

PREFACE

The Administrator's Guide provides an introduction and overview of the SFST Refresher Training Program. The SFST Refresher Training Program is an Instructor-led program.

THIS SFST REFRESHER TRAINING PROGRAM IS INTENDED FOR THE PURPOSE OF REFRESHER TRAINING ONLY. THIS PROGRAM IS NOT A SUBSTITUTE FOR NHTSA/IACP APPROVED DWI DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING TRAINING.

The SFST Refresher Training Program focuses on enforcement of alcohol impaired driving. Other programs have been designed to improve police officers' skills in detecting and apprehending drug impaired drivers, including a 4-hour module, "Introduction to Drugged Driving", an 8-hour module, "Drugs That Impair Driving", the 16-hour Advanced Roadside Impaired Driving Enforcement (ARIDE), and the Drug Evaluation and Classification Program (DEC). These are available from the International Association of Chiefs of Police (IACP) and the National Highway Traffic Safety Administration (NHTSA).

The SFST Refresher Program is provided in a minimum 4-hour modular format. Modules may be added to meet the training needs identified by each individual state SFST or DEC Program Coordinators. These optional modules are included in this curriculum package.

DEC Program Coordinators may approve the use of ARIDE to fulfill an individual state's requirement for SFST Refresher Training. Refer to the ARIDE Administrator's Guide for delivery of program.

For more information regarding these or other materials and programs, contact your State Office of Highway Safety, NHTSA Regional Training Coordinator, State DEC Program Coordinator, and/or State SFST Training Coordinator.

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PURPOSE OF THIS DOCUMENT

The Administrator's Guide is intended to facilitate planning and implementation of the SFST Refresher Training Program. The guide provides a general overview of the sequence of instruction for the SFST Refresher Training Program as well as an outline of the Instructor-led modules.

OVERVIEW OF THE COURSE

Intended Audience

SFST Refresher Training is for law enforcement officers at the federal, state, county and local level who have ***successfully completed*** the NHTSA/IACP-approved DWI Detection and Standardized Field Sobriety Testing Training Program.

Purpose of the Training

The primary purpose the SFST Refresher Training Program is to improve the overall consistency of administration of the SFST test battery by individual police officers. Officers can refresh their skills with:

- recognizing and interpreting evidence of DWI;
- administering and interpreting the scientifically validated sobriety tests; and
- describing DWI evidence clearly and convincingly; and
- information regarding recent case law and research studies.

Course Content

The minimum SFST Refresher Training Program has 4 content modules. Each module has an introduction and several topics. Optional modules may be added as described on page one of this document. The following is a description of the topics and content covered in each session:

Session	Title	Duration
I	Introduction and Overview	30 Minutes
II	Vehicle In Motion and Personal Contact	60 Minutes
III	Standardized Field Sobriety Testing Review	60 Minutes
IV	Proficiency and Written Examination	90 Minutes
Optional	Processing the Arrested Subject and Preparation for Trial	90 Minutes
Optional	Overcoming Impaired Driving Defenses and Legal Issues	90 Minutes
Optional	Live Alcohol Workshop	60 Minutes

Optional	Video Alcohol Workshop	60 Minutes
Optional	Overview of Drug-Impaired Driving	90 Minutes

Session 1: Introduction and Overview

This session has two Segments: "Welcoming Remarks and Objectives" and "Administrative Details".

In this session, participants will receive a brief welcome and introduction. Describe your credentials for providing SFST training and carefully state the goals and objectives of the course. This is a **preparation** step, focused in the **cognitive domain** of learning. During this segment have the participants introduce themselves and print their names clearly on name tent cards, so that you will be able to call on them by name.

Next, you must attend to some essential "housekeeping duties", e.g., by notifying participants of the schedule that will be followed, pointing out the locations of rest rooms, lunch rooms, etc.

Session 2: Vehicle in Motion and Personal Contact

This session is a review of the first two phases of Standardized Field Sobriety Testing. Phase 1, Vehicle in Motion, including impaired motorcycle operators, covers the officer's initial observations of vehicular operation, the decision to stop, and observation of the stop. Phase 2, Personal Contact, covers the face-to-face observation and interview of the driver while still in the vehicle and the decision to instruct the driver to exit the vehicle or dismount.

Session 3: Standardized Field Sobriety Testing Review

A detailed review of the Standardized Field Sobriety Tests including the foundational studies and the most recent validation studies. The session objectives are:

- Understand the results of selected SFST validation studies
- Define and describe the Standardized Field Sobriety Tests (SFSTs)
- Define nystagmus and distinguish between the different types
- Describe and properly administer the three SFSTs
- Recognize, document and articulate the indicators and clues of the three SFSTs

Visuals

Session 3 visuals will include short video clips of Horizontal Gaze Nystagmus, Walk-and-Turn, and One-Leg Stand tests imbedded in the PowerPoint presentation.

Session 4: Proficiency and Written Examination

The participant must pass the NHTSA/IACP Proficiency Examination. Participant will be given a minimum of two opportunities (or such number as prescribed by state standards) to successfully complete the Proficiency Examination. The objective for this session is to demonstrate knowledge and proficiency in administering the Standardized Field Sobriety Test Battery.

The evaluation is based on a written examination. The passing grade is 80%.

Participants who fail to obtain a passing grade may take a remedial examination after 15 days but no greater than 30 days following the completion of this course.

Optional Session: Processing the Arrested Subject and Preparation for Trial

In "The Processing Phase", you will review the tasks officers are supposed to perform when processing persons arrested for DWI. Since these tasks vary somewhat from agency to agency, **you may have to modify the content of this segment.**

In "Preparing the DWI Offense/Arrest Report: Documenting the Evidence", you will review the kind of information officers should include in their DWI reports. Participants will view a nighttime DWI stop and arrest scenario.

In "Case Preparation and Pretrial Conference", you will explain the things officers should do in preparing to testify in DWI cases, and you will emphasize the role of the pretrial conference with the prosecutor in trial preparation. You will show a video segment of a pretrial conference, and discuss the strengths and weaknesses of the officer's preparation with your participants.

In "Guidelines for Direct Testimony", you will present and explain some "do's and don't's" of testimony in DWI cases. You may show a video segment of a prepared officer and discuss the officer's performance with your participants.

Optional Session: Overcoming Impaired Driving Defenses and Legal Issues

This session serves as a guide to the most common defenses in impaired driving cases, drawing on the expertise and experience of prosecutors from around the United States. It is suggested that a Traffic Safety Resource Prosecutor (TSRP) or other prosecutor present this session. To locate your TSRP, go to www.ndaa.org

Many offices assign the newest prosecutors to the impaired driving cases, even though these cases can be among the most complex and challenging cases on the docket. Few other cases present the prosecutor and officer with a more complex and litigated statute, a greater likelihood of technical, scientific evidence, or the very real likelihood of expert defense testimony. Even so, some defense attorneys will occasionally use variations of a number of traditional defense tactics when trying DWI cases. Knowing these tactics, and being able to quickly respond to them, gives the prosecutor and the officer the advantage.

This session is based upon the publications *Overcoming Impaired Driving Defenses* published by American Prosecutors Research Institute and *Prosecution of DWI* published by NHTSA.

Optional Session: Live Alcohol Workshop

You will assign the participants to work in teams. But, instead of testing each other, they will administer the tests to a group of volunteer drinkers **who are not members of the class** and who have been recruited especially for this purpose. The participants will carefully record, and interpret, the volunteers' performance of the tests, and will assess each volunteer's impairment. In the final segment of this Session, "Session Wrap-up", participants will report their assessments of the volunteers, and will be informed of the volunteers' BACs. (Instructions for "dosing" volunteers are in the Administrator's Guide, of the current DWI Detection and Standardized Field Sobriety Testing curriculum, page 15).

Optional Session: Video Alcohol Workshop

For this session, participants will view the NHTSA/IACP approved videos designated for Session XI-A in the current DWI Detection and Standardized Field Sobriety Testing curriculum. They will view the videos, assess the subjects' impairment, and record their observations. In the final segment of this Session, "Session Wrap-up", participants will report their assessments of the video subjects, and will be informed of the subjects' BACs. Note that this optional session differs from the current DWI Detection and Standardized Field Sobriety Testing curriculum Session XI-A by not requiring participant practice during the session.

Optional Session: Overview of Drug-Impaired Driving

The purpose of the module is to improve participants' ability to recognize subjects who may be under the influence of drugs other than alcohol, and to take appropriate action when they encounter such subjects. The hope and expectation is that, due to this training, fewer drug-impaired subjects will avoid detection or be treated simply as alcohol-impaired. In those agencies that have a drug evaluation and classification program, the "appropriate action" would be to summon a DRE.

Note that the purpose of this module does not require that the participant develop the ability to distinguish what type of drug is responsible for the observed impairment. Indeed, we assert that this module, by itself, cannot develop that ability. But, the participant should become more adept to recognizing the possible presence of some drug other than alcohol, and at conveying a credible basis for that suspicion.

INSTRUCTOR-LED COURSE MATERIALS

The course materials for the Instructor-led SFST Refresher Training Program consist of the following documents and materials:

- Instructor's Lesson Plans Manual
- Visual Aids
- Participant Manual

Instructor's Lesson Plans Manual

The Instructor's Lesson Plans Manual is a complete and detailed blue print of what the course covers and of how it is to be taught. It is organized into four sessions with five optional sessions included. Each session consists of a cover page, an outline page, the lesson plans, a paper copy of the visual aids ("slides"), and any other related material referenced in the session.

- The **cover page** presents the session's title and the total instructional time required to complete the session.
- The **outline page** lists the content segments and principal types of learning activities that take place during the session.
- The **lesson plans** are arranged in a straight-text format. Shaded boxes contain the training aides (i.e., visual aides) and the Instructor Notes. These notes provide guidance concerning how the content is to be taught. For example, the instructor notes might include the approximate amount of time to be devoted to a particular topic and/or points requiring special emphasis.

In addition to the content, the Instructor's Lesson Plans Manual includes the following:

- Glossary
- Final Test
- ANACAPA Sciences Research Studies
- Listing of NHTSA Regional Offices

The Instructor's Lesson Plans Manual is designed to prepare the instructor to teach the course. Instructors should review the entire set of lesson plans to become familiar with the content and develop a clear understanding of the course flow. Instructors are expected to gather and be prepared to operate any equipment necessary (i.e., projection screen, computer with PowerPoint software, LCD projector, etc.). Instructors should also have all participant manuals and handouts (i.e., post course exam) prepared before class begins. Instructors should use the lesson plans as a tool for helping to maintain the sequence and pace of presentations and other learning activities. The Instructor's Lesson Plans Manual is not a script and should not be read verbatim to the participants.

Visual Aids

The instructor-led program uses two types of visual aids:

- PowerPoint presentations
- Video

The PowerPoint presentation is used to emphasize key points and support the instructor's presentation. Instructors should use this presentation when a computer and/or projection system is available for use.

If a computer is not available to display the PowerPoint presentation, instructors can use the print-ready format. This is a black and white, paper version of the PowerPoint presentation that can be printed from PowerPoint as handouts or transparencies. A CD which includes all of the video clips used in the program can be used to accompany this version of the presentation.

In addition to the PowerPoint presentation and the video, the instructor should feel free to use any available dry-erase board or flipchart paper to add emphasis to a presentation.

Participant Manual

The SFST Refresher Training Participant Manual serves as a reference guide for the participant. Each participant should receive a manual that includes:

- Training Objectives
- Glossary
- Summary of the content for each session
- ANACAPA Sciences Research Studies
- Listing of NHTSA Regional Offices
- Listing of IACP Regional Coordinators

TESTING

Description of Proficiency Testing

You will formally test each participant's ability to administer the three tests properly.

Description of Post Course Exam

The exam is handed out and taken in a paper-based, written format. The questions for the post course exam are adapted from the DWI Detection and Standardized Field Sobriety Testing Training Program. The exam is contained in Session 4: Proficiency and Written Examination

GLOSSARY OF TERMS

ALVEOLAR BREATH - Breath from the deepest part of the lung.

BLOOD ALCOHOL CONCENTRATION (BAC) - The percentage of alcohol in a person's blood.

BREATH ALCOHOL CONCENTRATION (BrAC) - The percentage of alcohol in a person's breath, taken from deep in the lungs.

CLUE - Something that leads to the solution of a problem.

CUE - A reminder or prompting as a signal to do something. A suggestion or a hint.

DIVIDED ATTENTION TEST - A test which requires the subject to concentrate on both mental and physical tasks at the same time.

DWI/DUI - The acronym "DWI" means driving while impaired and is synonymous with the acronym "DUI", driving under the influence or other acronyms used to denote impaired driving. These terms refer to any and all offenses involving the operation of vehicles by persons under the influence of alcohol and/or other drugs.

DWI DETECTION PROCESS - The entire process of identifying and gathering evidence to determine whether or not a subject should be arrested for a DWI violation. The DWI detection process has three phases:

- Phase One - Vehicle In Motion
- Phase Two - Personal Contact
- Phase Three - Pre-arrest Screening

EVIDENCE - Any means by which some alleged fact that has been submitted to investigation may either be established or disproved. Evidence of a DWI violation may be of various types:

- a. Physical (or real) evidence: something tangible, visible, or audible.
- b. Well established facts (judicial notice).
- c. Demonstrative evidence: demonstrations performed in the courtroom.
- d. Written matter or documentation.
- e. Testimony.

FIELD SOBRIETY TEST - Any one of several roadside tests that can be used to determine whether a subject is impaired.

HORIZONTAL GAZE NYSTAGMUS (HGN) - Involuntary jerking of the eyes, occurring as the eyes gaze to the side.

ILLEGAL PER SE - Unlawful in and of itself. Used to describe a law which makes it illegal to drive while having a statutorily prohibited Blood Alcohol Concentration.

IMPAIRED DRIVING - When the mental and/or physical faculties of a person are affected to a degree which renders such person unable to operate a vehicle safely.

NYSTAGMUS - An involuntary jerking of the eyes.

ONE-LEG STAND (OLS) - A divided attention field sobriety test.

PERSONAL CONTACT - The second phase in the DWI detection process. In this phase the officer observes and interviews the driver face to face; determines whether to ask the driver to step from the vehicle; and observes the driver's exit and walk from the vehicle.

PRE-ARREST SCREENING - The third phase in the DWI detection process. In this phase the officer administers field sobriety tests to determine whether there is probable cause to arrest the driver for DWI, and administers or arranges for a preliminary breath test, if available.

PRELIMINARY BREATH TEST (PBT) - A pre-arrest breath test administered during investigation of a possible DWI violator to obtain an indication of the person's blood alcohol concentration.

PSYCHOPHYSICAL - "Mind/Body." Used to describe field sobriety tests that measure a person's ability to perform both mental and physical tasks.

STANDARDIZED FIELD SOBRIETY TEST BATTERY - A battery of tests, Horizontal Gaze Nystagmus, Walk-and-Turn, and One-Leg Stand, administered and evaluated in a standardized manner to obtain validated indicators of impairment based on NHTSA research.

TIDAL BREATH - Breath from the upper part of the lungs and mouth.

VEHICLE IN MOTION - The first phase in the DWI detection process. In this phase the officer observes the vehicle in operation, determines whether to stop the vehicle, and observes the stopping sequence.

VERTICAL GAZE NYSTAGMUS - An involuntary jerking of the eyes (up and down) which occurs as the eyes are held at maximum elevation. The jerking should be distinct and sustained.

WALK-AND-TURN (WAT) - A divided attention field sobriety test.

NHTSA Regional Offices

Note: Regional Training Coordinators are located in each Regional Office.

Region	States	Telephone
I <i>Cambridge, MA</i>	Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont	(617) 494-3427
II <i>White Plains, NY</i>	New Jersey, New York, Pennsylvania, Puerto Rico, Virgin Islands	(914) 682-6162
III <i>Baltimore, MD</i>	Delaware, District of Columbia, Kentucky, Maryland, North Carolina, Virginia, West Virginia	(410) 962-0077
IV <i>Atlanta, GA</i>	Alabama, Florida, Georgia, South Carolina, Tennessee	(404) 562-3739
V <i>Olympia Fields, IL</i>	Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin	(708) 503-8822
VI <i>Fort Worth, TX</i>	Indian Nations, Louisiana, Mississippi, New Mexico, Oklahoma, Texas	(817) 978-3653
VII <i>Kansas City, MO</i>	Arkansas, Iowa, Kansas, Missouri, Nebraska	(816) 822-7233
VIII <i>Denver, CO</i>	Colorado, Nevada, North Dakota, South Dakota, Utah, Wyoming	(303) 969-6917
IX <i>San Francisco, CA</i>	Arizona, California, Hawaii, Northern Marianas, American Samoa, Guam	(415) 744-3089
X <i>Seattle, WA</i>	Alaska, Idaho, Montana, Oregon, Washington	(206) 220-7640

For the DEC Program Coordinators refer to the DECP website at: www.decp.org

SESSION I
INTRODUCTION AND OVERVIEW

SESSION I: INTRODUCTION AND OVERVIEW

Upon successfully completing this session, the participant will be able to:


- State the goals and objectives of the training.
- Describe the training schedule and activities.
- Describe the current DWI problem.
- Identify the elements of the drug problem.
- Define and describe impaired driving enforcement programs.
- Understand the roles and responsibilities of the Drug Recognition Expert (DRE) and how this course supports the Drug Evaluation and Classification Program (DECP).
- Define the term drug in the context of traffic safety and impaired driving enforcement as referenced in the DECP.

CONTENT SEGMENTS

- A. Welcoming Remarks and Objectives
- B. Administrative Details
- C. Driving Under the Influence
- D. Impaired Driving Enforcement System
- E. DWI Detection and Standardized Field Sobriety Testing Program
- F. Drugs and Highway Safety

I. INTRODUCTION AND OVERVIEW

Display Slide I-1: Title



A. Welcoming Remarks and Objectives

Welcome to the DWI Detection and Standardized Field Sobriety Testing Refresher Training Program.

Instructor Introductions

- Principal instructor (name, relevant background, etc.)

Write names on dry-erase board or flipchart.

- Instructor aides and other relevant individuals (names, assignments, etc.)

Display Slides I-2 and I-3: Objectives

Session Objectives

- State the goals and objectives of the training
- Describe the training schedule and activities
- Describe the current DWI problem
- Identify the elements of the drug problem

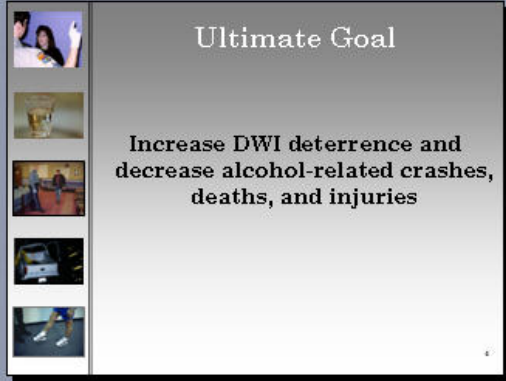
Session Objectives (continued)

- Define and describe impaired driving enforcement programs
- Understand the roles and responsibilities of the DRE and how this course supports the Drug Evaluation and Classification Program (DECP)
- Define the term drug in the context of traffic safety and impaired driving enforcement as referenced in the DECP

Session Objectives

- State the goals and objectives of the training.
- Describe the training schedule and activities.
- Describe the current DWI problem.
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Display Slide I-4: Ultimate Goal



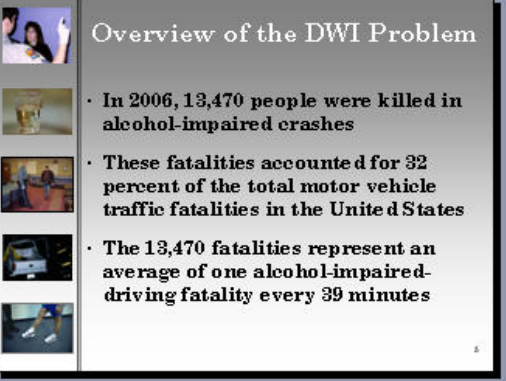
Ultimate Goal

Increase DWI deterrence and decrease alcohol-related crashes, deaths, and injuries

Ultimate Goal

Increase DWI deterrence and decrease alcohol-related crashes, deaths, and injuries.

Display Slide I-5: Overview of the Problem



Overview of the DWI Problem

- In 2006, 13,470 people were killed in alcohol-impaired crashes
- These fatalities accounted for 32 percent of the total motor vehicle traffic fatalities in the United States
- The 13,470 fatalities represent an average of one alcohol-impaired-driving fatality every 39 minutes

Overview of the DWI Problem

- In 2006, 13,470 people were killed in alcohol-impaired crashes.
- These fatalities accounted for 32 percent of the total motor vehicle traffic fatalities in the United States.
- The 13,470 fatalities represent an average of one alcohol-impaired-driving fatality every 39 minutes.

Point out that the success or failure of the SFST program will be judged on the participants' proficiency in these key abilities.

B. Administrative Details

- Training schedule (breaks, etc.)
- Facilities (rest rooms, lunchroom, etc.)
- Logistics (travel vouchers, etc.)
- Refer to glossary located at end of Session I

C. Driving Under the Influence

Understand the magnitude of the problem of subjects driving while impaired by drugs and alcohol.

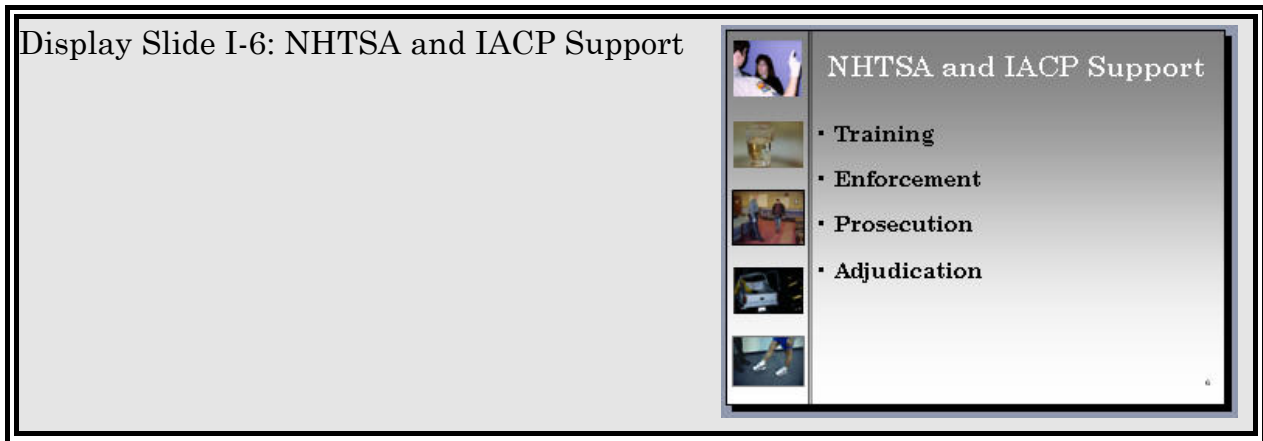
Ask class for examples specific to their state/ locality?

The National Survey on Drug Use and Health report provides a thorough overview of drug and alcohol use in the general population. The survey tells us:

- Males are twice as likely as females to drive under the influence of alcohol.
- An estimated 12.7 percent of persons aged 12 or older reported that they had driven at least once in the last year under the influence of alcohol.
- That further translated into approximately 30% of minors (16-20 years of age) and 29% of those between the ages of 21 and 25 years.
- 9.9 million persons aged 12 or older reported that they drove under the influence of illicit drugs during the last year.

Source: National Survey on Drug Use and Health, 2007

D. Impaired Driving Enforcement System



NHTSA and IACP support:

- Training
- Enforcement
- Prosecution
- Adjudication

What NHTSA/IACP Supports:

Selective Traffic Enforcement Program (STEP) Grants, Crackdown support, Traffic Safety Resource Prosecutors (TSRP), Saturation Patrols, Sobriety Checkpoints, and Judicial Education.

One of the most critical support activities NHTSA/IACP provides is **TRAINING**.

Some examples of law enforcement and justice professional training that NHTSA/IACP provides and supports are:

- Standardized Field Sobriety Testing
- Advanced Roadside Impaired Driving Enforcement (ARIDE)

Explain that ARIDE is a new NHTSA/IACP 16-hour training course designed to bridge the gap between SFST and DRE.

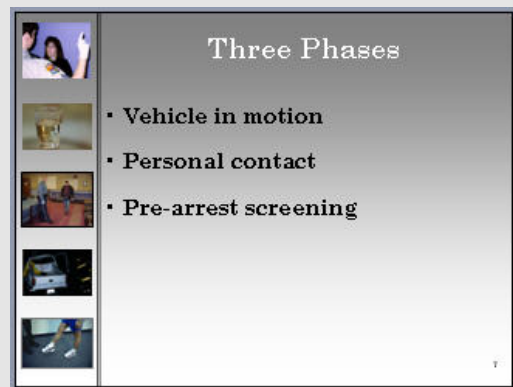
- Drug Evaluation and Classification program
- Drug Impairment Training for Education Professionals
- Prosecuting the Drugged Driver
- Lethal Weapon
- Protecting Lives, Saving Futures

The Standardized Field Sobriety Testing (SFST) Practitioner course provides:

- The cornerstone for a system of impaired driving detection training and enforcement.
- Proficiency in the SFST skills provides a foundation for ARIDE and the Drug Evaluation and Classification (DEC) program.
- The SFST program should be part of all alcohol and drug impaired driving enforcement initiatives.

E. DWI Detection and Standardized Field Sobriety Testing Program

Display Slide I-7: Three Phases



The DWI detection process includes three phases:

1. Vehicle in motion
2. Personal contact
3. Pre-arrest screening

Throughout this training we will be discussing concepts related to these three phases.

The SFST Battery is a set of tests that include the following:

- Horizontal Gaze Nystagmus
- Walk-and-Turn
- One-Leg Stand

These tests are designed:

- To be administered and evaluated in a standardized manner to obtain validated indicators of impairment based on NHTSA/IACP supported research.

The SFST test battery serves as the foundation for impaired driving enforcement. It is critical that these tests be performed and interpreted properly.

F. Drugs and Highway Safety

Many law enforcement officers are trained in Standardized Field Sobriety Testing (SFST) and use the skills gained in the course as part of their overall enforcement of DWI laws.

Alcohol and Drug Use

Social drinking is considered acceptable in many societies.

It is important to understand the use of alcohol in the context of society, since it is related to the enforcement and adjudication of DWI offenses.

Display Slides I-8 and I-9: Alcohol and Drug Use



Alcohol and Drug Use

- 119 million (50.1%) people consider themselves drinkers
- Slightly more than half of Americans aged 12 or older reported being binge drinkers of alcohol (5.1 percent). This translates to an estimated 126.8 million people
- Heavy drinking was reported by 6.9 percent of the population aged 12 or older, or approximately 17 million people



Alcohol and Drug Use

- Among young adults aged 18 to 25, the rate of binge drinking was 41.8 percent, and the rate of heavy drinking was 14.7 percent
- An estimated 12.7 percent of persons aged 12 or older drove under the influence of alcohol at least once in the past year according to the survey

The National Survey on Drug Use and Health (NSDUH) Survey reports that:

This is a self reported survey. There are some issues that need to be discussed.

For example: limitations of data collected.

2007 research survey

- 119 million (50.1%) people consider themselves drinkers.
- Slightly more than half of Americans aged 12 or older reported being binge drinkers of alcohol (5.1 percent). This translates to an estimated 126.8 million people.
- Heavy drinking was reported by 6.9 percent of the population aged 12 or older, or approximately 17 million people.
- Among young adults aged 18 to 25, the rate of binge drinking was 41.8 percent and the rate of heavy drinking was 14.7 percent.
- An estimated 12.7 percent of persons aged 12 or older drove under the influence of alcohol at least once in the past year according to the survey.

Although these statistics are significant, it is reasonable to assume that the problem is even larger when you consider legal or prescription drugs used in a manner other than for what they have been prescribed or produced.

When we look at drug use specifically, it is helpful to see the trends based on specific types of drugs.

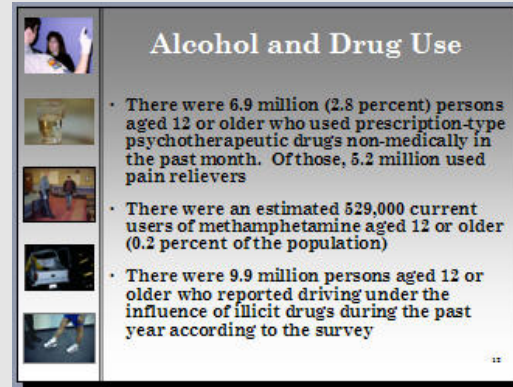
The following summarizes the usage information as reported by the NSDUH Survey 2007:

Display Slides I-10, I-11, and I-12: Alcohol and Drug Use



Alcohol and Drug Use

- An estimated 19.9 million Americans aged 12 or older were current (past month) illicit drug users, meaning they had used an illicit drug during the month prior to the survey
- This estimate represents 8.0 percent of the population aged 12 years old or older. (Illicit drugs include marijuana, marijuana/hashish, cocaine (including crack), heroin, hallucinogens, inhalants, or prescription-type psychotherapeutics used non-medically.)



Alcohol and Drug Use

- There were 6.9 million (2.8 percent) persons aged 12 or older who used prescription-type psychotherapeutic drugs non-medically in the past month. Of those, 5.2 million used pain relievers
- There were an estimated 529,000 current users of methamphetamine aged 12 or older (0.2 percent of the population)
- There were 9.9 million persons aged 12 or older who reported driving under the influence of illicit drugs during the past year according to the survey



Alcohol and Drug Use

- Marijuana was the most commonly used illicit drug (14.4 million past-month users)
- Hallucinogens were used in the past month by 1.0 million aged 12 or older
- There were 2.1 million current cocaine users aged 12 or older, comprising 0.8 percent of the population

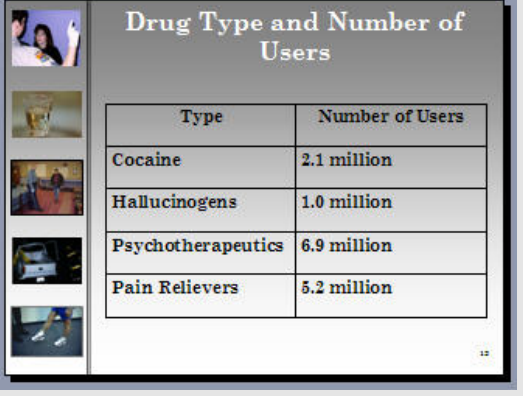
Note: Numbers are very conservative due to self reporting.

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- This estimate represents 8.0 percent of the population aged 12 years old or older. (Illicit drugs include marijuana, marijuana/hashish, cocaine (including crack), heroin, hallucinogens, inhalants, or prescription-type psychotherapeutics used non-medically.)
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- There were 6.9 million (2.8 percent) persons aged 12 or older who used prescription-type psychotherapeutic drugs non-medically in the past month. Of those, 5.2 million used pain relievers.
- There were an estimated 529,000 current users of methamphetamine aged 12 or older (0.2 percent of the population).
- There were 9.9 million persons aged 12 or older who reported driving under the influence of illicit drugs during the past year according to the survey.

