



THIESSEN

LAW FIRM

TIMBER!

Chopping Down High Breath Tests

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THIESSSEN
LAW FIRM

The DISCONNECT Defense

- ◎ High Breath Test (0.15 and higher)
- +
- ◎ Good Video Performance
- =
- ◎ Indisputable Conflict
 - > Alleged breath test science
 - > Common sense theme of believing what you see.
 - > e.g. a DISCONNECT

Sharpen Your Axe

- **Erratic Driving**

phone or text message records, evidence of car difficulties, other passengers, and Gary's bj defense?

- **Drowsy Driving**

NHTSA Study: mimics intoxication

- **Red Eyes**

contacts, smoker, allergies, fatigue?

- **Slurred Speech**

first time they've ever met; I05
Voice exemplar

- **Odor of Alcohol**

waitress; bartender; house party

- **HGN**

eye medical records; flashing lights; let the jury look at their eyes

- **Bobble on WAT or OLS**

medical records of leg, back, or neck injuries

- **Alternative Tests**

RHOM, ABCs, Finger to Nose, Finger Touch

- **Breath Test**

Dubowski; Widmark; Jones; temperature; dental records; GERD; tolerance

Get Your Crew Primed

- ◎ “The case is won or lost in voir dire.” — Trichter
- ◎ **Recognize Your Best Jurors**
 - > Connecting with? Laughing with you? Eye contact?
- ◎ **Scientists** (engineers, mechanics, machinists, NASA, IT guys)
 - > GOOD: they’ve never used a machine that worked perfect every time
 - > BAD: they know the difference between a machine and an instrument
 - > EFFECT: keep the engineer, IT guy and NASA off your jury. Strike for cause??
- ◎ **HYPOTHETICAL**
 - > Taxalyzer 5000EN, Thermometer, Doppler 5000
 - > Serious Consequences: jail, brain surgery, natural disaster
 - > Relate if to the Intoxilyzer:
 - 20% acceptable range of error; self checking for accuracy; recalled in states; newer model; current model not produced anymore; citizen cannot purchase; source code; not available for independent testing; destroys evidence; operator just pushes buttons; “scientist” rarely checks in person; any inconsistencies in data; no warranty
 - > How does that make you feel?

The Regular Joes (W & AO)

- ◎ Reasonable Suspicion and Probable Cause
- ◎ Start Weaving the Disconnect Thread
- ◎ Driving Issues
- ◎ Know the NHTSA Manual Better than Joe
- ◎ Mental and Physical Faculties
 - > Innocent reasons for odor, eyes, speech; compromised every SFST; coherent
 - > Must lose mental before physical (BTO Manual pg. 44)
 - > Neutralize M&P Faculties; Make it rely on the BT score
- ◎ Did not urinate or ask to use the restroom!
 - > 0.235 equals 12 beers (144 oz) in the system.

The Fall Guy (BTO)

- ◎ **Limited Exposure With Defendant**
 - > notes? (Hearsay 803(8)(b))
 - > No opinion of loss of mental or physical faculties
- ◎ **Knowledge of the Machine**
 - > Henry's Law; Infrared Spectroscopy; simulator solution; checking and maintaining machine
 - > Simply pushes buttons
 - > Machine tells him if working properly (self checking)
- ◎ **Temperature of the Machine (34°C ± 0.2)**
 - > Temp that night? Required to be? Standard deviation?
 - > Mistake can compromise the results (ask TS)
 - > Write in large letters on a board
- ◎ **15 Minute Observation Period**
 - > Video to see if burped or belched
 - > What does your TS consider "in the presence"
 - Line of sight; single or multiple officers; within hearing range
 - Establish a conflict with the timing and TS will admit this could compromise the test. (BTO Manual pg. 49; Tex.Admin. Code 19.3(a) and (c)(1)).
 - > Article 38.23 of Texas Code of Criminal Procedure
- ◎ **Did Not Use the Restroom!**

Dr. Doolittle (TS)

- ◎ “Expert,” But Speak in Lay Terms
 - > working knowledge of breath testing science, the Intoxilyzer, and possession of multiple authoritative studies in the field of breath testing
 - > Dr. Kurt M. Dubowski, Dr. A.W. Jones, and Professor Dr. E.M.P. Widmark

- ◎ Articles/ Learned Treatises 803(18)
 - > Dubowski, Kurt M., *Alcohol Determination in the Clinical Laboratory*, Am. J. Clin. Pathol. 74: 747, 749 (1980).
 - > Dubowski, Kurt M., *Absorption, Distribution, and Elimination of Alcohol: Highway Safety Aspects*, J. Stud. Alc. Suppl. No. 10: 98, 99 and 106 (1985);
 - > Jones, A.W., *Physiological Aspects of Breath-Alcohol Measurement*, Alcohol, Drugs and Driving, Vol. 6, No. 2 (1990).
 - > Widmark, E.M.P., *Principles and Applications of Medicolegal Alcohol Determination*, Biomedical Publications, pg 99, Davis, CA (1981).

- ◎ Tables
 - > Dubowski’s table of the Stages of Acute Alcoholic Influence/Intoxication
 - > Stages of Alcoholic Influence – Dubowski
 - > Elated Disorders: Alcohol, Nicotine and Caffeine
 - > Specific Effects of Alcohol Related to BAC

Dr. Doolittle (cont.)

◎ Get Your Chops In and Get Out

- 20%, self checking; recalled in states; newer model(8000); current model not produced anymore; citizen cannot purchase; source code; not available for independent testing; Toxitrap; check in person once a month; no warranty; any inconsistencies in data

◎ Retrograde Extrapolation

- > Only if you can explain it to a 5th grader and are in absorptive stage.

◎ Tolerance

- > The only explanation for the State.
- > Binder of articles
- > Don't know anything about Defendant or family
- > Metabolic, cellular, behavioral, initial, acute, acquired, cross,
- > Agree that a person has to practice these tests while intoxicated...

◎ Video

- > Did you even watch the video?
- > Your determination is purely on the number and not if it matches the table?

Paul Bunyon

◎ If the Client Can Afford It, Hire It

- › See Bubba's List
- › Research the expert's credentials and previous testimony
- › Make your expert familiar with your authoritative research
 - Simpson, G., Accuracy and Precision of Breath Alcohol Measurements for Subjects in the Absorptive State, Clin. Chem. 33/6, 753-756 (1987).
- › Let the expert meet with Defendant and his family
 - Counsel Defendant and family before this meeting

TIMBER!!!

- Systematically weaved reasonable doubt through every aspect of intoxication
- **Indisputable Conflict = Reasonable Doubt**
 - > Innocent Man, Insufficient Evidence, Indisputable Conflict
- Use Demonstrations
 - > Green, Green, Red
 - > Hypothetical Machine
 - > Pictures with ridiculous stats
- DISCONNECT: good video, no loss of mental or physical faculties, never urinated, all about the ridiculously high number, either the machine defies science or there is a problem
- Constitutional Duty to Find Defendant **NOT GUILTY**