8 MR. MALLORY: Thank you.

9 - - -

10 CROSS-EXAMINATION

11 BY MR. MALLORY:

12 Q. Good afternoon, Officer Myers.

13 A. Good afternoon, sir.

14 Q. I have a tendency to not speak very loudly,
15 probably too quickly, so I'm going to stand close to the
16 court reporter so she can smack me if I start talking too
17 fast.

18 I'm going to start off with your training.
19 There's a number of terms that you threw out there. Okay.
20 One of them was ADAP, correct?

21 A. I believe I said Advanced FSTs, but, yes.

22 Q. Okay. Is there a difference between Advanced
23 SFSTs and ADAP?

24 A. I don't think so. I think they changed the name

25 of it recently. It was called ADAP when I went through.

↑

206

1 Q. When you were in ADAP, you learned the NHTSA
2 manual.

3 A. Yes, sir.

4 Q. Can you tell the folks of the jury what the NHTSA
5 manual is? Would you tell the folks of the jury what the
6 NHTSA manual is.

7 A. Yes, sir. The NHTSA manual -- NHTSA stands for
8 National Highway Traffic Safety Administration, and they put
9 out a training manual regarding the detection of impaired
10 drivers, and then also how you evaluate to determine whether
11 someone's an impaired driver. And there are a series of
12 standardized field sobriety tests and other tests that the
13 NHTSA manual explains.

14 Q. Okay. This is the basis of your training,
15 correct?

16 A. Yes, sir.

17 Q. Okay. There's not a different manual that you
18 rely on when you learn field sobriety tests, correct?

19 A. No, sir.

20 Q. Okay. So the core of your training is this NHTSA
21 manual?

22 A. Correct.

Horton JT day 2 opening

23 Q. Okay. Do you find it to be reliable?

24 A. Yes.

25 Q. This is what you use to base the decision to make

207

1 an arrest or not make an arrest, correct?

2 A. Well, that along with my personal experience. I
3 have dealt with enough impaired people -- I've seen the same
4 person when they're sober and when they're impaired, I've
5 seen that enough times that I'm confident in my ability to,
6 you know, determine that.

7 Q. Okay. You're confident in your ability to
8 disregard your training and just rely on your personal
9 ability?

10 A. I didn't say. I said --

11 Q. I'm asking questions. Are you confident enough
12 to disregard what the NHTSA manual tells you and just simply
13 make an arrest based on your personal knowledge?

14 A. No.

15 Q. Okay. Fair enough. There's various phases that
16 the NHTSA manual goes through, yes?

17 A. Yes.

18 Q. Okay. The first phase is?

19 A. Vehicle in motion.

Horton JT day 2 opening

20 Q. Okay. And this is when you're taught to look for
21 certain clues of an impaired driver.

22 A. Correct.

23 Q. Okay. How many clues or cues are you looking for
24 in Phase 1, vehicle in motion?

25 A. I don't know. I don't know how many clues are in

208

1 the manual.

2 Q. Okay. You were trained on this manual?

3 A. Yes.

4 Q. Okay. Is it fair to say maybe you just don't
5 remember it verbatim?

6 A. Correct.

7 Q. Okay. 24 clues; does that sound right?

8 A. That sounds appropriate.

9 Q. Okay. Now, in this case, you stopped Mr. Horton
10 for, I believe I heard two things, either the slow speed or
11 impeding traffic.

12 A. Slow speed.

13 Q. Okay. And that was a Columbus City Code
14 violation?

15 A. Correct.

16 Q. Okay. So a parked car can actually be cited for
17 slow speed?

Horton JT day 2 opening

- 18 A. No.
- 19 Q. Are you sure about that?
- 20 A. Yes.
- 21 Q. Okay. So if you parked a car in the middle of
- 22 traffic, you're impeding traffic, you can't be stopped for
- 23 slow speed?
- 24 A. I'm sorry, I -- Is there a person in the car?
- 25 Q. In the car or not.

↑

209

- 1 A. Well, if someone's parked in the middle of
- 2 traffic, they're not parked. So I don't understand the
- 3 question.
- 4 Q. Let me ask you this: How fast was Mr. Horton
- 5 driving, do you know?
- 6 A. When he was stopped in the lane, zero miles per
- 7 hour.
- 8 Q. Okay. So he was stopped?
- 9 A. Yes.
- 10 Q. All right. And you didn't witness him driving
- 11 this vehicle beforehand.
- 12 A. Not that I recall.
- 13 Q. Okay. Back to Phase 1.
- 14 A. Uh-huh.

Horton JT day 2 opening

15 Q. Which indicator or which cue, clue of impairment
16 did you see Mr. Horton exhibit when you decided to pull him
17 over?

18 A. I don't believe any of the 24 clues.

19 Q. Okay. So at this point, again, no reason to
20 believe that he's impaired.

21 A. At this point I was conducting a traffic stop.

22 Q. Okay. When you decided to conduct the traffic
23 stop, there's another phase -- another portion of Phase 1.

24 A. Right, contact with the driver.

25 Q. Contact with the driver is Phase 2, correct?

↑

210

1 A. Okay. Yes.

2 Q. Okay. So the second portion of Phase 1 is the
3 stopping sequence. Okay?

4 A. Yes, sir.

5 Q. Okay. Explain to the jury why the stopping
6 sequence is important.

7 A. The stopping sequence is when -- After we turn on
8 our lights and order the driver to pull over, the stopping
9 sequence is what action they take at that point. The normal
10 response is for someone to brake, pull over to the
11 right-hand side of the road.

12 During the stopping sequence the driver's being

Horton JT day 2 opening

13 asked to do multiple things. They know that they're being
14 stopped, and they're being asked to now do things that they
15 weren't expecting to do, like pull over to the side of the
16 road. So it divides their attention. And I was trained
17 that alcohol affects your ability to divide your attention
18 between multiple things. So the stopping sequence, if there
19 are problems with it, can indicate possible impairment.

20 Q. Okay. Did you create a report in this case?

21 A. Yes, sir.

22 Q. Okay.

23 A. In conjunction with Officers Scott and Woolley.

24 Q. Okay. You two jointly prepared the report?

25 A. The three of us. Well, I actually don't know who

211

1 wrote their part of the arrest report. There is a computer
2 in the BAC room, and so I typed the portion of the report
3 that dealt with my contact and observations with the driver,
4 and then -- I believe it was Officer Woolley wrote the rest
5 of it.

6 Q. Okay. Let's back up to your time at the academy.
7 When you're in the academy, they teach you a number of
8 things; most importantly probably is how to write a report.

9 A. Yes, sir.

Horton JT day 2 opening

10 Q. It's important because -- you, like everybody
11 else -- memories fade over time.

12 A. Correct.

13 Q. So to the best of your ability, when you prepare
14 these reports, you prepare a report that is complete, honest
15 and accurate.

16 A. Yes, sir.

17 Q. Okay. And most importantly, you would include
18 facts that would help prosecute a defendant, yes?

19 A. Correct.

20 Q. Okay. Is it fair to say that during the stopping
21 sequence of this stop, Mr. Horton exhibited nothing --
22 nothing to indicate impairment?

23 A. No, not that I recall.

24 Q. Okay. Thank you.

25 So through all of Phase 1, driving, a vehicle in

↑

212

1 motion, and the stopping sequence, there is no reason to
2 believe he's impaired.

3 A. Correct.

4 Q. Okay. In fact, he actually does some things that
5 would indicate that potentially he is not impaired.

6 A. I wouldn't agree with that statement, if that's a
7 question.

Horton JT day 2 opening

8 Q. Okay. Was he able to successfully divide his
9 attention and pull over correctly?

10 A. Well, it's one thing to say that someone is able
11 to do something correctly, but that doesn't necessarily
12 exclude the fact that they're impaired.

13 Q. Okay. So if --

14 A. But, yes, I didn't notice any problems with the
15 stopping sequence.

16 Q. So if they're unable to stop properly and divide
17 their attention, that means they could be impaired.

18 A. That is an indicator, yes.

19 Q. Okay. But if they are able to, that doesn't have
20 any indication to mean that they're not impaired?

21 A. Well, you're not supposed to be impaired when you
22 drive. So if you're not violating traffic laws and you're
23 driving the way you're supposed to, I suppose it is
24 something to think about, yes, certainly.

25 Q. Okay. You already touched on it. The second

213

1 phase of the NHTSA manual, as you know it, is what?

2 A. Personal contact.

3 Q. Okay. Personal contact is your first contact
4 with Mr. Horton, yes?

Horton JT day 2 opening

- 5 A. Yes, sir.
- 6 Q. Okay. I believe you testified that you noticed a
7 moderate odor of alcohol.
- 8 A. Yes, sir.
- 9 Q. Okay. And at that point, that's when you decided
10 to pull him out of the vehicle?
- 11 A. Well, after we talked a little bit and I had him
12 do the alphabet test.
- 13 Q. Okay. The alphabet test is not a standardized
14 test, yes?
- 15 A. Correct.
- 16 Q. In fact, the NHTSA manual, the manual you're
17 trained on, even specifically tells you you don't use an
18 alphabet test to substitute for a standardized test.
- 19 A. Right, not as a substitute.
- 20 Q. So upon you smelling the odor of alcohol and I
21 believe you testified bloodshot, glassy eyes, that's when
22 you had him perform the alphabet test?
- 23 A. Yes, while he's still in the car.
- 24 Q. Okay. But that's not a test that's been
25 validated by any study, correct?

↑

214

- 1 A. Well, again, it wasn't my intention to screen him
2 for arrest at that point. I wasn't determining whether or

Horton JT day 2 opening

3 not to arrest him. I was determining whether or not to get
4 him out of the car.

5 Q. Okay. What I asked you, though, that is not a
6 test that's standardized or validated in any way, that
7 particular test.

8 A. Not to my knowledge, correct.

9 Q. Okay. When you -- You pulled him out of the car
10 after this test.

11 A. I didn't pull him out.

12 Q. You asked him to get out of the car after this
13 test?

14 A. Yes, sir.

15 Q. Thank you.

16 How long was it when you two were conversing
17 before your fellow officers came?

18 A. A few minutes.

19 Q. Okay. And that's when you guys were exchanging
20 information as to whether or not he was in law school or
21 applying to law school?

22 A. Right.

23 Q. At what point did you decide to call
24 Officers Woolley and Scott?

25 A. I don't know that I ever called them. They --

↑

Horton JT day 2 opening

1 Again, it's not outside of normal practices for officers to
2 come by on stops, especially when a sergeant makes a traffic
3 stop.

4 Q. Okay.

5 A. So I don't know if I called them or not. I don't
6 recall calling them to the scene. I know that they showed
7 up a few minutes after I stopped Mr. Horton.

8 Q. And their role then was to administer the
9 standardized tests?

10 A. Correct.

11 Q. Okay. You had testified about potentially the
12 use of prescription medication, specifically Xanax.

13 A. Yes, sir.

14 Q. Okay. Now you went through a lot of training,
15 right?

16 A. Uh-huh.

17 Q. This is not a case that you suspected drug
18 impairment, correct?

19 A. It's not a case I suspected solely drug
20 impairment; however, it did factor into my total evaluation.

21 Q. Okay. Because you're familiar with drug
22 recognition experts, correct?

23 A. Correct.

24 Q. And if you wanted to do a drug investigation, you
25 would have brought somebody that's capable of doing that,

216

1 correct?

2 A. Well, a drug recognition expert does a
3 post-arrest screening, and so we -- They don't do their job
4 until we have already made a decision whether or not to
5 arrest someone.

6 I've been through ARIDE, which is Advanced
7 Roadside Impaired Driving -- Impaired Driving Enforcement,
8 which talks about recognizing drunk drivers. And, also, in
9 the other training we're taught about the synergistic effect
10 of alcohol and drugs, which means that with -- alcohol and
11 drugs can work in combination with each other.

12 Q. I'm glad you brought that up. What test did you
13 do then to determine whether or not this was a drug-related
14 OVI?

15 A. I didn't do any.

16 Q. Did anybody do any?

17 A. Not that I recall.

18 Q. Okay. So the tests that were given to him were
19 specifically limited to alcohol use, correct?

20 A. Correct.

21 Q. Okay. And even after you arrested him, when the

Horton JT day 2 opening

22 three of you arrested him, no drug recognition expert was
23 brought in.

24 A. Correct.

25 Q. Because if you expected [sic] that this was a

217

1 drug-related case, you would have brought in a drug
2 recognition expert.

3 A. Well, Xanax, if I recall correctly, is a
4 depressant, which is in the same category of drugs as
5 alcohol, so its effect on the body is going to be the same.