NSDUH provides additional details on drugs used in a manner other than prescription:

Display Slide I-13: Drug Type and Number of Users



Type	Number of Users
Cocaine	2.1 million
Hallucinogens	1.0 million
Psychotherapeutics	6.9 million
Pain Relievers	5.2 million

<u>Type</u>	<u>Number of Users</u>
Cocaine	2.1 Million
Hallucinogens	1.0 Million
Psychotherapeutics	6.9 Million
Pain Relievers	5.2 Million

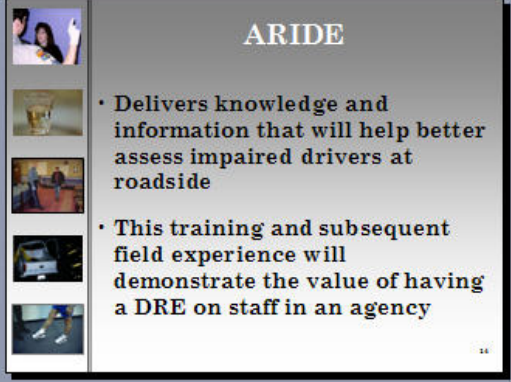
The ARIDE Course

The ARIDE course was designed with a dual purpose:

The ARIDE program will allow the participant to build on the knowledge gained through their training and experience related to the SFSTs.

- Many law enforcement officers have encountered subjects who appear to be impaired by a substance other than alcohol, or seem to be displaying signs and symptoms which are inconsistent with their BAC test results.
- This course will provide additional information which can assist the officer in effective observation and interview techniques related to driving while impaired by alcohol, drugs, or a combination of both, and make an informed decision to arrest or not arrest a subject for impaired driving.

Display Slide I-14: ARIDE



ARIDE

- Delivers knowledge and information that will help better assess impaired drivers at roadside
- This training and subsequent field experience will demonstrate the value of having a DRE on staff in an agency

14

This sums up the responsibilities and duties of the ARIDE trained officer at the conclusion of this training course.

- This course will deliver knowledge and information that will help them better assess impaired drivers at roadside.
- This training and subsequent field experience will demonstrate the value of having a DRE on staff in an agency and may serve as motivation for the individual officers to attend a DEC course in the future.

A subsequent result of this course will facilitate better utilization of DREs in the field.

The desired outcome of the training is:

- The participant will better understand the role of the DRE and will be able to use their expertise more effectively.
- For those communities with no DREs or limited access to their services, this course will help officers make informed decisions related to testing, documentation, and reporting.

This course is intended to bridge the gap between the SFST and DRE course and to provide a level of awareness to the participants, both law enforcement and other criminal justice professionals, in the area of drug impairment in the context of traffic safety.

Based on that premise, the ARIDE course was developed with the following goals in mind.

Place extreme emphasis on this point. This program is designed to work in conjunction with the DEC program.

Segment Goal

Display Slide I-15: ARIDE Goal - Law Enforcement



**ARIDE Goal
Law Enforcement**

- **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**

15

The ARIDE 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.

Often times officers come in contact with the drug impaired driver.

There are many things that could be happening:

- The officer is unfamiliar with the indicators of drug impairment, therefore does nothing with the subject.

Ask class to provide some examples before moving forward.

- Recognizes there is something wrong with the driver, but does not know how to address the issue.
- Allows subject to continue on their way.
- Drives the subject home or allows the subject to ride home with another individual.
- Not familiar with the resources available to them.

Drug Evaluation and Classification

Ask Class if they are familiar with the DEC program and if they have any DEC trained officers in their agencies.

The ultimate goal of the DEC program is to help prevent crashes and avoid deaths and injuries by improving enforcement of drug impaired driving violations.

A participant who successfully completes all phases of the DEC program is known as a Drug Recognition Expert or Drug Recognition Evaluator (DRE).

The DRE officer is trained to conduct a detailed evaluation, consisting of twelve steps (12), and obtain other evidence that can be articulated as an opinion.

They can reach reasonably accurate conclusions concerning the category or categories of drug(s), or medical conditions causing the impairment observed in the subject.

Based on these informed conclusions, the DRE officer can request the collection and analysis of an appropriate biological sample (blood, urine, or saliva) to obtain corroborative, scientific evidence of the subject's drug use.

The progression between each of the impaired driving enforcement programs is:

- The foundation is SFST
- The intermediate level is ARIDE
- The final stage is the DEC program

Display Slides I-16 and I-17: Roles and Responsibilities

<p>Roles and Responsibilities of a DRE</p> <ul style="list-style-type: none"> • 72 hours of classroom training • Field certifications • Comprehensive final knowledge examination • Participate in continuing education courses 	<p>Roles and Responsibilities of a DRE</p> <ul style="list-style-type: none"> • Complete a recertification training course every two years • Maintain a log of all evaluations completed in training and as part of any enforcement activities • Meet other administrative requirements as established in the IACP
--	--

Roles and Responsibilities of a Drug Recognition Expert

To obtain a DRE Certification the law enforcement officer must complete:

- 72 hours of classroom training
- Field certifications
- Comprehensive final knowledge examination

In order to retain their certification, the DRE must:

- Participate in continuing education courses.
- Complete a recertification training course every two years.
- Maintain a log of all evaluations completed in training and as part of any enforcement activities.

- Meet other administrative requirements as established in the International Association of Chiefs of Police (IACP) International Standards governing the DEC program.

The State DEC program state coordinators may place other standards on each DRE that is specific to that state.

Drug Impairment Training for Education Professionals

The purpose of the DITEP training is to provide school administrators, teachers, and nurses with a systematic approach to recognizing and evaluating subjects in the academic environment who are using, abusing, and/or impaired by drugs, in order to provide early intervention.

This training is not intended to qualify participants as DREs, but is intended to aid in the evaluation and documentation of those suspected of being impaired by drugs.

SESSION II
VEHICLE IN MOTION AND PERSONAL CONTACT

SESSION II: VEHICLE IN MOTION AND PERSONAL CONTACT

Upon successfully completing this session, the participant will be able to:

- Identify typical cues of Vehicle in Motion
- Identify typical observations made during Personal Contact.
- Describe the observed cues clearly and convincingly.
- Understand the significance of the problem of impaired motorcycle riders.
- Obtain the skills necessary to detect, arrest, and prosecute alcohol- and drug-impaired motorcyclists.

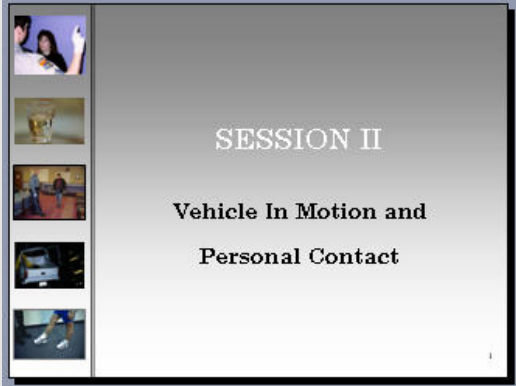
CONTENT SEGMENTS

A. Phase One: Vehicle in Motion

B. Phase Two: Personal Contact

II. VEHICLE IN MOTION AND PERSONAL CONTACT

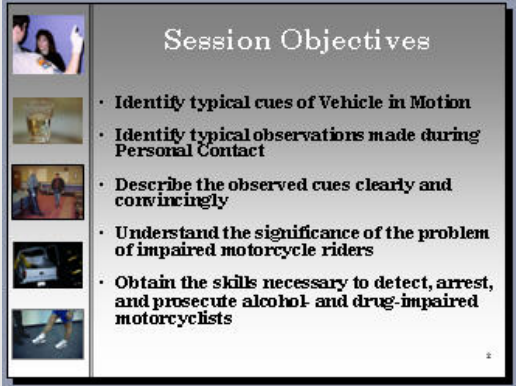
Display Slide II-1: Title



SESSION II

Vehicle In Motion and
Personal Contact

Display Slide II-2: Objectives



Session Objectives

- Identify typical cues of Vehicle in Motion
- Identify typical observations made during Personal Contact
- Describe the observed cues clearly and convincingly
- Understand the significance of the problem of impaired motorcycle riders
- Obtain the skills necessary to detect, arrest, and prosecute alcohol- and drug-impaired motorcyclists

Session Objectives

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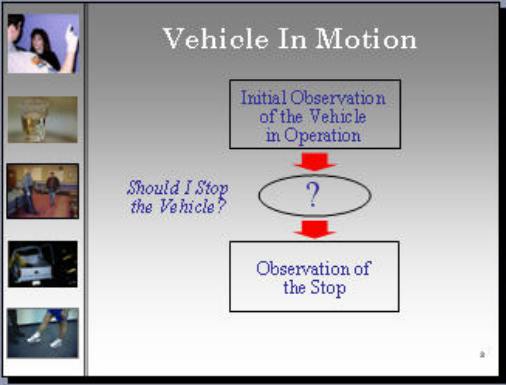
A. Phase One: Vehicle in Motion

Overview: Tasks and Decision

Display Slide II-3: Vehicle In Motion

Point out block No. 1 on the slide.

Pose this question: "What are some of the kinds of things that might first draw your attention to a vehicle?"



DWI Detection Phase One, Vehicle in Motion, consists of the initial observation of vehicular operation, the stop decision and the observation of the stop.

The initial observation of vehicular operation begins when the officer first notices the vehicle and/or the driver.

Once the stop command has been communicated to the suspect driver, the officer must closely observe the driver's actions and vehicle maneuvers during the stopping sequence.

Point out block No. 2 on the slide.

Sometimes, significant evidence of alcohol influence comes to light during the stopping sequence.

In some cases, the stopping sequence might produce the first suspicion of DWI.

Initial Observations: Visual Cues of Impaired Operation (Automobiles)

Drivers impaired by alcohol and/or other drugs may respond in unexpected and dangerous ways to the stop command.

Emphasize officer's need to be alert for own safety.

The National Highway Traffic Safety Administration sponsored research to identify the most common and reliable initial indicators of DWI.

ANACAPA Sciences, DOT HS 808 654, 1997.

Research identified 100 cues, each providing a high probability indication that the driver is under the influence.

The cues presented in these categories predict a driver is DWI at least 35 percent of the time.

The list was reduced to 24 cues during three field studies involving hundreds of officers and more than 12,000 enforcement stops.

Generally, the probability of DWI increases substantially when a driver exhibits more than one of the cues.

Note: There is a brochure published by NHTSA that contains these cues. The title is "The Visual Detection of DWI Motorists" DOT HS 808 677.

The driving behaviors are presented in four categories:

Display Slide II-4: Driving Behaviors

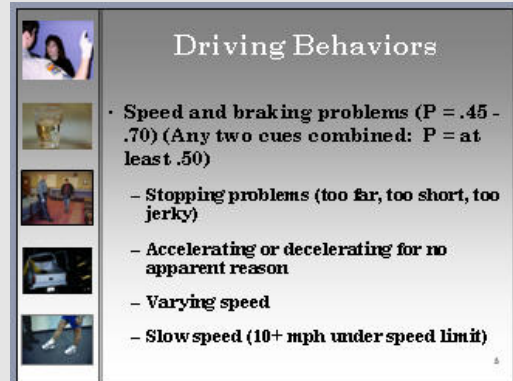
Driving Behaviors

- **Problems in maintaining proper lane position (P = .50 - .75) (Weaving [plus any other cue: P = .65])**
 - Weaving across lane lines
 - Straddling a lane line
 - Swerving
 - Turning with a wide radius
 - Drifting
 - Almost striking another vehicle

Remind participants that the formula are designed to identify the most common and reliable initial indicators of DWI based on 1997 ANACAPA Sciences Study.

- Problems in maintaining proper lane position. [P=.50-.75]
 - Weaving
 - Weaving across lane lines
 - Straddling a lane line
 - Swerving
 - Turning with a wide radius
 - Drifting
 - Almost striking a vehicle or other object

Display Slide II-5: Driving Behaviors



Driving Behaviors

- **Speed and braking problems (P = .45 - .70) (Any two cues combined: P = at least .50)**
 - Stopping problems (too far, too short, too jerky)
 - Accelerating or decelerating for no apparent reason
 - Varying speed
 - Slow speed (10+ mph under speed limit)

- Speed and braking problems. [P=.45-.70]
 - Stopping problems (too far, too short, or too jerky)
 - Accelerating or decelerating for no apparent reason
 - Varying speed
 - Slow speed (10+ mph under limit)

Display Slide II-6: Driving Behaviors



Driving Behaviors

- **Vigilance problems (P = .55 - .65)**
 - Driving in opposing lanes or wrong way on a one-way street
 - Slow response to traffic signals
 - Slow or failure to respond to officer's signals
 - Stopping in lane for no apparent reason
 - Driving without headlights at night
 - Failure to signal or inconsistent

- Vigilance problems. [P=.55-.65]
 - Driving in opposing lanes or wrong way on one way
 - Slow response to traffic signals
 - Slow or failure to respond to officer's signals
 - Stopping in lane for no apparent reason
 - Driving without headlights at night
 - Failure to signal or signal inconsistent with action

Display Slide II-7: Driving Behaviors



Driving Behaviors

- **Judgment problems (P = .35 - .90) (Any two cues combined: P = at least .50)**
 - Following too closely
 - Improper or unsafe lane change
 - Illegal or improper turn (too fast, too jerky, too sharp)
 - Driving on other than designated roadway
 - Stopping inappropriately in response to officer
 - Inappropriate or unusual behavior
 - Appearing to be impaired

- Judgment problems. [P=.35-.90]
 - Following too closely
 - Improper or unsafe lane change
 - Illegal or improper turn
 - Driving on other than designated roadway
 - Stopping inappropriately in response to officer

- Inappropriate or unusual behavior (throwing objects, arguing, etc.)
- Appearing to be impaired

Initial Observations: Visual Cues of Impaired Vehicle Operation (Motorcycles)

The National Highway Traffic Safety Administration (NHTSA) estimated that in 2005, about 27 percent of motorcycle operators involved in fatal crashes had a BAC of 0.08 or higher.

In 2005, NHTSA also estimated that 34 percent of the motorcycle operators involved in crashes had a BAC of .01 or higher.

Source: The Detection of DWI Motorcyclists, DOT HS 807 856, July, 2007 and Fatal Accident Reporting System (FARS).

NHTSA sponsored research to develop a set of behavioral cues to be used by law enforcement personnel to detect motorcyclists who are operating their vehicles while impaired.

Source: National Survey of Drinking and Driving Attitudes and Behaviors, DOT HS 810 644, NHTSA.

8 clues best discriminate between DWI and unimpaired motorcycle operation. These cues have been labeled as:

- Excellent Predictors
- Good Predictors

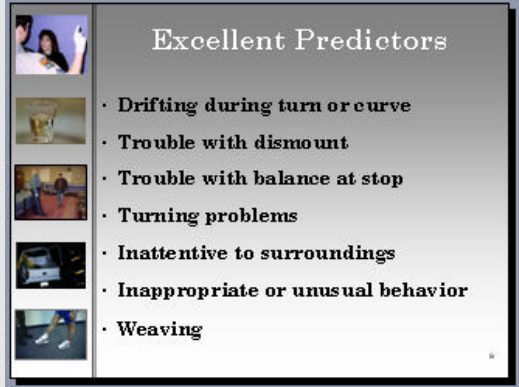
These cues can be used both day and night.

The excellent cues predicted impaired motorcycle operation at least 50 percent of the time.

The good cues predicted impaired motorcycle operation at least 30 to 49 percent of the time.

Cases that involve speeding require additional clarification. Motorcyclists stopped for excessive speed are likely to be driving while impaired only about 10 percent of the time.

Display Slide II-8: Excellent Predictors



Excellent Predictors

- Drifting during turn or curve
- Trouble with dismount
- Trouble with balance at stop
- Turning problems
- Inattentive to surroundings
- Inappropriate or unusual behavior
- Weaving

Study indicated probability rider being impaired is at least 50 percent.

Source: NHTSA, HS 807 839

Excellent Predictors

- Drifting During Turn or Curve

The most common cause of single vehicle, fatal motorcycle crashes is “Failure to Negotiate Curves”.

This type of collision is usually caused by impaired balance and coordination.

If you see a motorcycle drifting during a turn or curve, do the rider a favor and pull him or her over.

- Trouble with Dismount

Parking and dismounting a motorcycle can be a useful field sobriety test.

The operator must decide on a safe place to stop the motorcycle.

The operator must then balance their weight on one foot while swinging their other foot over the seat to dismount.

Operators having problems dismounting are impaired 50 percent of the time.

- Trouble with Balance at Stop

Riders whose balance has been impaired by alcohol and/or drugs often can not maintain control of the motorcycle while stopped.

Riders may be observed noticeably shifting their weight from side to side while stopped at a red light or stop sign for any length of time.

- Turning Problems

- Unsteady during turn of curve

As a result of impairment an officer might observe a motorcycle's front wheel or handle bars wobbling as the rider attempts to maintain balance at slow speeds.

The gyroscopic effects of a motorcycle's wheels tend to keep a motorcycle "on track" as long as the speed is maintained.

- Late Braking During Turn

An impaired motorcyclist might misjudge the speed or distance to the corner or curve, requiring an application of brakes during the maneuver.

- Improper Lean Angle During Turn


When a rider's balance or speed decision making is impaired, the rider frequently attempts to sit upright through the maneuver.

- Erratic Movement During Turn

Unsteady during a turn or curve, brake late, assumes an improper lean angle, or makes erratic movements during a turn or curve.

- Inattentive to surroundings
- Inappropriate or unusual behavior
 - Open containers
 - Dropping objects from motorcycle
 - Urinating at roadside
 - Arguing with other motorists
 - Disorderly conduct
- Weaving – involves excessive movement within a lane or across lane lines.

Display Slide II-9: Good Predictors



Good Predictors

- Erratic movements while traveling straight
- Operating without lights at night
- Recklessness
- Following too closely
- Running stop light or sign
- Evasion
- Wrong way

Study indicated probability rider being impaired is 30 to 49 percent.

Source: NHTSA, HS 807 839

Good Predictors

- Erratic Movements While Traveling Straight

Motorcyclists making erratic movements or sudden corrections while attempting to ride in a straight line.

- Operating Without Lights at Night

- Recklessness

HS00178C 8/08

- Following Too Closely
- Running Stop Light or Sign

Failure to stop at a red light or stop sign can indicate either vigilance capabilities, or impaired judgment.

- Evasion
- Wrong Way

Typical Reinforcing Cues of the Stopping Sequence

After the command to stop is given, the alcohol impaired driver may exhibit additional important evidence of DWI.

Ask participants to suggest possible cues that might be observed after the stop command that might reinforce the initial suspicion of DWI.

Some of these cues are exhibited because the stop command places additional demands on the driver's ability to divide attention.

Point out the dangers inherent with fleeing operators. If time allows, review agency's pursuit policy.

The signal to stop creates a new situation to which the driver must devote some attention. For example, emergency flashing lights, siren, etc., demand and divert the subject's attention.

Signal to stop requires the driver to turn the steering wheel, operate the brake pedal, activate the signal light, etc.

As soon as officer gives the stop command, the subject's driving task becomes more complex.

If subject is under the influence, the subject may not be able to handle this more complex driving very well.

Emphasize that turning on the patrol vehicle's emergency lights creates a simple test of the subject's driving impairment.

It is the officer's responsibility to capture and convey the additional evidence of impairment that may be exhibited during the stopping sequence.

Requires ability to recognize evidence of alcohol and/or other drug influence and to describe that evidence clearly and convincingly.

B. Phase Two: Personal Contact

Display Slide II-10: Personal Contact

The slide titled "Personal Contact" contains a flowchart with three main components: a top box labeled "Interview and Observation of the Driver", a central oval containing a question mark with the text "Should Driver Exit?" to its left, and a bottom box labeled "Observation of the Exit". Red arrows indicate a downward flow from the top box to the question mark, and from the question mark to the bottom box. To the left of the flowchart is a vertical column of five small, square images depicting various scenes related to law enforcement and vehicle stops.

DWI Detection Phase Two, Personal Contact, consists of:

- The face-to-face observation and interview of the driver while still in the vehicle.
- The decision to instruct the driver to exit the vehicle.
- The observation of the driver's exit from the vehicle.

Typical Investigation Clues of the Driver Interview

The interview and face-to-face observation of the driver allow the officer to use three senses to gather evidence of alcohol and/or other drug influence.

Write "see -- hear -- smell" on dry-erase board.

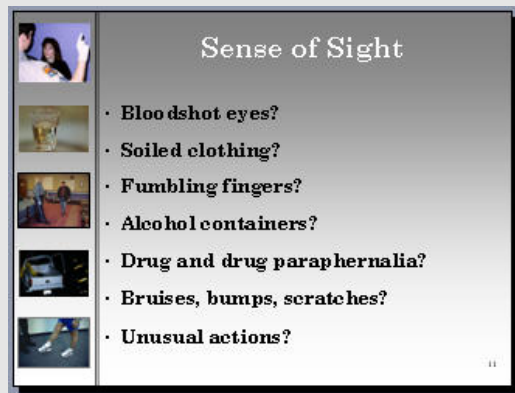
Remind participants that the interview and face-to-face observation will involve three of the five senses.

Sense of Sight

Ask participants to suggest typical things that an officer might see during the interview that would be describable clues or evidence of alcohol and/or other drug influence.

Display Slide II-11: Sense of Sight

After most major sight clues have been suggested, display them via slide II-11.



Sense of Hearing

Ask participants to suggest typical things that an officer might hear during the interview that would be describable clues or evidence of alcohol and/or other drug influence.

Display Slide II-12: Sense of Hearing

After most major sound clues have been suggested, display them via slide II-12.



Sense of Hearing

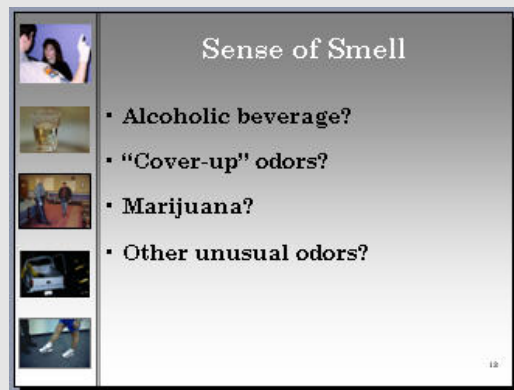
- Slurred speech?
- Admission of drinking?
- Inconsistent responses?
- Unusual statements?
- Abusive language?

Sense of Smell

Ask participants to suggest typical things that an officer might smell during the interview that would be describable clues or evidence of alcohol or drug ingestion.
NOTE: For officer safety be aware of communicable airborne diseases, etc.

Display Slide II-13: Sense of Smell

After most major odor clues have been suggested, display them via slide II-13.

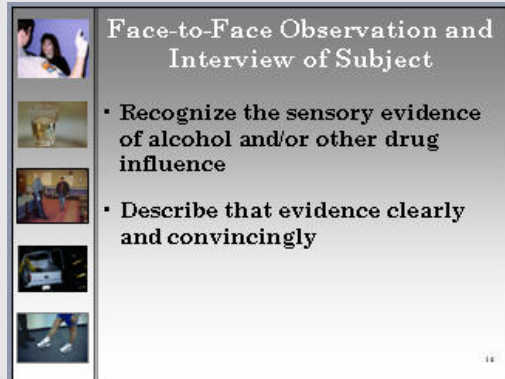


Sense of Smell

- Alcoholic beverage?
- “Cover-up” odors?
- Marijuana?
- Other unusual odors?

Proper face-to-face observation and interview of the subject demands two distinct but related abilities of the officer:

Display Slide II-14: Face-to-Face Observation and Interview



Face-to-Face Observation and Interview of Subject

- Recognize the sensory evidence of alcohol and/or other drug influence
- Describe that evidence clearly and convincingly

- Recognize the sensory evidence of alcohol and/or other drug influence.
- Describe that evidence clearly and convincingly.

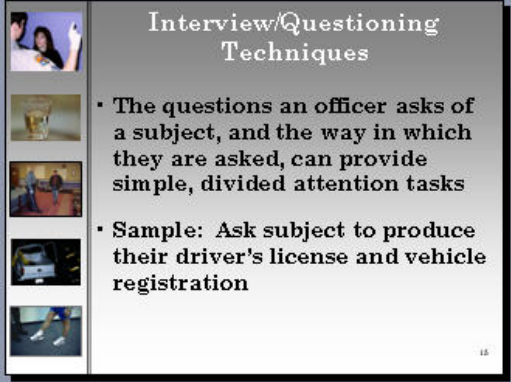
Recognition and Description of Investigation Clues

The research also identified 10 post stop cues. [P > .85]

- Difficulty with motor vehicle controls
- Difficulty exiting the vehicle
- Fumbling with driver license or registration
- Repeating questions or comments
- Swaying, unsteady, or balance problems
- Leaning on the vehicle or other object
- Slurred speech
- Slow to respond to officer/ officer must repeat
- Provides incorrect information, changes answers
- Odor of alcoholic beverage from the driver

Interview/Questioning Techniques

Display Slide II-15: Interview/Questioning Techniques



The questions an officer asks of a subject, and the way in which they are asked, can provide simple, divided attention tasks.

Sample Divided Attention Question: ask subject to produce their driver's license and vehicle registration.

Things to watch for in the subject's response to your instruction to produce driver's license and vehicle registration:

Ask participants to suggest possible evidence of impairment that might come to light during the production of the license and registration.

- Forgets to produce both documents (divided attention).
- Produces inappropriate or other documents.
- Passes over the license and/or registration while searching through the wallet.
- Fumbles or drops wallet, license or registration.
- Unable to retrieve documents, using fingertips.

Variation on the request for license and registration: the interrupting or distracting question.

The interrupting or distracting question forces the subject to divide attention between the license/registration search and the new question.

Have participants give examples of effective interrupting or distracting questions.

Things to watch for in subject's response to the interrupting or distracting question:

- Subject ignores question, because subject is concentrating on the license/registration search.
- Subject forgets to resume search for license and registration after answering the question.
- Subject supplies incorrect answer to the question.

After obtaining the license and registration: verifying information through unusual questions.

There are probably dozens of questions which the subject should be able to answer very easily, but which might be very difficult to handle while impaired, simply because they are unusual.

Unusual questions require the subject to process information; this can be especially difficult to do when the subject doesn't expect to have to process information.

Example: subject may respond to the question about the middle name by giving first name.

In this case, subject ignores the unusual question and instead answers an unspoken usual question.

Ask class to suggest other unusual questions that might be put to the subject.

Sample tests that can be administered while the subject is still inside the vehicle.

Point out that these kinds of tests have not been scientifically validated but still can be useful for obtaining evidence of impairment.

Demonstrate the examples listed below.

Alphabet Recital

- Recite the alphabet, beginning with the letter E as in Edward, and stopping after the letter P as in Paul.

Count-down Tests

- Count out loud backwards, starting with the number 67 and ending at the number 54.

Finger Count Test

- Touch the tip of right thumb, in turn, to tips of the fingers of the right hand, simultaneously counting "one, two, three, four"; then reverse direction on fingers, simultaneously counting down "four, three, two, one".

Recognition and Description of Clues Associated With the Exit Sequence

The decision to instruct the subject to exit the vehicle may be based on suspicion that the subject may be impaired.

Even though that suspicion may be strong, the subject usually is not yet under arrest at this point.

How the subject exits the vehicle, and the actions and behavior of the subject during the exit sequence, may provide important additional evidence of alcohol and/or other drug influence.

Usual kinds of evidence obtained during observation of the exit sequence.

Ask participants to suggest typical things that might be seen with an impaired subject during the exit sequence.

SESSION III
STANDARDIZED FIELD SOBRIETY TESTING REVIEW

SESSION III: STANDARDIZED FIELD SOBRIETY TESTING UPDATE AND REVIEW

Upon successfully completing this session, the participant will be able to:


- Understand the results of selected SFST validation studies.
- Define and describe the Standardized Field Sobriety Tests (SFSTs).
- Define nystagmus and distinguish between the different types.
- Describe and properly administer the three SFSTs.
- Recognize, document and articulate the indicators and clues of the three SFSTs.
- Identify the limitations of the three SFSTs.

CONTENT SEGMENTS

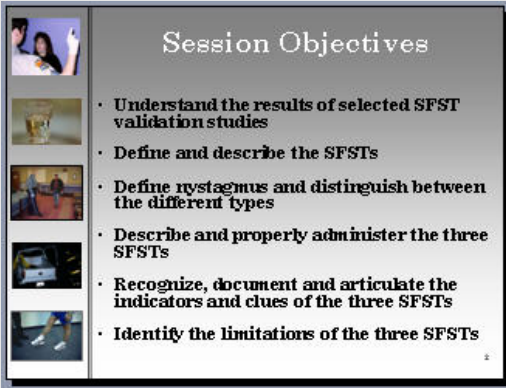
- A. SFST Validation Studies
- B. Overview of Selected Types of Nystagmus
- C. Standardized Field Sobriety Tests

III. STANDARDIZED FIELD SOBRIETY TESTING REVIEW

Display Slide III-1: Title



Display Slide III-2: Objectives



Session Objectives

- Understand the results of selected SFST validation studies.
- Define and describe the Standardized Field Sobriety Tests (SFSTs).
- Define nystagmus and distinguish between the different types.
- Describe and properly administer the three SFSTs.
- Recognize, document and articulate the indicators and clues of the three SFSTs.
- Identify the limitations of the three SFSTs.

A. Overview of the SFST Validation Studies

For many years law enforcement officers have utilized field sobriety tests to determine a subject's impairment due to alcohol.

The performance of the subject on those field sobriety tests was used by the officer to develop probable cause for arrest and as evidence in court.


This may not seem important, but officers are seeing this in court as a defense strategy.

A wide variety of field sobriety tests being used by officers throughout the country.

There was a need to develop a battery of standardized, validated tests.

Study conducted in 1975, Sponsored by NHTSA through a contract with the Southern California Research Institute (SCRI)

Display Slide III-3: SCRI Reports



SCRI Reports

- California; 1977 (Lab)
- California; 1981 (Lab and Field)
- Maryland, DC, VA, NC; 1983 (Field)

SCRI conducted several research projects and published the following three reports:

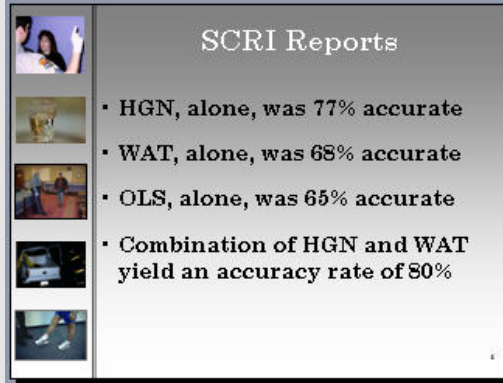
1. California; 1977 (Lab)
2. California; 1981 (Lab and Field)
3. Maryland, DC, VA, NC; 1983 (Field)

Primary distinction (Validated at 0.10 BAC)

The recommended battery included the following SFSTs:

- Horizontal Gaze Nystagmus (HGN)
- Walk-and-Turn (WAT)
- One-Leg Stand (OLS)

Display Slide III-4: SCRI Reports



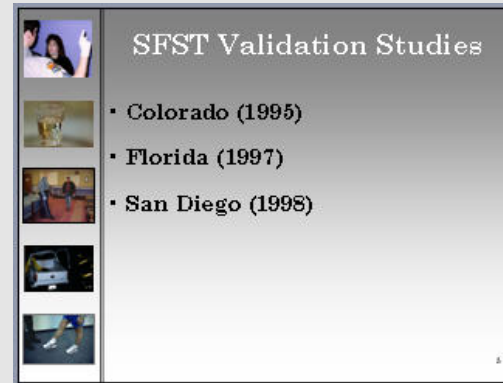
SCRI Reports

- HGN, alone, was 77% accurate
- WAT, alone, was 68% accurate
- OLS, alone, was 65% accurate
- Combination of HGN and WAT yield an accuracy rate of 80%

SCRI analyzed the laboratory test data and determined that:

- HGN, alone, was 77% accurate
- WAT, alone, was 68% accurate
- OLS, alone, was 65% accurate
- Combination of HGN and WAT yield an accuracy rate of 80%

Display Slide III-5: SFST Validation Studies



SFST Validation Studies

- Colorado (1995)
- Florida (1997)
- San Diego (1998)

Additional research studies were conducted to validate the 3-test battery.

Three SFST validation studies were:


1. Colorado (1995)
2. Florida (1997)
3. San Diego (1998)

Keep in mind when these studies were conducted not all states had 0.08 BAC as their Per Se limit.

The Colorado SFST validation study was the first full field study that utilized law enforcement personnel experienced in the administration of SFSTs.

The results of this study indicated that correct arrests decisions were made 93% of the time based on the 3-test battery (HGN, WAT, OLS)

Display Slide III-6: Colorado



Colorado (1995)

- **The first full field study that utilized law enforcement personnel experienced in the use of SFSTs.**
- **Correct arrest decisions were made 93% of the time based on the three-test battery (HGN, WAT, OLS). Substantially higher than the initial study results**

Colorado was the first full field study that utilized law enforcement personnel experienced in the use of SFSTs.

Correct arrest decisions were made 93% of the time based on the three-test battery (HGN, WAT, OLS). Substantially higher than the initial study results.

Display Slide III-7: Florida



Florida (1997)


- Florida was the first study to evaluate the three-test battery at a 0.08 BAC
- Correct decisions to arrest were made 95% of the time based on the three-test battery (HGN, WAT, OLS)

The Florida SFST field validation study examined whether SFSTs are valid and reliable indices of the presence of alcohol when used under present day traffic and law enforcement conditions.

Florida was the first study to evaluate the 3-test battery at a 0.08 BAC.

Correct decisions to arrest were made 95% of the time based on the 3-test battery (HGN, WAT, OLS).

Display Slide III-8: San Diego



San Diego (1998)

- Undertaken because of the nationwide trend towards lowering the BAC limits to 0.08
- Based on the revised arrest and release criteria, the officers in the study made correct decisions 91% of the time based on the 3-test battery (HGN, WAT, OLS) at the 0.08 BAC level and above

The San Diego SFST validation field study was undertaken because of the nationwide trend towards lowering the BAC limits to 0.08.

The research was done to investigate how well the SFSTs discriminate at BACs below 0.10. Based on the revised arrest and release criteria, the officers in the study made correct decisions 91% of the time based on the 3-test battery (HGN, WAT, OLS) at the 0.08 BAC level and above.

B. Overview of Selected Types of Nystagmus

Display Slide III-9: Nystagmus

Nystagmus

- An involuntary jerking of the eyes
- Natural Nystagmus –
 - Normal and occurs naturally
- Induced Nystagmus –
 - Occurs as a result of an external influence

Nystagmus

The involuntary jerking of the eyes and is normal and occurs naturally.

Horizontal Gaze Nystagmus is defined as the involuntary jerky of the eyes, as the eyes gaze to the side.

Display Slide III-10: Nystagmus

Nystagmus

- Over 40 different types of nystagmus – this course focuses on two
 - Horizontal Gaze Nystagmus (HGN)
 - Vertical Gaze Nystagmus (VGN)

There are over 40 different types of nystagmus, but during this course we will focus on two types of nystagmus:

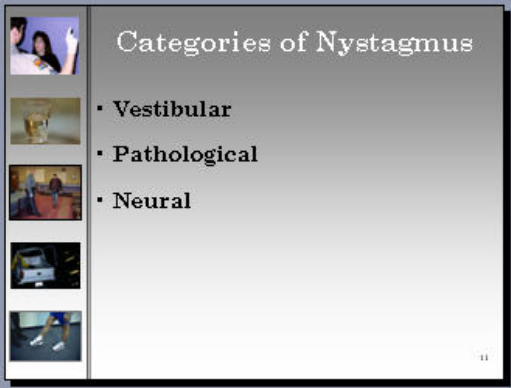
- Horizontal gaze nystagmus (HGN)
- Vertical gaze nystagmus (VGN)

The ability to recognize horizontal and vertical gaze nystagmus are important tools in impaired driving enforcement.

Alcohol and certain other drugs have been shown, through research, to cause horizontal and vertical gaze nystagmus, which is visible without the aid of specialized instrumentation.

Categories of Nystagmus

Display Slide III-11: Categories of Nystagmus



The slide content is as follows:

Categories of Nystagmus

- Vestibular
- Pathological
- Neural

11

Vestibular Nystagmus

Caused by movement or action to the vestibular system that can occur when an individual is spun around and the fluid in the inner ear is disturbed or there is a change in the fluid (temperature, foreign substance, etc.).

Pathological Nystagmus

Caused by the presence of specific pathological disorders, which include brain tumors, other brain damage, or some diseases of the inner ear.

Neural Nystagmus

Caused by some disturbance to the neural system.

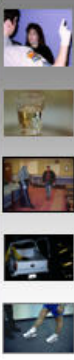
In this course we will only be concerned with gaze-evoked neural nystagmus.

Alcohol and/or specific types of drugs can cause the following three types of nystagmus. These examples of gaze-evoked neural nystagmus can be visible to the officer during the proper administration of the HGN and VGN tests.

Gaze Nystagmus


Horizontal Gaze Nystagmus

Display Slide III-12: Horizontal Gaze Nystagmus



Horizontal Gaze Nystagmus

- The involuntary jerking of the eyes as they gaze toward the side



Defined as the involuntary jerking of the eyes as they gaze toward the side.


As defined in the August 2006 revision of the SFST curriculum.

Although this type of nystagmus is useful in determining alcohol influence, its presence may also indicate use of CNS Depressants, Inhalants, and Dissociative Anesthetics. These are known as DID drugs.

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III-10

Display Slide III-13: Vertical Gaze Nystagmus



Vertical Gaze Nystagmus

- An involuntary jerking of the eyes (up and down), which occurs when the eyes are held maximum elevation. The jerking should be distinct and sustained.



Vertical Gaze Nystagmus

Defined as the involuntary jerking of the eyes (up and down), which occurs when the eyes gaze upward at maximum elevation.

The presence of this type of nystagmus is usually associated with a Dissociative Anesthetic, high dose of a CNS Depressant (including alcohol), or an Inhalant for a particular subject.

VGN will not be present without HGN.

If VGN is present and HGN is not, it could indicate a medical condition.

Resting Nystagmus

Defined as the involuntary jerking of the eyes as they gaze straight ahead.

This condition is not frequently seen. Its presence usually indicates a pathology or high doses of a drug such as a Dissociative Anesthetic like PCP.

If detected, take precautions. As always, exercise sound officer safety techniques and consider calling for medical aid.

C. Standardized Field Sobriety Tests

Horizontal Gaze Nystagmus

HGN may be observable when a subject is impaired by alcohol.

As the subject's BAC increases, jerking will appear sooner.

HGN is also visible when an individual is impaired by certain drugs. Examples include CNS Depressants, Inhalants, Dissociative Anesthetics.

In administering the HGN test:

- Subject must focus on stimulus
- You will need a contrasting stimulus for the subject to follow with their eyes. This can be the tip of your index finger, penlight, or pen.

Ask class to give examples of a good stimulus.

Make sure you remind the officer to follow their local policy or recommendations when selecting a stimulus.

Initiating the HGN Test

Display Slide III-14: Initiating the HGN Test

Initiating the HGN Test

- Ask the subject to:
 - Put their feet together
 - Hands at their sides
 - Look straight ahead and keep head still

Ask the subject to:

1. Put their feet together,
2. Hands at their side,
3. Look straight ahead and keep head still

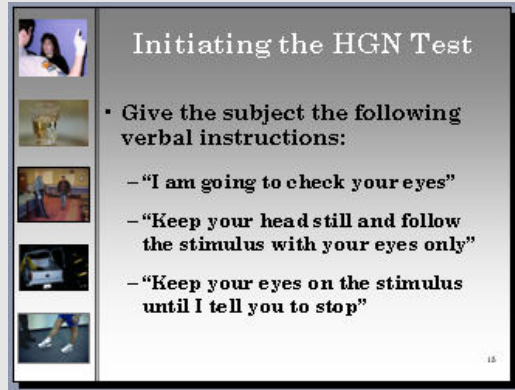
Begin the test by positioning the subject in a manner that is deemed safe by the officer and safe for the subject being tested.

When practical, subject should be turned away from emergency lights.

Remind participants that HGN will not be influenced by optokinetic nystagmus when administered properly.

The subject should not be wearing glasses during the test.

Display Slide III-15: Initiating the HGN Test



Initiating the HGN Test

- Give the subject the following verbal instructions:
 - "I am going to check your eyes"
 - "Keep your head still and follow the stimulus with your eyes only"
 - "Keep your eyes on the stimulus until I tell you to stop"

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Give the subject the following verbal instructions:

1. "I am going to check your eyes."
2. "Keep your head still and follow the stimulus with your eyes only."
3. "Keep your eyes on the stimulus until I tell you to stop."

Position the stimulus approximately 12 to 15 inches from the face in front of the subject's nose and hold it slightly above eye level.

Check both eyes for equal pupil size and resting nystagmus.

- Both pupils should be of equal size.
- If the pupils are noticeably unequal in size or there is noticeable nystagmus at rest, this could indicate a medical condition or a head injury.


Check both eyes for equal tracking.

This is done by making a horizontal pass across both eyes. The movement should go from center, across the left eye, across the face to the person's right eye, and back to center.

Both eyes should track the stimulus together. If the eyes fail to track together, discontinue the test. This could be the indication of a possible medical disorder, injury or blindness.

Administration of the HGN

Display Slide III-16: Lack of Smooth Pursuit



Lack of Smooth Pursuit

- When the eyes jerk or bounce as they follow a smoothly moving stimulus
- Stimulus should be moved in a smooth manner to best observe the eyes in motion
- Two-second timing is provided based on how the eyes should follow the stimulus if the individual is not impaired by alcohol and/or other drugs

Lack of Smooth Pursuit

When the eyes jerk or bounce as they follow a smoothly moving stimulus.

1. Check the subject's left eye by moving the stimulus to your right. Move the stimulus smoothly, at a speed that requires approximately two seconds to bring the subject's eye as far to the side as it can go. While moving the stimulus, look at the subject's eye and determine whether it is able to pursue smoothly.

2. Move the stimulus all the way to the left, back across subject's face checking if the right eye pursues smoothly. Movement of the stimulus should take approximately two seconds out and two seconds back for each eye.
3. Repeat the procedure.

The stimulus should be moved in a smooth manner to best observe the eyes in motion.

The two-second timing is provided based on how the eye should follow the stimulus if the individual is not impaired by alcohol and/or other drugs.

Display Slide III-17: Distinct and Sustained Nystagmus at Maximum Deviation



Distinct and Sustained Nystagmus at Maximum Deviation

- At extreme lateral gaze the nystagmus is obvious and sustained when the stimulus is held for a minimum of four seconds

Distinct and Sustained Nystagmus at Maximum Deviation

At extreme lateral gaze, also known as the endpoint or maximum deviation, the nystagmus is obvious and sustained when the stimulus is held for a minimum of 4 seconds.

1. Start again with the subject's left eye.
2. Move the stimulus to the subject's left side until there is no more white of the eye visible.
3. The eye should not be able to move any further on the horizontal plane.

4. Hold the left eye in that position for a minimum of four (4) seconds.

Remind participants that fatigue nystagmus may begin if the subject's eyes are held at a maximum deviation for more than 30 seconds.

5. Observe the eye for distinct and sustained nystagmus while being held in this position.
6. Move the stimulus all the way to the left, back across the subject's face and check the right eye.
7. Repeat the procedure until each eye has been checked twice.

Onset of Nystagmus Prior to 45 Degrees

1. Start again with the subject's left eye
2. Move the stimulus at a speed that would take at least four seconds to reach the 45 degree angle.
3. Watch the eye carefully for any sign of jerking.
4. If jerking is observed, hold the stimulus at that position and verify the jerking continues.
5. Move the stimulus all the way to the left, back across the subject's face and check the right eye.
6. Repeat the procedure until each eye has been checked twice.

HGN Test Criterion

Vertical Nystagmus

1. Start with the stimulus approximately 12-15 inches from the face in front of the nose.
2. Elevate the stimulus up until the eyes can not elevate further.

3. Hold the stimulus in that position for a minimum 4 seconds.
4. If vertical nystagmus is present it must be distinct and sustained.

Test Interpretation

There are three clues in each eye and six total clues.

Lack of Smooth Pursuit

- Present
- Not Present
- If present, it accounts for 2 clues, one in each eye.

At this point the instructor should have the Dry Lab workshop videos cued to the beginning of tests for one subject. This subject should be used to demonstrate the tests throughout this section.

Distinct and Sustained Nystagmus at Maximum Deviation

It is important to hold the eye in this position for at minimum of four (4) seconds.

This jerking must be distinct and sustained.

- Present
- Not present
- If present, it accounts for 2 clues, one in each eye.

Onset of Nystagmus Prior to 45 Degrees

The earlier the onset the more impaired a subject may be.

Documenting the HGN Clues

The HGN test has been researched and found to be a reliable indicator of impairment with subjects at or above 0.08 BAC.

Based on the 1998 San Diego field validation study, if four or more clues are observed, it is likely that the subject's BAC is at or above 0.08.

If two or three clues are observed, it is likely that the subject's BAC is at or above 0.04 but under 0.08.

When applicable you should always document the clues of impairment as you are conducting the roadside tests.

Make sure that you keep officer safety in mind when documenting these clues.

Each jurisdiction has come up with methods and forms to record the results. As long as these forms follow the NHTSA/IACP manuals, they may be used. Listed in your manual is only one example that could be used.

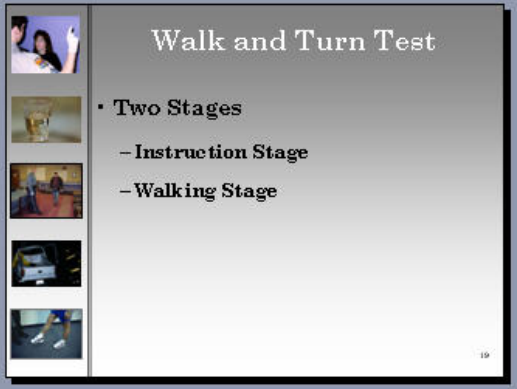
Display Slide III-18: Horizontal Gaze Nystagmus – video demonstration



Remind participants to accurately document everything associated with the DWI arrest, from the time of vehicle observation through the post arrest processing.

Walk and Turn Test

Display Slide III-19: Walk and Turn Test



Walk and Turn Test

- Two Stages
 - Instruction Stage
 - Walking Stage

The Walk and Turn (WAT) test is divided into two stages:

1. Instruction Stage
2. Walking Stage

Instruction Stage

Stand heel-to-toe with arms at their sides.


Divided attention: listening to and remembering instructions.

Walking Stage

Balancing, walking heel-to-toe, and turning.

Small muscle control, counting out loud, and short-term memory, recalling the number of steps required, turning as instructed, and counting correctly.

Display Slide III-20: Officer Safety Precautions



Officer Safety Precautions

- Keep subject on your left when beginning demonstration
- Never turn your back on a subject
- Be aware of surroundings

Officer safety precautions:

- Keep subject on your left when starting demonstration
- Never turn your back on a subject
- Be aware of surroundings

Left handed officers should demonstrate a test at more than arms length.

Instruction Stage

1. "Place your left foot on the line" (real or imaginary).

Demonstrate.

2. "Place your right foot on the line ahead of the left foot, with heel of right foot against toe of left foot".

Demonstrate.

3. "Place your arms down at your sides".

Demonstrate

4. "Maintain this position until I have completed the instructions. Do not start to walk until told to do so."

5. "Do you understand the instructions so far?"

Make sure subject verbally acknowledges understanding.

Walking Stage

1. "When I tell you to start, take nine heel-to-toe steps, turn, and take nine heel-to-toe steps back."

Demonstrate by taking several heel-to-toe steps.

2. "When you turn, keep the front foot on the line, and turn by taking a series of small steps with the other foot, like this."

Demonstrate

3. "While you are walking, keep your arms at your sides, watch your feet at all times, and count your steps out loud."
4. "Once you start walking, don't stop until you have completed the test."
5. "Do you understand the instructions?" (Make sure the subject understands.)

Make sure subject verbally acknowledges understanding.

6. "You may begin."

Note: There may be instances when the officer may have to remind the suspect that the first step from the heel-to-toe position is step "one".

Clues for Walk and Turn Test

Look for the following clues each time the Walk-and-Turn test is administered.

Display Slide III-21: Clues for Walk and Turn Test

Clues for Walk and Turn Test

- Cannot maintain balance while listening to the instructions
- Starts too soon
- Stops while walking
- Does not touch heel-to-toe
- Steps off the line
- Uses arms to balance
- Improper turn
- Incorrect number of steps

1. Cannot keep balance while listening to the instructions.
 - Record this clue if the subject does not maintain the heel-to-toe position throughout the instructions.
 - Feet must actually break apart or leave the line.
2. Starts before the instructions are finished.
 - Since you specifically instructed the subject not to start walking "until I tell you to begin," record this clue if the subject does not wait.
3. Stops while walking.
 - The subject pauses while walking.
4. Does not touch heel-to-toe. The subject leaves a space of more than one-half inch between the heel and toe on any step.
5. Steps off the line. The subject steps so that one foot is entirely off the line.
6. Uses arms to balance. The subject raises one or both arms more than 6 inches from the sides in order to maintain balance.
7. Improper turn. The subject removes the front foot from the line while turning. Also record this clue if the subject has not followed directions as demonstrated, i.e., spins or pivots around.

8. Incorrect number of steps. Record if the subject takes more or fewer than nine steps in either direction.

**If a subject is unable to complete the test he/she will
be held accountable for only the clues that were observed.**

Documenting the Walk and Turn Clues

Each clue is noted by placing a slash in the appropriate place on the assessment form.

For example, if the subject raised their arms twice and stepped off the line three times, they would be considered to have demonstrated “two” clues.

It is a good practice to use an assessment form that documents the administrative procedures.

Considerations

Walk-and-Turn test requires a real or imaginary line, and should be conducted on a reasonably dry, hard, level, non-slippery surface.

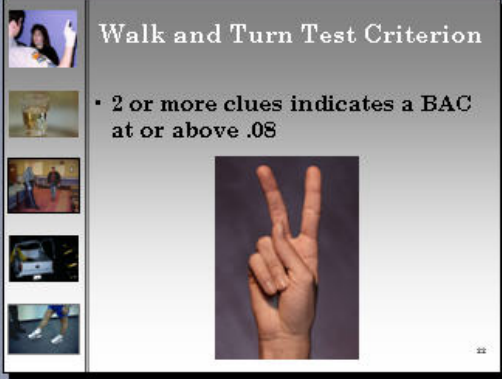
There should be sufficient room for subjects to complete nine heel-to-toe steps.

However, recent field validation studies have indicated that varying environmental conditions have not affected a subject’s ability to perform this test.

This exercise has not been researched with individuals over 65 years of age.


Subjects wearing heels more than 2 inches high should be given the opportunity to remove their shoes.

Display Slide III-22: Walk and Turn Test Criterion



Walk and Turn Test Criterion

- 2 or more clues indicates a BAC at or above .08



22

The slide features a vertical navigation bar on the left with five small thumbnail images. The main content area has a grey background with the title 'Walk and Turn Test Criterion' at the top. Below the title is a bullet point stating '2 or more clues indicates a BAC at or above .08'. In the center is a photograph of a hand with the index and middle fingers extended in a peace sign gesture. A small number '22' is in the bottom right corner.

Walk-and-Turn Test Criterion

- 2 or more clues indicates a BAC at or above .08
- Is unable to complete the test

Display Slide III-23: Walk and Turn Video Demonstration



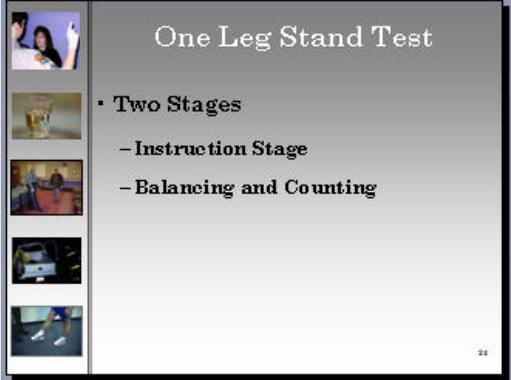
Walk and Turn Test Video Demonstration



23

The slide features a vertical navigation bar on the left with five small thumbnail images. The main content area has a grey background with the title 'Walk and Turn Test Video Demonstration' at the top. Below the title is a video frame showing a police officer and a man standing on a mat with a line, in front of a blue curtain. The text 'Walk and Turn' is at the bottom of the video frame. A small number '23' is in the bottom right corner.

Display Slide III-24: One Leg Stand



One Leg Stand Test

- Two Stages
 - Instruction Stage
 - Balancing and Counting

One Leg Stand

The One Leg Stand (OLS) test is divided into two stages:

1. Instruction stage
2. Balancing and counting

Instruction Stage

- Balancing
- Listening to instructions

The Balancing and Counting Stage

- Balancing and counting
- Short-term memory

Administrative Procedures

Initial Positioning and Verbal Instructions

1. “Stand with your feet together and your arms by your side.”
2. “Do not start to perform the test until I tell you to do so.”

3. "Do you understand the instructions so far?"

Make sure subject verbally acknowledges understanding.

Instructions for the Balancing and Counting Stage

1. "When I tell you to start, raise one leg, either leg, with the foot approximately six inches off the ground, keeping your raised foot parallel to the ground and pointed out."
2. "Keep both legs straight, and your arms by your side."
3. "While holding that position, count out loud in the following manner: "one thousand and one, one thousand and two, one thousand and three, and so on until told to stop."
4. "Keep your arms at your sides at all times and keep watching the raised foot."
5. "Do you understand?"

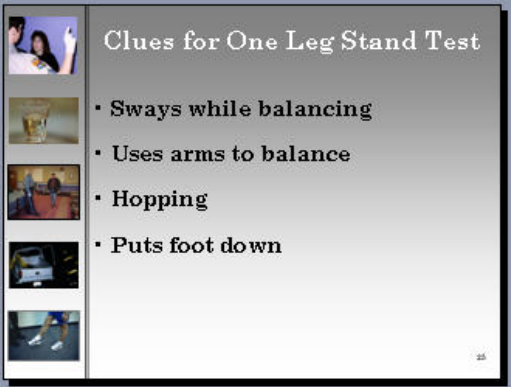
Make sure subject verbally acknowledges understanding.

6. "Go ahead and begin the test."

You should always time for 30 seconds, at which time discontinue the test.

If the subject puts their foot down, instruct the subject to pick the foot up again and continue counting from the point at which the foot touched the ground.

Display Slide III-25: Clues for One Leg Stand Test



Clues for One Leg Stand Test

- Sways while balancing
- Uses arms to balance
- Hopping
- Puts foot down

Clues for One Leg Stand Test

Look for the following clues each time the One-Leg Stand test is administered:

1. Puts foot down.

Explain if necessary.

2. Uses arms to balance.

Subject raises arms more than 6 inches from their side to balance.

3. Sways while balancing.

Side to side, back to front.

4. Hopping

Documenting the One Leg Stand Clues

Each clue is noted by placing a slash in the appropriate place on the assessment form.

For example, if the subject used their arms twice and swayed three times, they would be considered to have demonstrated “two” clues. It is a good practice to use an assessment form that documents the administrative procedures.

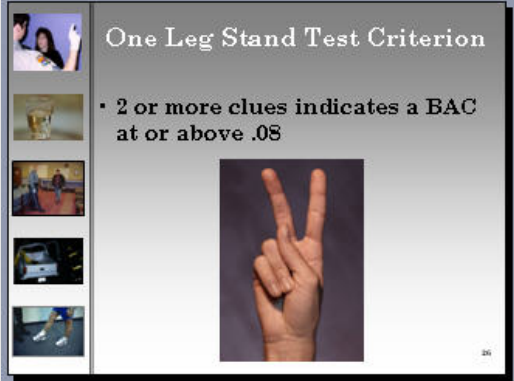
Considerations

Some people may have difficulty with the one leg stand test even when not impaired. Persons over 50 pounds overweight and /or with injuries to their legs and/or hips or inner ear disorders may have difficulty with this test.

This exercise has not been researched with individuals over 65 years of age.

Subjects wearing shoes more than 2 inches high should be given the opportunity to remove them.

Display Slide III-26: One Leg Stand Test Criterion



The slide content is as follows:

One Leg Stand Test Criterion

- 2 or more clues indicates a BAC at or above .08

The slide also features a vertical strip of five small images on the left side and a large image of a hand making a 'V' sign (two fingers up) on the right side.

One Leg Stand Test Criterion

- 2 or more clues indicates a BAC at or above .08
- Is unable to complete the test

Display Slide III-27: One Leg Stand Video Demonstration





APRI

American
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Research Institute

Overcoming Impaired Driving Defenses

Targeting
Hardcore
Impaired
Drivers

American Prosecutors Research Institute

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This document was produced thanks to a charitable contribution from the Anheuser-Busch Foundation in St. Louis, Missouri. Its support in assisting local prosecutors' fight against impaired driving is greatly acknowledged. This information is offered for educational purposes only and is not legal advice. Points of view or opinions expressed in this document are those of the authors and do not necessarily represent the official position of the Anheuser-Busch Foundation, the National District Attorneys Association, or the American Prosecutors Research Institute.

Overcoming Impaired Driving Defenses

Targeting Hardcore
Impaired Drivers

November 2003

American Prosecutors
Research Institute

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Illustrations on pages 1, 3, 7 & 16.

Bruce Plante, nationally syndicated editorial cartoonist & Past President of the Association of American Editorial Cartoonists

INTRODUCTION: THE ART OF ANTICIPATING DEFENSES

“The criminal trial today is...a kind of show-jumping contest in which the rider for the prosecution must clear every obstacle to succeed.”

—Robert Mark, Commissioner, London Metropolitan Police.
The Washington Post, November 1971

Many prosecutors may bristle at an analogy which reduces the criminal justice system to a steeplechase, but this analogy speaks an obvious truth. To successfully prosecute hard core impaired drivers, prosecutors must clear statutory and constitutional hurdles. Prosecutors must demonstrate that every element of the crime has been established beyond a reasonable doubt and that none of the defendant’s constitutional rights were violated.



Impaired driving is a crime that cuts across all socio-economic lines, and a conviction for a multiple offense DUI has severe consequences. Many impaired driving defendants have resources to support a vigorous defense. Across the country, defense attorneys have risen to meet the challenge and serve their clients. For a prosecutor, nothing is better than encountering the best attorneys from the defense bar. But, anticipating defenses is generally an art form learned through experience—often painfully. Yet, there is a similarity of facts and constitutional issues in impaired driving cases that makes the job less painful.

OVERCOMING IMPAIRED DRIVING DEFENSES

This publication serves as a guide to the most common defenses in impaired driving cases, drawing on the expertise and experience of Herb Tanner, the 2003 Prosecutor Fellow with the National Highway Traffic Safety Administration (NHTSA). Currently working for the Prosecuting Attorneys Association of Michigan, Herb was formerly the Chief Deputy Prosecuting Attorney for Montcalm County, Michigan, and before that he worked as a criminal defense attorney. As the NHTSA Prosecutor Fellow, Herb has traveled the country teaching and speaking on impaired driving issues. He also teaches regularly at the Ernest F. Hollings National Advocacy Center in Columbia, South Carolina.

For their thoughtful review, insight and comments, APRI is grateful to Kimberly A. Fogarty of the Massachusetts District Attorneys Association, Jeff Kwiatkowski, Chief Assistant Solicitor General of Gwinnett County, Georgia and Tom Kimball of the Tennessee District Attorney Generals Conference. APRI also thanks Bruce Plante, nationally syndicated cartoonist and out-going president of the Association of American Editorial Cartoonists for his illustrations.

For other impaired driving defenses, be sure to check out other APRI Special Topics publications, including *Crash Reconstruction Basics for Prosecutors*, *The Admissibility of Horizontal Gaze Nystagmus Evidence* and *Alcohol Toxicology for Prosecutors*. These and other publications are available online at www.ndaa-apri.org click on *NTLC—Traffic Law*.

John Bobo
Director, National Traffic Law Center
American Prosecutors Research Institute
November 2003

DEFENSES IN IMPAIRED DRIVING CASES

By Herbert R. Tanner, Jr.
NHTSA Prosecutor Fellow, 2003

Suppose you've been diagnosed with a life-threatening illness that requires complex surgery. Now suppose that you have your choice of surgeons: one who has years of experience and a high success rate, and the other who is fresh out of medical school.

Add to that the urgency of the situation—the surgeon you choose will have little or no time to study and prepare for your surgery. It's a no brainer, right?

But in many prosecutors' offices a similar decision is made for impaired driving cases, and the new guy is chosen every time.



The facts of life are that many offices assign the newest prosecutors to the impaired driving cases, even though these cases can be among the most complex and challenging cases on the docket. Few other cases present the prosecutor with a more complex and wordy statute, a greater likelihood of technical, scientific evidence, or the very real likelihood of expert defense testimony.

Even so, some defense attorneys will occasionally use variations of a number of traditional defense tactics when trying DUI cases. Knowing these tactics, and being able to quickly respond to them, gives the prosecutor the advantage.

Rule of Thumb: If you only have five minutes to prepare, go over the police report with the arresting officer. Is it reasonable to believe people will mislead to avoid jail time? Of course it is, so

OVERCOMING IMPAIRED DRIVING DEFENSES

take time to *spot untruths*. Figure out what the defendant will say. Preparation is key.

Pre-Trial Tactics

Invalid Stop Defenses

As the great Japanese swordsman Musashi said: “Pressing Down the Pillow means not letting your opponent’s head up. In the Way of Martial Arts combat, it is wrong to let your opponent lead you around or push you into a defensive position. Above all you want to move him around freely.” While the defense attorney may not be a student of Musashi, he may follow this advice and strike quickly and decisively. For the defense attorney, the plan is simple: no stop, no case.

CLAIM: The stop is invalid because there is *no reasonable and articulable suspicion*.

RESPONSE: Your response is fact-driven and relatively simple. All that is needed to make a valid stop is a *reasonable suspicion*. If, looking at the totality of the circumstances, an officer can establish that a fair-minded person in similar circumstances would suspect some violation was afoot, the stop is valid.

Remember: In *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed.2d 660 (1979), the Supreme Court held that an officer must have reasonable and articulable suspicion of a violation of the law or that a driver is otherwise subject to seizure (as a fugitive, for example) before the officer can stop and detain a driver.

CLAIM: The stop was *pretextual*. The officer was on a fishing expedition and merely stopped someone at random in hopes of catching an impaired driver.