6 Q. Okay. Do you know how that affects a breath
7 test?

8 A. I'm sorry?

9 Q. Xanax, do you know how that affects a breath
10 test?

11 A. If someone were only on Xanax?

12 Q. If they're taking Xanax and potentially consumed
13 alcohol earlier.

14 A. Do I know how Xanax affects a breath test?

15 Q. Yeah.

16 A. It doesn't.

17 Q. It doesn't affect it?

18 A. No.

Horton JT day 2 opening

- 19 Q. Okay. Do you have any medical training?
- 20 A. No, sir.
- 21 Q. You talked about college. Where did you go to
- 22 college?
- 23 A. The Ohio State University.
- 24 Q. What did you study there?
- 25 A. Mostly criminology.

↑

218

- 1 Q. Okay. Any physiology?
- 2 A. No, sir.
- 3 Q. Okay. Any biology?
- 4 A. I took anthropology, forensic anthropology, not
- 5 biology.
- 6 Q. Okay. Let's back up. We've gone through
- 7 Phase 1. There's no indicators of impairment. We're back
- 8 to Phase 2. What you've noticed now is odor of alcohol; I
- 9 believe in your report it's moderate odor of alcohol.
- 10 A. Yes, sir.
- 11 Q. It's not illegal to drink and drive, is it?
- 12 A. It's illegal to be impaired and drive. No, it's
- 13 not.
- 14 Q. So it's perfectly legal to consume a couple
- 15 alcoholic beverages and then drive as long as you're not
- 16 impaired.

Horton JT day 2 opening

- 17 A. As long as you're not impaired.
- 18 Q. Okay. Bloodshot glassy eyes --
- 19 A. Yes.
- 20 Q. -- can be caused by a lot of things, yes?
- 21 A. Sure.
- 22 Q. So at this point, have you made your mind up
- 23 whether or not you're going to make an arrest?
- 24 A. At which point? I missed where we are on this.
- 25 Q. Okay. Phase 2, you get him out of the car, he's

↑

219

- 1 done the alphabet test. At this point have you made your
- 2 determination as to whether or not you're going to make an
- 3 arrest?
- 4 A. No. They do the standardized field sobriety
- 5 tests before we make that decision.
- 6 Q. Okay. Because that's what your training is.
- 7 A. Correct.
- 8 Q. Okay. And just to be clear, you didn't
- 9 administer any of the standardized field sobriety tests?
- 10 A. Correct.
- 11 Q. And these tests are the most reliable tools you
- 12 have in the field to determine whether or not somebody's
- 13 impaired.

Horton JT day 2 opening

14 A. Yes, in the field.

15 Q. Okay. Now, there's been several validation

16 studies of these tests, yes?

17 A. Yes.

18 Q. Are you familiar with which studies those were

19 that were validated?

20 A. There were three validation studies done in the

21 1990s that used officers who were experienced in the

22 administration of the field sobriety tests. One was in

23 San Diego; one was in Florida; and I can't recall where the

24 third was.

25 Q. Now, are you familiar with any of the studies

↑

220

1 where a subject actually would pass a number of these field

2 sobriety tests?

3 MR. STEINBERG: Can we approach?

4 THE COURT: Sure.

5 - - -

6 The following discussion was held at the bench,

7 out of the hearing of the jury:

8 THE COURT: Yes.

9 MR. STEINBERG: Judge, I think the issue of

10 validation studies is, one, irrelevant, it can't come in;

11 and, two, anything in the validation study is also hearsay.

Horton JT day 2 opening

12 So the recitation by Mr. Mallory that, well, there are
13 validation studies that demonstrate improper arrest would
14 also be hearsay. We ask that that be excluded and stricken.

15 MR. MALLORY: I'm just trying to say these
16 tests --

17 THE COURT REPORTER: I'm sorry?

18 MR. MALLORY: What I'm arguing is these tests are
19 reliable. I have never done this before because I have
20 never had somebody pass the field sobriety tests. I'm
21 trying to tell the jury how reliable these tests are, and
22 they're ignoring the fact that he passed them. I won't use
23 the word validation anymore.

24 MS. CASWELL: Your Honor -- You're talking about
25 studies, that's what he's saying here --

221

1 MR. STEINBERG: It's not our intention --

2 THE COURT REPORTER: I'm having trouble hearing
3 all of you.

4 MR. MALLORY: I will withdraw the question.

5 MR. HUEY: Start again where you left off.

6 MR. STEINBERG: It is not our intention, because
7 we believe we cannot introduce evidence of percentages --
8 Whether it's a per se trial or an impaired trial, we believe

Horton JT day 2 opening
9 that case law tells us we can't admit percentages and that
10 they're irrelevant by case law, so it's not our intention to
11 admit that evidence.

12 MR. HUEY: I agree with Steve, that's what the
13 case law says. If they're not going to try to do that, we
14 will -- we will withdraw this line of questioning.

15 MR. MALLORY: Yes, that's easy enough.

16 MR. STEINBERG: Thank you.

17 - - -

18 THE COURT: Ladies and gentlemen, after
19 discussion between counsel, Mr. Mallory's going to resume
20 his questioning. The last question is going to be
21 withdrawn.

22 MR. MALLORY: That's correct.

23 THE COURT: Okay. So, ladies and gentlemen,
24 please disregard the last question that was asked.

25 And, Mr. Mallory, you can go ahead.

↑

222

1 BY MR. MALLORY:

2 Q. Phase 3, okay. What's Phase 3?

3 A. Pre-arrest screening.

4 Q. This is where you're gathering evidence to make
5 an arrest?

6 A. Well, you're doing that through all the phases,

Horton JT day 2 opening

7 but pre-arrest screening is specifically where we do the
8 field sobriety testing.

9 Q. Okay. You had a chance to observe my client
10 perform the field sobriety tests, correct?

11 A. I was there. I don't recall watching it
12 intently. My job at that point, because Officers Scott and
13 Woolley were engrossed in the testing, First and High is a
14 very active area, so I sort of stood back and made sure that
15 no one walked up on them and everything was safe.

16 Q. Okay. Right before the field sobriety testing,
17 you testified earlier that Miles was swaying fairly
18 significantly.

19 A. He was swaying noticeably.

20 Q. Noticeably. And that sparked your interest, so
21 to speak, as to whether or not he was impaired?

22 A. It was one of the factors, yes.

23 Q. But he was definitely swaying?

24 A. Yes.

25 Q. All right. Were you able -- Do you recall

↑

223

1 watching him perform the one-leg stand or the walk-and-turn?

2 A. No.

3 Q. Okay. So you don't have an opinion one way or

4 Horton JT day 2 opening
the other as to how he did on them?

5 A. I don't recall.

6 Q. Okay.

7 MR. MALLORY: One moment, Your Honor.

8 THE COURT: Sure.

9 BY MR. MALLORY:

10 Q. Did you participate in the decision to arrest
11 Miles?

12 A. No. I gave the officers the information that I
13 had at the time they arrived, but once they performed the
14 tests, they made a decision to arrest.

15 MR. MALLORY: Thank you. Nothing further.

16 THE COURT: Okay. Thank you.

17 Any redirect examination?

18 Go ahead when you're ready.

19 MS. CASWELL: Thank you, Your Honor.

20 - - -

21 REDIRECT EXAMINATION

22 BY MS. CASWELL:

23 Q. Sergeant Myers, the contact that you had with the
24 defendant and the observations that you made and shared with
25 Officers Woolley and Scott, while maybe not directly out of

↑

224

1 the NHTSA manual, did go to supplement the total totality of

Horton JT day 2 opening

2 the circumstances; is that fair to say?

3 MR. HUEY: I'm going to object, Your Honor. It
4 seems like a completely leading question. I think she just
5 testified with a nod. It seemed like the question was
6 completing leading to me, that she just basically testified
7 and then had him affirm her statement.

8 MS. CASWELL: It's redirect.

9 THE COURT: The objection will be sustained on
10 the basis of leading.

11 MS. CASWELL: Okay. Thank you, Your Honor.

12 BY MS. CASWELL:

13 Q. What did you do with the information that you
14 gathered as it related to the impairment observations that
15 you made of Mr. Horton?

16 A. I gave it to Officer Scott and Officer Woolley.

17 Q. And was it your -- What was the reason that you
18 gave them that information?

19 A. Any time a police officer makes a decision to
20 arrest, we look at -- at everything that's happened. It's
21 no different than if a citizen were to call us and say, hey,
22 this is what I saw. We take that into account along with
23 our own personal observations before we decide to arrest
24 someone. So, you know, any little fact is important in
25 assessing the whole situation.

1 Q. And you shared with them the defendant's
2 admission to consumption of alcohol?

3 A. Yes, ma'am.

4 Q. You shared with them -- Did you share with them
5 that the defendant was untruthful to you?

6 A. Yes, ma'am.

7 Q. Did you share --

8 MR. HUEY: Objection, Your Honor. It's been
9 asked and answered. She's gone over this about five times,
10 and we're really not covering any new ground that was --
11 that was brought up in the cross-examination.

12 THE COURT: Counsel?

13 MS. CASWELL: Thank you, Your Honor. I think
14 that Mr. Mallory used a great deal of reference to the NHTSA
15 manual, and I'm trying to tie in that there were things
16 outside the NHTSA manual as it relates to impairment that a
17 regular lay person, trained or untrained, would have
18 information relevant, and that's what I'm asking about.

19 MR. HUEY: Again, Your Honor, I think --

20 MR. MALLORY: Your Honor, it's hearsay, even
21 though a personal statement --

22 THE COURT REPORTER: It's hearsay --

Horton JT day 2 opening

23 MS. CASWELL: Absolutely not --

24 THE COURT REPORTER: I'm sorry. I lost him.

25 MR. MALLORY: She's asking him something he said

226

1 to another officer out of court to prove the truth of the
2 matter that he asserted; that's hearsay. It's a commonly
3 misunderstood portion of hearsay, but it's hearsay.

4 THE COURT: I don't think it was asking about a
5 statement from another officer. So based on all of that,
6 the objection will be overruled.

7 MS. CASWELL: Thank you, Your Honor.

8 THE COURT: You may continue.

9 BY MS. CASWELL:

10 Q. Defense counsel asked you specifically about this
11 modified alphabet test that you asked the defendant to do.
12 Why did you do that?

13 A. It's an easy thing to ask someone to do without
14 getting somebody out of the car. When we get people out of
15 the car, there are a lot of safety things that we're worried
16 about. So it's an easy test to do, it's quick, and it's
17 something that -- You know, we're all taught our alphabet in
18 grade school, so it's a very easy thing to ask someone to
19 do.

20 Q. Did you learn about that -- Mr. Mallory got you

21 to say that you didn't learn about that test in the NHTSA
22 manual. Did you learn about it in any other training that
23 you received?

24 A. No, it's in the NHTSA manual. It's just not a
25 standardized test in the NHTSA manual, which just means it

227

1 hasn't been subjected to the same level of validation as the
2 other tests.

3 Q. Okay. And do you use it regularly --

4 A. I do.

5 Q. -- when you are trying to determine impairment in
6 people?

7 A. Yes, ma'am, I do.

8 MS. CASWELL: May we approach real quickly,
9 Your Honor?

10 THE COURT: Yes.

11 - - -

12 The following discussion was held at the bench,
13 out of the hearing of the jury:

14 MS. CASWELL: Your Honor, I'd like to ask the
15 witness -- The specific question is, what was his
16 determination as to the defendant's impairment, but I wanted
17 to get the Court's ruling on whether or not I'd be permitted

Horton JT day 2 opening
18 to do that, based on the totality of his observation.

19 The reason the State thinks we can do that is any
20 lay witness could testify as to their belief of impairment.
21 That -- That doesn't require any level of expertise,
22 although maybe we did qualify him as an expert.

23 MR. HUEY: You say you want to ask him did he
24 make a conclusion as to whether or not he was impaired?

25 MS. CASWELL: Yes.

228

1 MR. HUEY: I don't think there's anything
2 objectionable about that.

3 THE COURT: Okay.

4 MS. CASWELL: Thank you, Your Honor.

5 - - -

6 THE COURT: Ms. Caswell, you can continue.

7 BY MS. CASWELL:

8 Q. Sergeant Myers, based on your contact and
9 experience and training, did you make any determination
10 about the defendant as to whether or not he was impaired?