RESPONSE: The real challenge here is whether there was reasonable and articulable suspicion of a traffic violation to justify the stop. The officer must be able to *articulate* what caused him to stop the driver in the first place.

CLAIM: The stop is invalid because the officer's *detention of the driver exceeded the reasonable amount of time* for the purpose of the stop. For example, was it reasonable to keep the defendant at roadside for 30 minutes and subject him to field sobriety tests, all for a burned-out tail light?

RESPONSE: Officers often stop a driver for a minor traffic violation and then develop a suspicion that the driver is impaired during that initial, brief detention. Keep in mind that the officer's detention can only last as long as is reasonably necessary to resolve the purpose of the stop. If the detention continues for more than a brief period of time, the officer must establish reasonable suspicion for continued detention. Here again, the observations that led the officer to believe the driver is impaired must be reasonable and articulable. During encounters with suspects, reasonable and articulable suspicion is not a static property, but something that may continually rise to higher levels based on the totality of the facts. Prosecutors must skillfully conduct direct examination of the officers, building upon the events to demonstrate the rising level of proof that the officer encountered during the stop.

PRACTICE TIP: When the defendant challenges an officer's continued detention of a driver stopped for a minor traffic violation, stress the following types of observations:

- Responding inappropriately to the emergency equipment, such as failing to pull over immediately;
- Parking incorrectly;
- Physical observations (odor of alcohol, bloodshot eyes, slurred speech, etc.);
- Open containers or drug paraphernalia;
- Evidence that the driver vomited, urinated or defecated on himself;
- Inability to produce a license and registration although in the defendant's wallet;
- Inappropriate responses to questions;
- Admission of drinking or drug use;
- Inappropriate demeanor, e.g., excessively belligerent or abusive to the officer.

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All of these behaviors and observations contribute to the rising levels of reasonable suspicion, allowing officers to continue their investigations.

CLAIM: The officer's stop of the driver for suspicion of impairment is based on all the *wrong observations*.

RESPONSE: When the officer stops a driver because he suspects the driver is impaired, the officer should be prepared for challenges to those observations. What the defendant is really challenging is whether the officer had reason to suspect that the driving he witnessed was due to alcohol impairment. This argument gets to the crux of DUI prosecutions. The challenges are behaviorally based because the driving behaviors known to be indicators of impairment are sometimes quite nuanced. When the motion to suppress is denied, many of these same arguments will be repeated for the jury (*see section on Common Trial Tactics*).

Practice Tips: NHTSA has published more than 20 specific driving behaviors that indicate possible impairment. Officers are trained to look for them, and you should be trained to spot them in the report. These are the clues that give the officer reasonable suspicion, together with all the other facts, to stop and investigate. Some of the more common indicators of impairment are:

- Weaving within one's own lane;
- Driving significantly slower than the posted speed limit;
- Stopping for an excessive time at a stop sign without an apparent reason;
- Failing to continue to drive when a light turns green;
- Following too closely;
- Making wide turns or cutting a turn too sharply.

While any of these behaviors might not be a traffic violation, in combination with other facts it can justify a stop. The response remains the same, however. The stop is justified if, based on the totality of the circumstances, the officer had a reasonable and articulable suspicion that the driving behaviors he saw were due to alcohol impairment.

CLAIM: The officer did not have reasonable suspicion to stop the defendant because the officer relied on a *citizen's tip*. The prosecutor has made no showing of the reliability of the citizen's tip or the caller's basis of knowledge.

RESPONSE: How you respond to this challenge depends on what kind of citizen tip it was. A citizen's tip that is truly anonymous may require the officer to corroborate the caller's information. A tip that describes the driver's location, the make and model of the car, the license plate number, and the specific driving behaviors may require less corroboration from the officer. Also, urge officers to call dispatch and determine the name of the caller. An anonymous tipster may later become a powerful prosecution witness.

Practice Tip: Widespread use of mobile phones makes it easy for citizens to alert law enforcement officers to suspected impaired drivers. A true citizen's tip can be defined as an identifiable caller who is not of the criminal element, e.g., a

mailman who reports an impaired driver while delivering mail, a fast-food, drive-thru server who suspects a customer at the window is driving drunk, or a metro bus driver calling in someone who appears to be intoxicated, etc.



Remember that police have relied on true citizen tips for centuries, and keep in mind that the law makes a distinction between true citizen information and information that comes from people of the criminal element. Many defense attorneys argue that true citizen tips should be held to the higher level of scrutiny required of informants from the criminal milieu in determining probable cause in issuing search warrants, e.g., basis of knowledge, reliability, corroboration, etc. First, they are arguing for a level of scrutiny

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used in a probable cause analysis—not a reasonable and articulable suspicion analysis. And secondly, courts have held that “when an average citizen tenders information to the police, the police should be permitted to assume they are dealing with a credible person in the absence of special circumstances suggesting that such may not be the case.” 2 Wayne R. LaFare, *Search and Seizure* Section 3.4(a), at 209–11 (3d ed. 1996). “[T]he skepticism and careful scrutiny usually found in cases involving informants, sometimes anonymous, from the criminal milieu, is appropriately relaxed if the informant is an identified victim or ordinary citizen witness.” *U.S. v. Patane*, 304 F.3d 1013 (U.S. 2003).

Invalid Arrest Defenses

CLAIM: The officer did not have probable cause to make an arrest.

RESPONSE: The major difference between challenges to the arrest and challenges to the stop is where on the continuum of proof the justification lies. Whereas a stop is justified by a reasonable suspicion, officers must have greater proof to arrest; they must have probable cause. This doesn’t mean that all the evidence used to justify the stop now becomes irrelevant. On the contrary, that evidence, along with everything else that the officer developed during the course of his contact with the defendant, is relevant to the court’s determination of probable cause.

Skillful defense attorneys often concede the officer had a basis for the stop, but then they mount a full attack on probable cause for arrest. Their strategy is based on the fact that at a motion hearing the judge would not hear any proof after the decision to make an arrest was made —i.e., the judge would never hear the results of the blood, breath or urine tests. Blood Alcohol Content tests are typically administered after the decision to make an arrest. Therefore, no arrest, no test.

PROBABLE CAUSE: The courts have defined probable cause as the point when the facts and circumstances within the officer’s knowledge and of which he has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in believing that a crime has been or is being committed.

Like reasonable suspicion, probable cause is based on the *totality of circumstances*: all the facts known and the reasonable inferences that can be drawn from them.

CLAIM: The officer's observations were wrong; there are alternative explanations for what the officer saw. For example, the defendant may claim that his eyes were red and watery because he worked a double shift and was tired (see section on *Common Trial Tactics*).

RESPONSE: At this stage, whether there are alternative explanations for the officer's observation doesn't matter, as long as the officer's observations can fairly be characterized as signs of impairment. Also, police are not required to eliminate all other possible explanations for the behavior.

CLAIM: The officer did not have probable cause to make the arrest based on his administration of the Standardized Field Sobriety Tests (SFSTs), and the results of the blood alcohol tests should be suppressed.

RESPONSE: The attack will be on how the officers developed probable cause and, in particular, on the SFSTs. The officer is typically cross-examined from an SFST manual published by NHTSA. NHTSA has produced a CD-ROM of all SFSTs, their validation studies and digital video clips suitable for demonstrative purposes. Copies are available from APRI's National Traffic Law Center or from NHTSA at www.nhtsa.dot.gov.

CLAIM: The officer administered *non-standardized field sobriety tests*. Variations on the theme include:

- These tests are inadmissible because they are not scientifically validated.
- The standard battery of tests were administered but not in strict accordance with NHTSA guidelines and is therefore inadmissible.
- The officer never received formal SFST training on how to administer the tests in accordance to NHTSA guidelines. The officer testified that he learned them from other patrolmen; therefore, all the tests given are inadmissible.

RESPONSE: Courts have long held that even lay people can detect and express an opinion about impairment. The effects of alcohol on a per-

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son's physical appearance and behavior are common knowledge and easily observable. Some of these familiar signs include lack of balance, poor coordination, exaggerated movements, poor motor skills, slurred speech and inability to follow directions.

Field sobriety tests merely allow the officer to make observations about these signs of impairment. There are a number of field sobriety tests that officers administer other than the SFSTs. Although these tests have not been subject to the same rigorous examination as the SFSTs, they are still useful in assisting the officer in determining impairment. This is where an officer's life experience and field experience become crucial. The fact that the tests are non-standardized or administered differently than NHTSA prescribes goes to the *weight of the evidence* rather than its admissibility. (See *Attacking Field Sobriety Tests* on page 17).

CLAIM: The officer did not have probable cause for arrest because the defendant refused all SFSTs and chemical tests.

RESPONSE: Hard core impaired drivers often will refuse blood tests when the consequences of refusal are not as harsh as the penalties for another DUI conviction. In those cases, developing probable cause is more difficult, and the officer's observations of other indicators of impairment gain in importance.

PRACTICE TIP: In jurisdictions where a preliminary breath test can be used to establish probable cause, there are likely to be administrative rules governing how the test is given. A challenge to the test based on the officer's failure to follow the rules in the field, e.g., the officer did not observe the driver for the required time before giving the test, could mean the results are suppressed, and probable cause will be judged solely on the officer's remaining observations.

CLAIM: After investigating the wreck, the officer arrested the defendant for a DUI that occurred outside his presence.

RESPONSE: A number of states have statutes that prohibit officers from making arrests for misdemeanors that did not occur in their presence.

Generally, there are exceptions to the statute for crimes such as domestic violence and shoplifting. Some states have exceptions for DUIs, allowing arrests to be made within a certain time limit. Know your state's statute, the exceptions and case law surrounding the arrests. Experienced officers will often make a felony arrest of a defendant who left the scene and fill out an arrest warrant for the misdemeanor when booking the defendant into jail.

5th Amendment—Miranda Defenses

CLAIM: The SFSTs are not admissible because the defendant was not free to leave the scene during the investigation. Therefore, under *Miranda* guidelines, the defendant was in custody.

RESPONSE: In most states, the typical DUI traffic stop is considered non-custodial, even if the driver is briefly detained. If the SFSTs are given during that brief, non-custodial detention, *Miranda* does not apply.

Remember that for *Miranda* to apply, the defendant must be i) *in custody*, ii) *under interrogation*, iii) *by a police officer*. Obviously in traffic stops, drivers are not free to leave, but the U.S. Supreme Court passed a bright line rule in *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed.2d 317 (1984). The Court held that suspects on the roadside were not considered *in custody* for *Miranda* purposes until arrested by the officer or when the handcuffs go on the suspect.

Perhaps your jurisdiction doesn't follow *Berkemer* or hasn't ruled on the specific issue based on how your courts interpret your state's constitutional protections. If so, the defendant will try to push back the point of custody to the earliest time in the stop, subjecting everything that follows to *Miranda*. Remember that even if your court rules the defendant was *in custody* early in the stop, *Miranda* covers only verbal expression and is a protection designed to ensure voluntary and knowing confessions by suspects.

Practice Tip: For a small minority of judges, *Miranda* is often scrutinized under the "focus of the investigation" standard, and the facts are often reviewed on a standard of when the officer knew he was going to make an arrest. Bring the law to court and be

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ready to demonstrate the correct legal analysis, and if that fails, build your record for appeal.

CLAIM: The SFSTs are not admissible because they are *testimonial* in nature. The defendant incriminated himself with the SFSTs without the benefit of a *Miranda* warning.

RESPONSE: This argument applies only to non-standardized tests like reciting the alphabet or counting backwards, which are not part of the SFSTs. Most jurisdictions that have ruled on this issue have found that the physical portions of the SFSTs are non-testimonial. Remember that for *Miranda* purposes the suspect is still not in custody, so even the verbal portions should be allowed. Two states, Oregon and Florida, have found that the verbal portion of field sobriety tests are testimonial and cannot be given absent *Miranda*.

CLAIM: The defendant's response to the invitation to take a blood, breath or urine test occurred after arrest and violates *Miranda*. Those statements should be suppressed.

RESPONSE: Typically, officers will place defendants under arrest and read them the implied consent form for a blood alcohol test in the cruiser or in the booking area of the jail. Often, defendants' statements are extremely incriminating. Yes, the defendant is in custody, but *Miranda* does not apply because the defendant was not subject to interrogation by the officer.

In most states, officers are required by law to read the implied consent statute to suspects and note their response. This is not interrogation; rather, the officer is fulfilling a statutory duty. Anything a defendant chooses to say in response to the request to take a breath test is admissible. (Be sure to check the law in your jurisdiction; a minority of states interpret their constitutions to have heightened protections.) Spontaneous admissions and statements against interest are usually admissible. *But*, if the officer asks questions after reading the implied consent statute without a *Miranda* waiver from the suspect, those statements will be suppressed.

Common Trial Tactics

How any case is defended is unique to each case and each defense lawyer. To say that there are “common” tactics only means that there are certain recurring themes, and you should be prepared for them.

Attacking the Investigation

In many DUI cases, the best defense is to attack the investigation in some way. These defenses tend to fall into a few broad and often overlapping variations:

1. Alternative explanations for the officer’s observations;
2. Attacks on the officer’s observations;
3. Alternative explanations for the blood alcohol concentration (BAC);
4. Attacks on the BAC.

Many of the arguments try to exploit the difference between what the jurors think they know and what really goes on in the field. For example, many people believe that the SFSTs are extraordinarily hard to do and designed to generate a failure. How many in the general public believe that one standard field sobriety test is to say the alphabet backwards?

Practice Tip: Defendants profit from the empathy that jurors may have for them. Many people have driven after a few drinks and truly believe that they were not impaired. **If the prosecutor doesn’t do it for them, jurors will define what it means to be impaired.** And, their definition may be favorable to the defendant, if only because jurors are reluctant to admit that they may have driven while impaired and broken the law.

Attacking Observations of Driving

It makes sense that the defense will attack the officer’s observations. Many acquittals have been achieved by the defense convincing a juror that his client’s driving was not that bad or attributable to something other than the drinks he had on the way home.

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CLAIMS:

WEAVING INSIDE THE LANE, SHARP OR WIDE TURNS: It is not illegal to stay within the painted lines, is it? There are many reasons for corrections of steering, like poor alignment? Lighting a cigarette? Putting in a CD? The crown of the road? It is not illegal to turn wide when there is no opposing traffic or hazard, is it?

SPEEDING OR GOING SLOWLY: Many people speed, don't they? Did you suspect each of them of drunk driving? Have you ever been lost?

BLACK AND WHITE FEVER: You testified to "bad driving," but you were in a marked patrol car, correct? No reason why the defendant couldn't have seen you in the rearview mirror? And if he did, he probably kept his attention on you a great deal? If he glances up to the mirror, he could swerve within his lane or even out of it, couldn't he? His speed could drift a little? And if you followed him for a mile, you would see every swerve? But, you never saw him drive once without your patrol car in his mirror, did you?

THE NHTSA CLUES: There are more than 20 different clues you are taught to look for, aren't there? That's virtually every possible driving behavior, isn't it? One of the clues is wide turns? And one is sharp or abrupt turns? Those are opposites, so no matter what the driver does he's looking like he's drunk?

RESPONSE: Watching an officer struggle to answer these questions on the stand is difficult; however, keep in mind that the defense attorney is not trying to raise doubt about what the officer saw in the field. Indeed, the tacit assertion of these questions is that the client really did weave. The defense wants the jury to believe that there might be another explanation for what the officer saw and that any driving behavior short of staying absolutely straight in one's lane is a DUI clue.

Attacking Observations During Personal Contact

CLAIMS:

Odor of Alcohol: Alcohol really doesn't smell, does it? The flavoring does? It's impossible to tell how much of any drink someone had by the smell,

isn't it? Some drinks with a low alcohol content, like red wine, can leave the breath smelling strong with just a few sips? Other very high proof liquors smell hardly at all, don't they? You can't tell when they drank from the smell, can you?

Disheveled clothing: Officer, you dressed appropriately for court today, didn't you? You wanted to show the court and jury the appropriate respect? And my client, he dressed appropriately, too. But he looked different the night you arrested him, didn't he? Before that night, you had never seen my client? You have no idea if he's usually a sloppy dresser, do you? Being a slob is not a crime, is it?

Blood-shot, watery eyes: There are many causes for blood-shot watery eyes, aren't there? Fatigue? Lack of sleep? Using the window defroster or blower while wearing contacts? Seasonal allergies and other medical conditions? You didn't ask about those, did you?

Fumbled with wallet and documents: Have you ever been scared? Your body reacted to that adrenaline dump, didn't it? Your heart beat faster? Maybe your hands shook?

RESPONSE: The first response to this line of attack is the officer still on the scene. Did he ask about mechanical problems? If the driving clues he saw *could* have been caused by bad alignment, he should ask about it to exclude it. This is anticipating the lie! By asking the question at roadside, the officer takes away from the defendant's testimony that the weaving was caused by poor alignment or some cause other than impairment.

The next response is to remind the jury that the clues are just that—clues. The driver's behavior should be analyzed in the context of all the other clues or evidence of impairment. The fact that weaving within one's lane is not illegal is completely irrelevant. It becomes relevant when considered together with all the other observations and evidence of impairment. Similarly, while the odor of alcohol, standing alone, may not prove impairment, taken with all the other evidence, it makes sense that we hear that the defendant smelled of alcohol.

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Finally, don't forget at closing what the defense lawyer said and asked during trial. Chances are there was no evidence that the observable driving clues resulted from some other cause and the defense lawyer will not argue the point. That allows you to point out to the jury that there is no evidence of any of the alternative explanations.

*SEVEN BLIND MICE-
A CHINESE*

PARABLE. One day seven blind mice were surprised to find a strange *Thing* by their pond.

"What is it?" they cried. Red Mouse said, "It's a pillar."

"No, it's a snake!" said Green Mouse.

"Can't be," said

Yellow Mouse. "It's a spear." "No, no," said Purple Mouse. "It's a great cliff." "Oooo, it's a fan," Orange Mouse cried. "What's the big deal," said Blue Mouse. "It's nothing but a rope." Then, they all began to argue.

Until White Mouse, the seventh mouse, went to the *Thing*. She ran up one side and down the other. She ran across the top and from end to end. "Ah," said white mouse. "Now, I see. The *Thing* is as sturdy as a pillar, supple as a snake, wide as a cliff, sharp as a spear, breezy as a fan, stringy as a rope, but altogether the *Thing* is...an elephant!" The other mice ran up one side and down the other, across the *Thing* from end to end, and they agreed, too.

The Mouse Moral: *Knowing in part may make a fine tale, but wisdom comes from seeing the whole.*

The same can be said about messy clothing or other personal contact clues, like using the car for balance or stumbling when getting out of the



car. Taken alone, they can be relatively innocuous and innocent, but it's unlikely that all of the clues observed by the officer can be explained by anything other than the defendant was impaired.

PRACTICE TIP: Take great care in assessing cases in which the police stop a female driver at night. These situations can be particularly scary to women because they may be vulnerable. A clever defense attorney may cite this fear to explain the officer's observations of suspected impaired driving

Attacking the Field Sobriety Tests

CLAIM: *The officer failed to use approved SFSTs –i.e., he used non-standardized tests.* You're aware that NHTSA has approved only three field sobriety tests, aren't you? The alphabet test you gave is not among them? Having people guess the time is not one of the approved tests, is it?

RESPONSE: NHTSA has not "approved" any field sobriety tests. NHTSA has sponsored validation studies and created curricula to train officers in a standard procedure to make sure the three tests are conducted the same way every time. In other words, NHTSA has certified curriculum. **NHTSA does not certify tests and officers.**

Furthermore, the defense has not claimed that other field sobriety tests are invalid. The other tests, such as reciting the alphabet, are still evidence of impairment. The simple argument is that a sober person can say the alphabet.

CLAIM: *How can a person fail a test when he doesn't know what's tested?* You didn't tell him that if he used his arms for balance he would fail the test, did you? Is that fair? Isn't that what the arms are for? Is it fair to judge him on things you didn't tell him about?

RESPONSE: The word "fail" in relation to a driver's performance on SFSTs carries more baggage than some airlines. The tests are not graded and provide only clues of impairment. The officer is simply making observations and noting those observations. A driver does not "fail" the test when he uses his arms for balance. However, considered with the totality of the evidence, using his arms is evidence of impairment, the

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same as failing to follow directions in the Walk & Turn, or putting a foot down during the One-Leg Stand.

CLAIM: *SFSTs are subjective and insensitive.* You are the only one who decides when someone passes or fails, aren't you? What is the definition of "swaying?" How far does someone have to move?

RESPONSE: It is true that SFSTs don't discriminate well between levels of impairment, but they are designed to be insensitive so that the tests identify only the most impaired. In fact, the insensitivity favors those who are stopped.

It is also true that some of the SFSTs have subjective elements. That is why the tests are standardized, systematic and fairly easy to score, so that subjectivity is reduced. Also, to counter this argument, highlight the officer's experience and training.

CLAIM: *SFSTs don't test impairment.* My client did well on some tasks, didn't he? So what does the test really test if he can do some and not the others but still fail?

RESPONSE: Remind the jury at every opportunity that driving is the complex integration of many different skills and faculties: the eyes, the feet, the hands, the brain. We do most of that integration without ever thinking about it. SFSTs mirror the *divided attention skills* necessary to operate a car and examine whether the divided attention skills of the defendant were impaired to a point to affect his driving ability.

These defense questions also open the door for questions during redirect to the officer about why he does the SFSTs. He can explain SFSTs and the concept of divided attention tasks, which test whether a person can do two things at the same time—two tasks much simpler than driving. If not, how can that person engage safely in the much more complex task of driving?

Attacking Breath Test Instruments and Their Results

CLAIM: *The officer didn't follow the rules for administering the test.* Officer,

you're supposed to watch my client for 15 minutes before giving him the test? But you had to type his name and other information into the machine before giving the test? You didn't look at him while you typed, did you? So you looked away and violated the rule, didn't you?

RESPONSE: Virtually every state that uses some breath-testing instrument has made administrative rules governing how to give the test and maintain the machine. The first response to these attacks is to simply know your state's rules.

Second, remember that the rules exist to ensure the accuracy, and therefore, the relevancy and admissibility of the test. When the defendant makes challenges like this, the appropriate response is to ask how the alleged violation affects the accuracy of the test.

For example, officers are often required to observe defendants for a prescribed time period before a breath test. The defendant will argue that if the officer looks away for even the briefest time, the test must be thrown out because the officer violated the rules. Does that mean the test is inaccurate? If so, is it because the defendant had something to eat or drink, or he threw up while the officer looked away? Many of the new breath testing machines have technology sophisticated enough to detect mouth alcohol, including a quick shot of mouthwash. Of course, most breath tests are given in the jail, where there isn't anything to eat or drink on hand. The waiting period ensures that nothing gets tested other than the defendant's BAC. Unless the defendant can show that there's a reasonable chance that he ate or drank something or regurgitated during the officer's brief glance away this momentary lapse is a violation in only the most technical sense.

CLAIM: *Other substances can cause a positive result for alcohol:* You're aware, aren't you, that other things, like having diabetes, can cause the machine to show that people are drunk when they're not? Even white bread will show that a person's been drinking?

RESPONSE: It is often heard that everyday foods like white bread and M&Ms will give a false reading, and officers must be able to testify that nothing was in the defendant's mouth before he took the test.

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CLAIM: The test is not accurate because the results can be affected by *Gastroesophageal Reflux Disease* (GERD), in which stomach acid contains alcohol and is brought into the mouth through the esophagus. This creates an artificially high BAC reading.

RESPONSE: Studies have shown this is a myth. The epiglottis actually closes when a person blows into the instrument, blocking stomach acid from being released. Also, unless the defendant has GERD, these questions are not even relevant. For more information, see www.gerd.com.

CLAIM: *The test is inherently inaccurate.* Someone tests the machine with a solution that has a known alcohol content and keeps records of that? That solution is supposed to be at .10, but the records show that solution sometimes reads more or less than that? Therefore, the machine is inaccurate.

RESPONSE: There is no evidence that the instrument's tests are inaccurate when administered properly. In every state, the breath test instrument (or any other testing instrument, for that matter) must be periodically tested for accuracy and calibrated to return accurate results. Records of those tests will often reveal that the instrument's reading of known sample varies from that known value. Usually that variance is quite small; for instance, a test sample known to have a concentration of .10 may result in a reading of .101 or .098. The defense argues that the results cannot be trusted because the machine cannot even give an accurate reading on a known sample.

This can be a persuasive argument. It may be fruitless to argue to a jury the concept of measurements within a scientific tolerance. It's equally challenging to talk in terms of statistically significant differences. Some jurors may ignore the test results entirely once they learn about the variance in known sample tests. It may be difficult to persuade them with scientific chatter.

Now is the time to pose logical questions to the jury. Let's say the instrument did give an inaccurate reading. How inaccurate does the defendant say the reading is? Does he really say he had no alcohol, and the reading is entirely false? The only evidence is that the reading varied from the known sample by what, .001?

Let's subtract .001 from his test results. Is that what the reading is? So, he's still over the legal limit.

Let's be real fair and subtract twice that amount (or more if your case will bear it). Is that the reading?

CLAIM: *The test is gender biased.* Is it not true that the machine will read higher for a woman than a man if they both drink the same amount? If a man and a woman are given the same amount of alcohol to drink, and then given a breath test after the same period of time, the woman's BAC results will be higher, right? Therefore, the machine is biased against women, isn't it?

RESPONSE: This is an example of a fallacious conclusion built upon an accurate premise. It is true in some cases, that a woman's BAC will be higher than a man's after drinking the same amount of alcohol. The instrument is accurately measuring that difference. On average, women have a higher percentage of body fat than men. Fat cells do not contain a great deal of water, and alcohol is completely water soluble. Therefore, women will not metabolize alcohol like men, who have a higher percentage of body water. (See APRI Special Topic Series, *Alcohol Toxicology for Prosecutors*.) The obvious question is: just how inaccurate is the test? How much higher is its reading for women? And, does that matter if the test provides an accurate reading of her blood alcohol concentration? Use the same argument that refutes the "inaccurate test of a known sample" defense.

More to the point, refocus the case on the real issue—impairment. If the BAC is .08, the driver is legally deemed impaired. It doesn't matter if the BAC belongs to a man or a woman, the impairment is still there. The bias is not in the instrument, but in the physiological differences between men and women.

Attacking Officer's Finding of Impairment

CLAIM: As a [friend / girlfriend / boyfriend / family member / family minister, etc.], I can testify that I did not think the defendant was impaired, and if I thought he was, I would never have let my loved one leave the [barbecue, reception, reunion, swimming pool, restaurant, bar, etc.].

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RESPONSE: Bringing in another person to dispute the officer's ultimate finding that the defendant was impaired is a popular tactic for defense attorneys who wish to present the defendant's version of the case to the jury without having the defendant actually testify.

If the witness testifies that he did not think the defendant was impaired, he opens the door to a line of questioning about what the defendant looks like when he is impaired. Ask the witness how much it takes to get the defendant impaired. Ask how the witness knows when the defendant is impaired.

This is a line of questioning where the answers can help you. If the witness says he can tell by looking, so can the police or the citizens who saw the defendant. If he says that the defendant slurs his speech or staggers or has trouble driving, then that may confirm previous testimony by your witnesses. If the witness testifies that the defendant was not impaired because he was not passed out, then you can argue that the witness defines impairment differently than the law does. Rather than discredit this witness, you get farther by making him an unwitting witness for you.

Other Resources Available

For more help with common impaired driving defenses, be sure to check out other publications in the APRI Special Topic Series, such as *Crash Reconstruction Basics for Prosecutors*, *The Admissibility of Horizontal Gaze Nystagmus Evidence* and *Alcohol Toxicology for Prosecutors*. These publications and more are available online at www.ndaa-apri.org. Click on *NTLC—Traffic Law*.

APRI's National Traffic Law Center also provides research, training and technical assistance on a wide range of topics related to the prosecution of impaired driving cases. Brief banks and expert witness databanks are available on both prosecution and defense witnesses. Contact NTLC at 703.549.4253 or trafficlaw@ndaa-apri.org.

Conclusion

DUI prosecutions are among the most difficult criminal cases a prosecutor can handle. They almost always involve technical testimony, scientific testimony and juror empathy. Sometimes, too, they involve a dedicated, experienced, skilled and knowledgeable defense counsel who has done his or her homework on this and many other cases. The people we represent deserve nothing less from us. Hopefully, this guidance will enable you to present your case more skillfully and professionally.



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OPTIONAL SESSION

COMMON CHALLENGES AND DEFENSES IN A DWI/ALCOHOL CASE

OPTIONAL SESSION: COMMON CHALLENGES AND DEFENSES IN A DWI/ ALCOHOL CASE

This session will help the participant to:

- Identify the main challenges and defenses in DWI cases
- Formulate responses to combat defense challenges

CONTENT SEGMENTS

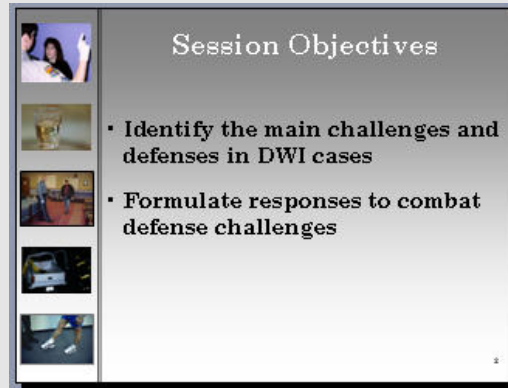
- A. Introduction
- B. Reasonable Suspicion
- C. Probable Cause
- D. *Miranda*
- E. Lack Of Moving Violation, Or Crash
- F. Evidentiary Chemical Tests And The Right To Counsel
- G. Refusal As Evidence
- H. Alternative Explanations For Observed Signs Of Impairment
- I. Horizontal Gaze Nystagmus
- J. Field Sobriety Tests
- K. Incomplete Arrest Report
- L. The Phantom Driver
- M. Local Legal Issues

OPTIONAL SESSION: COMMON CHALLENGES AND DEFENSES IN A DWI/ALCOHOL CASE

Display Slide 1: Title



Display Slide 2: Objectives



Session Objectives

- Identify the main challenges and defenses in DWI cases.
- Formulate responses to combat defense challenges.

The sections in this chapter are intended to clarify the issues and provide a guide to participants in responding to common local DWI defenses. Instructors may wish to utilize their state Traffic Safety Resource Prosecutor (TSRP) or a local prosecutor to tailor the material for this section.

Introduction

An effort has been made to discuss only the most common defenses, therefore, not every issue discussed will be applicable in every jurisdiction and there may be issues unique to specific jurisdictions which are not included. Because of the variance in state laws, there are few case citations except to United States Supreme Court cases, state cases which are unique and represent a departure from the norm, or state cases which provide a clear illustration of a specific point. Always check state law before making any argument to the court.

Each section identifies a defense. Then there is a brief explanation of the issue, followed by the prosecution response. The section has “tips” which provide additional information and/or cautions.

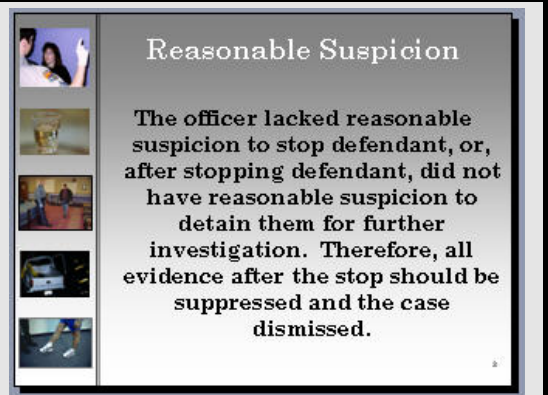
Many of these defenses will be raised in the context of a pre-trial motion to dismiss or to suppress evidence. As you review the material, it will often state whether the issue involves suppression or dismissal. For example, motions to dismiss are commonly based on lack of reasonable suspicion to stop the driver and/or lack of probable cause to arrest.

Suppression motions seek to prevent evidence from coming before the court.

Although the court does not dismiss the case if the suppression motion is granted, the prosecution may lose compelling evidence, making it impossible to proceed as a practical matter. Typical suppression motions involve the field sobriety tests, chemical test results, refusals and any statements made by the defendant.

Display Slide 3: Reasonable Suspicion

Assign each table to list as many signs as possible in two minutes which would support an officer's reasonable suspicion. Have a spokesperson from each table report to group. Point out the difference for stops based on routine traffic stops and those where a driver is stopped because the officer suspects he or she is DWI.



Reasonable Suspicion

The officer lacked reasonable suspicion to stop defendant, or, after stopping defendant, did not have reasonable suspicion to detain them for further investigation. Therefore, all evidence after the stop should be suppressed and the case dismissed.

Reasonable Suspicion

The officer lacked reasonable suspicion to stop defendant, or, after stopping defendant, did not have reasonable suspicion to detain them for further investigation. Therefore, all evidence after the stop should be suppressed and the case dismissed.

Issue


Stopping and detaining a driver is a "seizure" within the meaning of the 4th and 14th Amendments to the U.S. Constitution even though the stop is limited and the detention brief.

In *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed.2d 660 (1979), the Supreme Court held that an officer must have reasonable and articulable suspicion of a violation of the law or that a driver is otherwise subject to seizure (as a fugitive, for example) before the officer can stop and detain a driver.

In a motion to suppress for lack of reasonable suspicion, the defendant may challenge either the initial stop or the subsequent detention.

Whether there was sufficient reasonable suspicion is a question of law. If the court determines there was not reasonable suspicion, then the evidence is suppressed and the prosecution has no case.

Display Slide 4: Response



Response

- Routine traffic stop
- During stop, officer's observations support a reasonable suspicion of impairment

Response

Routine Traffic Stop

The officer stops the driver for an observed traffic violation, either moving or nonmoving, which may not give the officer any reason to suspect impairment. For example, the driver is stopped for speeding or an expired registration. The stop is justified because the officer has probable cause to arrest for the traffic violation.

Defendant may argue, however, that the officer lacked reasonable suspicion of driving while impaired to justify detaining defendant for investigation of DWI.


Facts that support the officer's suspicion are developed through observations of the driver.

Facts to support a finding of reasonable suspicion of impairment may include:

- Responding inappropriately to the emergency equipment, such as failing to pull over immediately
- Parking incorrectly
- Physical observations such as odor of alcohol, bloodshot eyes, slurred speech
- Open containers or drug paraphernalia
- Evidence that the driver vomited, urinated or defecated on them self
- Inability to produce a license and registration although in the defendant's wallet
- Inappropriate responses to questions
- An admission of drinking or drug use
- Inappropriate demeanor, e.g., excessively belligerent or abusive to the officer

Once the officer has developed reasonable suspicion of impairment, he or she is justified in detaining the subject for further investigation although the officer may not yet have sufficient facts to justify an arrest for impaired driving.

Display Slide 5: Response



Response

- Stopped for suspicion of impaired driving
- Observations after stop warrant further investigation

Stopped For Suspicion of Impaired Driving

In this scenario, the stop is actually based on the officer's suspicion that the driver is impaired whether or not the officer has seen a moving violation. Some examples which would support a finding of reasonable suspicion might include:

- Weaving within one's own lane
- Driving significantly slower than the posted speed limit
- Stopping for an excessive length of time at a stop sign for no apparent reason
- Failing to proceed when the light turns green
- Following too closely

(which may also be a moving violation)

- Wide turns

(which may also be a moving violation)

Unlike the stop based on a routine traffic violation, the officer must be able to articulate specific indicators of impaired driving which would justify stopping the driver.

Once the officer has made the stop, their observations of the driver will determine whether the initial reasons for the stop can be confirmed and whether there is additional suspicion to justify detaining the driver for a further investigation of DWI.

Example:

- The officer pulls the driver over for going too slowly and stopping for an excessive length of time at the stop sign.

When the officer speaks with the driver, however, the officer does not observe any other signs of impairment and the driver explains that they are looking for an address.

While the officer was justified in making the stop, he or she no longer has sufficient reasonable suspicion to detain the subject.

But suppose the officer observes an open container, smells alcohol on the driver's breath and the driver admits to having one beer. The officer may have sufficient reasonable suspicion to detain the driver for further investigation despite the driver's explanation about looking for an address.

Check specific state law for direction on what constitutes reasonable suspicion to stop and/or detain.


Prouse, 440 U.S. 648, requires that the officer be able to articulate specific facts that, combined with the reasonable inferences flowing from those facts, justify the stop and/or detention.

Although the driver may contest or offer an alternative explanation for the officer's observations, such as bloodshot eyes from wearing contact lenses, those explanations should not defeat a finding of reasonable suspicion.

Alternative explanations go to the issue of reasonable doubt, not reasonable suspicion.

TIP: Challenges to reasonable suspicion often arise in two ways: sobriety checkpoints and anonymous tips or citizen informants.

Display Slide 6: Response



Response

- Stopped during a sobriety checkpoint
- Officer developed reasonable suspicion of impairment after stop

Sobriety Checkpoints

The Supreme Court specifically determined that the use of sobriety checkpoints is constitutional in *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed.2d 412 (1990).

However, several states have outlawed checkpoints on state constitutional grounds, holding that drivers may not be stopped without reasonable suspicion directed towards an individual driver.

A few states have passed specific statutes authorizing sobriety checkpoints, which define the requirements for a legally permissible checkpoint.

Others have interpreted their state constitution in accordance with the federal constitution.

To survive a constitutional challenge, checkpoints should be established in accordance with a pre-determined plan and as part of an ongoing DWI enforcement effort.

Decisions regarding site selection, procedures for stopping drivers, and operation and duration of the checkpoint should be made at the command/supervisory level.

The more discretion given to the officers manning the checkpoint, the more likely the courts will find the checkpoint unconstitutional.

Moreover, there should be adequate concern for the safety of officers and drivers. Any detention must be minimally intrusive.

Even if the checkpoint is constitutional, an officer must develop reasonable suspicion of impaired driving within a short period of time to justify further detention of the driver for a DWI investigation.

There is no "brightline" standard defining how long the detention may be. In *Sitz*, the drivers were detained approximately 25 seconds.

Other courts have upheld a detention of as long as two to three minutes. However, the courts consistently refer to the permissible period of detention as "brief".

See State v. Kadelak, 655 A.2d 461 (N.J. Super. Ct. App. Div. 1995).

There is a split of authority whether deliberate avoidance of a checkpoint constitutes reasonable suspicion to pull a driver over.

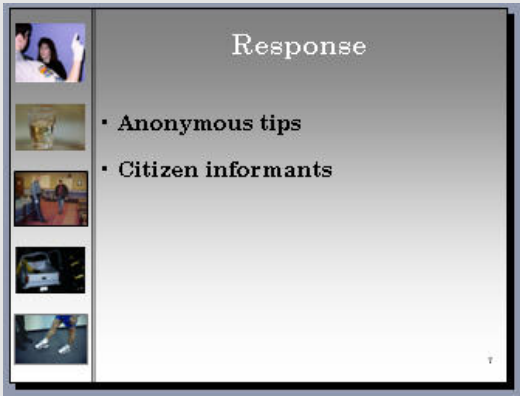
Some courts have held that there must be an alternative route for citizens who do not want to go through the checkpoint; therefore, avoidance of the checkpoint does not constitute justification for a stop.

See Pooler v. Motor Vehicles Department, 755 P.2d 701 (Or. 1988); *State v. Talbot*, 792 P.2d 489 (Utah 1990).

Other courts have held just the opposite, finding that deliberate avoidance of the checkpoint is reasonable suspicion.

See Coffman v. State, 759 S.W.2d 573 (Ark. App. 1988); *Snyder v. State*, 538 N.E.2d 961 (Ind. App. 1989); *State v. Hester*, 584 A.2d 256 (N.J. Super. 1990).

Display Slide 7: Response



Response

- Anonymous tips
- Citizen informants

Anonymous Tips And Citizen Informants

Although law enforcement officers have always used citizen informants and anonymous tips to detain suspected DWI offenders, the increased use of cellular phones has increased this phenomenon.

Information received from citizen informants and anonymous tips may be sufficient to provide reasonable suspicion for the officer to stop a car even though the officer did not see the violation.

Anonymous Tips – An anonymous tip which simply describes the color, make or model of a car, gives a location, and states that the driver is impaired may not be sufficient to support a finding of reasonable suspicion to stop without the officer's independent observations of a traffic violation or indicia of impaired driving.

This requires that the officer locate the car, follow it, and make observations before stopping the driver.

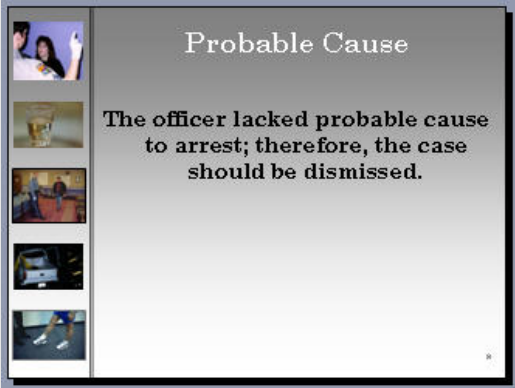
Refer to local law for guidance on the use of anonymous tips.

Citizen Informants – The more information received from the informant that can be corroborated by the officer, the more likely the court will find reasonable suspicion. The willingness of the citizen to identify them self and to talk to the officer at the scene is helpful.

The more specific the informant is as to the car's description, identity of the driver, and the observations that made them believe the driver was impaired, the more likely the court will be to justify the stop based on the call even if the officer did not actually observe the driving pattern or violation. If the information is conclusory or indefinite, the officer generally cannot rely on it to form a basis for reasonable suspicion.

TIP: Even when the court finds sufficient reasonable suspicion for the stop based on a tip, if the witness is not available for trial, the evidence is hearsay and may not be admitted. Some courts have allowed information given to law enforcement dispatch into evidence not for the truth of the matter (that the driver was impaired) but to explain the officer's conduct in stopping defendant.

Display Slide 8: Probable Cause



Probable Cause

The officer lacked probable cause to arrest; therefore, the case should be dismissed.

Probable Cause

The officer lacked probable cause to arrest; therefore, the case should be dismissed.

Issue

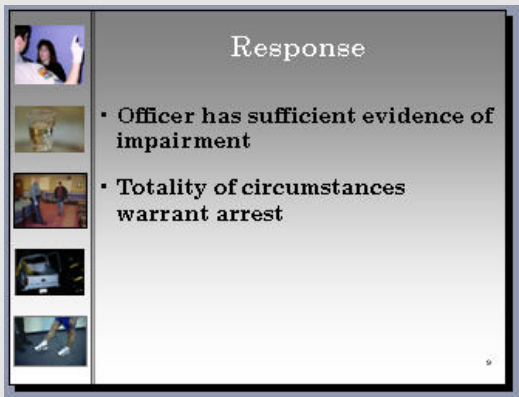
An arrest is a "seizure" under the 4th Amendment and must be supported by probable cause. At what point does an officer have sufficient evidence to justify arresting the driver?

Reasonable suspicion and probable cause are two ends of the same continuum, which begins with a decision to stop and detain a driver and ends with the arrest.

Reasonable suspicion focuses on what circumstances exist to justify the stop and/or detention, while probable cause focuses on the evidence which supports the arrest.

Unfortunately, courts have clouded the issue by using imprecise language when talking about the two concepts.

Display Slide 9: Response



Response

- Officer has sufficient evidence of impairment
- Totality of circumstances warrant arrest

Response

Probable cause requires that there be sufficient articulable facts for a reasonable person in the officer's position to believe that a crime has been committed by the suspect before the officer makes an arrest.

Probable cause is based on the totality of the circumstances.

The facts, which support a finding of reasonable suspicion, are also relevant to the probable cause inquiry and provide the foundation for further development of probable cause.

The difference between the two concepts is in the quantity of the evidence.

The courts have defined probable cause as the point when the facts and circumstances within the officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in believing that an offense has been or is being committed.

At a suppression hearing, the facts and circumstances are to be judged from the officer's viewpoint, i.e. subjectively.

Nevertheless, the officer's opinion that there was sufficient evidence to arrest must be objectively reasonable.

Example:

- An officer pulls a driver over for speeding.

During the course of the officer's conversation with the driver, the officer smells alcohol on the driver's breath and notices the driver's bloodshot eyes.

TIP: If an officer does not smell alcohol, the driver may be otherwise impaired, i.e., drugs, prescription drugs, illness, etc. If available, the officer should have contacted a DRE (Drug Recognition Expert) for further evaluation.

At this point the officer has probable cause to arrest for speeding but only reasonable suspicion that the driver is DWI.

However, as the officer interacts with the driver, he or she notices other indicia of intoxication: slow, hesitant speech; difficulty producing a license and registration; inappropriate responses to questions; an open container at defendant's feet; increasingly belligerent behavior; failure to perform the field sobriety tests correctly or a refusal to take the tests.

At some point during this interaction, the officer will have to decide when there is enough evidence to justify an arrest.

There is no hard and fast rule as to when reasonable suspicion turns into probable cause.

One or two signs, particularly if commonly associated with drinking, will generally be sufficient to support reasonable suspicion. Several signs will be required to find probable cause.

Even though the defendant may offer alternative explanations for the signs and symptoms of impairment observed, if those signs and symptoms are also indicative of impairment due to alcohol consumption, the court should find probable cause.

Moreover, probable cause is not required to be proven beyond a reasonable doubt; there need only be sufficient evidence to justify a belief that the defendant was driving while impaired.

However, the evidence which establishes probable cause to arrest is likely the most persuasive evidence of guilt.

The general rule is that an officer need only have reasonable suspicion of DWI to request a motorist to perform Standardized Field Sobriety Tests (SFSTs). Defendant's performance on the SFSTs goes to the officer's development of probable cause.

Jurisdictions which use preliminary breath tests (PBTs) usually confine the PBT results to the issue of probable cause and preclude use of the results at trial. The use of a PBT should occur after conducting the SFSTs.

TIP: Probable cause often becomes an issue if the defendant refused field sobriety tests and/or the evidentiary chemical test. This is a popular motion by defense counsel because the court will never learn the results of the chemical test, and the court will make its decision based only on the facts developed by the officer before arrest.

If the defendant refused SFSTs, the officer is then required to determine whether to arrest or let defendant leave.

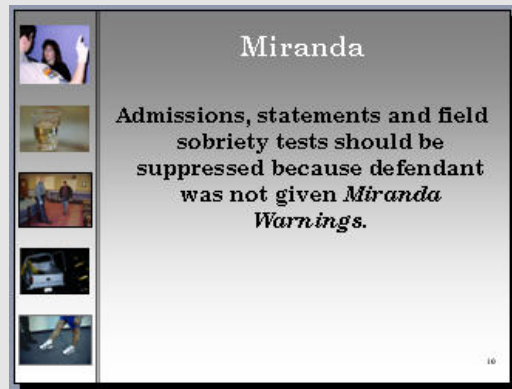
If an arrest is made, it is vital to have the officer explain every sign or symptom which supports the arrest decision.

Otherwise, the court may find that the officer's suspicion did not rise to the level of probable cause.

If defendant performs the SFSTs but refuses the evidentiary chemical test, the defense will argue that the officer's observations do not support a finding of probable cause. Defense may challenge the validity of the tests given or the officer's observations of defendant's performance on tests.

See DWI Defenses, Standardized Field Sobriety Tests.

Display Slide 10: Miranda



Miranda

Admissions, statements and field sobriety tests should be suppressed because defendant was not given *Miranda Warnings*.

Miranda

Admissions, statements and field sobriety tests should be suppressed because defendant was not given *Miranda Warnings*.

Display Slide 11: Miranda

This may be a good opportunity to distinguish between a defendant's 5th and 6th Amendment rights to an attorney.



Miranda

- **Miranda is triggered by three things**
 - **In custody**
 - **Interrogation**
 - **By a law enforcement officer**


Issue

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966), held that the prosecution may not use a defendant's admissions or statements as evidence against the defendant which are the product of custodial interrogation unless defendant was first advised of, and knowingly and intelligently waived, his 5th Amendment privilege against self-incrimination.

Custodial interrogation is defined as questioning initiated by an officer after a subject has been taken into custody or otherwise deprived of their freedom of action in any significant way.

Miranda does not apply to statements that are unsolicited and spontaneous, those which are made when the defendant is not in custody, or to "non-testimonial" evidence, such as performance on SFSTs or other behavioral evidence.

Display Slide 12: Response



Response

- Preliminary investigation is non-custodial
- Officer does not make decision to arrest until the roadside investigation is complete

12

ResponsePreliminary Investigation Is Non-Custodial

In *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed.2d 317 (1984), the Court recognized the applicability of *Miranda* to traffic stops but held that the preliminary investigation was not custodial even though the driver may be temporarily detained.

In accordance with *Berkemer*, the majority of courts have held that routine questions and field sobriety tests are investigatory to determine whether a crime has in fact been committed.

Generally, *Miranda* is not required until after field sobriety tests have been administered and defendant arrested.

Any interview after the arrest requires the *Miranda* warning.

Check recent case law.

The officer's determination that the individual was not free to leave does not mean the defendant is "in custody" for purposes of *Miranda*, as stated above. Ultimately, it is the court's determination, based upon an objective view of the facts, as to whether or not the person was "in custody".

Defense counsel may argue that the circumstances surrounding the stop indicate the defendant was not free to leave and, therefore, subject to custodial interrogation requiring suppression of all admissions or statements.

In advocating that the defendant should have been given *Miranda*, defense counsel will try to move the point at which the officer determined defendant was not free to leave to the earliest moment in the officer/driver encounter.

If the officer testifies that he or she felt they had probable cause to arrest based on the driving pattern alone and defendant was not free to leave from the moment they were pulled over, counsel will argue that defendant was "in custody" and should have been given *Miranda*.

Following *Berkemer*, this argument would fail under a federal constitutional analysis; however, it may have greater weight under a state constitutional analysis, particularly in those jurisdictions seeking to develop a body of state constitutional law or which have announced that the state constitution provides greater protection to its citizens than the federal constitution.

A decision to arrest is based on the totality of the circumstances.

During the preliminary investigation and field sobriety tests, the officer is gathering information to determine whether defendant is impaired.

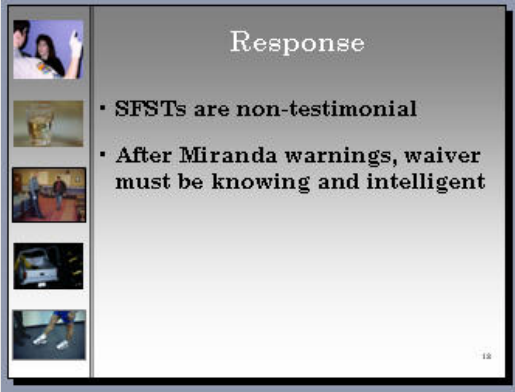
As long as the officer has reasonable suspicion to detain the defendant, he or she may conduct an investigation without violating *Miranda*.

The officer's subjective belief that there was probable cause to arrest before the conclusion of all SFSTs would not turn the investigation into a custodial situation.

"Probable cause" is an objective standard based on what a reasonable person in the officer's position would believe.

Other courts which have considered this issue have found that defendant was not "in custody" when field sobriety tests were given. Thus, *Miranda* was not required to be given.

Display Slide 13: Response



The slide is titled "Response" and contains the following text:

- SFSTs are non-testimonial
- After *Miranda* warnings, waiver must be knowing and intelligent

The slide also features a vertical strip of five small images on the left side, depicting various scenes related to law enforcement and field sobriety tests.

Standardized Field Sobriety Tests Are Non-Testimonial

This section generally applies to those field sobriety tests that are not part of the Standardized Field Sobriety Test battery, such as counting backwards or reciting the alphabet. *Miranda* warnings are to protect verbal (testimonial), not physical (non-testimonial) expression.

Although in *Pennsylvania v. Muniz*, 496 U.S. 582, 110 S. Ct. 2638, 110 L. Ed.2d 528 (1990), the Court held that asking defendant the date of his sixth birthday was testimonial, the Court specifically declined to address whether the other verbal aspects of field sobriety tests, such as counting out loud, are testimonial.

Approximately half the states have addressed the specific issue whether field sobriety tests are testimonial.

All states have found that the physical aspects of the SFSTs, such as standing on one leg or walking heel-to-toe, are non-testimonial.

Two state supreme courts have held that verbal portions of the SFSTs, e.g., counting out loud or reciting the alphabet, are testimonial because they reveal beliefs or thought processes.

See State v. Fish, 893 P.2d 1023 (Ore. 1995), *Allred v. State*, 622 So.2d 984 (Fla. 1993). *See also Vickers v. State*, 878 S.W.2d 329 (Tex. Ct. App. 1994).

Therefore, in Oregon and Florida, the verbal portions of the tests are subject to the 5th Amendment privilege against self-incrimination and *Miranda* must be given.

The issue is unresolved in Texas, as different divisions of the appellate court have ruled differently. Check your state law.

In the absence of *Miranda* warnings or a waiver, an officer may not testify regarding the person's ability post arrest to count out loud, say the alphabet, give their middle name, or other verbal responses.

Audiotapes of the field sobriety tests are not admissible and videotapes must have the verbal portions deleted.

Typically, the state may still offer evidence regarding the physical characteristics of defendant's speech, e.g., it was slurred or difficult to understand.

TIP: Often the officer will conduct an interview with defendant after the evidentiary chemical test has been taken and this can be a problem. The defendant should be given *Miranda* before this interview is conducted.

Miranda requires that defendant make a knowing and intelligent waiver of their right against self-incrimination.

Check with your state case law for definitions of a knowing and intelligent waiver.

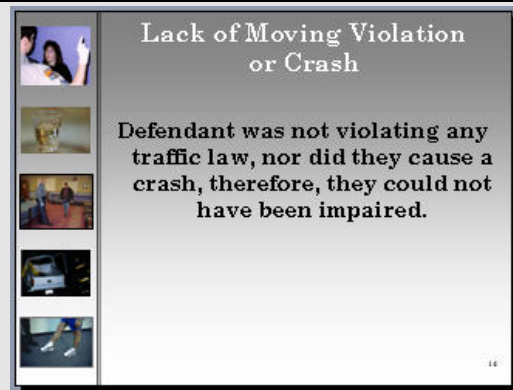
The defense may argue that if defendant was as impaired as the officer testified, they could not possibly have made a knowing and intelligent waiver; therefore, all post-arrest statements should be suppressed.

The prosecutor should look to the totality of the circumstances to determine whether the waiver was knowing and intelligent. What did defendant do or say that evidenced their understanding of the arrest?

For example:

- Was the defendant able to respond appropriately to the officer's questions during the investigation?
- Did the defendant attempt to follow the officer's instructions on the SFSTs?
- Did the defendant ask appropriate questions?
- Did the defendant say that their rights were understood?
- Was defendant able to provide correct information about their name, date of birth, address, etc?

Display Slide 14: Lack of Moving Violation or Crash



**Lack of Moving Violation
or Crash**

**Defendant was not violating any
traffic law, nor did they cause a
crash, therefore, they could not
have been impaired.**

14

Lack of Moving Violation or Crash

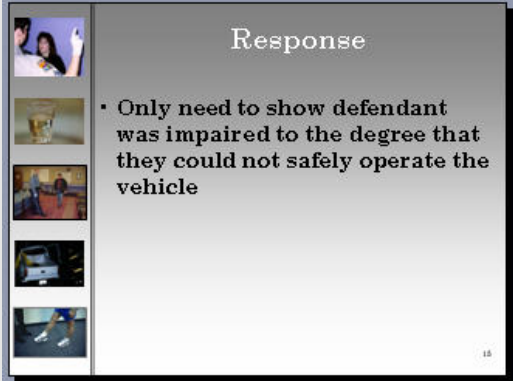
Defendant was not violating any traffic law, nor did they cause a crash, therefore, they could not have been impaired.

Issue

In a DWI prosecution the issue is whether defendant was impaired to the degree that they were less safe as a driver than an unimpaired driver.

A traffic violation is not a predicate to an impaired driving charge; the impaired driving is the offense.

Display Slide 15: Response



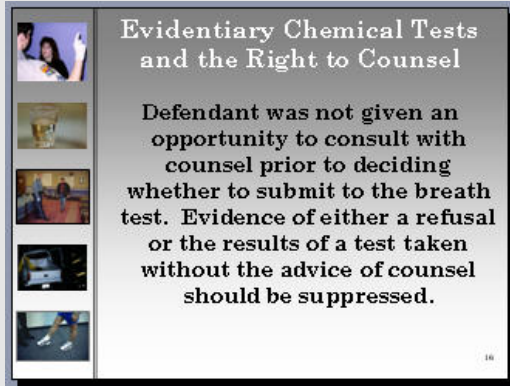
Response

- Only need to show defendant was impaired to the degree that they could not safely operate the vehicle

Response

The prosecutor should educate the jury about the elements of a DWI case. The prosecutor should explain to the potential jurors that the state does not need to prove that defendant was drunk, that he or she drove poorly, nor that there was a crash, only that defendant was impaired to the degree that they could not operate the vehicle safely.

Display Slide 16: Evidentiary Chemical Tests and the Right to Counsel



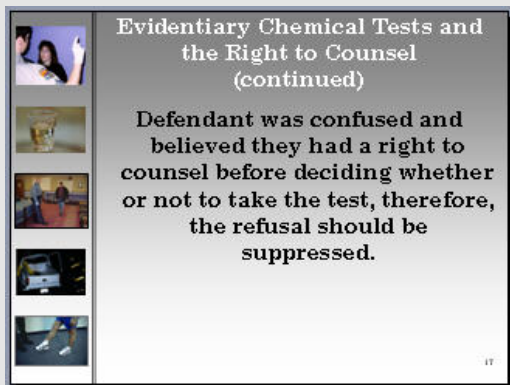
Evidentiary Chemical Tests and the Right to Counsel

Defendant was not given an opportunity to consult with counsel prior to deciding whether to submit to the breath test. Evidence of either a refusal or the results of a test taken without the advice of counsel should be suppressed.

Evidentiary Chemical Tests and the Right to Counsel

Defendant was not given an opportunity to consult with counsel prior to deciding whether to submit to the breath test. Evidence of either a refusal or the results of a test taken without the advice of counsel should be suppressed.

Display Slide 17: Evidentiary Chemical Tests and the Right to Counsel



Evidentiary Chemical Tests and the Right to Counsel (continued)

Defendant was confused and believed they had a right to counsel before deciding whether or not to take the test, therefore, the refusal should be suppressed.

Defendant was confused and believed they had a right to counsel before deciding whether or not to take the test, therefore, the refusal should be suppressed.

Issue

Does a defendant have the right to counsel prior to deciding whether to submit to the chemical test? If so, how far does that right to counsel extend? What must an officer do to protect defendant's right to counsel?

Whether a DWI subject has a right to counsel prior to submitting to a chemical test is purely a matter of state law; there is no federal precedent.

There is a split of authority among the states on this issue.

Display Slide 18: Response



Response

- Majority rule - No right to counsel
- Minority rule - Right to counsel

18

Response

No Right To Counsel

The majority of states do not recognize the right to counsel prior to deciding whether to submit to the chemical test.

Generally, states with implied consent laws hold that these laws are purely civil in nature. In these jurisdictions, if the defendant asks to speak with an attorney before deciding to submit to the chemical test, they must be told that their right to counsel does not apply at this stage of the procedure.

If defendant persists in their request for counsel after being warned, the request is treated as a refusal. Even in these jurisdictions, if the defendant claims that they were confused about their right to counsel, the courts will generally not treat the request for an attorney as a refusal unless there is clear evidence that defendant was informed that their right to counsel does not apply to the decision to take the test.

Defendant's confusion most often arises as a defense when the officer gives *Miranda* prior to asking for the chemical test and then tries to explain that defendant does not have the right to consult with an attorney until after the test.

Right To Counsel

A minority of jurisdictions do recognize a right to counsel before deciding whether to submit to the chemical test; however, there are differences in approach.

Some states base the right to counsel on an interpretation of the state constitution.

Others have passed statutes granting the right in a DWI case but do not consider it a constitutional right.

Where defendant has a right to counsel, the issue is how far that right extends.

Defendant's right to counsel is satisfied when there is a reasonable opportunity to consult with an attorney prior to the decision to take the chemical test.

The opportunity to consult with an attorney by phone is sufficient; the attorney need not be present at the actual administration of the test.

However, if the defendant or their attorney requests that the attorney be present for the test, the officer may be required to wait for defendant's counsel when the request will not unreasonably delay the test or otherwise unduly interfere with other officer responsibilities.

It is not necessary that defendant actually consult with counsel as long as they are provided with a legitimate opportunity. For example, DWI statutes often require that a chemical test be given within a designated period of time after driving, usually two or three hours.

Where defendant has been given the opportunity to call an attorney but has been unsuccessful in reaching one within the statutory time limits, they may be required to make a decision about taking the test without consultation.

An officer must provide a timely opportunity to consult and may not hinder the consultation.

Generally, officers do not have an affirmative duty other than to give notice of the right to counsel, provide access to a telephone and directory, and allow a reasonable degree of privacy to make contact.

Since the officer is required to keep defendant under observation to ensure that they do not eat or drink anything prior to the test, the officer is not necessarily required to leave defendant totally alone while they consult with counsel.

Check your state statutes and case law for foundational requirements.

TIP: In the criminal proceeding, the remedy for violation of a defendant's right to counsel is suppression of the evidence, whether the evidence is a test result or the defendant's refusal. Defense arguments that a violation of the right to counsel directly impinges on a defendant's right to a fair trial have been generally unsuccessful.

Display Slide 19: Refusal as Evidence

Refusal as Evidence

Evidence of defendant's refusal to perform SFSTs or to take the evidentiary chemical test is compelled testimony. Therefore, the use of the refusal as evidence against the defendant violates the 5th Amendment privilege against self-incrimination.

Refusal as Evidence

Evidence of defendant's refusal to perform Standardized Field Sobriety Tests (SFSTs) or to take the evidentiary chemical test is compelled testimony.

Therefore, the use of the refusal as evidence against the defendant violates the 5th Amendment privilege against self-incrimination.

Alternatively, the refusal does not tend to prove that the defendant was impaired and should be suppressed as irrelevant.

Issue

The 5th Amendment

A 5th Amendment analysis raises two questions: (1) Is the evidence testimonial? (2) Is it the product of compulsion?

The 5th Amendment states “No person shall be compelled in any criminal case to be a witness against himself”. The courts have interpreted this phrase to mean that an accused cannot be required to testify or give testimonial evidence against himself.