11 A. Yes.

12 Q. And what was your determination?

13 A. I believed he was impaired.

14 MS. CASWELL: Thank you. Nothing further.

15 THE COURT: Thank you.

Horton JT day 2 opening

16 Any recross?

17 MR. MALLORY: Yes. Thank you.

18 - - -

19 RE CROSS-EXAMINATION

20 BY MR. MALLORY:

21 Q. We're talking about other things that you took
22 into consideration to form this opinion. Okay. Back to
23 divided attention tests. The NHTSA manual repeatedly talks
24 about divided attention tests, yes?

25 A. Yes.

↑

229

1 Q. Okay. Because impaired people have a hard time
2 doing two things at once.

3 A. Yes.

4 Q. Okay. For instance, one thing you're trained to
5 do is ask for driver's license, insurance and registration.

6 A. That's one of the techniques, yes.

7 Q. Okay. And you did that here.

8 A. I asked him for a driver's license and proof of
9 insurance, I believe.

10 Q. Not registration?

11 A. No.

12 Q. Okay. Whatever you asked him for, he provided

Horton JT day 2 opening

13 adequately.

14 A. (Nodding head.)

15 Q. This is another divided attention test that he

16 so-called would have passed?

17 A. Certainly, yes.

18 Q. Okay.

19 MR. MALLORY: Nothing further.

20 THE COURT: All right. Thank you.

21 And, Sergeant Myers, you may step down.

22 THE WITNESS: Thank you, sir.

23 MR. HUEY: Did you want to approach?

24 MR. STEINBERG: Is this about scheduling?

25 MR. HUEY: Yeah.

↑

230

1 THE COURT: No, that's okay. I will handle it.

2 Ladies and gentlemen, as I stated yesterday, we

3 try to stop the trial at convenient places, and we have now

4 finished with a witness. And I promised you to be done as

5 close to 5:00 as we can. We were a few minutes over

6 yesterday. But I know that if we get involved with another

7 witness, I'm not going to be able to stand fast with that.

8 So at this point, I think it's appropriate to recess for the

9 day.

10 And does anybody have any issues tomorrow?

11 (No response.)

12 THE COURT: I can't remember if I mentioned it or
13 not, that we may or may not do this tomorrow afternoon, but
14 I have decided that we will recommence the trial tomorrow.
15 And I'm going to ask you to be back at 1:00 again. I'm
16 going to try real hard to get the morning docket done and,
17 hopefully, convene as soon after 1:00 as we can. In fact,
18 let's make it 1:15 for tomorrow. I don't think I can be
19 that optimistic of 1:00. So 1:15 just be back on the 9th
20 floor at the Jury Commissioner's office.

21 And I will remind you that while we're recessed
22 for the evening until tomorrow afternoon, please do not
23 discuss this case among yourselves or with anyone else, and
24 don't let anybody talk to you about it either. Also,
25 finally, do not express an opinion about any determination

↑

231

1 that you will be making in this case. So we'll stand in
2 recess for the day.

3 Everyone please rise, and Mr. Beck will see you
4 out.

5 - - -

6 Thereupon, the jury withdrew from the courtroom.

7 - - -

Horton JT day 2 opening

8 THE COURT: All right. Anything else we need to
9 talk about before we recess?

10 MS. CASWELL: No, Your Honor. Thank you.

11 MR. HUEY: Thank you very much.

12 THE COURT: Let's make it 1:15 tomorrow.

13 - - -

14 And, thereupon, court was adjourned until
15 1:15 p.m. on Wednesday, October 9, 2013.

16 - - -

17

18

19

20

21

22

23

24

25



The First-Person Presentation at Trial: Using Its Power, Managing Its Risks

Maren Lynn Chaloupka
TLC '99



Gerry Spence teaches us that the power of speaking in the role of another, is its unique ability to draw the listener into the story. Compare the difference, Gerry suggests, between telling a familiar story like this:

The papa bear complained that someone had slept in his bed. Then the mama bear also complained that someone had slept in her bed. Finally, the baby bear complained that someone had slept, and was still sleeping, in his bed.

Versus:

The papa bear says, “*someone’s been sleeping in my bed!*” (Adopting the voice and role of “papa bear”)

Then the mama bear says, “*someone’s been sleeping in my bed!*” (Adopting the voice and role of “mama bear”)

And finally the baby bear says (again, adopting this role), “*someone’s been sleeping in my bed—and there she is!*”

In one version, the listener hears a series of reports; in the other, the listener is in the room, hearing the tone, inflection, and emotion in the voices of each of the three bears.

And so we teach students to step into the role of a character in the story and speak from that role in the first person. This is a creative and dynamic approach to storytelling that can be used in opening statement, in final argument, in witness examinations and even in depositions. In exercises at Trial Lawyers College and in our Local Working Groups, taking the risk of stepping into role can help shake a protagonist out of a rut in the way he or she thinks about a case. The protagonist can discover new insights into a character’s motivations and fears by speaking in role. Presented properly in trial, a TLC alum can captivate the jury in a uniquely gripping manner, connecting each juror to an element of the story on a deep emotional level.

But there is a live concern that some graduates leave Thunderhead Ranch with the belief that no matter the type of the case, no matter the facts of the case, and no matter the unique circumstances of the client (whom we are dutybound to honor as an individual), speaking in the first person as someone or *something* is always appropriate. Worse yet is the belief that there are no guidelines, no risks, and no reasons to adapt what we produce in first person at Thunderhead Ranch to the different environment of a courtroom. Imagine a new owner of an AR-15, so enamored with this exciting and interesting tool that he uses it not only for shooting at a range, but also for weeding his rose garden.

My lofty goal in this article is to build on what we teach at the Ranch and at regional seminars about the use of first-person presentations in trial. We know the “how”: I hope to provide some guidance, with the assistance of staff who contributed their wisdom and experience, as to the more fundamental questions of “whether” and “when” and even “when not to.” All of these decisions must be made, deliberately, before trial—instead of spontaneously emoting in role in a manner that confuses or repels the jury and, in so doing, jeopardizes our clients’ best chance to obtain justice. These are decisions to be made from planning and practice, beginning *but not ending* in the risk-free laboratory of Thunderhead Ranch or a Local Working Group.

In short, the more we plan and prepare, the more likely our first-person presentation will survive objections and will engage, rather than confuse, our audience—the jury and judge.

WHAT IS THE PURPOSE OF A FIRST-PERSON PRESENTATION IN OPENING STATEMENT (OR FINAL ARGUMENT)?

Asked what the purpose of a first-person presentation in opening statement is, Joey Low answers that it is “a tool or technique to improve communication—‘communication’ being the transfer of information from one person to another.” Johnny Zelbst teaches that “studies tell us that our recall of the events, and our subjective understanding of the events, is better preserved in a first-person rendition of the event.” Properly done, a first-person presentation is a method to present the same evidence you would present speaking as a narrator, but with unique emotional content. For you to speak in the role of another can assist the jury to understand perspective that may not come through clearly if you speak as the narrator.

What is not the purpose? The purpose is not to enable an end-run around the rules of evidence. The purpose is not to misstate or represent the evidence that you reasonably expect to admit at trial. And, the purpose is not to show off or to rattle the judge’s cage. There is a difference between employing a first-person presentation as a deliberate means of keeping the jury’s attention while you tell the story, versus employed a first-person presentation to get attention for attention’s sake.

Joey Low warns that first-person presentations should not be used as a substitute for dealing with our fear by being playful or dramatic. Similarly, Bob Dawson cautions that “first person is not a substitute for being real.” Nor is a first-person presentation *the same* as being real.

Jeff Hill draws an excellent analogy between first-person presentations at trial and the painting exercise at TLC:

The painting exercise has many functions, but one purpose for which Gerry includes it is what it teaches us about the use of precious, limited space. We only get so much opening statement—and only so much juror attention—just as we only get the space on the canvas.

Although there are a few modern art pieces where the whole canvas is covered in a dimensionless plane of single color, for the most part, successful paintings—the ones that really hold our interest, and move us, and that have been valued through the ages—rely on composition, contrasting values (lights and darks), an interplay of colors, use of negative and positive space. Often the effect of these carefully arranged elements upon is unconscious. The artist achieves her emotional purpose with-

out us being consciously aware of how she is doing it. Works of art are mostly created by toil and deliberation and calculation. The artist’s choices are all intentional. Good painters, regardless of genre, study and practice their craft, and possess a strong methodical work ethic, no less than lawyers. A painting succeeds when we are so drawn in that all the painter’s plotting and scheming are invisible, and we experience an emotion.

When the first person is used inappropriately, the “painting” cannot hold our interest. We become aware of the lawyer. We are transported not into the virtual reality of the scene in the story (as the lawyer might have hoped by using present tense and first person), but painfully away from the story into the present moment of being stuck in our chair, held hostage to the lawyer’s performance. The lawyer has slopped red paint all over the limited canvas of our attention and our goodwill. The lawyer is intruding upon the story.

Though the lawyer is always the storyteller, the lawyer should be subordinate to the story. The persona and performance of the lawyer should inject their mark only when they further the story. Otherwise the story in the jurors’ minds becomes about the lawyer’s performance, the lawyer’s ego, the lawyer’s awkwardness, the lawyer’s disconnection from the group; and those stories steal attention from the story of the case, and further alienate the lawyer from the group.

“It all begins with you” is not synonymous with *“it’s all about you.”* Our innate desire to perform is not necessarily our friend, and certainly is not necessarily our clients’ friend. If our decision tree includes “will my fellow Warriors think this is kick-ass,” “will Gerry be impressed,” or “will other lawyers in my community be in awe,” then we have lost our appropriate focus on the client, and the evidence, and the story our client needs us to tell.

THE MOST IMPORTANT ROLE REVERSAL

You’ve reversed roles with your client. You’ve reversed roles with the villain of the story. You’ve reversed roles with eyewitnesses and experts. You may even have reversed roles with characters that no longer exist or that never existed. This is good and necessary work in preparation. But before you commit to a first-person presentation in your opening statement (or in any other part of the trial), you need to reverse roles with your jurors.

Has your juror been trained in psychodrama? Has your juror deliberately spent time in the role of another since high school drama club, if ever? What must a juror think, watching a first-

Bob Dawson advises that the trial attorney needs to be able to answer clearly why first-person is better than just talking with the jury as a narrator. This requires knowing our case; it requires thoughtful consideration of each part of the story our clients need us to tell; and it requires identifying what part of the story is its crisis moment, where a first-person presentation can have the most impact and an appropriate impact.

person presentation borne from the lawyer's desire to "take a risk" for the sake of risk-taking—not in the risk-free laboratory of Thunderhead Ranch, but in the courtroom?

I'm not thrilled to be here. I've been disrupted from my normal routine. I'm worrying about my pissed-off boss. I'm worrying about child care. I'm worrying about who will care for my elderly parent while I'm sitting in here. I've just had to answer questions about personal matters, in front of strangers, which I did not appreciate. There's going to be science in this trial, and I'm not good at science. I am not totally sure what is expected of me.

And now this lawyer is prancing around in front of us pretending to be a shovel? Are you serious?

Call me when this is over...I'll sit through this because I have to, but I am not giving any credence to anything Shovel Guy says.

Think about how your first-person presentation will strike a juror, new to this process and unsure what to expect. Will your novel idea really focus the juror on your client's interest? Or will your idea distract the juror from your client, and cause the juror to discredit you as a messenger?

Jeff Hill observes that in upholding our sacred duty to the client in trial, "it is the jury's needs that we must honor impeccably." Elaborating, Jeff says:

Lawyers make the mistake of blindly concluding that what the juror happens to need is the thing that the lawyer *feels the impulse to give*. The lawyer must learn to view his or her own impulses with distrust—to see them as the impulses of a person who craves attention, or power, or adoration, or respect, or whatever the case may be. In other words, we must admit that we were driven to this profession in flight from our own insecurities. We sought out this work to compensate for them, and we still have not escaped them—and they cause us to put ourselves first.

If you want the love, and adoration, and respect of the jury—and we all do—then get over yourself, be patient, and put the jurors' needs first.

Put otherwise, we must not impose our own self-importance onto the different and very personal experiences of jurors whom, even after the best *voir dire*, we hardly know.

This is NOT to say "do not give opening statements in first-person in the role of another." It is, however, to say "use your head in your decisionmaking—and reverse roles with the jurors." New to the courtroom (even if they have served on a jury in the past), jurors want to feel like their work will not be in vain. Jurors want to feel like they are receiving a fair presentation of the facts. While jurors do not want to be bored and do appreciate our care for them, they do not like cleverness.

We can tell a story in the role of another effectively, without alienating our jury, if we tune into their needs—not their need

to be entertained, but their need to understand the story, and their need to be respected, and not manipulated, by us. They need for us to think not, "*this'll* get their attention!", but rather "how can we understand the story together?"