The disputed evidence must be both testimonial and compelled to implicate the privilege against self-incrimination. Evidence is testimonial if it reveals a defendant’s belief, knowledge, or state of mind.

A refusal arguably reveals a defendant’s belief that if they submit to the tests, they will fail.

Although the privilege against self-incrimination does not apply to physical evidence, an act need not be verbal to be testimonial. Nodding or shaking the head in response to a question is testimonial.

The defendant may argue that the refusal was compelled because it requires them to make a choice between two potentially incriminating responses: (1) taking the tests and risk failing, or (2) refusing and having the refusal used against them.

Relevance

Federal Rule of Evidence (FRE) 402 states that “Evidence which is not relevant is not admissible.”

FRE 401 defines relevant evidence as “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

State codes have similar provisions regarding the admissibility of evidence.

Does the fact that the defendant refused to perform the SFSTs or take the chemical test tend to prove that they were impaired?

Check local law: some jurisdictions allow evidence of refusal to be considered as indicia of guilt.

Display Slide 20: Response

Response

- SFSTs - Majority of jurisdictions hold the refusal is non-testimonial or compelled
- Chemical tests - Split authority

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Response

Standardized Field Sobriety Tests

5th Amendment

The majority of jurisdictions ruling on this issue have held that field sobriety tests, including the verbal portions of the tests, are non-testimonial and evidence of defendant's performance does not violate their privilege against self-incrimination.

See this section, *Miranda*.

In considering whether a refusal is testimonial, these courts have analogized the refusal to the SFSTs themselves and found the refusal non-testimonial.

Because the refusal is non-testimonial, it can be used against the defendant just as any other item of physical evidence.

The evidence must be both testimonial and compelled to be a 5th Amendment violation. The issue of whether the refusal is compelled arises only if the court finds the refusal to be testimonial.

In *Allred v. State*, 622 So.2d 984 (Fla. 1993), the Florida Supreme Court held that the verbal portions of the SFSTs were testimonial.

However, in *State v. Taylor*, 648 So.2d 701 (Fla. 1995), the court held that a refusal to submit to SFSTs was not compelled, therefore, the refusal was admissible.

The Virginia Court of Appeals also rejected the compulsion argument; however, the court also implied that it did not find the refusal to be testimonial. *Farmer v. Commonwealth*, 404 S.E.2d 371 (Va. Ct. App. 1991) (*reh'g en banc*).

Massachusetts and Oregon have found the refusal both testimonial and compelled under a state constitutional analysis.

In *Commonwealth v. McGrail*, 647 N.E. 712 (Mass. 1995), the court found the refusal testimonial because it communicated a defendant's belief that he would not pass the test.

The court also found the refusal to be compelled. Since a defendant is not required to submit to SFSTs, use of the refusal enables the state to obtain evidence to which it would otherwise not have a right.

In *State v. Fish*, 893 P.2d 1023 (Ore. 1995), the court found the refusal to be testimonial because it conveys a belief that defendant will fail.

It is compelled because the defendant is forced to give evidence against themselves either by taking the SFSTs or refusing, both choices that are potentially incriminating.

Therefore, in Massachusetts and Oregon, evidence of refusal is inadmissible under the state equivalent of the 5th Amendment. This result is clearly a minority position.

Relevance

Two cases have addressed refusal of SFSTs. They are:

Griffith v. State of Texas, 55 S.W. 3d 598, 601 (Tex Crim. App, 2001), states “evidence of a defendant's refusal to perform field sobriety tests also is admissible and circumstantially relevant to the issue of intoxication.”

Greenbough v. State of Oregon (2007), ruled that evidence of a refusal of either the field sobriety tests or the chemical test is admissible.

Evidentiary Chemical Tests

5th Amendment

In *Schmerber v. California*, 384 U.S. 757, 865 S.Ct. 1826, 16 L.Ed.2d 908 (1966), the Court held that the results of a blood test were neither testimonial nor communicative, thus, were not subject to the 5th amendment.

Later, in *South Dakota v. Neville*, 459 U.S. 553, 103 S.C. 916, 74 L.Ed.2d 748 (1983), the Court held that since a refusal to submit to a chemical test was a matter of choice, not compulsion, the 5th amendment privilege against *compulsory* self-incrimination was not implicated.

The Court did not address whether the refusal was itself testimonial.

The majority of states which have considered the issue follow the reasoning noted above.

The 5th Amendment protection is limited to compulsory self-incrimination and since a refusal is a free choice, the 5th Amendment is not implicated.

Since the refusal is not compelled, it does not matter whether it is testimonial.

Therefore, the evidence of refusal is admissible and may be argued as a "consciousness of guilt".

A minority of states has held under the state constitution that a refusal is both testimonial and compelled.

The compulsion exists because the defendant tends to incriminate them self by either refusing or taking the test.

Relevance

Another challenge to the admission of the refusal is on grounds of relevance.

The common sense argument is that a defendant refuses to take the chemical test because it will confirm that they have had too much to drink and will test over the *per se* limit.

A minority of courts have held that the refusal does not tend to prove impairment, therefore, it is not relevant.

In addition, any probative value of the refusal is far outweighed by the potential prejudice.

TIP: In some jurisdictions, whether a refusal can be admitted into evidence is governed by statute.

Check local statutes.

Typically, statutes fall into one of the following categories:

- (1) the refusal is admissible and may be argued as consciousness of guilt,
- (2) the refusal is admissible to show that a test was offered but may not be commented upon and the jury is instructed not to speculate upon the reason for the refusal,
- (3) the refusal is totally inadmissible, and
- (4) the refusal is admissible only if defendant takes the stand.

Display Slide 21: Alternative Explanations for Observed Signs of Impairment



Alternative Explanations for Observed Signs of Impairment

Most defendants will offer a host of alternative explanations in an effort to excuse or explain away the signs of impairment the officer observed.

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Alternative Explanations for Observed Signs of Impairment

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Display Slide 22: Alternative Explanations for Observed Signs of Impairment



Alternative Explanations for Observed Signs of Impairment

- Diabetes
- Fatigue
- Medication
- Physical condition
- Nervousness

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Defenses such as being fatigued, on medication, or suffering a diabetic reaction concede that the driver was impaired and corroborate the officer's observations.

These defenses are offered as an excuse.

Instead of impairment by alcohol consumption, which is illegal, the defense seeks to attribute the impairment to a cause which is either not illegal or which is designed to gain sympathy for the defendant.

For example, driving while excessively fatigued or ill to the point that it affects driving may be illegal, but it is usually a minor traffic offense as opposed to the seriousness of DWI.

And in some jurisdictions, there may not be a law prohibiting driving while fatigued or ill.

Other defenses challenge the existence of impairment and seek to explain away the officer's observations by offering explanations which do not demonstrate alcohol consumption or impairment:

- defendant could not locate their driver's license because they were nervous,
- defendant's eyes are bloodshot because they wear contact lenses,
- he has poor balance because of a bad back, etc.

Diabetes

Defense

Defendant claims that they were not impaired by alcohol (illegal), but suffering from a diabetic reaction (not illegal).

Issue

With the diabetes defense, the defendant is admitting that they were impaired but offering a legally recognized excuse.

There are several issues of which a prosecutor should be aware when attempting to rebut a diabetes defense.

It is important to recognize that there are two types of diabetes: Type I (insulin dependent) and Type II (non-insulin dependent).

Insulin dependent diabetics take insulin injections to lower blood sugar, as their pancreas generates little or no insulin.

Type II diabetes results when there is insufficient insulin production to maintain blood sugar at normal levels. Type II diabetes is usually controlled through diet and/or oral medication.

This defense is generally raised with a Type I diabetic, but may be raised by a Type II diabetic.

When a diabetic does not eat regularly or enough, they may suffer from low blood sugar or hypoglycemia/insulin reaction. Hypoglycemia will occur even more quickly if a diabetic drinks without eating.

The symptoms of an insulin reaction may be similar to a person under the influence of alcohol: slurred speech, uncoordinated movements, confusion, and an alcohol-like odor on the breath (acetone). These symptoms would be more likely to occur if a Type I diabetic were having an insulin reaction.

An additional complication is that the diabetic defense also includes a ready-made explanation for high breath test readings. The defense claims that acetone emitted by the defendant's breath interferes with and creates an artificially high breath alcohol result.

The National Highway Traffic Safety Administration (NHTSA) issued a report in September 1985 regarding acetone interference in breath alcohol measurement. NHTSA's report concluded that diabetics with a higher than normal acetone level usually suffer from "uncontrolled" diabetes (inability to maintain blood sugar at normal levels or non-diabetic levels), which would make the true diabetic too sick to drive and would generally require hospitalization.

Diabetics with their condition under control would not generate significant enough amounts of acetone on their breath to interfere with a breath alcohol measurement. A non-insulin diabetic is unlikely to even emit acetone from their breath. Moreover, most of the current breath test devices have the ability to screen for interferants such as acetone. The instrument will record the presence of an interferant and abort the test.

Response

To determine if the defendant may have a valid diabetes defense, a law enforcement officer should do the following:

- Check for medic alert bracelet or medical indicators that support that they are diabetic.
- Check for evidence of diabetic maintenance equipment (Dial-a-Pump pens, syringes, etc.).
- Ask if they suffer from any medical conditions requiring on-going treatment.
- Did defendant seek medical treatment at the time of incarceration?
- Ask if the defendant is an insulin or non-insulin dependent diabetic.

Fatigue

Defense

"I wasn't impaired by alcohol. I was just tired."

Issue

What is the cause of defendant's impairment?

DWI statutes specifically require that impairment be caused by ingestion of alcohol or drugs or a combination of drugs and alcohol. Therefore, if defendant can persuade the trier of fact that fatigue was the cause of their impairment, they cannot be convicted under a DWI statute.

Response

It is important to realize that a defendant who claims fatigue is not really challenging the officer's assessment of impairment; they are merely offering an alternative explanation for that impairment.

Most DWI cases contain evidence of defendant's drinking in addition to the observations of impairment, such as the odor of alcohol on the defendant's breath or open containers in the car. Therefore, a defendant usually will not deny alcohol consumption, but will claim that they drank only a minimal amount, the classic "two beers" defense.

Did the defendant offer the fatigue excuse to the officer at the scene? If so, what did the officer do to determine if fatigue was a factor?

Did the officer ask or note in the report how long it had been since defendant last slept? Stress the impairment observed.

If defendant testifies, get them to admit that driving while fatigued is unsafe.

Examine them about just how much they had to drink, if only to confirm the minimal amount told the officer.

Get the defendant to admit that people do not drink alcohol to stay awake.

Common sense says that alcohol has a more pronounced effect on a fatigued driver.

Medication

Defense

“I was not impaired by alcohol. I was on medication.”

It may be prescription or over the counter.

Issue

Again, defendant is not actually contesting impairment, only its cause.

In states which prohibit driving under the influence of alcohol, drugs, or any combination of alcohol or drugs, being under the influence of medication is not a legal defense. However, it has tremendous factual appeal to jurors who may not believe that a person taking medication should be prosecuted at all.

Response

Did defendant tell the officer they were on medication at the time of the arrest? Usually, officers will ask if the defendant was ill, injured or on medication of any type that would influence their ability to perform field sobriety tests. If the defense surfaces for the first time at trial, jurors will likely see it as untrue.

Find out all you can about the medication that defendant claims to have been taking. Check the Physician's Desk Reference (PDR) for information about effects: specifically, if there are warnings about drowsiness, driving while taking the medication, or combining the medication with alcohol or other drugs.

Pin down the amount and when it was taken in relation to driving. Ask if they read the package inserts and if they warn against driving or about drowsiness as a side effect.

If it is a prescription medication, what warnings was defendant given about possible impairing effects? Were they warned against combining the medication with alcohol or other drugs?

Remind participants of the protocols for summoning a DRE into a DWI investigation.

There will likely be independent evidence of alcohol consumption, such as the odor. Did defendant admit drinking, even in small amounts? Stress the warnings against combining the medication and alcohol.

The prosecution may call a DRE or another expert witness to testify about alcohol and drug combinations. Although jurors may be sympathetic to someone on medication, they will not be if it can be shown that defendant was irresponsible in not following the directions. Stress the dangerousness of combining alcohol with even over-the-counter medications.

TIP: Defenses which rely on excuses such as medication are designed primarily to appeal to the natural tendency of jurors to put himself or herself in a DWI defendant's place.

Part of any effective DWI prosecution is educating the jurors to the seriousness of impaired driving. People on medication are under an obligation to ensure that they do not endanger the safety of themselves or others on the highway.

Physical Condition

Defense

Defendant was not impaired. He or she suffers from a physical condition (back or leg injury, overweight, foot/knee problems, etc.) which causes them to lose balance, or be unable to stand on one leg.

Issue

Unlike the excuses, defendant is not admitting to impairment.

While conceding that the officer observed what appeared to be impairment, defendant is offering an explanation unrelated to the impairment. The issue is simply whether defendant was impaired.

Response

A DWI arrest is based on the totality of the circumstances. It is unlikely that the only evidence of DWI is defendant's performance on the SFSTs or their inability to walk or stand without difficulty.

Usually, the first things noticed by the officer are the driving pattern, the odor of alcohol, bloodshot eyes, slurred or incoherent speech, or an inability to produce a license.

The officer should be prepared to articulate their observations which may contradict the defendant's claim of physical disabilities. Was defendant's physical problem explained to the officer and what did the officer do to corroborate it? Was the defendant given field sobriety tests that would not be affected by the condition, such as the finger-to-nose?

Results of the HGN test are particularly critical in these types of cases. If defendant suffers from an alleged medical condition, are they on medication which may contribute to the impairment?

See Medication above.

Remind officers that jurors will observe defendant's appearance and demeanor in court. If the defendant testifies and claims to suffer a chronic back ailment which causes balance problems, were any balance problems observed as they walked around the courthouse? Officers should be reminded to watch and listen to the defendant in any post-arrest proceedings, and correlate those observations with those made during the arrest.

TIP: If defendant offers these explanations in a pre-trial motion to suppress or dismiss for lack of probable cause, remember, to establish probable cause, the officer need only have reasonable ground to believe that a crime had been or was in the process of being committed.

TIP: The officer is not required to eliminate all other possible explanations for the behavior.

Nervousness

Defense

Defendant was not impaired, just nervous.

Issue

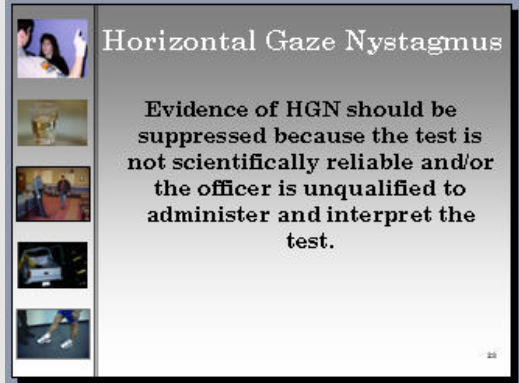
Was defendant impaired or were the officer's observations consistent with a nervous person?

Response

It is certainly natural that someone who has just been stopped by an officer would be nervous, particularly if that person had been drinking.

Point out all of the evidence that supports defendant's impairment, which would be unaffected by their nervousness: driving pattern, odor, slurred speech, presence of HGN, etc.

Display Slide 23: Horizontal Gaze Nystagmus



The following information is provided as a general overview. Each TSRP or prosecutor may utilize the information applicable to their jurisdiction(s).

Horizontal Gaze Nystagmus

Defense

Evidence of Horizontal Gaze Nystagmus (HGN) should be suppressed because the test is not scientifically reliable and/or the officer is unqualified to administer and interpret the test.

Issue

There have been numerous challenges to the admissibility of HGN as a field sobriety test.

Explain the difference between establishing scientific reliability under *Frye* and *Federal Rule of Evidence 702*. Most courts still require a showing that HGN is scientifically reliable. A few courts have held that HGN is neither new nor novel and, therefore, does not require an evidentiary hearing or proof of reliability.

Courts have varied in their approach to its admissibility depending upon the standard for admissibility of scientific evidence in a given jurisdiction. It is essential for prosecutors to know the standard in their jurisdictions.

In general, the defense will argue that HGN is a scientific test that either (1) does not meet the *Frye* standard of "general acceptance", or (2) that there is insufficient indicia of reliability to be admissible under *Daubert/FRE 702*.

The third challenge focuses not on the test itself but the ability of the officer to administer and interpret the test results.


Courts have typically responded to HGN challenges in one of the following ways:

- HGN meets the *Frye* test,
- HGN meets the more relaxed standard under *Daubert/FRE 702*,
- HGN is neither new nor novel and requires only a showing of relevance, or
- the prosecution has failed to carry its burden of proof in demonstrating that HGN meets the required criteria for admissibility.

Only the Mississippi Supreme Court has found that HGN "is not generally accepted in the scientific community." *Young v. City of Brookhaven*, 693 So.2d 1355 (Miss. 1997). The basis of the court's decision is unclear since no *Frye* hearing was held.

Other courts which have rejected HGN have done so on the basis that the officer's testimony alone is insufficient to demonstrate scientific reliability.

Display Slide 24: Response



Response

- HGN meets admissibility standards
- The officer was properly trained to administer test

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ResponseFrye

In *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed.2d 469 (1993) the U.S. Supreme Court held that Federal Rule of Evidence (FRE) 702 had replaced *Frye* as the standard for the admissibility of scientific evidence.

Nevertheless, a number of states continue to adhere to the "general acceptance" standard enunciated in *Frye* even when the state has adopted the Federal Rules of Evidence.

In jurisdictions maintaining *Frye*, an evidentiary hearing should be held to determine if HGN meets the requirement of general acceptance in the relevant community.

In *State v. Superior Court (Blake)*, 718 P.2d 171 (Ariz. 1986), the Arizona Supreme Court held that HGN meets the *Frye* standard of admissibility.

Blake remains the seminal case on the admissibility of HGN under *Frye*.

See also *People v. Joehnk*, 35 Cal. App. 4th 1488, 42 Cal. Rptr. 2nd 6 (Cal. App. 1995), a California case holding that HGN meets the *Frye* standard.

Daubert/FRE 702

Several states have held HGN scientifically reliable under the more relaxed standard set by the Federal Rules of Evidence and the equivalent state evidentiary rules.

The Federal Rules favor admissibility of all relevant evidence.

If evidence is admissible under *Frye*, it is also admissible under FRE 702.

In *Daubert*, the Court held that *FRE 702* governs the admissibility of scientific evidence.

However, even under *FRE 702*, the proponent must establish some degree of scientific reliability.

The Court listed several factors relevant to determining scientific reliability:

- can the theory or technique be tested,
- has it been subject to peer review,
- what is the known or potential rate of error and,
- is there "general acceptance".

The listed factors are not exclusive nor does the presence or absence of any one factor determine admissibility.

If the science or methodology has gained "general acceptance" under *Frye*, it will also meet the FRE 702 standard.

The difference is that the proposed scientific evidence does not need to be generally accepted to be admissible under FRE 702.

HGN Is Not Scientific And No Showing Of Scientific Reliability Required

A few courts have declined to rule on the basis of scientific reliability, treating HGN solely as a field sobriety test with observable and objective signs.

Several courts have determined that HGN is well established, not new nor novel, and therefore, no evidentiary hearing is required.

Officer's Qualifications

Once the court allows HGN evidence, the prosecution must establish that the officer is properly trained to administer the test and that the test was administered in accordance with that training.

Individual states may require that an officer be certified to administer the test.

Many officers maintain logs of every HGN test they give, the arrests made and the actual BAC.

This can be powerful evidence in demonstrating both the reliability of the test and the officer's proficiency in administering the test and interpreting the results.

Evidentiary Hearings

A number of states have found HGN admissible for at least one purpose, either probable cause or substantive evidence of impairment.

The majority of courts find HGN admissible, but for prosecutors admission is a question of foundation.

Check National Traffic Law Center website. (www.ndaa.org)

An increasing number of courts appear willing to take judicial notice of HGN's scientific reliability.

This is a minority position, however, and if there are any doubts about a court's willingness to take judicial notice, request an evidentiary hearing with expert witnesses who can establish the scientific basis for the test as well as the ability of the officer to administer the test in the field and interpret the test results.

In the states which have rejected HGN, the courts have specifically held that the prosecution failed in its burden to establish reliability, **not** that the test is unreliable.

But see Young v. City of Brookhaven, 693 So.2d 1355 (Miss. 1997). In this case, the prosecution attempted to admit HGN based solely on the arresting officer's testimony without first establishing the reliability of the test through the use of expert witnesses or submitting to the court case law and scientific literature validating HGN.

Limitations On The Use Of HGN

Even where the courts have accepted HGN evidence, the purposes for which it may be admitted vary.

HGN is not a substitute for the chemical test and, in the absence of a chemical test, courts will not allow the officer to testify as to what the defendant's BAC was based on HGN.

Emphasize this point that HGN is not a substitute for chemical tests and should not be attempted in court.

If, however, defendant submitted to an evidentiary breath or blood test and now challenges the result, the court may allow the officer's opinion to corroborate the test result.

Some courts have limited HGN evidence to a determination of probable cause or some evidence of alcohol consumption. Others allow it as substantive evidence of impairment.

Other Causes Of Nystagmus

Be aware that Nystagmus can be induced by things other than alcohol or drug use.

Alcohol or drug induced Nystagmus is only one cause of Nystagmus.

Neurological dysfunction, for example, may cause Nystagmus.

As with all field sobriety tests, alternative explanations for the officer's observations go to the weight of the evidence and not its admissibility.

A small percentage of the population will demonstrate nystagmus at maximum deviation.

However, the other clues - lack of smooth pursuit and an angle of onset prior to 45 degrees - will not be present.

Since the other clues are not observed, the officer should find that HGN was not present.

Among other things, spinning a person around rapidly or irrigating the ears with either hot or cold water may induce nystagmus.

The defense may try to confuse the issue by referring to these other causes of nystagmus.

None of the alternative methods of inducing nystagmus are likely to occur outside of a laboratory setting and are, therefore, irrelevant.

The common sense response to these other methods of inducing nystagmus is that there is no evidence that defendant had hot and cold water poured in their ears, or that they were spun around rapidly.


It is also important to note that the Nystagmus ceases rapidly when induced by these means.

For example, a defendant who was in a crash may claim that the car spun around several times during the crash and this caused the nystagmus.

This type of nystagmus passes rapidly and would not be observable by the time the officer administered the HGN test.

For a list of state courts that have dealt with HGN, obtain a copy of *Horizontal Gaze Nystagmus: The Science and The Law* from the National Traffic Law Center (also available online at www.ndaa.org) and from NHTSA.

Display Slide 25: Field Sobriety Tests



Field Sobriety Tests

**Standardized Field Sobriety Tests
were not used or were not given
properly.**

Field Sobriety Tests

Defenses

The development of the Standardized Field Sobriety Test (SFST) battery, i.e., Horizontal Gaze Nystagmus, the Walk-and-Turn, and One-Leg Stand tests have given rise to several potential defenses:

- If the officer did not use the SFSTs, the tests should be suppressed because these other tests have not been scientifically validated.
- If the standard battery was used, the SFSTs are based on scientific principles and are subject to admissibility under either the *Frye* standard or the state equivalent of *FRE 702*.
- If the standard battery was used, the tests were not given strictly in accordance with the National Highway Traffic Safety Administration (NHTSA) guidelines and are, therefore, inadmissible.

Issue

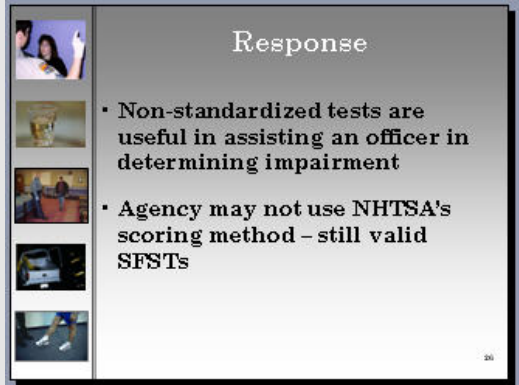
In the 1970's, NHTSA contracted with the Southern California Research Institute (SCRI) to study the field sobriety tests then in use, choose the tests that had the greatest potential for demonstrating impairment which could be easily administered in the field, and develop a standardized test battery.

As a result of this study, Horizontal Gaze Nystagmus, the Walk-and-Turn and One-Leg Stand tests were recommended as the most reliable tests to predict when a subject's BAC is over .10. Subsequently, these three tests were adopted by NHTSA as the recommended battery of tests.

In addition to the tests themselves, a protocol was developed for administering the tests, hence the term "standardized." The issue is whether any field sobriety test provides sufficiently reliable information to the arresting officer that he or she can reasonably conclude that the defendant was impaired. The issue is pertinent to both an inquiry on probable cause to arrest as well as the use of FST results as substantive evidence of impairment. The issue is particularly likely to arise when the defendant has refused the chemical tests and performance on the field sobriety tests is the strongest evidence of impairment.

When challenging the standardized test battery, there is an additional issue concerning the "scientific" nature of these tests.

Display Slide 26: Response



Response

- Non-standardized tests are useful in assisting an officer in determining impairment
- Agency may not use NHTSA's scoring method - still valid SFSTs

Response

Non-Standardized Tests

Courts have long held that even lay persons can detect and express an opinion about impairment. It is considered common knowledge that alcohol causes physical and behavioral changes that are readily observable.

Some of the familiar signs of impairment include lack of balance, poor coordination, exaggerated movements, poor motor skills, slurred speech, and inability to follow directions. Field sobriety tests merely allow the officer to make observations about these typical signs of impairment.

There are a number of field sobriety tests that officers routinely administer other than the three recommended tests. Although these tests have not been subject to the rigorous examination of the standardized tests, they are still useful in assisting an officer in determining impairment.

The officer should be prepared to testify about their experience in giving the particular tests that were administered, whether he or she has given them to impaired as well as unimpaired persons, the differences between how impaired and unimpaired individuals perform the tests, and how the defendant performed.

Standardized Tests

After thorough and controlled testing, the Horizontal Gaze Nystagmus, Walk-and-Turn, and the One-Leg Stand were identified as the best field tests to determine alcohol impairment over .10.

Remind the participants that more recent studies have been completed validating the SFSTs at .08.

Defendants have argued that the SFSTs are scientific, and thus subject to a determination of admissibility as scientific evidence under state law. Obviously, SFSTs rely on the well-known fact that alcohol ingestion causes observable physical and mental reactions in the human body. SFSTs are analogous to observations of personal behavior. The scientific principle upon which they are based is neither new nor novel and therefore should not be subject to the *Frye* standard.

Tests Not Administered According To NHTSA Guidelines

Not all law enforcement agencies which have adopted the Standardized Field Sobriety Tests use the NHTSA scoring method. For example, on the Walk-and-Turn test, NHTSA scores the failure to touch heel-to-toe as one clue no matter how many times the defendant fails to touch heel to toe.

If the officer does not administer the test as prescribed, it should be treated as a non-standardized exercise or task and it still provides information to the officer about impairment. The officer should be prepared to explain why the test was not administered in the standardized manner.

Field sobriety tests are based on common knowledge that alcohol ingestion causes observable physical and behavioral reactions. A common defense strategy is to argue that the SFSTs do not show driving impairment.

Be prepared to testify about driving skills. For example, a driver needs to be able to see the red light, process the information that they need to stop, judge the distance they are from the intersection so that they can respond in time, etc. Be prepared to testify about the skills you are looking for the defendant to be able to perform in the field sobriety tests.

Among other things, SFSTs are designed to help assess the defendant's ability to do multiple, simple tasks simultaneously (divided attention tasks), comprehend and follow simple instructions (process information), to maintain physical control, and to judge reaction times.

Substantial Compliance Issue

The Ohio Supreme Court held in *Ohio v. Homan*, 732 N.E.2d 952 (Ohio 2000), that standardized field sobriety tests conducted in a manner that departs from the methods established by NHTSA "are inherently unreliable" and thus inadmissible.

TIP: A brief on the substantial compliance issue is available online at the National Traffic Law Center.

The majority based its decision on a portion of the NHTSA DWI Detection and Standardized Field Sobriety Testing Participant Manual that states "if any one of the standardized field sobriety test elements is changed, the validity is compromised." Obviously, officers should strive to fully comply with NHTSA's guidelines when administering standardized field sobriety tests.

However, should deviations occur, prosecutors should be prepared to argue that any deviation goes to the weight of the evidence, not its admissibility.

This argument is consistent with the preface of the NHTSA SFST Participant Manual, which states that the procedures outlined in the manual describe how SFSTs should be administered under ideal conditions, and that ideal conditions do not always exist in the field. The preface goes on to state that variations from ideal conditions may have some affect on the evidentiary weight given to the results, but this does not necessarily make SFSTs invalid.

Courts in Florida, Georgia, Hawaii, Illinois, Pennsylvania, Tennessee, Texas, Wisconsin and Wyoming have reviewed the admissibility of field sobriety tests that assess physical coordination and have held that deviations in the administration of the tests, including departing from NHTSA's guidelines, should not result in the suppression of test results.

In reaching this conclusion, these courts have found that field sobriety tests, including the walk-and-turn and the one-leg-stand, are simple physical dexterity exercises that can be interpreted by the fact-finder through common sense and experience. Thus, even if NHTSA's guidelines were not substantially complied with when the tests were administered, the tests still have evidentiary value and should be considered by the court.

A cautionary note: The admissibility of Horizontal Gaze Nystagmus may be treated differently due to its "scientific nature". Consequently, those results face the possibility of being excluded if the test is not administered in substantial compliance with established protocols.

Display Slide 27: Incomplete Arrest Report

Incomplete Arrest Report

Defendant either attempts to show that the officer is lying when they testify about information not in the report or that the officer was intending to arrest defendant from the beginning so never wrote down anything favorable to defendant.

27

Incomplete Arrest Report

Defense

Defendant either attempts to show that the officer is lying when they testify about information not in the report or that the officer was intending to arrest defendant from the beginning so never wrote down anything favorable to defendant.

The defense will argue:

- That a truly competent officer would have written down every little detail which supports the arrest.

- The officer's superiors will read the report and the officer knew he or she may have to come to court to testify from the report.
- Wouldn't the officer want it to be as complete as possible?
- The officer has had hundreds of encounters with citizens and probably several other DWI arrests between the time of this arrest and the trial.
- If the information the officer testifies to is not in the report, how can the jurors be sure the officer really remembers?
- Maybe the officer has confused this case with another.
- The officer's failure to note favorable information about the defendant in the report shows that he or she was planning to arrest from the moment they contacted the defendant, therefore, the motives are suspect.

Issue

This defense is an attack upon both the officer's competence and credibility. It attempts to shift the focus from the defendant and their actions to the officer.

Display Slide 28: Response

Response

- Establish the purpose of the arrest report
- Absence of an impairment indicator does not negate the other signs the officer observed

Response

The officer must establish the purposes of the arrest report, one of which is to help recall an arrest which took place months before the trial.

TIP: These problems can be minimized with effective preparation.

It is not intended to list everything that happened, only those details which are pertinent to the officer's decision to arrest.

Defense attorneys often point out the absence of signs of impairment, e.g., defendant's speech was not slurred.

Although there are many common traits that DWI drivers share, no defendant will exhibit every impairment indicator. Normally, if the officer failed to note a sign of impairment, it is because they did not see it. An absence of slurred speech does not negate the other signs the officer observed.