WHAT COULD GO WRONG?

Connie Henderson reports a story about an attorney who decided, in final argument in a vehicular homicide case, to reverse roles with the victim. The victim's widow and children watched, aghast, from the gallery, and broke down in tears. Jurors reached a swift decision to convict. The lesson is that if our first-person presentations evoke feelings of outrage, those feelings should be outrage at the villain—not feelings of "how dare you purport to speak for the innocent victim?"

A different unreasonable risk arises if we give a first-person presentation in opening statement when there is a live risk that the story we are presenting in opening may change in the presentation of evidence. Colby Vokey reports that in a recent rape trial, he anticipated that the accuser's story on direct examination would change under cross-examination. "I didn't want to put something into action for the jurors to burn into their minds how the events actually unfolded," Colby explains.

This caution applies to civil cases as well. Do not say anything in a first-person presentation that you can't deliver in evidence. We lose credibility whenever we fail to keep promises during presentation of evidence that we made in opening statement, regardless of whether we used a first-person presentation—but the loss of credibility is all the more attenuated if we have employed a novel and attention-getting storytelling method like a first-person presentation.

The bottom line is *know your case*. Don't plan your trial during trial. There is a difference between preparing for trial so that you can be nimble and can react quickly, versus thinking you can make up for a lack of preparation by emoting all over the jury in a first-person presentation. Selection of the first-person arrow from the quiver when we know our case shows the jury our confidence that the story we are telling is true; stumbling into first-person when we are unprepared shows the jury that we are panicked and are making it up as we go.

And while TLC bravado can mislead us to think we shouldn't care if opposing counsel objects and if the judge sustains the objection, that bravado can become a barrier of stubbornness that separates us from the client and from the jury. Sometimes it's worth it to take the punch of an objection and an adverse ruling; but our goal in trial is not to prove our own toughness or to unfurl our oppositional defiant disorder. Our goal is to serve the client. Needless provoking an objection, or insisting on blunt reversion to a first-person presentation after the judge shuts it down, does not serve the client. It can, however, cause the jury to question your competence.

The decision to include a first-person presentation in our opening statement or final argument should not be made "in the moment." It should be made thoughtfully, and on searching review of what the evidence will, might and will not show. Invite the honest feedback of a colleague who knows the case—

and structure the question we want the colleague to answer. The question is not, “is this interesting/radical/attention-getting”; but rather “is this supportable based on the evidence,” and “is this too jarring for the jury?”

And, it matters if you have done your pretrial work in educating the judge about the facts and issues in the case. That doesn't mean giving away necessary trial strategy to the opposition. It means showing up prepared for every hearing, filing thoughtful motions, and submitting well-written and well-researched briefs. All of that demonstrates to the judge that you've got her back if her rulings are reviewed on appeal. It educates the judge that you are not a “last-minute lawyer”—that you have a plan and you are executing it, and your first-person presentation is part of that plan.

WHAT DO THE COURTS SAY?

Most courts that have reviewed the propriety of first-person presentations have done so in the context of a prosecutor's final argument. For example, the United States Court of Appeals for the Ninth Circuit found that a prosecutor had committed misconduct by recounting the crime from the victim's perspective in a manner that misstated the evidence:

[T]he prosecutor engaged in misconduct when he delivered a soliloquy in the voice of the victim. By doing so, the prosecutor inappropriately obscured the fact that his role is to vindicate the public's interest in punishing crime, not to exact revenge on behalf of an individual victim. Furthermore, the prosecutor seriously risked manipulating and misstating the evidence by creating a fictitious character based on the dead victim and by “testifying” in the voice of the character as if he had been a percipient witness. Finally, by testifying as [the victim], the prosecutor also risked improperly inflaming the passions of the jury through his first-person appeal to its sympathies for the victim who, in the words of the prosecutor, was a gentle man who did nothing to deserve his dismal fate.¹

The Ninth Circuit's reasoning focuses on prosecutors, whose role in the justice system is subject to that unique definition; yet we too have burdens to not manipulate or misstate evidence. If we employ the first-person presentation recklessly or inappropriately, we are responsible for the adverse precedent we set that unfairly limits others.

A second case in which a prosecutor's misuse of the first-person presentation generated helpful direction is *People v. Richmond*, wherein the Illinois Court of Appeal affirmed a conviction for rape.² The prosecutor had delivered her entire opening statement in the first-person from the perspective of the accuser, beginning with “hi. My name is RJ, and I'm eight years old. I'm going to tell you about something that happened a couple of years ago when I was just a little kid.” Remaining in role, the prosecutor then said, “now, my State's Attorneys, Miss Roseanne McDonnell and Theo Jamison then, they're going to present this evidence to you today.” The defendant assigned error to the trial

court's allowance of the prosecutor's first-person presentation.

The Illinois Court of Appeal did not approve of what the prosecutor had done. In explaining why the prosecutor's use of first-person presentation was improper, the court provided specific boundaries that we can use as guidance for our presentations:

Although the use of a first-person delivery may not be error under other circumstances, in this case it improperly bolstered the credibility of the State's star witness, an eight-year old. The State delivered R.J.'s version of the facts much more eloquently than R.J. did from the witness stand. *Moreover, the State continued to use R.J.'s perspective when discussing evidence that, according to the trial testimony, R.J. was never exposed to.* For example, “R.J.” told the jury in opening statement about Richmond's confession, even though she was not present when Richmond made the statement.

The State's use of “my State's Attorneys...they're going to present this evidence to you today” further placed the State in the role of a witness. The State's method of delivery implied the State's Attorneys would personally vouch for the credibility of R.J.'s testimony.

Again, the takeaway is that we must not misstate, misrepresent or manipulate the evidence—which includes presenting surplus reality as actual reality, as the prosecutor of *Richmond* did in discussing evidence in role as the accuser never saw. Whether telling a story in role is “more eloquent” or “more passionate” is subjective and can vary from one judge to another; but whether a first-person presentation misstates the evidence is objective and is always improper.

The Ninth Circuit considered whether, “had the prosecutor delivered exactly the same speech in the third person, it would have been proper.” This is a helpful consideration for us, in deciding whether to employ a first-person presentation. Are we resorting to first-person presentation to try to slip in inadmissible evidence (such as hearsay)? Do we wish to step into role so that we can show the jury something that is not fairly representative of what the evidence will show? Does the validity of our first-person storytelling depend on the uncontrollable variable of whether the court will admit a hotly-contested piece of evidence? Are we trying to represent surplus reality as actual reality? If the answer to any of these questions is “yes,” we have to pull back on the reins.

The unpublished decision of the Michigan Court of Appeals in *People v. Smith*³ is one of the few appellate decisions addressing the use of first-person presentations by defense counsel. The defendant appealed her convictions for firearms offenses, asserting she was denied the effective assistance of counsel. Among her complaints was that in opening statement, her trial counsel “purported to speak as defendant in the first person,” which she contended rendered her case “dead on arrival.”⁴ The court observed that

it is difficult to see how counsel's opening statement constituted ineffective assistance where the thrust of the

statement supported her theory of the case that the victim, an older man, took advantage of defendant's youth and inexperience. Indeed, this is why the prosecution objected to the statement in the first place.

Though the *Smith* court provided little detail of the defense counsel's argument, even this scant information helps to clarify what is allowed: a first-person presentation that fairly reflects the evidence and that thoughtfully introduces the theory of the case.

At a trial management conference before trial commenced, the defense lawyer of *United States v. LeMieux*⁵ informed the court and the prosecutor that he planned to make his opening statement in role as his client, speaking in the first person as the defendant. The prosecutor objected. Sustaining the prosecutor's objection, the court explained its concerns:

For what part of the narrative is the jury to conclude that the defendant has personal knowledge? When is the lawyer, speaking in the defendant's voice, giving information of which the defendant does not have personal knowledge and that actually can come only from other witnesses? When is the lawyer giving the jury his own opinion (prohibited conduct: the lawyer's view is irrelevant and inadmissible)? Is the narrative in the defendant's voice a promise that the defendant will actually testify?⁶

Again, while the judge may very well have gotten it wrong—and it is hard to know, based on the brief factual discussion in this opinion—the concerns expressed by this judge clarify our boundaries and help us to make good decisions about what is, and is not, within those boundaries in our first-person presentations.

Many opinions in which courts disapprove first-person presentations include concerns that a first-person presentation is too emotionally provocative. If we are defending the use of a first-person presentation, it is important to clarify to the court that those concerns are not the primary drivers of decisional authority disapproving first-person presentations. The primary drivers are findings that a lawyer misstated the evidence in his or her first-person presentation. If evidence evokes an emotional response, that alone does not make the evidence inadmissible; nor does a narrative presentation become objectionable simply because it evokes an emotional response. **But an emotional response evoked by misrepresentation of the evidence is always improper.** If you do not misstate the evidence, this decisional authority should not bar your first-person presentation.

RISKS IN CRIMINAL CASES

If you are trying a criminal case, it is highly risky to speak in role as your client in opening statement if your client is not going to testify. Colby Vokey explains that “[t]elling the story in first-person is a promise to the jurors that they will hear the same story from that person from the witness stand.” Breaking that promise can have serious and severe consequences for your client.

First, the judge may construe your first-person presentation in

role as the defendant as a promise, made in opening statement, that your client will take the stand. Consistently, the decisional authority repeats that if the jury convicts the defendant, and when the failure to present the promised testimony cannot be chalked up to unforeseeable events, the attorney's broken promise may constitute ineffective assistance of counsel:

When a jury is promised that it will hear the defendant's story from the defendant's own lips, and the defendant then reneges, common sense suggests that the course of trial may be profoundly altered. A broken promise of this magnitude taints both the lawyer who vouchsafed it and the client on whose behalf it was made.⁷

On this point, the decisional authority actually may reflect a predictable juror reaction, if jurors believe your presentation means the defendant will testify and you don't deliver. If you are taking the risk of a first-person presentation in role as your client when you know your client will not testify, you must be *enormously* careful that your presentation does not come through as a promise to jurors who do not know your trial plan in advance.

Nor do you want the judge to allow the prosecutor to comment on your client's failure to testify in final argument (or rebuttal), for the reason that you arguably opened the door to such commentary in your first-person presentation. For example, if you use a first-person presentation to explain why your client is not testifying, *i.e.*, “I can't take the stand without snitching on X—and I'm not a snitch!” or “I want to testify, but I'm afraid of how the prosecutor will twist my words!”—this can open the door to a prosecutor's comment on your client's failure to testify.⁸

A third risk is that a court may decide that since defense counsel was allowed to speak in role as the defendant, evenhandedness requires that the prosecutor must be allowed to speak in role as the victim. That type of presentation by a prosecutor is generally disallowed (see below) precisely because of its inflammatory impact. If, by an ill-thought-out and ego-driven first-person presentation as a defendant who does not testify, we open the door to a prosecutor's devastating reenactment of a rape or murder in role as the victim, we would badly betray our client's trust.

There are few absolutes in trial practice, and I am not in this section advocating for an absolute bar on first-person presentations in criminal cases where the defendant will not testify. I am, however, advising readers of the risks—including the appellate courts' lack of appreciation for creativity. And, I am urging that we consider these risks and make thoughtful and prepared decisions to give first-person presentations, rather than impulsive “hold my beer and watch this!” decisions. Educating your judge with solid work before trial will help to comfort the judge during trial that when you step into role, you are executing a careful plan instead of flying without a net.

SEAMLESS, NOT STILTED

Joey Low tells us that “transitions are genuine introductions as if introducing a friend to someone who is very important. You don't want them to miss it, but you do not overdo or oversell.”

While we have often counseled new students that transitions are important, we may have fallen short in explaining exactly what makes a helpful transition. It is not enough to simply spin around in a circle and then announce, “and now I’m Fred!”

Joey provides these helpful examples of how to transition into a first-person presentation in a manner that does not announce to the world, “here I am, putting on a show!”:

When I need to put a piece of evidence into action during the Opening, I often like to have a conversation with the jury that sounds like this: “When I read this (or heard this fact) I had to ask myself what that would look like. So I put it into action. Here is what I discovered.” And then I launch into the story and reenactment. The reason that I do this is because it actually puts into the story format the transition itself and it causes the listener to anticipate and therefore participate. The more that people participate, the more information that they receive.

On direct examination and cross-exam, I will ask, “What does that look like?” Can you show us what you are *trying* to describe?” The reason that I use this as but one transition is that it cues the listener that the witness has more truth, and can tell more by showing. The listeners get that they are missing something, and the lawyer wants them to see it and is asking the witness to share even more through seeing.

In final argument, I often reenact surplus reality—meaning what should have happened but did not. This is by design a way to cause the juror or listener to ask, “why didn’t they just do that?” The listener or juror will see how easy the act could have been and wonder why the actor made a different decision. The transition into this demonstration can be as simple as, “What would a reasonable person have done? A person who is fair, considerate and mindful of the greater good? It may have sounded (or looked) like this...”

Notice that Joey’s transitional hooks comport with the so-called magic words in the rules of evidence. A judge who hears Joey’s hooks will understand that what Joey is presenting is within the lines, and is not a trick.

Transitioning into the voice of a second character deserves care as well. At Grad Course II in August 2015, storytelling instructors from “The Moth” explained that when they bring other characters into the stories they tell, it is not a matter of awkwardly hopping sideways to signify that someone else is talking. The dialogue and words of other characters flow naturally through the storytelling, balanced with narration, as natural features of a rich, arced story.

J.R. Clary tells of a Louisiana playwright named Jamie Wax, who wrote a play called Going to Jackson. In that play, Wax takes a trip to Jackson, Louisiana, the home of the state hospital for long-term care of the mentally ill. Wax tells the entire story

in what J.R. describes as “an endlessly-changing panoply of first-person characterizations,” all without the crutches of costuming, set changes and such. Wax transitions from one character to the next seamlessly: his body shifts, and his voice changes, without any other reference points.⁹ J.R. recommends that we could learn from Wax’s skill in this area.

A SPECIAL CAUTION: FIRST PERSON PRESENTATION AS AN INANIMATE OBJECT

In exercises to discover the story, it can be very helpful for the protagonist to get out of his or her head by stepping into role as something that is not human, or not even alive. Some alums have taken the role of an inanimate object out of the TLC laboratory and into the courtroom. This has two primary incarnations:

- *The object at issue in the case.* Some believe we can tell the jury the secrets known to a defective product, a dangerous condition on the premises, or the weapon used in a crime. For example, “I’m a fence! The landowner who put me up knows I’m weak and frail and knows I can’t keep cattle in the pasture and off of the road. Look, here comes a cow! Someone stop this cow before he runs through me and onto the road where he can be hit by a car! Help!” Or, “I am the Intoxilyzer 5000! I can give information about whether a driver is drunk—but not if the officers don’t clean me and calibrate me regularly. This officer didn’t even check to see how accurate I am, like the regulations require him to do. Now he’s using me to test a driver when I’m not even cleaned and calibrated! Help!”
- *An object present at the crime scene or scene of injury that, while not part of what happens, is an “all-seeing eye.”* Some believe that if we speak as a painting on the wall or as a video camera on the ceiling or as a barstool, this captivates the jury more effectively. “I’m just the travel mug in this trucker’s cab, riding along while he drives. I’ve been here a long time and he’s supposed to be resting now. I’m watching him, from the cupholder, while he texts an escort service to cancel a date because he wants to keep driving.”

I have not identified any decisional authority that addresses the legal propriety of either type of inanimate-object presentation. But in terms of how ordinary jurors will react, I personally would advocate for a rebuttable presumption *against* speaking to the jury as an inanimate object.

This rebuttable presumption would be that jurors will react poorly. At best, they will see such a presentation as some sort of trick and a reason for even more skepticism. At worst, they will see the lawyer who gives such a presentation as unhinged. Either way, this type of presentation creates a substantial risk that the lawyer will lose her credibility and never regain it.

If, as you prepare your opening statement, you are considering a first-person presentation as an inanimate object, ask yourself: in telling the “all-seeing eye” overview of the action, is it really necessary to pretend to be a sprig of mistletoe or a stubbed-out cigarette? Our goal is to tell the jury everything that happened, showing the context of each action and each omission. How do we advance that goal by pretending to be any random object in

the room? Why is a puddle on the floor or a cell phone on the table a better storyteller than you, speaking as the “all-seeing eye”?

But we tried it at the Ranch—my staff put me in role as the line between legally drunk and not, and we all took turns producing information as that line! Guilty as charged. Teaching exercises call on the creativity of staff and the group. Sometimes, in our search for the solution or the answer or the missing piece of the puzzle, we take the risk of asking a protagonist to assume an unusual role. Sometimes getting the protagonist out of his or her head takes putting the protagonist in the role of an inanimate object, or of a character who only exists in surplus reality. Disruption can yield the answers we are seeking.

But it is important to distinguish between a disruptive exercise—*especially* if it is productive—and a modus of communication to our actual jury. Our jurors have not spent three weeks at Thunderhead Ranch with instructors who train them in communication methods. Our jurors are skeptical. Our jurors are trying to reconcile the court’s instructions with the sight of you pretending to be a pothole.

Our work is not done because the protagonist has laudably taken a risk in an exercise, and has presented an opening or closing in a different voice (human or otherwise). **Taking that risk in an exercise is the first step—it is not the final decision for trial.** Staff, Local Working Group leaders and group members should check themselves when the creativity that a protagonist just demonstrated in the Big Barn should not be presented to a jury.

We can be of best service to our students and fellow group members if, instead of ending the exercise, we take time to ask the protagonist and the group how that demonstration can be best made appropriate for a courtroom presentation. It might be perfect as is—but that is a conclusion reached after deliberation, not a presumption. The protagonist and group should work together to examine whether the exercise should be modified for the courtroom and, if so, how.

Taking a risk at Thunderhead Ranch opens the door. We then have to carefully and thoughtfully decide what, in trial, should come through that door.

BUT MILTON DID IT!

Milton Grimes is one of the most talented practitioners of the first-person presentation in the TLC constellation. Many of us have seen his opening statement from *State v. Manuel Salazar*, presented almost entirely in role as his client. Seventeen years after I attended TLC as a student, I remember Milton in role as Martin Luther King, Jr., asking us, “*did I die in vain?*” Milton can genuinely disappear into a role in a manner that is seamless and fluid, and no one can reasonably question his commitment to that role.

You’re not Milton. Neither am I. We cannot make trial decisions because of what someone else did in another case—because we want to imitate that person, or because we think that what worked for another person in a different case in a different court, before a different judge and jury, authorizes or even challenges us to do our own version in our client’s case.

But we can learn from Milton, about how to decide whether and when and how much to present in the role of another.

Though he makes it look spontaneous, Milton does not wait until he is in the moment to decide whether to give a first-person presentation. He discusses in advance the story he needs to share, and the viability of presenting it in role, with friends, colleagues, TLC brethren. He learns the high points, low points and danger points and where each of those points fits into the story he needs to share. He decides what needs to be reframed and what needs to be highlighted. “When you have all of these things understood with your story,” Milton says, “your intelligence will tell you what the turning point is that you can demonstrate, that you can illustrate, and that you can show and tell the best.”

The first-person presentation is what Milton uses to show the turning point of the case. After much work in discovering the story of the case and the story of every character in the case, Milton identifies one moment that he is driving toward:

What part of the case do you want *the punch* to be in?
Don’t waste this on entertainment; do it for *the punch*.
Make the listener will see, feel, hear, smell, experience
the punch. That moment, that tipping point moment.
Everything needs to drive to that moment.

Put otherwise, Milton doesn’t just give a rambling presentation to show the listeners what kinds of things go through a character’s head from day to day, or to give voice to a part of the human body or to a bullet. He picks a moment of impact, and drives toward that moment in the role that the jury *must* see to understand. The turning point that Milton illustrates is the point that reveals who that character really is—hero or villain.

In *Salazar*, the turning point was when the soon-to-be-killed cop said, “*motherfucker, I’m gonna kill you!*” Milton wanted the jury to know how hearing and seeing that from the cop felt to a boy who was surrendering after the cop had beaten him. He wanted the jury to understand that from the moment he heard “*motherfucker, I’m gonna kill you!*”, the boy was fighting for his life.

There was another purpose to presenting that moment in role in opening statement. Specifically, Milton explains that “if I hadn’t done first-person, the jury wouldn’t have been ready for Manuel’s emotional testimony.” Because Milton had done the work of reversing roles with the cop, and discovering the story with Manuel, so that he could produce that “*motherfucker, I’m gonna kill you!*” moment with all of the tension and terror and imminent threat of that moment, the jury was better able to understand Manuel’s experience. When Manuel took the witness stand and raised his hand to be sworn, the jury was ready to hear him describe his feelings in the moment that Milton had shown in opening statement.

Milton emphasizes that “I want to feel that shiver go down my own spine when I’m doing first-person, because that impact moment is that significant. When I don’t get that shiver, I didn’t hit it right.” No shiver means not really in the moment, not really in role...no shiver means showing off instead of telling a story.

SO HELP ME, DAMMIT—WHAT DO I DO?

The first-person presentation is a way, but not “*the only* TLC way” to give an opening statement. If there is “a” TLC way to give an opening statement, it is to *tell the story you have discovered, using a story structure that shows trust and betrayal*. This can be done via a first-person presentation, but it can also be done speaking in role as a narrator. Just as we should be able to tell the story of the action of the case without needing to physically reenact it (in case the judge disallows reenactment), we should be able to tell the story of the case as a narrator without resort to a first-person presentation.

Once we have discovered the story well enough to tell it with depth and detail and nuance as a narrator, *then* we may consider what methods may enhance our presentation of a part of that story. We can determine whether there is a moment—a *punch*, to honor Milton—that the jury needs to feel to truly understand—in a way that the all-seeing eye narrative cannot convey. We can determine whether there is an aspect of witness testimony for which the jury needs to be emotionally prepared before the witness takes the stand.

“Yes, a first-person presentation is the best way to communicate this part of the story,” is a decision that comes *after* role-reversing with the jury, and *after* ruling out other ways to communicate. Bob Dawson advises that the trial attorney needs to be able to answer clearly why first-person is better than just talking with the jury as a narrator. This requires knowing our case; it requires thoughtful consideration of each part of the story our clients need us to tell; and it requires identifying what part of the story is its crisis moment, where a first-person presentation can have the most impact and an appropriate impact.

Assuming all of this careful consideration leads to “yes,” the next determination is of how much content to present in the first-person. Johnny Zelbst recommends that we start with just a snippet—taking baby steps. Johnny observes that thirty seconds of well-planned storytelling in role can be far more powerful than ten minutes of poorly-planned rambling. Think of Gerry’s opening statement in *Sandy Jones*, in which Gerry spoke from role as the sheriff, then Sandy’s son, then Sandy’s daughter—as quickly as Gerry delivered one character’s line of dialogue, he had moved on in narrative fashion, and then stepped into another character. The contrast between first-person presentation and narration is what gets and keeps the listener’s attention.

Remember Milton’s admonition. First-person storytelling helps him to deliver a particular *punch*—a particular moment of betrayal or revelation. Identify what *punch* you need to deliver. Don’t just ramble on in first person without defining what this performance is leading toward. Ascertain your *punch*. Structure your opening around it. Reviewing that structure will help you to see if there is a part of the story whose emotional content demands presentation in role.

Test your idea with people who will give honest feedback. When we’ve left the Ranch and are preparing for a real trial, the feedback we’re looking for is not whether it’s great that we’re taking a risk—we’re looking for “*this really got to me—now I want to*

see that character testify,” versus “too strange” or “maybe you’re onto something, but I couldn’t figure out what you were doing.”

SUMMATION

Decisionmaking for trial isn’t about what we think will be fun or cool. Nor is decisionmaking for trial about trying something in the courtroom today so we’ll have a story to tell about ourselves tomorrow. It is about taking care of our client; and that in turn means taking care of our judge and jury so that our judge and jury will care about our client. This is true, of course, not only regarding the decision of whether to give a first-person presentation, but for each of our trial decisions.

That said, I hope that this article is not taken as an argument against the first-person presentation. I’ve given first-person presentations before, sometimes effectively but also sometimes ineffectively and without fully reversing roles with my jury. These are guidelines I will use in my future decisionmaking:

- **Use the laboratory of TLC and Local Working Groups!** Take risks. Step into unusual roles in the laboratory to see what you can learn, aided by your brothers and sisters, when you are out of your own head and under the hide of another.
- **Then, work on how to translate what you learned in the laboratory into an effective presentation for the jury.** Make a point to divorce yourself from ego. Consider the practical risks. Role-reverse with the jury.
- **To other group members and staff: separate feedback for the exercise from feedback over its suitability for presentation to the jury.** Radical role work in the exercise may yield important information for the protagonist, but may not be the best avenue to tell the story to the jury. Work with your protagonist to collaboratively think this through. Remember the lessons of the listening exercise: sometimes, even rejecting a suggestion leads to discovery of a better suggestion.
- **Identify your *punch*, as Milton Grimes does.** The first-person presentation should drive toward the *punch*. If it doesn’t, why are you really doing it?