Defense counsel also stress that the officer did not write down anything that was favorable to defendant in the report, such as that they parked correctly after being pulled over.

The fact that defendant may have been able to do some things correctly does not mean that they were not impaired. The American Medical Association reports that all persons are impaired at a BAC of .05 or greater whether or not obvious signs of impairment are observable.

TIP: In the pretrial interview, the officer will be asked to clarify any omissions or discrepancies in the report.

The officer should be prepared to be questioned about the report on cross-examination. Ordinarily, the prosecution would not ask about the report on direct examination but wait until the report has been called into question. If it becomes necessary to explain the report, the prosecutor may rehabilitate the officer on redirect.

The following are samples of a few questions that could be asked on redirect:

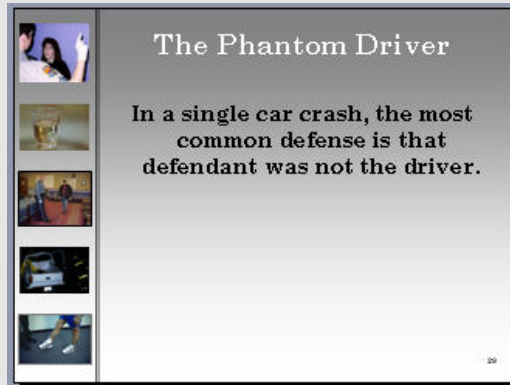
- When was this report prepared?
- Why do you write a report?
- Have you listed everything related to defendant's arrest in this report? Why not?

- You testified on cross-examination that defendant pulled over to the curb correctly in response to your overhead lights.
- Why isn't that noted in your report?
- Did you take into account what the defendant did correctly in your decision to arrest?

Of course, this question could be asked of anything that the defense claims was favorable but not included in the report.

- You testified that the area where the SFSTs were given was well lit, however, there is nothing in your report which references lighting conditions.
- How do you recall the lighting conditions?
- Do you have an independent recollection of the defendant?
- Do you recall the arrest without your report? How?

Display Slide 29: The Phantom Driver



The Phantom Driver

In a single car crash, the most common defense is that defendant was not the driver.

29

The slide features a vertical strip of five small images on the left side, depicting various scenes related to a car crash investigation, including a person, a car, and a crash site.

The Phantom Driver


Defense

In a single car crash, the most common defense is that defendant was not the driver.

Issue

What evidence is there to substantiate that defendant was the driver in the absence of an eyewitness who can place defendant behind the wheel of the car?

Display Slide 30: Response



Response

- **Officers should testify about the investigation and all the evidence supporting the conclusion that the defendant was the driver**

Response

Did defendant tell the officer at the scene that he or she was not the driver or is this a story which has surfaced only at trial? If the defense is raised at trial, the jury is likely to see it as a lie.

Point out in closing that the logical time to raise this issue is at the scene when defendant is being arrested for a crime they did not commit and when the officer had the opportunity to investigate and exonerate defendant.

Whether or not defendant told the officer that they drove, it is important the officer testify regarding the investigation and all evidence that support the conclusion that defendant was the driver.

- Was the defendant still in the car and in what position?
- Is the defendant the owner of the car or the logical person to have been driving, e.g., is it defendant's parents' car?
- Was there any evidence to suggest that another person had been in the car and left the scene, e.g., footprints leading from the scene?
- Were there witnesses who came upon the scene immediately after the crash and did they see anyone else in the area?
- Did defendant identify the other driver?
- Was the driver a friend or some unknown person that defendant met at the bar the night of the crash?
- Is defendant's explanation about the driver consistent with the evidence? Did it make sense?
- Where were the keys, in the ignition or in defendant's possession?
- Was defendant at the scene or had he or she left?
- If defendant was located away from the scene, did he or she lead officers to the scene or indicate knowledge of the location of the crash?
- Did defendant try to leave when the officer arrived?
- What physical evidence exists? For example:
 - What was the position of the driver's seat in relation to defendant's height?
 - Did defendant sustain any abrasions or injury consistent with being the driver, such as bruising from the steering column, seatbelt abrasions, and injuries from broken glass or hitting the windshield?
 - Check for blood, tissue or hair transfers to the vehicle interior.
 - Did defendant have knee injuries from contact with the dashboard?

- Are there items on the passenger seat and/or floor negating the likelihood of a passenger?

Local Legal Issues

This section can be devoted to discussing local defense or prosecution issues.

OPTIONAL SESSION
LIVE ALCOHOL WORKSHOP

OPTIONAL SESSION: LIVE ALCOHOL WORKSHOP

Upon successfully completing this session, the participant will be able to:


- Properly administer the SFST's.
- Properly observe and record subject's performance.
- Properly interpret the subject's performance.

CONTENT SEGMENTS

- A. Procedures
- B. Hands-on Practice
- C. Session Wrap-Up

OPTIONAL SESSION: LIVE ALCOHOL WORKSHOP

Display Slide 1: Title



Display Slide 2: Objectives



Session Objectives

- Properly administer the SFST's.
- Properly observe and record subject's performance.
- Properly interpret the subject's performance.

NOTE: See Section E, "Guidelines for Controlled Drinking Practice Sessions", pages 12-14 of the Administrator's Guide in the DWI Detection and Standardized Field Sobriety Testing Instructor Manual.

Procedures

Participants work in teams and will test at least as many drinking volunteers as the team has members.

Make sure that all participants understand the practice procedures.

Example: If a team has four members, that team will administer a complete set of tests to at least four volunteers.

Each team member will administer one complete series of tests to at least one drinking volunteer.

If time permits, teams will test additional volunteers.

While one participant is administering tests to a volunteer, the other team members will observe and record the volunteer's performance.

Emphasize that each team member is to prepare a descriptive, written test record on each volunteer tested (using the standard note-taking guide).

Example: Three members in a team evaluating one subject will result in three individual written records. EACH team member must determine if the subject should or should not be arrested.

As soon as the team has completed the SFSTs on a particular volunteer, the volunteer must be escorted by a monitor to the next scheduled team.

Define the sequence in which volunteers will circulate among teams.

Upon termination of this practice segment, monitors will escort the volunteer subjects to the Breath Testing Station.

Emphasize that teams will not be informed of the volunteers' BACs until the session "Wrap-Up".

Hands-on Practice

Participants carry out the "drinking subjects" practice procedures.

Instructors circulate among teams to observe and coach participants' performance, as necessary.

Upon completion of practice, teams escort volunteers to the Breath Testing Station.

Teams return to classroom to complete report writing assignment. An instructor records the BACs of the volunteer.

Session Wrap-Up

Teams report their observations of volunteers.

Solicit SFST results on each volunteer. Record results and display to class.

Instructors notify participants of volunteers' BACs.

Instructor notifies participants of volunteers' BACs, as obtained during the breath tests.

Solicit participants' comments, questions or observations concerning the relationship between volunteers' BACs and their performances on the tests.

TABULATING RESULTS

<u>"Designated Subjects"</u>	<u>Horizontal Gaze Nystagmus</u>	<u>Walk And Turn</u>	<u>One-Leg Stand</u>	<u>Arrest ?</u>
"A"	_____	_____	_____	_____
"B"	_____	_____	_____	_____
"C"	_____	_____	_____	_____
"D"	_____	_____	_____	_____
"E"	_____	_____	_____	_____
"F"	_____	_____	_____	_____
"G"	_____	_____	_____	_____
"H"	_____	_____	_____	_____
"I"	_____	_____	_____	_____
"J"	_____	_____	_____	_____

OPTIONAL SESSION
OVERVIEW OF DRUG-IMPAIRED DRIVING

OPTIONAL SESSION: OVERVIEW OF DRUG-IMPAIRED DRIVING

Upon successfully completing this module of instruction, the participant will be able to:


- Define the term "drug" in the context of DWI enforcement.
- Name the major categories of drugs.
- Describe the observable signs generally associated with the major drug categories.
- Describe the ARIDE training program.

Content Segments

- A. Drug Categories and Their Observable Effects
- B. Advanced Roadside Impaired Driving Enforcement (ARIDE) Overview

OPTIONAL SESSION: OVERVIEW OF DRUG-IMPAIRED DRIVING


Display Slide 1: Title



OPTIONAL SESSION

Overview of Drug-Impaired Driving

Display Slide 2: Objectives



Session Objectives

- Define the term “drug” in the context of DWI enforcement
- Name the major categories of drugs
- Describe the observable signs generally associated with the major drug categories
- Describe the ARIDE training program

Session Objectives

- Define the term "drug" in the context of DWI enforcement.
- Name the major categories of drugs.
- Describe the observable signs generally associated with the major drug categories.
- Describe the ARIDE training program.

Definition of "Drug"

The word "drug" is used in many different ways, by many different people.

The corner druggist and the U.S. Drug Enforcement Administration are both concerned with "drugs", but they don't have exactly the same thing in mind when they use that word. And neither the druggist nor the DEA have the same perspective as the DWI enforcement officer.

Display Slide 3: Definition of "Drug"

Definition of "Drug"

Any substance that when taken into the human body, can impair the ability of the person to operate a vehicle safely.

For our purposes, a "drug" is any substance that when taken into the human body, can impair the ability of the person to operate a vehicle safely.

Working definition is derived from California Vehicle Code, Section 312; 1985.

This definition excludes some substances that physicians consider to be drugs. (Examples: nicotine; caffeine)


Ask participants: what are some things that physicians would consider to be "drugs" that would not be covered under this definition?

This definition includes some substances that physicians don't usually think of as drugs. (Examples: model airplane glue; paint)

Ask participants: what are some common chemical substances that doctors don't usually consider drugs, but that definitely impair driving ability?

Drug Categories and Their Observable Effects

Display Slide 4: CNS Depressants



The slide titled "CNS Depressants" lists the following categories:

- Barbiturates
- Non-Barbiturates
- Anti-Anxiety Tranquilizers
- Anti-Depressants
- Muscle relaxants and many other drugs

The slide also features five small images: a person holding their head, a glass of alcohol, a person sitting at a desk, a person sleeping, and a person walking unsteadily.

CNS Depressants

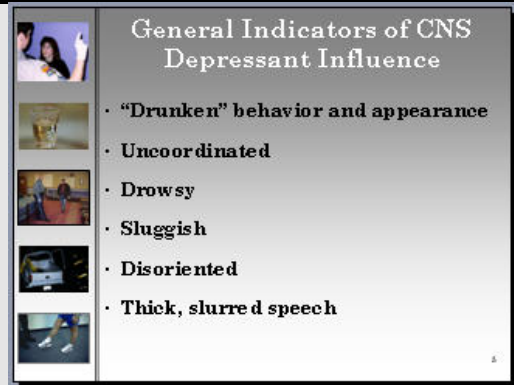
CNS Depressants slow down the operations of the brain, and usually depress the heartbeat, respiration, and many other processes controlled by the brain. The most familiar CNS Depressant is alcohol. Other CNS Depressants include:

- Barbiturates (such as Secobarbital and Pentobarbital)
- Non-Barbiturates (GHB - Gama hydroxy Butyrate and Soma)
- Anti-Anxiety Tranquilizers (such as Valium, Librium, Xanax, and Rohypnol)
- Anti-Depressants (such as Prozac and Elavil)
- Muscle relaxants and many other drugs.

CNS Depressants usually are taken orally, in the form of pills, capsules, liquids, etc.

In general, people under the influence of any CNS Depressant look and act like people under the influence of alcohol.

Display Slide 5: General Indicators of CNS Depressant Influence



General Indicators of CNS Depressant Influence

- "Drunken" behavior and appearance
- Uncoordinated
- Drowsy
- Sluggish
- Disoriented
- Thick, slurred speech

Eye Indicators of CNS Depressant Influence

- Horizontal gaze nystagmus usually will be present.
- Vertical nystagmus may be present (with high doses).
- Pupil size usually will be normal, except that Methaqualone and Soma will cause pupil dilation.

Solicit participants' questions concerning indicators of CNS Depressant influence.

Display Slide 6: CNS Stimulants



CNS Stimulants

- Accelerate the heart rate, respiration and many other processes of the body
- Two most widely abused kinds of CNS Stimulants are cocaine and methamphetamines

CNS Stimulants

CNS Stimulants accelerate the heart rate, respiration and many other processes of the body.

The two most widely abused kinds of CNS Stimulants are cocaine and methamphetamines. Cocaine is made from the leaves of the coca plant. Methamphetamines are chemically produced (manufactured) drugs.

Illegal and illicit production.

Cocaine abusers may take the drug

- by "snorting"
- by smoking (freebase, or "Crack")
- by injection
- orally

Abusers of Methamphetamines may take their drugs:

- by injection
- orally
- by "snorting"
- or smoked (i.e., "ice")

People under the influence of CNS Stimulants tend to be hyperactive, indicated by nervousness, extreme talkativeness and an inability to sit still. They also are usually unable to concentrate, or to think clearly for any length of time.

Display Slide 7: General Indicators of CNS Stimulant Influence



The slide contains the following text:

General Indicators of CNS Stimulant Influence

- Restlessness
- Talkative
- Excitation
- Euphoria
- Exaggerated reflexes
- Loss of appetite
- Anxiety
- Grinding teeth
- Redness of nasal area
- Runny nose
- Body tremors

General Indicators of CNS Stimulant Influence

- Restlessness
- Talkative
- Excitation
- Euphoria
- Exaggerated reflexes
- Loss of appetite
- Anxiety
- Grinding teeth (bruxism)
- Redness to nasal area (if "snorting")
- Runny nose (if "snorting")
- Body tremors

Eye Indicators of CNS Stimulant Influence:

- Neither horizontal nor vertical nystagmus will be observed.
- The pupils generally will be dilated.

Solicit participants' questions concerning indicators of CNS Stimulant influence.

Display Slide 8: Hallucinogens



Hallucinogens

- Drugs that affect a person's perceptions, sensations, thinking, self awareness, and emotions

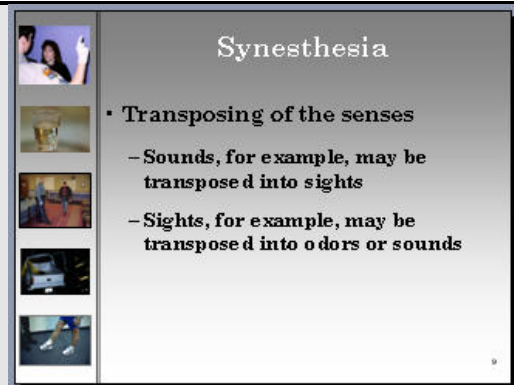

Hallucinogens

Hallucinogens are drugs that affect a person's perceptions, sensations, thinking, self awareness and emotions.

The word "Hallucinogen" means something that may cause hallucinations.

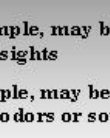
Definition from The Random House College Dictionary (Revised Edition, 1980).

Display Slide 9: Synesthesia



Synesthesia

- Transposing of the senses
 - Sounds, for example, may be transposed into sights
 - Sights, for example, may be transposed into odors or sounds



One common type of hallucination caused by these drugs is called synesthesia, which means a transposing of the senses.

- Sounds, for example, may be transposed into sights.

Example: the user may "see" a flash of color whenever the telephone rings.

- Sights, for example, may be transposed into odors or sounds.

Example: the user may "smell" a particular fragrance when he or she looks at something painted red.

Some hallucinogenic drugs come from natural sources.


- Peyote is a hallucinogen found in a particular specie of cactus.
- Psilocybin is a hallucinogen found in a number of species of mushroom.

Other hallucinogens are synthetically manufactured:

- LSD (Lysergic Acid Diethylamide)
- MDA (3,4-Methylenedioxyamphetamine)
- MDMA/Ecstasy (3,4-Methylenedioxymethamphetamine)
- Many others.

Hallucinogen abusers usually take their drugs orally; however, some hallucinogens can be smoked, or injected or "snorted".

Display Slide 10: General Indicators of Hallucinogen Influence



General Indicators of Hallucinogen Influence

- Hallucinations
- Dazed appearance
- Body tremors
- Uncoordinated
- Perspiring
- Disorientation
- Paranoia
- Difficulty in speech
- Nausea
- ~~Erection~~

General Indicators of Hallucinogen Influence

- Hallucinations
- Dazed appearance
- Body tremors
- Uncoordinated
- Perspiring
- Disorientation
- Paranoia
- Difficulty in speech
- Nausea
- Piloerection (goose bumps)

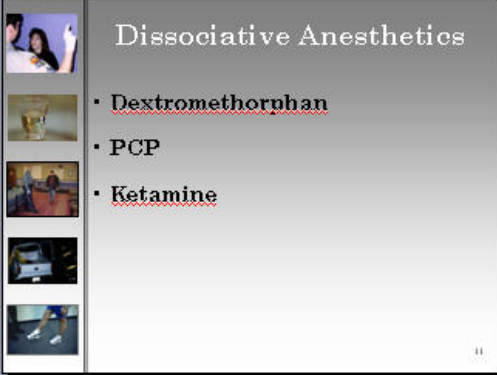
Eye Indicators of Hallucinogen Influence

- Neither horizontal nor vertical nystagmus will be present.
- The pupils usually will be noticeably dilated.

Point out that the indicators of hallucinogen influence are very similar to the indicators of CNS Stimulant Influence.

Solicit participants' questions concerning indicators of hallucinogen influence.

Display Slide 11: Dissociative Anesthetics



Dissociative Anesthetics

- Dextromethorphan
- PCP
- Ketamine

Dissociative Anesthetics

Examples include:

- Dextromethorphan
- PCP
- Ketamine

Dextromethorphan (DXM) is the active ingredient in over-the-counter cough medicine such as Robitussin, Coricidin Cough and Cold, and Dimetapp. DXM is typically abused by school age children and teenagers by concentrated or multiple dosages to achieve impairment. DXM can be found in liquid and pill form. With high doses of DXM, the user may experience hallucinogenic effects.

PCP is a synthetic drug, that was first developed as an intravenous anesthetic.

Point out that PCP is a very powerful anesthetic, or pain-killer.

Because PCP produces very undesirable side effects, it is no longer legally manufactured. However, an analog (chemical cousin) Ketamine is still being legally manufactured and available.

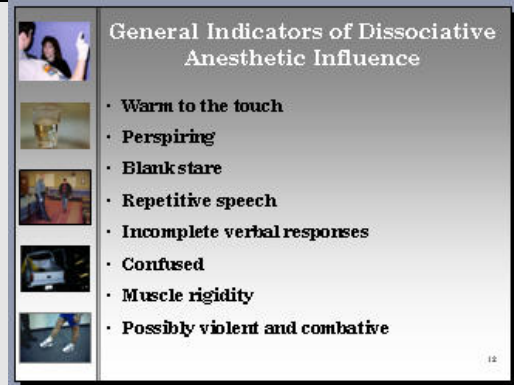
However, it is easy to manufacture:

- The formula for making PCP and PCP analogs have been widely publicized.
- The manufacturing process involves readily available chemicals.

Some PCP and Ketamine users smoke the drug, by using it to adulterate tobacco, marijuana, or various other substances.

Dissociative Anesthetics can also be taken orally, by injection, or inhaled.

Display Slide 12: General Indicators of Dissociative Anesthetic Influence



General Indicators of Dissociative Anesthetic Influence

- Warm to the touch
- Perspiring
- Blank stare
- Repetitive speech
- Incomplete verbal responses
- Confused
- Muscle rigidity
- Possibly violent and combative

General Indicators of Dissociative Anesthetic Influence

- Warm to the touch
- Perspiring
- Blank stare
- Repetitive speech
- Incomplete verbal responses
- Confused
- Muscle rigidity
- Possibly violent & combative

Eye Indicators of Dissociative Anesthetic Influence

- Horizontal gaze nystagmus generally will be present, often with very early onset and very distinct jerking.
- Vertical nystagmus generally will be present.
- Pupil size usually will be normal.

Solicit participants' questions concerning indicators of Dissociative Anesthetic influence.

Display Slide 13: Narcotic Analgesics



Narcotic Analgesics

- A large number of drugs that share three important characteristics
 - Relieve pain
 - Produce withdrawal signs and symptoms
 - Suppress the withdrawal signs and symptoms of chronic morphine administration

Narcotic Analgesics

Narcotic Analgesics include a large number of drugs that share three important characteristics.

- They will relieve pain.

Point out that "analgesic" means "pain killer".

- They will produce withdrawal signs and symptoms, when the drug is stopped after chronic administration.

Point out that this characteristic implies that narcotic analgesics are physically addicting.

- They will suppress the withdrawal signs and symptoms of chronic morphine administration.

Some narcotic analgesics are natural derivatives, some are synthetic.

- Morphine
- Heroin
- Codeine
- Demerol
- Methadone
- Fentanyl

- OxyContin
- Many Others.

Some narcotic analgesics (such as heroin) usually are injected. Others (such as codeine) usually are taken orally.

Display Slide 14: General Indicators of Narcotic Analgesic Influence



General Indicators of Narcotic Analgesic Influence

- "On the nod"
- Droopy eyelids
- Depressed reflexes
- Dry mouth
- Facial itching
- Low, raspy speech
- Fresh puncture marks may be evident

General Indicators of Narcotic Analgesic Influence

- "On the nod"

Clarification: "On the nod" is a semi-conscious state of deep relaxation.

- Droopy eyelids
- Depressed reflexes
- Dry mouth
- Facial itching
- Low, raspy speech
- Fresh puncture marks may be evident

Eye Indicators of Narcotic Analgesic Influence



- Neither horizontal nor vertical nystagmus will be present.
- Pupils generally will be constricted.

Solicit participants' questions concerning indicators of Narcotic Analgesic influence.

Display Slide 15: Inhalants

Inhalants

- Breathable chemicals that produce mind-altering effects
- Inhalants generally fall into one of three categories:
 - Volatile Solvent
 - Aerosol
 - Anesthetic Gas

Inhalants

Inhalants are breathable chemicals that produce mind-altering effects. Inhalants generally fall into one of three categories:

Volatile Solvent
 Aerosol
 Anesthetic Gas

A wide variety of familiar household items are sometimes abused as inhalants.

Examples:

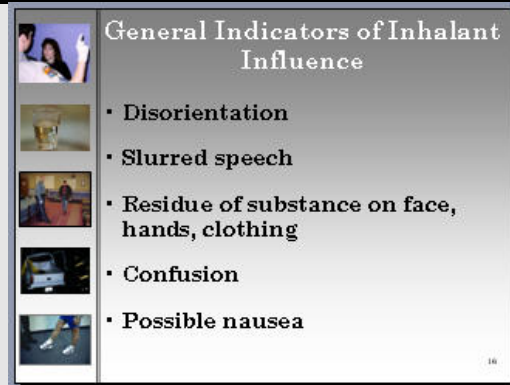
- plastic cement (model airplane glue, Toluene)
- gasoline
- paint
- vegetable frying pan lubricants
- hair sprays
- insecticides
- many others

Certain anesthetics also may be abused as inhalants.

Examples:

- nitrous oxide
- ether
- chloroform

Display Slide 16: General Indicators of Inhalant Influence



General Indicators of Inhalant Influence

- Disorientation
- Slurred speech
- Residue of substance on face, hands, clothing
- Confusion
- Possible nausea

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General Indicators of Inhalant Influence

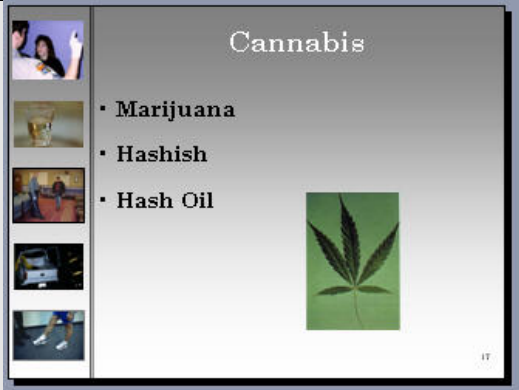
- Disorientation
- Slurred speech
- Residue of substance on face, hands, clothing
- Confusion
- Possible nausea

Eye Indicators of Inhalant Influence

- Horizontal gaze nystagmus generally will be present.
- Vertical nystagmus may be present (especially with high doses).
- Pupil size generally will be normal, but anesthetic gas may dilate.

Solicit participants' questions concerning inhalants.

Display Slide 17: Cannabis



Cannabis

- Marijuana
- Hashish
- Hash Oil

17

Cannabis

Cannabis is the category that includes the various products of the Cannabis Sativa plant.

- Marijuana
- Hashish
- Hash Oil

Cannabis products generally are smoked, although they also can be ingested orally.

Display Slide 18: General Indicators of Cannabis Influence



General Indicators of Cannabis Influence

- Marked reddening of the Conjunctivae
- Body tremors
- Odor of marijuana
- Disoriented
- Relaxed inhibitions
- Difficulty in dividing attention

18

General Indicators of Cannabis Influence

- Marked reddening of the Conjunctivae
- Body tremors
- Odor of marijuana
- Disoriented
- Relaxed inhibitions
- Difficulty in dividing attention

Eye Indicators of Cannabis Influence

- Neither horizontal nor vertical nystagmus will be present.
- Pupil size generally will be dilated, but may be normal.

Solicit participants' questions concerning Cannabis.

Advanced Roadside Impaired Driving Enforcement (ARIDE) Overview

Many law enforcement officers are trained in Standardized Field Sobriety Testing (SFST) and use the skills gained in the course as part of their overall enforcement of DWI laws.

Display Slide 19: ARIDE

ARIDE

The ARIDE course is not developed to act as a substitute for the DEC program and will not qualify or certify an individual as a DRE.


The ARIDE course is not developed to act as a substitute for the DEC program and will not qualify or certify an individual as a DRE.

This course is intended to bridge the gap between the SFST and DRE course and to provide a level of awareness to the participants, both law enforcement and other criminal justice professionals, in the area of drug impairment in the context of traffic safety.

Based on that premise, the ARIDE course was developed with the following goals in mind.

Course Goal

Display Slide 20: ARIDE Goal: Law Enforcement

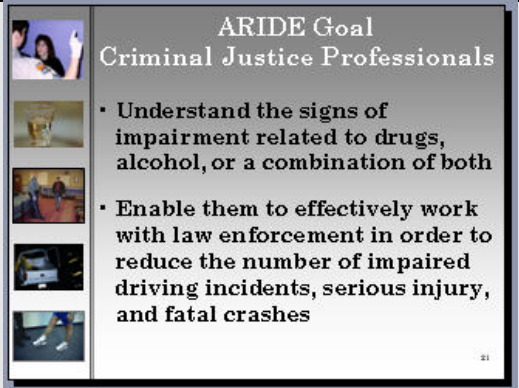


**ARIDE Goal
Law Enforcement**

- 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

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.

Display Slide 21: ARIDE Goal: Criminal Justice Professionals



**ARIDE Goal
Criminal Justice Professionals**

- Understand the signs of impairment related to drugs, alcohol, or a combination of both
- Enable them to effectively work with law enforcement in order to reduce the number of impaired driving incidents, serious injury, and fatal crashes

This course will train other criminal justice professionals (prosecutors, toxicologists, etc.) to:

- Understand the signs of impairment related to drugs, alcohol, or a combination of both.
- To enable them to effectively work with law enforcement in order to reduce the number of impaired driving incidents, serious injury, and fatal crashes.

NHTSA has promoted high visibility enforcement efforts among law enforcement agencies. As a result of this effort, several things happened:

- Prosecutors were left behind in technology advances and training.
- Overloaded the criminal court system.
- Delivered poorly developed cases for prosecution.
- Short cuts were taken that jeopardized court cases.

Criminal justice professionals such as Prosecutors, Toxicologists, Probation and Parole Officers must also understand the impaired driving detection process in order to support enforcement efforts, which will increase the probability of successful prosecution and adjudication.

The ARIDE course will train participants to:

- Define and describe the relationship of drugs to impaired driving incidents.
- Demonstrate, articulate, and properly administer the SFSTs proficiently.
- Observe, identify, and articulate the observable signs of drug impairment with the established seven drug categories associated with the DEC program.
- Recognize possible medical conditions, which may mimic the observable signs of drug impairment.

- Identify, document and describe indicators observed and information obtained related to impairment which leads to the arrest/release decision.
- Articulate, through testimony, impairment related to alcohol, drugs, or a combination of both, based on a complete investigation.

The ARIDE course is divided into sessions, which are designed to provide the participant with an overview of drug impaired driving.

- Introduction & Overview of Drugs and Highway Safety
- SFST Update and Review
- SFST Proficiency Exam
- Drugs in the Human Body
- Observation of the Eyes and Other Sobriety Tests for Impairment.
- Seven Major Drug Categories
- Effects of Drug Combinations
- Pre and Post Arrest Procedures
- Legal Issues Associated with Impaired Driving

The course is designed to serve as a bridge between the SFST and DEC Programs.

Often times officers come in contact with the drug impaired driver.

There are many things that could be happening:

- The officer is unfamiliar with the indicators of drug impairment, therefore does nothing with the subject.
- Recognizes there is something wrong with the driver, but does not know how to address the issue.
- Allows subject to continue on their way.
- Drives the subject home or allows the subject to ride home with another individual.
- Not familiar with the resources available to them.

OPTIONAL SESSION
PROCESSING THE ARRESTED SUBJECT
AND
PREPARATION FOR TRIAL

OPTIONAL SESSION: PROCESSING THE ARRESTED SUBJECT AND PREPARATION FOR TRIAL

Upon successfully completing this session, the participant will be able to:

- Discuss the importance of correct processing and report writing procedures in DWI arrests.
- Discuss the correct sequence of DWI subject processing procedures.
- Discuss the essential elements of the DWI arrest report.
- Discuss the importance of pretrial conferences and presentation of evidence in the DWI trial.

CONTENT SEGMENTS

- A. The Processing Phase
- B. Preparing the DWI Arrest Report: Documenting The Evidence
- C. Narrative DWI Arrest Report
- D. Case Preparation and Pretrial Conference
- E. Guidelines for Direct Testimony

***OPTIONAL SESSION: PROCESSING THE ARRESTED SUBJECT
AND PREPARATION FOR TRIAL***

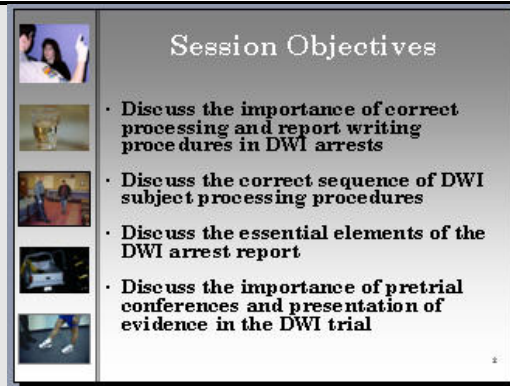
Display Slide 1: Title



OPTIONAL SESSION

Processing the Arrested Subject
and Preparation for Trial

Display Slide 2: Objectives



Session Objectives

- Discuss the importance of correct processing and report writing procedures in DWI arrests
- Discuss the correct sequence of DWI subject processing procedures
- Discuss the essential elements of the DWI arrest report
- Discuss the importance of pretrial conferences and presentation of evidence in the DWI trial

Session Objectives

- Discuss the importance of correct processing and report writing procedures in DWI arrests.
- Discuss the correct sequence of DWI subject processing procedures.
- Discuss the essential elements of the DWI arrest report.
- Discuss the importance of pretrial conferences and presentation of evidence in the DWI trial.