Then, **make your plan, and practice.** Be fully ready, educated by feedback, and prepared to present your story, in the role that makes your *punch* really punch, when you hear the judge say, “*counsel, you may proceed.*” ☺

ENDNOTES

- 1 *Drayden v. White*, 232 F.3d 704, 712-13 (9th Cir. 2000). The court stopped short, however, of finding that this misconduct violated the defendant’s right to due process.
- 2 *People v. Richmond*, 791 N.E.2d 1132 (2003).
- 3 *People v. Smith*, 2014 WL 2118264 (Mich. App. 2014)
- 4 *Id.* at *1. From the text of *Smith*, it appears that the defendant did testify in her own defense.
- 5 *United States v. LeMieux*, 436 F. Supp.2d 130 (D. Maine 2006).
- 6 *Id.* at 131-32.
- 7 *Ouber v. Guarino*, 293 F.3d 19, 28 (1st Cir. 2002)
- 8 *Commonwealth v. Adams*, 39 A.3d 310, 320 (Pa. Super. 2012); *Rivers v. State*, 248 S.E.2d 31 (Ga. App. 1978).
- 9 See www.youtube.com/watch?v=LHy_5CrEafM. On that marketing video, Wax does don some costumes, but J.R. has attended performances in which Wax conveys the story of each character with nothing but himself to delineate between roles.

Section Eleven

Cross-Examination

Matthew A. Dodd
Dodd Blackford & Carls, P.C.
Big Sky, Montana
Matt@doddlawfirm.com

Section Eleven

Cross-Examination..... Matthew A. Dodd

Crossing the Cop – Constructive and Destructive Cross-Examination in DUI Cases

1. Recognizing the complementary approaches of destructive and constructive Cross-examination	1
2. Proper preparation leads to powerful cross-examinations	1
2.1. Proper preparation requires a thorough knowledge of our case.....	2
2.2. Proper preparation establishes control.....	3
3. Proper preparation allows us to listen	6
4. Use sequencing to persuasively convey our client’s narrative	7
5. Treat the cop as an expert witness	8
5.1. Marry the officer to his or her written report.....	8
5.2. Know the terminology but do not let it confine you	9
5.3. Officers will admit facts, but not conclusions	10
6. Conclusion	11

Crossing the Cop –
Constructive and Destructive Cross-Examination in DUI Cases

As trial lawyers, we know that every client and every case represents a new story—a new test. DUI cases present a unique situation because, often, the only witness through whom we can tell our client’s story is the State’s witness—a law enforcement officer who arrested our client and who has been trained to testify in a way that is harmful to our client. We therefore need to arm ourselves to tell our client’s story through this adversarial witness. The contemporary approach of constructive cross-examination, coupled with the traditional approach of destructive cross-examination, allows us to affirmatively tell our client’s story and maintain the focus on our client’s theory of the case.

1. Recognizing the complementary approaches of destructive and constructive cross-examination

Destructive cross-examination is the traditional approach to questioning an adversarial witness, and the style with which most are familiar. Its purpose is to attack the opposing theory or the opposing witness, and it almost universally appeals to those of us that try criminal cases and DUIs. The downside to such an approach is that, as with a Coke advertisement that includes references to Pepsi, destructive cross-examination keeps the focus on the State’s theory of the case. Even when we are scoring points in a destructive cross-examination, we are focusing the fact-finder’s attention on the narrative constructed by the State.

On the other hand, the use of constructive cross-examination allows us to structure cross-examinations in a way that highlights our client’s story and advances our client’s theory of the case. By eliciting facts (not conclusions) that support our client’s theory of the case through the officer, we can teach the jury in a way that gives more worth to each fact, presents the material in a more efficient manner, and keeps the fact-finder focused on our client’s theory throughout the cross-examination.

2. Proper preparation leads to powerful cross-examinations

While preparation is one of the most potent tools in developing persuasive cross-examinations, it is often one of the most overlooked step of the process. We all fancy ourselves as smart, witty, and quick on our feet. But in the heat of battle, in the midst of a challenging

cross-examination, the degree of our preparation is almost always more determinative of the outcome than any of our smarts or wit.

It is our job to organize the disjointed facts lifted from our client interview, the police report, and the video into a narrative theory that is relatable to the fact-finder and allows the fact-finder to answer the following questions:

- Why should the fact-finder care about our client's case?
- Why should the fact-finder side with our client?
- How can the fact-finder help our client?

2.1. Proper preparation requires a thorough knowledge of our case

Whether you have tried one DUI case or one hundred, an intimate knowledge of the particular facts of each case is the foundation upon which every good cross-examination is built. For every minute of cross-examination, the diligent trial lawyer has spent hours breaking down the police report and the video, educating him or herself about the proper police procedures and the science of breath and blood testing, and crafting a narrative that is specific to his or her client's case. Particularly where the goal is to tell our client's story through the officer, we must understand the unique facts and nuances that will make this client's story resonate with the fact-finder.

Our preparation begins from the minute a potential client walks in the door. We watch how he or she walks. We watch how he or she holds him or herself. And as we interview the potential client, we must listen for the thread of a narrative amongst the fragmented facts he or she lays on our desk. In a recent case, I had a client who was stopped in a small, rural town for rolling through a stop sign. The client almost immediately admitted to the officer that he'd had a number of drinks throughout the afternoon. The officer saw "bloodshot and watery eyes." Unsurprisingly, the officer determined that my client was impaired and arrested him.

When I dug deeper though, the client revealed a number of positive facts that that allowed me to craft a different narrative than the one I assumed the prosecution would present. The client had travelled many hours from home for a softball tournament. His team had done well and they were on the field, out in the heat and sun, most of the day. He and his team were camping at the field and he drove to get dinner for his teammates. He was unfamiliar with the area because they only played one tournament a year in this particular town. All of these factors

suggested to that my client was tired, not impaired, and I began my trial preparation with that story in mind.

Once we begin crafting our client’s narrative, we must thoroughly review the evidence in search of facts that support our narrative. What does the video show? Does our client demonstrate good driving but bad walking? Is our client respectful and responsive? Is the officer aggressive and accusatory from the start? Does he or she report only on our client’s signs of impairment while leaving out any contrary evidence? Does the officer’s subjectively written report vary from the objective evidence in the video?

In addition to reviewing the specific evidence in each particular case, we must know the policies and procedures required of the officers in our jurisdictions. Since almost every DUI case involves administration of standardized field sobriety testing (“SFSTs”), every lawyer taking DUI cases should be familiar with the administration and assessment of SFSTs as taught by the National Highway Transportation Safety Administration and any jurisdiction specific policies and procedures. Without an understanding of the policies and procedures that control officers’ actions, we miss an opportunity to constructively show how a good officer completes an investigation and destructively show that the officer in our particular case did not live up the high standard he or she preaches on direct.

Judges and juries are more skeptical than ever—in a day and age where they trust used car salespeople more than they trust criminal defense and DUI lawyers, they will not blindly accept our narrative if it based on conclusions. Rather, judges and juries today expect us to give them facts so that they can come to their own conclusions. And as with any good storyteller, it is our job to put our positive (and negative) facts into a framework that leads to the inevitable conclusion that our client is not guilty.

2.2. Proper preparation establishes control

When we have spent the time to dig deep into the material, when we have spent time understanding what makes this case unique, and when we have spent time understanding how the unique facts of our case come together to form our client’s narrative, we can more easily establish and maintain control on cross-examination.

In almost all cases, it has been many months (or even years) since the officer stopped our client. Our client was one of many that the officer stopped, investigated, and arrested in the

interim. And the officer does not likely have the time (or desire) to review our client's file as thoroughly as have we. This provides an advantage to the DUI lawyer who has spent time reviewing the positive (and negative) facts from the police report, video, and other evidentiary sources. We gain power because we can contrast the officer's "standard" recitation and spin on the facts with questions that are focused on the unique nature of our client's theory.

In the softball case referenced above, my client's interactions with the officer after he was stopped supported the theory that the client was tired but not impaired. I was therefore able to focus on these facts during many chapters (self-contained segments or sections of the cross-examination) of the officer's cross.¹ During a series of chapters on the parties' initial interaction, I was able to concentrate on each of my client's actions that supported our theory:

- Officer, when you walked up to my client's door, he had already rolled down the window?
 - He was ready to speak to you?
 - He was not distracted?
- When you spoke to my client, he answered all our questions?
 - He answered without hesitation?
 - He answered without slurring his words?
 - He answered in a friendly tone?

...

- When you asked him for his license and registration, he got them out of his glove box?
 - He reached over and opened the glove box without fumbling?
 - He quickly shuffled through the papers in the glove box to retrieve his insurance card?
 - He handed you the insurance card?
 - He didn't hand you a stack of papers?
 - You've seen folks do that?
 - You've seen drunk folks do that?
 - And you've had drunk folks hand you the wrong piece of paper?
- But not my client?
- He handed you just what you asked for?

Even where an officer may have received more training, corrected bad habits, and learned to testify more persuasively in the time since he or she arrested our client, the use of constructive cross-examination provides an opportunity to use the officer's new found talents to our client's advantage. In that same softball case, we used the officer's testimony to both establish proper police procedures and demonstrate his failure to comply with the proper procedures:

- Officer, you've received extensive training on the SFSTs?
 - Over forty hours at the Academy?
 - Another five hours every two years since you graduated?
- In the time since you arrested my client, you've taken additional, advanced training?
- That training has made you an educated officer? A diligent officer?
- As an educated and diligent officer, you are aware of the importance of following the standardized administration procedures of the SFSTs?
 - You are aware that an officer's failure to follow the standardized administration procedures can compromise the validity of any conclusions?ⁱⁱ
 - As an educated and diligent officer, you do not want to compromise the validity of your conclusions?
 - As an educated and diligent officer, you would not want to mislead this Court?
 - An an educated and diligent officer, you would not want to mislead this jury?

These types of questions are safe because an officer will almost universally agree with the discrete fact enclosed in each question. An officer who disagrees with the discrete fact enclosed in any of the above questions loses credibility with the judge and the jury. Therefore, no matter how the officer responds, it is a win for our client.

After allowing the officer to educate the jury on good police procedures (which took many more chapters than the above excerpt) through constructive cross, I then attacked him on each of his failures in properly administering and assessing the SFSTs through destructive cross chapters. In that way, the two approaches to cross-examination support each other and allowed

me to use the officer's "superior" knowledge of police procedure to his disadvantage and my client's advantage.

3. Proper preparation allows us to listen

Listening is a learned skill. How many of us have attempted to multi-task only to respond to the one we claim to love with a variation on, "Of course I was listening...wait, what did you say?" This same inability to multi-task during cross-examination presents a lost opportunity for lawyers who are not prepared before they step to the podium. When we have prepared our cross-examination as a persuasive narrative, broken down into individualized chapters (much like the stories within a story of a children's chapter book), we are free to listen during direct and cross-examination to make use of the officer's testimony.

Because we know that the same fact or the same phrase elicited from the officer on cross will have more impact than that fact or phrase asserted as a conclusion during closing, we must be alert to the opportunities presented whenever the officer is talking. By actively listening to the officer's testimony (rather than loading our next question or searching for the record cite that will support our next impeachment), we can loop the officer's testimony whenever it coincides with our client's theory of the case. By looping the officer's testimony—intentionally reusing the officer's words and phrases that are supportive of our client's theory—we continue our client's narrative and add emphasis and focus while avoiding objections and decreasing risk that the officer will challenge our word choice.ⁱⁱⁱ

For instance, in a recent case, the officer compared the evidentiary breath test machine to a DVD player during direct examination. Since my theory focused on the disconnect between my client's performance on the video and the result produced by the breath test, I used the officer's DVD analogy to minimize the alleged scientific accuracy and reliability of the machine. In contrast to the officer's reference to the breath test device as a piece of "scientific equipment," I referred to it as "the DVD player." By making the analogy in direct, the officer had given me permission to use the phrase "the DVD player" throughout my cross-examination and closing.

The officer's choice of words had also provided me with a power chapter on which to end my cross-examination. With his analogy in hand, I closed with the following questions designed to empower the jury during deliberations:

- Officer, when a DVD player does not work, no one is arrested?
- When a DVD player does not work, no one goes on trial?
- When a DVD player does not work, no one goes to jail?