The Processing Phase

Relationship to overall DWI enforcement function. Processing of arrested subject is the bridge between arrest and conviction of a DWI offender.

Remind participants to become thoroughly familiar with their agency's guidelines for processing subjects.

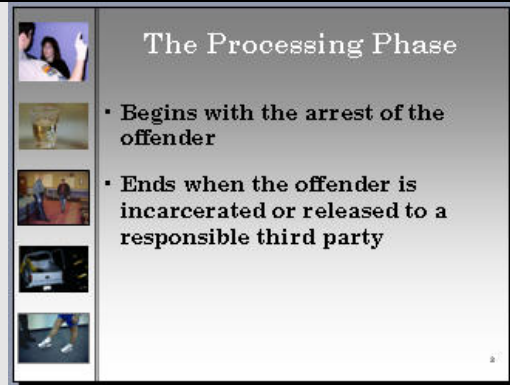
During processing phase, all evidence gathered during the detection phases is organized to ensure that it will be available and admissible in court. Additional evidence may be obtained during the processing phase, subsequent to arrest.

Ask a participant to give an example of such post-arrest evidence. (e.g. evidential chemical test).

It is important that proper procedures be followed during this phase; otherwise, important evidence might be ruled inadmissible, and therefore worthless.

Ask a participant to suggest how a procedural error during the processing phase might cause some evidence to be ruled inadmissible.

Display Slide 3: The Processing Phase



The Processing Phase

- Begins with the arrest of the offender
- Ends when the offender is incarcerated or released to a responsible third party

The processing phase begins with the arrest of the offender. Processing ends when the offender is incarcerated or released to a responsible third party (depending on jurisdiction).

Preparing the DWI Offense/ Arrest Report: Documenting the Evidence

Successful prosecution depends on clarity and completeness with which the arresting officer's and the evaluator's observations are presented.

Arresting officer must be able to convey observations with sufficient clarity to convince others there was probable cause to believe the subject was under the influence.

Point out that officer's efforts in detecting, apprehending, investigation, arresting and testing DWI offenders are of little value if officer cannot document sufficient evidence to prove each element of the DWI offense.

Chemical test evidence and additional evidence gathered subsequent to the arrest may be suppressed if the arresting officer does not adequately establish probable cause for the arrest prior to the chemical test.

DWI trials are often held many months after the defendant's arrest. A clear, concise report will enable the officer to recall those details and present them through direct testimony.

Evidence must be clearly conveyed in the formal structured reports (forms) and in a narrative offense/arrest report. A well-written, clear and convincing narrative report increases the likelihood that conviction will result because:

Display Slide 4: Preparing the DWI Offense/Arrest Report

**Preparing the DWI Offense/
Arrest Report**

- **Prosecutor is more likely to file the charge if the evidence is organized, clearly documented and compelling**
- **Defense is less likely to contest the charge when the report is descriptive, detailed and complete**
- **Helps to ensure convincing verbal testimony in court**

- Prosecutor is more likely to file the charge if the evidence is organized, clearly documented and compelling.
- Defense is less likely to contest the charge when the report is descriptive, detailed and complete.
- Helps to ensure convincing verbal testimony in court.

The written report should document all evidence available to establish the essential ingredients of the prosecution's case.

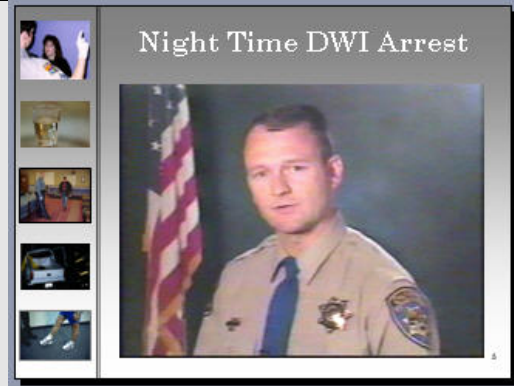
- That there was probable cause for arrest:
 - the accused was the operator or in actual physical control of the vehicle;
 - the accused was stopped based upon reasonable suspicion or a violation of law; and,

NOTE: Instructor should be familiar with all applicable state laws defining these terms.

- there was probable cause to believe the accused was impaired.
- That proper arrest procedures were followed.
- That proper procedure was followed with regards to the rights of the accused.
- That subsequent observation and interview of the accused provided additional evidence relevant to the alleged offense.
- That there was a proper request for the accused to submit to the chemical test.

The narrative offense/arrest report should be organized around the total sequence of events, beginning at the first observation of the offender, continuing through the arrest, and ending with the incarceration or release of the subject.

Display Slide 5: Show video segment of night time DWI arrest. Allow participants 4-5 minutes to complete notes.



Narrative DWI Arrest Report

Report writing is an essential skill for every officer.

Point out that good report writing becomes second nature with practice.

While there is no one best way to write a report, it is helpful to follow a uniform format.

Point out that officers should be guided by departmental policies and/or instructions or requirements specified by the prosecutor.

Display Slides 6 and 7: Suggested Report Writing Format



Selectively reveal the essential elements of narrative report via slides 6 and 7.

Observation/results recorded on the field notes can be used to refresh the officer's memory when preparing the narrative report.

Suggested Report Writing Format

- Initial Observations
 - First observations of the offender and their actions
 - Factors that drew officer's attention
 - Time and location of first observations

Point out that not every report will require all elements: some may be missing or irrelevant to some DWI investigations.

Briefly discuss each element.

- Vehicle Stop
 - Unusual actions taken
 - Offender's response to the stop command
 - Method(s) officer used to signal the stop command
 - The fashion in which the offender stopped the vehicle
- Face-to-Face Contact
 - Offender's personal appearance
 - Condition of eyes, speech, etc.
 - Names, numbers, seating locations of passengers
 - Unusual actions taken
 - Unusual statements made
 - What officer saw, heard and smelled
- Operation/Actual Physical Control
 - Establish offender as the operator
- Exit from Vehicle
 - Unusual actions, occurrences.

- Field Sobriety Tests
 - Physical performance
 - Mental performance
- The Arrest
- Disposition/Location of Vehicle and Keys
- Disposition of Passengers and Property
- Transport of Offender
 - Departure time
 - Arrival time
- Evidential Tests
 - What tests
 - Who administered
 - Test results
- Implied Consent/Miranda Admonitions
 - When given
- Statements of Witnesses
- Notification of Offender's Attorney or Other Party
 - Time of call(s)
 - Result of call(s)
- Citations/Complaints
 - Charges issued
 - When issued

- Incarceration or Release
 - Time
 - If released, to whom

- Additional Chemical Tests
 - Types of test
 - Time taken
 - Where taken
 - By whom administered

Solicit participants' questions concerning the narrative DWI arrest report elements.

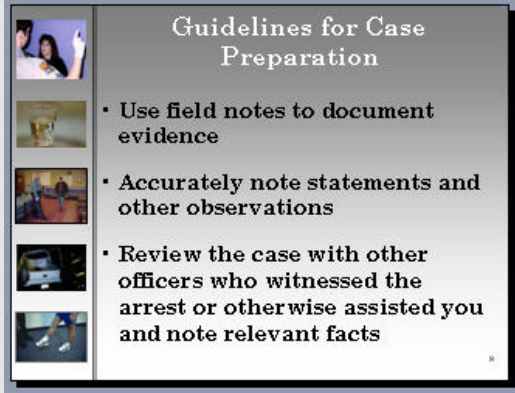
Refer participants to sample report in their manual.

Discussion. Emphasize the Phase One, Two, and Three indicators of impairment.

Solicit participants questions and comments concerning the video and sample narrative report.

Case Preparation and Pretrial Conference

Display Slide 8: Guidelines for Case Preparation



Guidelines for Case Preparation

- Use field notes to document evidence
- Accurately note statements and other observations
- Review the case with other officers who witnessed the arrest or otherwise assisted you and note relevant facts

Guidelines for Case Preparation

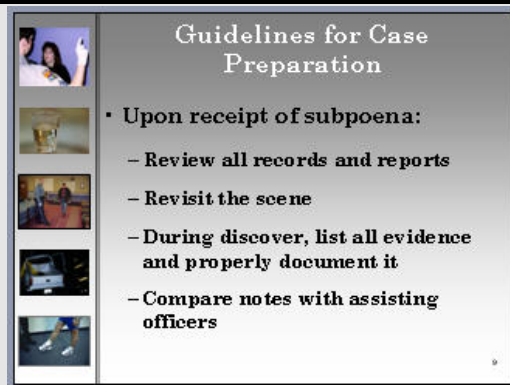
Case preparation continues with your first contact with the subject:

- Use field notes to document evidence.
- Accurately note statements and other observations.
- Review the case with other officers who witnessed the arrest or otherwise assisted you and note relevant facts.

Point out that it is essential that reports are corroborative or when differences occur, that they be adequately explained. The defense will try to impeach your testimony over any inconsistencies.

Ask participants to identify relevant records/ reports to be reviewed. Probe until appropriate items are identified.

Display Slide 9: Guidelines for Case Preparation



Guidelines for Case Preparation

- Upon receipt of subpoena:
 - Review all records and reports
 - Revisit the scene
 - During discover, list all evidence and properly document it
 - Compare notes with assisting officers

Upon receipt of subpoena or other notification of trial date:

- Review all records and reports
 - Field notes
 - Narrative report
 - Chemical test results
 - Other
- Revisit the scene if appropriate
- Compare notes with assisting officers

Exactness and attention to detail are very important.

The Pretrial Conference

Successful DWI prosecution also depends on clarity and completeness with which an officer's observations are presented.

Emphasize that the defendant in a DWI case could be acquitted if the officers testimony was not sufficient to establish probable cause or prove beyond a reasonable doubt that the defendant was impaired.

Officer must be able to convey observations with sufficient clarity to convince others that there was probable cause to believe the subject was under the influence.

Chemical test evidence may be suppressed if the officer does not adequately establish that there were reasonable grounds for the arrest prior to the test.

A pretrial conference with the prosecutor assigned to the case is very helpful. Try to insist on a pretrial conference if at all possible.

Point out to participants that the prosecutor will be able to develop an officer's testimony to bring out the most important facts necessary to convict the defendant.

The prosecutor needs an opportunity not only to review the evidence but to discuss case strategy.

BE HONEST AND FORTHRIGHT.

Review all evidence and reasons for your conclusions.

Point out that there should be "no surprises" during the trial.

If there are weak/strong points in your case, bring them to the attention of the prosecutor.

Ask the prosecutor to review the trial tactics/evidence to be presented:

Ask the participants to give examples of items to be discussed at a pretrial conference.

- The officer's training and experience.
- The narrative arrest report.
- The officer's ability to articulate observations.
- Documents to be presented at the trial.
- Questions the prosecutor will ask the officer.
- Anticipated defense tactics.
- Responses to defense arguments and questions.
- The defendant's driving record.

The main point is to familiarize the prosecutor with the case and your qualifications as a witness, and to review case strategy.

Again, "no surprises."

If you cannot have a pretrial conference, try to identify the main points to be discussed with the prosecutor in the few minutes you will have just before the trial.

Point out that due to a variety of reasons, prosecutors are not able to have pretrial conferences. That does not mean they are unconcerned. Try to see it from their viewpoint.

Pretrial Conference video and discussion. If time allows, show video segment. (10 minutes)

Emphasize the importance of the discussion of a DWI case between the arresting officer and the prosecuting attorney prior to going to trial.

Solicit participants' questions concerning the pretrial conference.

Guidelines for Direct Testimony

General Guidelines

Keep this in mind at all times.

It is the officer's job to present evidence in an impartial manner. Do not appear biased against defendant. Testify accurately and completely but also dispassionately. Don't be afraid to say "I don't know."

Avoid contact with the defense attorney if possible. Don't be upset if prosecutor and defense attorney appear friendly to each other.

Remind participants that both sides have a specific role to play in the case, but that does not preclude a personal or professional relationship.

Jury focuses on an officer's demeanor more than content of testimony.

Point out that officer should be polite and courteous during testimony...do not become agitated as a result of defense questions. Do not take personal issue with defense statements, stick to the facts.

Do not bring manuals or articles into court for reference.

Review training manuals and other materials before court to become familiar with contents.

Explain technical terms in layman's language.

For example, nystagmus means an involuntary jerking of the eyes. Horizontal Gaze Nystagmus occurs as the eyes gaze toward the side.

Pay attention to what evidence/testimony can be and is excluded.

Point out that if officer testifies on subject matter that was excluded, it could result in a mistrial.

When describing subject's performance on SFST's, state that subject "performed the test as demonstrated" or "did not perform the test as demonstrated." Provide specific descriptive details concerning exactly what the subject did or failed to do on the test (e.g., "stepped off the line twice and staggered while turning.")

Be sure to emphasize that all evidence is taken into account before forming an opinion.


Point out that officers should not embellish their testimony...be careful not to open any doors for the defense.

Point out that the defense attorney's job is to try to create a "reasonable doubt."
Don't take it personally.

Show video segment "The Courtroom Testimony." During this video segment, the prosecutor asks three important questions of the officer.

Solicit responses from the participants on how they would answer that question.
Discussion can follow.

Display Slide 10: Typical Defense Tactics



Typical Defense Tactics

- Inconsistencies
- Comparison with past testimony
- Testimony that is at odds with other established experts
- Lack of recall

Typical Defense Tactics

The defense relies on several factors to "impeach" or discredit your testimony.

Arresting officer's and assisting officer's testimony should be corroborative. Any differences must be explained.

By impeaching your credibility:

- Inconsistencies

Get your facts straight and stick to them.

- Comparison with past testimony

Try to get copies of transcripts of previous trials to review your strong/weak points. If possible, review your testimony with the prosecutor.

- Testimony that is at odds with other established experts

Do your homework...review the literature. Explain any differences if possible.

- Lack of recall

Try to be prepared, but don't be afraid to say "I don't know." Be honest.

By exposing the court to alternative conditions which account for your observations:

- Sickness
- Injury
- Other

Point out that if the defense can discredit your training and/or experience your testimony will have little "weight" with the jury.

Defense will challenge your credentials... a bona fide expert has both formal training resulting in a high degree of knowledge and experience in applying that knowledge, by:

- Directly challenging formal training and experience.

- Demonstrating the officer lacks knowledge in the field by contrasting officer's knowledge with the defense expert's knowledge.

The trial tactic is to show that the officer does not have the expertise to accurately identify impairment because of inadequate formal training which lessens the value of field experiences and increases likelihood that the officer's conclusions are wrong.

By demonstrating that the officer did not follow testing procedures established by departmental policy, training or legal precedent.

Point out that field sobriety tests should be administered "by the book" each and every time they are conducted.

Show video segment "DWI Courtroom Testimony." (15 minutes).

Summarize the relationship between detection phases, field notes, narrative report, pretrial conference and direct testimony.

Emphasize the need for clear and convincing testimony.

Solicit participants questions and comments concerning direct testimony.

ATTACHMENT A

*TRIAL TIPS & TECHNIQUES***Courtroom Decorum**

1. **TELL THE TRUTH.** Honestly is the best policy. Telling the truth requires that a witness testify accurately as to what he knows. If you tell the truth and are accurate, you have nothing to fear on cross- examination.
2. Condense your professional resume on to a 3x5 card, which you bring to court with you each time you receive a subpoena. On it, include your P.O.S.T. certification date, classes taken as a law enforcement officer, and other special awards or permits you have.
3. **READ YOUR INCIDENT REPORT** before you come to court. Go over the details in your mind so that you will have an independent recollection of the events of the arrest. **DO NOT** come to court and ask the prosecutor for a copy of your report. Do ask, prior to court, if you cannot locate a copy of your request.
4. Dress neatly and professionally. Leave sunglasses and cumbersome equipment in your car before coming into the courtroom unless needed for a demonstration. Wear a coat and tie if you prefer.
5. Do not guess the answer to any question asked. It is **OKAY** to say “I don’t know” or “I can’t remember” in response to questions. Do not give the impression that you are guessing the answer by prefacing your response with “I think” or “I believe.” If you do not know the answer, it is okay to look at your report and refresh your memory. Always give definitive, positive, sure answers.
6. Listen carefully to the question asked. Do not begin your answer until the prosecutor has finished asking the question. Be sure you understand the question before you attempt to give an answer. If necessary, ask that the question be repeated or rephrased if you do not understand it.
7. Take your time. Do not feel pressured to give a quick answer. After a question is asked, there may be an objection; allow this to happen. When you hear the work, “objection”, stop testifying.

8. Answer the question that is asked, then stop. Do not volunteer information not asked for, or you will risk causing a mistrial, or even an immediate acquittal. DO explain an answer, if you feel your answer might appear ambiguous to the jury. You are always permitted to explain your answer. Tell the prosecutor prior to your testimony if there is anything you feel the prosecutor needs to know, but might not!
9. Be serious in the courthouse...Jurors are aware that criminal prosecutions are serious business.
10. Speak clearly and loudly enough so that you can be easily heard.
11. Look at the jury when testifying, even when the defense attorney asking the question is not standing near the box. Always talk to the jury, and maintain eye contact with them, even if it feels unnatural to you.
12. Always be courteous, even when the defense attorney is not. Control your temper, and never allow yourself to be drawn into an argument with that attorney. Remember, the best way to make a good impression with the jury is to appear courteous and professional. You were just doing your job during the arrest, and you do not have a personal stake in the case.
13. Testify using layman's terms. Do not say, "The perpetrator exited the vehicle" when in reality "the defendant got out of his car." The person on trial is never a "lady" or "gentlemen," but is always "the defendant." Do not use military times without clarifying the time in layman's terms. Do not use call signals. It makes more sense to the jury when you speak the same language as they do.
14. It is permissible and desirable to discuss the case with the prosecutor before trial. A defense attorney may ask this question; tell the truth. Obviously, a prosecutor will try to discuss the case with the witnesses before trial; be straight forward in answering this question.
15. A defense attorney will always ask whether you have an independent recollection of the case. That is, aside from your police report or other notes, do you remember the event? Any fact that you remember about the stop and/or arrest of the defendant would be sufficient to answer this question positively.

Specific DWI Trial Recommendations

1. Never give the numerical preliminary breath test reading of the defendant when asked by the prosecutor. However, if the defense attorney asks you for the NUMERICAL reading, give it to him/her. The prohibition of preliminary breath test results of a defendant do not apply to witnesses, such as passengers in the car.
2. Always demonstrate how you conducted field sobriety tests. If the prosecutor forgets to ask you to come off the witness stand to demonstrate, suggest that it will aid your testimony. Be certain, however, that you can do in court all the tests you asked the defendant to perform the night of the arrest. If you cannot do them, the jury will not expect the defendant to have done them properly.
3. Know the reasons for giving field sobriety tests:
 - They are **divided attention tests**, designed to detect when a person is impaired by alcohol and/or drugs.
 - They provide evidence of intoxication in case defendant refuses to take a state administered test under implied consent.
 - They prevent an arbitrary decision to arrest, and allow an officer to articulate the reasons for concluding a driver was DWI to someone not present at the scene.
4. You are not required to know about the evidential breath-testing instrument's internal workings or anything other than how to operate it and take a breath sample from a defendant. You are merely an operator of an instrument, and while you have been taught something about how the instrument works when you became certified as an operator, never testify to its internal workings, or the defense attorney will discredit you, and make you out to be a "thinks-he-knows-it-all" who really knows nothing.

Do Not bring the evidential breath-testing instrument operator's manual to court, or the log, unless instructed to by the prosecutor. Discuss any subpoena to produce that you may receive with the prosecutor, before complying with the subpoena.

5. When testifying about field sobriety tests remember to discuss the level of impairment of the defendant. Officers can testify to numerical scores on a field sobriety test, including HGN, and can testify to the level of impairment. For example you could say; “the defendant scored four out of a possible six clues on the HGN and four clues is considered impaired.”
6. With a proper Motion In Limine from the prosecutor, you can testify only as to the observations you make on the field sobriety tests. You would therefore not testify about the numbers of clues or whether the defendant passed or failed any tests. Thus, you would ignore the advice given in number five above. It is very important that you discuss this option with the prosecutor in advance of trial. This avoids the NHTSA/IACP requirements of passing or failing a test based on the number of clues. You would only testify as to what you observed regarding the defendant’s manifestations of intoxication and performance of the field sobriety tests.

SAMPLE DWI INCIDENT REPORT

Defendant: Eryn Greenfield
Age: 31
Date of Birth: 10/03/70
Date of Arrest: XX-XX-XX
Time of Arrest: 9:20 pm
CA - D.L. #: CA 1234567

First Observations:

On XX-XX-XX at approximately 9:00 p.m., I was patrolling westbound on Reed Avenue at the intersection with Interstate-80 (fully marked CHP patrol vehicle #904534). I was stopped at the intersection preparing to make a left turn onto eastbound I-80. I observed a yellow Volkswagon (S/V) traveling down the eastbound I-80 exit ramp approaching the intersection with Reed Avenue. I noticed the S/V traveling with no headlights. Furthermore, I noticed the right tires of the S/V travel over the solid white fog line on the exit ramp by approximately 2 feet. The S/V made a brief stop at the intersection, then made a right turn onto eastbound Reed Avenue. I made a U-turn and followed the S/V. The S/V then made a wide right turn from Reed Avenue onto southbound Riverpoint Drive. An enforcement stop was initiated at which point the S/V began to pull to the right. At the point the right front tire of the S/V rubbed up onto the raised concrete curb that paralleled the roadway.

Observations After The Stop:

I approached the S/V on the passenger side and made contact with the driver (convertible-top down). I immediately noticed that the driver had red and watery eyes. I advised her of the reason for the stop and asked if her vehicle had any mechanical problems. She stated, "no." I requested her driver's license, registration, and insurance. The driver removed a stack of cards from her wallet, which was located in her purse on right front passenger seat. She began sifting through the stack of cards. I observed her clearly pass by her license and continue searching through the cards. Unable to locate her license on the first attempt, she started over at the top and located the license on the second attempt. She was identified as Eryn Greenfield by California driver's license (#CA1234567). After handing me the license, she did not make an attempt to retrieve the other documents I had requested. I asked her again for the registration and insurance cards. She then retrieved them out of the glove compartment. I asked her how much alcohol she had consumed and she stated "a couple of beers about an hour

ago.” I asked her what size and type of beer and she replied with 12oz. bottles of Heineken. I asked her if she felt the effects of the drinks and she stated, “No, I feel fine.” As she spoke, I noticed that her speech was slurred. I asked her to exit the vehicle and step to the side walk so I could administer several field sobriety tests to her (see field sobriety test section). As she exited the vehicle, she stepped around the front as instructed, then stumbled on the raised curb. I asked her several pre-field sobriety test questions of which she answered accordingly. As I communicated with her, I smelled an odor of alcoholic beverage emitting from her breath.

Field Sobriety Tests:

This evaluation was performed on Riverpoint Drive, just south of Reed Avenue. The evaluation surface was smooth concrete. Lighting conditions consisted of patrol vehicle headlights, spotlights, overhead lights, streetlight, and my flashlight. No surface defects were noted or claimed.

Horizontal Gaze Nystagmus (explained):

I observed lack of smooth pursuit, distinct and sustained nystagmus at maximum deviation, and an onset of nystagmus prior to 45 degrees in both of Greenfield’s eyes.

Walk and Turn (explained and demonstrated):

Instruction Stage: Lost balance (feet broke apart)

Walking Stage (1st Nine): Walked 10 steps (counted 10).

Raised left arm over 6 inches away from body to assist with balance (at steps 4-5).

Walking Stage (2nd Nine): Walked 10 steps (counted 9).

Raised left arm over 6 inches away from body to assist with balance (at steps 6-7).

Turn: Lost balance during turn.

One Leg Stand (explained and demonstrated):

Greenfield raised her left leg and began counting. She put her foot down on counts 1006 and 1009. As she was counting, she skipped 1017 (counting from 1016 to 1018). Used right arm for balance (6+ inches from body). She counted to 1019 after 30 seconds.

Arrest:

Based on the following information, I formed the opinion that Greenfield was driving under the influence of an alcoholic beverage:

- Driving at night with no headlights.
- Driving to the right of the solid white fog line on exit ramp.
- Making wide right turn from eastbound Reed Avenue to southbound Riverpoint Drive.
- Right tire rubbing against raised concrete curb after stop was initiated.
- My observed divided attention problems while retrieving her license/registration and insurance.
- Her red, watery eyes, and slurred speech.
- Her admissions to consuming alcoholic beverages.
- Stumbling over curb after exiting the vehicle.
- Odor of alcoholic beverage emitting from her breath.
- My observed signs of impairment as she performed the field sobriety tests.

I arrested Greenfield for driving under the influence of an alcoholic beverage at 9:20 p.m. Greenfield was given the proper chemical testing advisement. She chose a breath test and was transported to the breath testing facility. She provided two breath samples of 0.10 and 0.10 at 9:50 p.m. and 9:52 p.m. She was then booked along with her property.

Recommendations:

I recommend a copy of this report be forwarded to the district attorney's office for review and prosecution of Greenfield for driving under the influence and driving with a blood alcohol concentration at or above the legal state limit.

Vehicle Disposition:

Greenfield's vehicle was stored by Reliable Towing.

OPTIONAL SESSION
VIDEO ALCOHOL WORKSHOP

OPTIONAL SESSION: VIDEO ALCOHOL WORKSHOP

Upon successfully completing this session, the participant will be able to:


- Properly observe and record subject's performance utilizing the standard note taking guide.
- Properly interpret the subject's performance.

CONTENT SEGMENTS

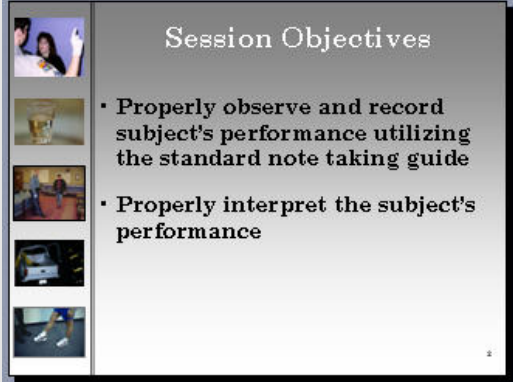
- A. Practical Exercise
- B. Session Wrap-Up

OPTIONAL SESSION: VIDEO ALCOHOL WORKSHOP

Display Slide 1: Title



Display Slide 2: Objectives



Session Objectives

- Properly observe and record subject's performance utilizing the standard note taking guide.
- Properly interpret the subject's performance.

Procedures

Distribute video score sheets, have participants fill in their name and team number.

Have sufficient copies of Handout 1 available. (Minimum of six copies per participant.)

Advise participants that each subject will be viewed performing all three tests. Pauses are provided between each test to allow participants time to record observed clues.

Point out that participants will have only one chance to view each subject. Review can be conducted after the “wrap-up”.

Participants shall record the number of clues observed, in the boxes located opposite each test.

Advise participants that two views of the subject performing the walk and turn are also provided.

Practical Exercise

Each participant viewing the videos must determine if the subject should or should not be arrested.

Each participant is to prepare a descriptive, written test record on each videoed subject, using the standard note taking guide.

Participants will be informed of the volunteers' BACs at the session "Wrap-Up".

Show SFST Option Dry Workshop Day 1

Session Wrap-Up

Participants report their observations of video subjects.

Solicit participant's SFST results on each video subject. Record results and display to class.

Instructors notify participants of video subjects' BACs.

Instructor notifies participants of video subjects' BACs.

Solicit participants' comments, questions or observations concerning the relationship between video subjects' BACs and their performances on the tests.

TABULATING RESULTS

<u>"Designated Subjects"</u>	<u>Horizontal Gaze Nystagmus</u>	<u>Walk And Turn</u>	<u>One-Leg Stand</u>	<u>Arrest ?</u>
"A"	_____	_____	_____	_____
"B"	_____	_____	_____	_____
"C"	_____	_____	_____	_____
"D"	_____	_____	_____	_____
"E"	_____	_____	_____	_____
"F"	_____	_____	_____	_____
"G"	_____	_____	_____	_____
"H"	_____	_____	_____	_____
"I"	_____	_____	_____	_____
"J"	_____	_____	_____	_____

Standardized Field Sobriety Testing
Option Video
Subject Results

SFST Option Dry Workshop Day 1		
Subjects Name: Bob		BAC: <u>.155</u>
HGN Clues	6	Lack of smooth pursuit present in each eye, Distinct and sustained nystagmus and maximum deviation present in each eye, Onset of nystagmus present in each eye, vertical nystagmus present in each eye.
W & T	2	Missed heel to toe, uses arms for balance.
OLS	0	None
Teaching points/Comments: Left leg is slightly bent, which will improve the subject ability to perform the test without demonstrating clues.		

SFST Option Dry Workshop Day 1		
Subjects Name: Brandon		BAC: <u>.073</u>
HGN Clues	4	Lack of smooth pursuit in each eye, Distinct and sustained nystagmus at maximum deviation present in each eye.
W & T	3	Loses balance during instructional stage, Used arms to balance, Stopped walking.
OLS	0	None
Teaching points/Comments: None		

SFST Option Dry Workshop Day 1		
Subjects Name: Jason		BAC: <u>.000</u>
HGN Clues	0	None
W & T	0	None
OLS	0	None
Teaching points/Comments: None/Placebo		

SFST Option Dry Workshop Day 1		
Subjects Name: Carl		BAC: .134
HGN Clues	5	Lack of smooth pursuit in each eye, Distinct and sustained nystagmus at maximum deviation in each eye, Onset of nystagmus in left eye only.
W & T	4	Lost balance during instructional stage, Uses arms for balance, Stepped off line, Misses heel to toe.
OLS	1	Swaying
Teaching points/Comments: Subject looked beyond stimulus at maximum deviation , not allowing clue to be observed in that eye.		

SFST Option Dry Workshop Day 1		
Subjects Name: Suzanne		BAC: .074
HGN Clues	4	Lack of smooth pursuit in each eye, Distinct and sustained nystagmus at maximum deviation in each eye.
W & T	0	None
OLS	1	Hopping
Teaching points/Comments: Give opportunity to remove shoes, especially those with high heels		

SFST Option Dry Workshop Day 1		
Subjects Name: Christina		BAC: .093
HGN Clues	5	Lack of smooth pursuit in each eye, Distinct and sustained nystagmus at maximum deviation in each eye, Onset of nystagmus in right eye. Vertical nystagmus present.
W & T	3	Stepped off line, Uses arms for balance, Stopped while walking.
OLS	1	Swaying
Teaching points/Comments: None		

SFST Option Dry Workshop Day 1		
Subjects Name: <u>Keith</u>		BAC: <u>.140</u>
HGN Clues	6	Lack of smooth pursuit in each eye, Distinct and sustained nystagmus at maximum deviation present in each eye, Onset of nystagmus present in each eye.
W & T	4	Lost balance during instructional stage, Uses arms for balance, Steps offline, Misses heel to toe.
OLS	3	Sways, Puts foot down, Uses arms for balance, Stopped test
Teaching points/Comments: Consider stopping the psychophysical tests for the safety of the subject.		

SFST Option Dry Workshop Day 1		
Subjects Name: <u>Josh</u>		BAC: <u>.132</u>
HGN Clues	6	Lack of smooth pursuit present in each eye, Distinct and sustained nystagmus at maximum deviation present in each eye, onset of nystagmus present in each eye.
W & T	2	Stepped off line, Misses heel to toe.
OLS	0	None
Teaching points/Comments: None		