4. Use sequencing to persuasively convey our client's narrative

Almost every direct examination of an officer follows the same, chronological arc. It begins with the officer's initial observations that led to the investigation and concludes with the arrest of our client for driving while impaired. In almost every case, this sequence of events does not support our client's theory of the case. While we've all heard the admonition, "Don't chase the direct," very rarely does the one giving the admonition suggest a good starting point for our cross. Under the constructive cross-examination approach, the answer is relatively straightforward—begin with a chapter that sets up our client's narrative and immediately focuses the fact-finder on our client's theory of the case.

In the softball case, I began with a series of questions related to my client's long drive to the ball field on the morning of the arrest. These questions were available because the officer had been friendly with the client and asked background questions related to my client's day as he began his investigation. The officer's admissions and confirmations related to the early hour my client left his house, the hundreds of miles he had traveled, and the many hours he had been on the field all provided facts on which I could support my client's narrative that he was tired, but not impaired.

Only after I established the theory of my client's case through these initial chapters did I transition to chapters designed to teach proper police procedures (excerpted above). My chosen sequencing not only established my client's story early in the cross-examination, but it provided the necessary background for the jury to follow the shift to proper police procedures and, eventually, the officer's failure to follow the proper procedures.

Had I sequenced the initial chapters later in the cross, the jury may not have been as willing to follow me when I started my destructive chapters about the officer's failures. In addition, by establishing an alternative theory for the officer's observations—tired vs. impaired—we undercut the officer's ability to suggest that his conclusion was correct even if his procedures were not. The impact of his failures was not theoretical because we had already

provided the jury with facts to support our narrative that the officer's flawed procedures actually led to flawed conclusions.

5. Treat the cop as an expert witness

The DUI lawyer who ignores that officers spend much of their time on the witness stand does so at his or her own peril. While most officers do not have advanced degrees and lots of letters after their names, many officers testify with as much, or more, regularity than traditional expert witnesses. This testimonial experience means that officers are alert to the strategies that we can typically utilize to expose bias, uncertainty, and holes in the testimony of lay witnesses.

5.1. Marry the officer to his or her written report

Just as with a traditional expert witnesses, the officers we cross-examine almost always provide a written report. Particularly when you intend to use a combination of constructive and destructive cross techniques to impeach the officer about contrasts between the written report and his or her actions, it is critical to tie the officer to the report early in the cross-examination.

The following sample questions quickly and easily accomplish the job (keep in mind that it takes only three to five seconds to ask and receive an answer to each of the questions):

- While at the academy, you learned how to prepare written reports?
 - You were taught to diligently draft reports?
 - You were taught to include all important facts in your reports?
 - You were taught not to leave out any important facts?
- You prepared this report as part of your investigation?
 - You were diligent when you prepared this report?
 - You used all your professional skill?
 - You used all your professional knowledge?
- You included all relevant facts?
 - You did not leave out any important facts?
 - You did not exaggerate any facts?
 - You did not distort any facts?
- You prepared this report with the expectation that this court would rely on the facts in the report?

- ...with the expectation that this judge would rely on the facts?
- ...with the expectation that this jury would rely on the facts?
- Because you knew that a judge and jury would rely on the facts in your report, you carefully chose the words you used?
 - You chose specific words to convey your specific observations?
- You reviewed this report before trial?
 - Having reviewed it, there is nothing you would like to change?
 - ...nothing you would like to amend?
 - ...nothing you would like to edit?

Assuming the officer answers these questions in the affirmative, the questions tie him or her to the report, warts and all. We can then move on and begin to highlight any inconsistencies in the report and/or contrast the written report with the video evidence. On the other hand, if the officer denies any of the above questions, we can cross-examine on the officer's failure to produce an accurate report or the fact that the officer is trying to convince the jury that his memory now is more reliable than his report written just hours after the arrest.

5.2. Know the terminology but do not let it confine you

Word selection and usage is critical to persuasively telling our client's story. Our word selection should be specific, vivid, and used to create imagery that is supportive of our client's narrative. Word selection also provides witness control. By understanding, and intentionally and selectively using, the vocabulary of the witness whom we are cross-examining, we teach the witness and the fact-finder that we understand the nuance of the officer's role and that we can be trusted to properly educate the fact-finder.

In the softball case referenced throughout this article, I was very careful in using the specific language in the SFST manuals during the constructive chapters of my cross-examination. I did so to prevent argument with the officer about the appropriate terminology, completely tie good investigatory procedure to compliance with the manuals, and remind the jury that I had done my homework. The jury then allowed me to attack the officer in my destructive chapters because I demonstrated that the officer did not explicitly comply with the specific instructions (and terminology) in the manuals.

Keep in mind, however, that our use of the officer’s terminology must be intentional and selective, as we do not want adopt the mentality of or mimic the prosecution’s approach. While officers and prosecutors use the language of law enforcement, we, as the storyteller for our client, must use language that is used by, understood by, and relatable to our fact-finder.

Instead of using the terminology and phrasing, “the subject then exited the vehicle,” we can humanize our client and our case by simply saying, “then Mr. Smith got out of his car.” Just like an author in a children’s book, we must use language that can easily be remembered and repeated by jurors in deliberations.

5.3. Officers will admit facts, but not conclusions

As with other expert witnesses, it is naïve to believe that our cross-examination will be so effective that the officer will abandon his or her conclusion that our client was impaired. Those cases do not make it to trial and those officers do not remain on the force for long. But, even though we may never see an officer change his or her conclusion on cross, we can use constructive cross-examination techniques to create admissions that are supportive of our client’s narrative and our client’s theory of the case. By gathering admission after admission, we can build a foundation for our closing argument.

In order to collect these admissions on cross, we must stay true to the fundamentals of any good cross-examination by asking only leading questions with one new fact per question.^{iv} For instance, while the officer will not likely admit that our client was driving safely, he or she will have to answer “yes” to the following questions (assuming that’s what the video shows):

- Officer, you followed my client for nearly ten minutes?
 - You followed my client for nearly ten miles?
 - You followed my client for nearly ten minutes, nearly ten miles, at highway speeds?
- You’ve been trained to watch for traffic violations?
 - You were using your training that night?
 - You were alert for traffic violations that night?
- Officer, you did not ticket my client for weaving?
 - You did not ticket him for weaving outside of his lane?

- You did not ticket him for weaving within his lane?
- Weaving can be an indicator of impairment?
- You did not ticket my client for speeding?
 - He was not driving faster than the posted speed limit?
 - He was not driving faster than the posted speed limit the entire time you followed him?
 - Speeding can be an indicator of impairment?

...

Even though the officer may be forced to give you all of these admissions, resist the temptation to ask the conclusory question. Don't get caught asking, "So...my client was driving safely?" Asking that "So..." question, that conclusory question, allows the officer to go back and once again explain his or her theory of the case, explain that our client was driving badly but the officer did our client a favor by not citing him or her for everything, and undo all the work you did by slowly building a cache of positive facts. Facts come out in cross-examination; conclusions are saved for closing.

6. Conclusion

The coordinated use of constructive and destruction cross-examination provides us a framework in which we can tell our client's story through an adverse witness. Particularly in those cases where the only witness is the State's witness, a witness trained to testify in a way that harms our client, constructive cross-examination allows us to leverage the officer's knowledge to our advantage. By turning the officer into our witness through constructive cross-examination and by using the officer's knowledge to turn him into our expert, we can more effectively represent our clients and see more positive outcomes at trial.

ⁱ For more information on the setting up our chapters, see Cross-Examination: Science and Techniques by Larry Pozner and Roger Dodd, available at: <http://www.lexisnexis.com/shop/poznerdodd/default.page>.

ⁱⁱ Although this conclusory question may seem to be a dangerous question, the phrasing, "compromise the validity" is borrowed from the NHTSA training manuals. Because I chose this

specific phrasing, it doesn't matter how the officer answers – he either had to agree with my question or risk being impeached with the NHTSA manual.

ⁱⁱⁱ *Id.*

^{iv} *Id.*

Section Twelve

Closing Statements

Terrence R. Rudes
Rudes Law Office
Port Clinton, Ohio
trudes@duiohio.net

Section Twelve

Closing Statements..... Terrence R. Rudes

Section Thirteen

Making a Good Record for Appeal

Cara Schaefer Wieneke
Wieneke Law Office LLC
Brooklyn, Indiana
cara.wieneke@gmail.com

Section Thirteen

Making a Good Record for Appeal..... Cara Schaefer Wieneke

PowerPoint Presentation



Making a Good
Record for
Appeal

Why is the “Record” Important?

- o The goal is always to win at the trial level. But if you are not successful at trial, then your next chance of success is on appeal.
- o The appellate courts only see what is included in the “record.” So in order to give yourself the best chance of success on appeal, you must build a good record.

What is the “Record”?

- o Ind. App. R. 2(L) defines “Record on Appeal” as:
 - o (1) the “Clerk’s Record”; and
 - o (2) all proceedings before the trial court or Administrative Agency.
- o The “Clerk’s Record” contains the CCS and “all papers, pleadings, documents, orders, judgments, and other materials filed in the trial court or Administrative Agency or listed in the CCS.”

What is the “Record”?

- o Thus, the “Record” includes:
 - o the Appellant’s Appendix (in criminal cases, a copy of the “Clerk’s Record”); and
 - o the transcript of all hearings, the trial, etc. that took place in the proceedings.
- o If favorable information is not included somewhere in the Clerk’s Record or the transcript, the appellate court will not know it exists.

5 Tips to Building a Good Record

How to get favorable information into the record and how to preserve errors for appellate review

Tip #1

o Start building a record as soon as possible, even before trial.

o Pretrial motions

o Motions in limine

o Motions to suppress evidence

o Requests for trial court to rule before trial on the admission or exclusion of evidence

o Attach helpful documents, such as affidavits, proffered expert's publications, photos, etc.

What's the point if the judge will just deny it anyway?

- o The point? TO MAKE A GOOD RECORD FOR APPEAL.
- o On appeal, what the judge did with the motion is much less important than whether the issue is preserved. If the issue is not preserved for an appeal, the appellate court will never even consider the merits of the claim because the claim will be dismissed as having been waived.

Summary denials and hurried trials

- o If you practice in a court where the judge is likely to deny a motion without a hearing, putting favorable information into the body of your motion and through attachments will ensure you have it in the record.
- o If you wait until trial, you may not be given as much time to develop the record as you would before trial. Hearings outside the presence of the jury often feel rushed.

Tip #2

- **When attempting to exclude evidence from being admitted at trial, make a timely and specific objection.**
 - The objection must be contemporaneous with the offering of the evidence. You must object at the earliest opportunity to do so.
 - Indiana Evidence Rule 103(a) requires a statement of the “specific ground of objection if the specific ground was not apparent from the context.”
 - **DON'T FORGET:** if you filed a pretrial motion to exclude evidence (suppression, limine, etc.), you must object again when the State attempts at trial to admit the evidence through eliciting testimony or offering an exhibit.

Tip #3

- **Be sure what you say in court is actually being recorded.**
- Some courts advise attorneys that only those sidebars that attorneys ask to be recorded will actually be recorded
- if there is no recording made of the objection, then it will not be in the “record” because it will not be transcribed, so the issue is not preserved

Example

STATE: What did you do that day?

WITNESS: Before or after I drove [Defendant] to
meet with his parole officer?

COUNSEL: Your Honor, may we approach?

Whereupon, an off-the-record discussion was
held at the bench.

State, please ask your next question.

Example

- If an off-the-record discussion does occur, summarize the discussion once you are back on the record if the judge does not do so.

Tip #4

- **If you want to convey what is happening in the courtroom at that time, frame your question to the witness to capture that.**
- Example: when an officer demonstrates through gestures what defendant was doing at scene during field sobriety tests

Tip #5

- o **If you are the one attempting to admit evidence and the court rules against you, make an offer of proof.**
- o Indiana Evidence Rule 103(a): the exclusion of evidence will not constitute error unless, among other things, an offer of proof was made.

Offers of Proof

- o Three ways to make an offer of proof:
 - o Preferred way at trial: present the proffered testimony outside the jury's presence
 - o If the State is making an offer of proof, be sure to lodge any objections you have to the proffered testimony, just as if the witness is actually testifying on the record
 - o But if you are making an offer of proof, the State may do the same, and you may never get a full offer of proof made if you aren't careful

Offers of Proof

- o Other ways:
 - o If you are not able to present testimony, make a record by reciting to the court what you anticipate the testimony would be had you been given the opportunity to fully present it
 - o When a court refuses to even allow you to make an offer of proof, get that refusal on the record if possible and then file with the court a written offer of proof at the earliest opportunity

Contact Information

- o Cara Schaefer Wieneke
- o Wieneke Law Office, LLC
- o P.O. Box 368
- o Brooklyn, IN 46111
- o (317) 331-8293
- o cara.wieneke@gmail.com

Section Fourteen

OVWI License Suspensions 101

Scott A. DeVries
DeVries and Kelly
Indianapolis, Indiana
sdevries@devries-law.com

Section Fourteen

OVWI License Suspensions 101..... Scott A. DeVries

PowerPoint Presentation

OVWI License Suspensions 101



Scott DeVries
DeVries Law Office
www.DeVries-Law.com

License Suspensions overview

- General Authority for Criminal cases: 9-30-16-1, 9-30-13-0.5
 - Court **may** order DL suspension for crime for which operation of motor vehicle is an element
 - **Max suspension = max period of incarceration**
- General Authority for infraction cases: 9-30-3-16(a)(3)
 - Court may suspend up to 30 days unless provided otherwise by statute

License Suspensions Overview

- Crime with elements of vehicle operation causing/resulting in SBI = min. 1 year suspension, SDP eligible
- OVWI 2nd offense = min. 1 year susp
 - Time of the prior does not matter
 - SDP eligible
 - Based on Federal Law
- Crime with elements of vehicle operation causing/resulting death = min. 2 year suspension. Not SDP eligible
- CDL = 1 year or more from conviction date

License Suspensions Overview

- One episode with multiple convictions = concurrent suspensions
- Suspension may start prior to conviction
- Drug possession in vehicle = suspension up to 2 years is optional 35-48-4-15
- 9-30-5-5 operating a vehicle causing death is L4 if prior ovwi conviction within 10 (was 5) years of commission date

OVWI/OBWI

- Pre-convictions suspensions 9-30-6-9
 - 180 days for failing certified chemical test
 - Dispute about definition of PC for suspension
 - Refusal = 1 year or 2 years if prior conviction
- Refusal not eligible for SDP
- **BUT 9-30-6-8 IID pre-conviction, no notation in ODR**

OVWI/OBWI

- SDP eligible except if causing/resulting in death
- Credit for time on Ignition Interlock Device
- Refusal may be terminated or vacated
- 9-30-16-3 the Court sets the SDP duration i.e. **no longer min of 180 max of 2.5 years**

SDP at initial hearing

- 9-30-16-1 and 35-33-7-5(8) = SDP at initial hearing
 - Courts must advise defendants of SDP option
 - If Def. indicates intent for SDP then no suspension for 30 days and PC is not sent to BMV
 - Hearing set no later than 30 days
 - 10 days to file SDP Petition or suspension occurs and PC to BMV
 - If SDP petition is filed then no suspension until hearing
 - If Def. files MTC over PX objection then suspension is ordered until hearing

What happens to suspensions if case ends in Defendant's favor

- 9-30-16-6.5 Court and BMV shall end suspension when charges are dismissed, acquittal or conviction set aside
- 9-30-6-13.5 BMV shall remove 9-30-6-9(b)(c) suspension notations from ODR

What happens to SDP if case ends in Defendant's favor

- 9-30-16-3 and -3.5
- Whenever the judgment that caused the suspension is set aside then the SDP is terminated

Habitual Vehicular Substance Offender 9-30-15.5

- Vehicular Substance Offense: Any conviction with a material element of operating a motor vehicle:
 - While intoxicated
 - While over the legal limit
 - With controlled substance or its metabolite in the person's system.
- 1-8 additional years

HVSO Timing

- Timing:
 - If > 2 priors, timing does not matter
 - If two priors, then at least one of the priors must have a conviction date that is within 10 years of the current offense date
 - Similar timing and procedure as Habitual Offender
 - Placement for L6 + HVSO = DOC 35-38-3-3(d)(2)(C)

Financial Responsibility

- SR 22 required upon end of OVWI PC suspension 9-30-6-12(c)
- No insurance on date of accident of incident = reinstatement fees. Rental vehicle, co. vehicle, operator's policy, umbrella policy.
- Points-administrative code, suspensions

Habitual Traffic Violators

- 9-30-10-4 lists qualifying violations
- Date of Offense is used for 10 year window
- Out of State judgments
 - compare elements

HTV continued

- Court may determine that a person is a habitual traffic violator (9-30-10-6.5)
 - Check ODR to see if person will be HTV
 - Determine at time of sentencing or afterwards
 - Preponderance of the Evidence
 - Court orders suspension, avoids duplicate BMV suspension
 - May order Specialized Driving Permit for current case and HTV suspension

9-30-16 SDP Ineligibility

- Operating Vehicle Causing Death
- Person with more than one conviction for violation of SDP conditions
 - Class C Misdemeanor

9-30-16 SDP Eligibility

- Includes pre-2015 suspensions
- Operator's lic., Chauffeur's lic., PPC
- CDL holder except to operate a CMV
- Person with a BMV imposed suspension
- Interstate Compact – IN citizens committing out of state violations
- IN resident who moved out of state
- Person who never held an IN DL
- HTV suspensions, including life
- OVWI pre-conviction suspensions

9-30-16 SDP Conditions

- Court imposing a suspension may stay the suspension and order SDP in lieu of the suspension
- Ct have lots of discretion
- 9-30-16-3 the Court sets the SDP duration
i.e. **no longer min of 180 max of 2.5 years**
- IID time counts toward suspension time
- Must maintain SR 22 insurance

Section Fifteen

Using Experts

Charles J. Rathburn, Jr.
Rathburn Law Office
Indianapolis, Indiana
CJR@rathburnlaw.com

Section Fifteen

Using Experts..... Charles J. Rathburn, Jr.

PowerPoint Presentation

Using Experts

ICLEF Impaired Driving Defense 101

Charles James Rathburn, Jr., March 26, 2021

“I need an expert.”

**An expert is not going to change
your facts.**

Using an Expert

We use experts to help the trier of fact to understand our theory of the case.

Why use the Expert

ICLEF Impaired Driving Defense 101

What can the Expert bring to the trier of fact that you can't get into evidence another way.

Testimony by an Expert Witness (IRE 702)

ICLEF Impaired Driving Defense 101

(a) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Testimony by an Expert Witness (IRE 702)

ICLEF Impaired Driving Defense 101

(a) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Testimony by an Expert Witness (IRE 702)

ICLEF Impaired Driving Defense 101

(a) A witness who is qualified as an expert by **knowledge**, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Testimony by an Expert Witness (IRE 702)

ICLEF Impaired Driving Defense 101

(a) A witness who is qualified as an expert by knowledge, **skill**, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Testimony by an Expert Witness (IRE 702)

ICLEF Impaired Driving Defense 101

(a) A witness who is qualified as an expert by knowledge, skill, **experience**, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Testimony by an Expert Witness (IRE 702)

ICLEF Impaired Driving Defense 101

(a) A witness who is qualified as an expert by knowledge, skill, experience, **training**, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Testimony by an Expert Witness (IRE 702)

ICLEF Impaired Driving Defense 101

(a) A witness who is qualified as an expert by knowledge, skill, experience, training, **or education** may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Testimony by an Expert Witness (IRE 702)

ICLEF Impaired Driving Defense 101

(a) A witness who is qualified as an expert by knowledge, skill, experience, training, or education **may testify in the form of an opinion or otherwise if the expert's** scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Testimony by an Expert Witness (IRE 702)

ICLEF Impaired Driving Defense 101

(a) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's **scientific**, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Testimony by an Expert Witness (IRE 702)

ICLEF Impaired Driving Defense 101

(a) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, **technical**, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Testimony by an Expert Witness (IRE 702)

ICLEF Impaired Driving Defense 101

(a) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, **or other specialized knowledge** will help the trier of fact to understand the evidence or to determine a fact in issue.

Testimony by an Expert Witness (IRE 702)

ICLEF Impaired Driving Defense 101

(a) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge **will help the trier of fact to understand the evidence** or to determine a fact in issue.

Testimony by an Expert Witness (IRE 702)

ICLEF Impaired Driving Defense 101

(a) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence **or to determine a fact in issue.**

Testimony by an Expert Witness (IRE 702)

ICLEF Impaired Driving Defense 101

(b) Expert scientific testimony is admissible only if the court is satisfied that the expert testimony rests upon reliable scientific principles.

Testimony by an Expert Witness (IRE 702)

ICLEF Impaired Driving Defense 101

(b) Expert scientific testimony is admissible only if the court is satisfied that the expert testimony rests upon reliable scientific principles.

Testimony by an Expert Witness (IRE 702)

ICLEF Impaired Driving Defense 101

(b) Expert scientific testimony is admissible only if the court is satisfied that the expert testimony rests upon reliable scientific principles.

Testimony by an Expert Witness (IRE 703)

ICLEF Impaired Driving Defense 101

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. Experts may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field.

Testimony by an Expert Witness (IRE 704)

ICLEF Impaired Driving Defense 101

(a) In General—Not Automatically Objectionable. Testimony in the form of an opinion or inference otherwise admissible is not objectionable just because it embraces an ultimate issue.

Testimony by an Expert Witness (IRE 704)

ICLEF Impaired Driving Defense 101

(a) In General—Not Automatically Objectionable.
Testimony in the form of an opinion or inference otherwise admissible is not objectionable just because it embraces an ultimate issue.

Testimony by an Expert Witness (IRE 704)

ICLEF Impaired Driving Defense 101

(b) **Exception.** Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions.

Testimony by an Expert Witness (IRE 704)

ICLEF Impaired Driving Defense 101

(b) Exception. Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions.

Testimony by an Expert Witness (IRE 704)

ICLEF Impaired Driving Defense 101

(b) **Exception.** Witnesses may not testify to opinions concerning intent, **guilt**, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions.

Testimony by an Expert Witness (IRE 704)

ICLEF Impaired Driving Defense 101

(b) **Exception.** Witnesses may not testify to opinions concerning intent, guilt, **or innocence in a criminal case**; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions.

Testimony by an Expert Witness (IRE 704)

ICLEF Impaired Driving Defense 101

(b) **Exception.** Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; **the truth or falsity of allegations;** whether a witness has testified truthfully; or legal conclusions.

Testimony by an Expert Witness (IRE 704)

ICLEF Impaired Driving Defense 101

(b) **Exception.** Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; **whether a witness has testified truthfully;** or legal conclusions.

Testimony by an Expert Witness (IRE 704)

ICLEF Impaired Driving Defense 101

(b) Exception. Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; **or legal conclusions.**

Potential Expert Testimony in an OWI Case

ICLEF Impaired Driving Defense 101

1. Pre-arrest testing,
 1. SFST
 2. ARIDE
 3. DRE

Potential Expert Testimony in an OWI Case

ICLEF Impaired Driving Defense 101

2. PBT

Potential Expert Testimony in an OWI Case

ICLEF Impaired Driving Defense 101

2. Chemical Testing

1. Blood

2. Breath

3. Urine

Blood Testing Expert Testimony

ICLEF Impaired Driving Defense 101

1. Blood Testing

1. Blood Collection

1. Materials used,

2. Cleaning procedure,

3. Process used by the person taking the blood.

Blood Testing Expert Testimony

ICLEF Impaired Driving Defense 101

- 1. Blood Testing**
 - 1. Blood Transportation**
 - 1. Sealed**
 - 2. Climate controlled**

Blood Testing Expert Testimony

ICLEF Impaired Driving Defense 101

1. Blood Testing

1. At the lab

1. Accessioning

2. Storage

3. Sample preparation

Blood Testing Expert Testimony

ICLEF Impaired Driving Defense 101

- 1. Blood Testing**
 - 1. Gas Chromatography**
 - 1. The run**
 - 2. The sample**
 - 3. The history**

Breath Testing Expert

ICLEF Impaired Driving Defense 101

1. Breath testing
 1. Observation
 2. Sample delivery
 3. Sample analysis
 4. Device history

Urine Testing Expert Testimony

ICLEF Impaired Driving Defense 101

- 1. There is nothing in urine that will prove present impairment or intoxication.**

Urine Testing Expert Testimony

ICLEF Impaired Driving Defense 101

- 1. Urine Testing**
 - 1. Sample collection**
 - 2. Sample delivery to lab**
 - 3. Sample evaluation at lab**

Section Sixteen

Bringing It Together

John L. Sandy
Sandy Law Firm
Spirit Lake, Iowa
jmsandy@sandylawpractice.com

Section Sixteen

Bringing It Together..... John L. Sandy

