

DISTRICT ATTORNEYS  
COUNCIL

# Highway Headlights

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## A Missing Tool in DWI Trials

By W. Clay Abbott, TDCAA DWI Resource Prosecutor in Austin

Behold, the ubiquitousness of PowerPoint.

If you have a fifth grader, he will present his important reports in school with PowerPoint. If you attend a civic group luncheon, the presentations are probably in PowerPoint. If you go to a CLE seminar, there will be PowerPoint. Anywhere you find education, training, or group communication you will see this tool. Well, except for the stuff that doesn't matter, like criminal trials. This important means of presenting a case is sorely missing from courtrooms, and I am writing in the hopes of changing that.

The message we send to juries when we make presentations in trial without up-to-date methods is that the subject of the trials is not worthy of a good

presentation. When we lose any chance to communicate with juries, the result benefits the defense.



### The objections to PowerPoint

I know the objections are already forming. Let's look at them, I will refute them, then let me provide some tips on how to use PowerPoint.

### I. PowerPoint and computer equipment can break or malfunction.

Any trial attorney knows that the

more complicated we make a presentation, the more that can go wrong. But the worst that can happen, if we are honest with ourselves, is that we will have to do a trial just like we do now, without PowerPoint. Secondly, in using something new, attorneys will have to leave their comfort zones and actually touch technology. Your fifth grader can do it; it's time you learned too. Practice and planning are essential to doing something new. You practice your close and you practice with your witnesses—you will have to practice using PowerPoint. (Speaking of witnesses: If we eliminate things that go wrong and don't work right, we should get rid of witnesses long before we get rid of PowerPoint.)

(Continued on page 10)

## Legislative Update

**SB 325** Defines the term "recreational off-highway vehicle" to mean, a vehicle manufactured and used exclusively for off-highway use, traveling on four or more non-highway tires, having non-straddled seating and which is steered by a steering wheel.

**HB 2131** Recently signed by Gov. Fallin, this bill modifies the definition of "eligible offender" relating to the Oklahoma Community Sentencing Act, to mean, one who is found to be in a range other than the low range and convicted of at least one prior felony, but gives the district attorney the power to consent to one who scores in the low range on an LSI unless otherwise prohibited by law.

(Continued on page 2)

### Traffic Safety Resource Prosecutor

If you have any questions, comments, or requests for assistance with research, writing, or trial preparation on the subject of impaired driving please do not hesitate to contact me at: [Leann.Paczkowski@dac.state.ok.us](mailto:Leann.Paczkowski@dac.state.ok.us)

## Legislative Update (Cont. from Page 1)



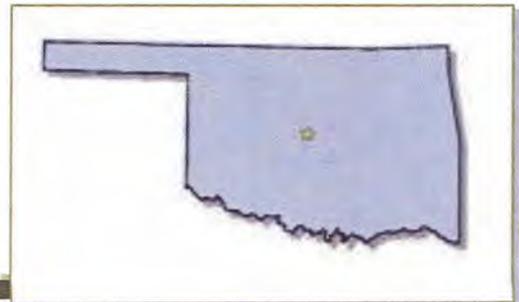
*"At his best, man  
is the noblest of  
all animals;  
separated from  
law and justice  
he is the worst."*

-Aristotle

**SB 324** This law, signed by Gov. Fallin, decreases the legal limit of blood or breath alcohol concentration for someone operating a water vessel from 0.10 to 0.08. It goes on to state that a person operating such a vessel has given consent to test blood or breath to determine alcohol concentration. It outlines the parameters on who may do the blood draw and how it must be done. The bill states that if a conscious person under arrest refuses to submit, the test must not be performed unless the officer has probable cause to believe that the person under arrest operated the vessel while intoxicated and was in an accident which could have caused serious injury or death of a person.

**SB 529** Recently signed into law by Gov. Fallin, this bill requires those convicted of DUI who refused to submit to the state's test, or those with a blood alcohol content of 0.15 or higher to have an ignition interlock installed at the expense of the offender for a year and a half following the mandatory period of revocation or until driving privileges of the person are reinstated, whichever is longer. Second offense would require installation for four years, and subsequent offenses would require five years. The offender would also be required to have the words "Interlock Required" on their driver's license for the entire period. Additionally, if someone is under age 21 and convicted of a third or subsequent offense, their driving privileges may be cancelled.

**HB 1319** This new law modifies the DUI statute. It clarifies that additional penalties can be applied to anyone who commits a subsequent offense within 10 years of the date following completion of execution of the sentence or deferred judgment. It requires that any person if previously convicted of second-degree murder or first-degree manslaughter as a result of DUI violation, commits another DUI offense, they may be punished from 5-20 years in DOC and a fine up to \$10,000. The penalty for Aggravated DUI was modified, removing the 480 hours of community service and increasing the minimum amount of time an ignition interlock is required from 30 to 90 days. It goes on to state that commission of a second aggravated DUI within 10 years of another conviction is a felony. It requires the offender to have an assessment and evaluation for treatment and successfully complete all recommendations. Finally, it allows for witnesses who are qualified by experience and training to testify to impairment but not concentration level.



## Sobriety Checkpoints

Yes. Sobriety checkpoints are lawful in Oklahoma according to *Lookingbill v. State*, 157 P.3d 130, 2007 OK CR 7 . They are very effective in not only apprehending those who are driving impaired, but also act as a deterrent for those who may be considering driving while impaired. So what are the legal requirements for an effective checkpoint?

In *Lookingbill*, the Court held:

- I. Seizure of a defendant at a vehicle checkpoint on highways is reasonable under the 4th Amendment (overruling *Smith v. State*).
- II. In future cases, prosecution will be required to introduce into evidence the agency guidelines governing operation of checkpoints.
- III. Vehicle checkpoints must meet three overarching standards:
  - A. Operation must be rationally related to stated public purpose;
  - B. Operation must be carried out in accordance with agency guidelines limiting officer discretion and assuring all motorists are treated equally; and
  - C. Operation must be planned and carried out in a manner that minimizes invasion of motorist privacy
- IV. Six specific factors are used to determine compliance with overarching standards:
  - A. Stated purpose of operation;
  - B. Approval of superior officers;
  - C. Degree of compliance with established agency standards;
  - D. Time, location, and duration of checkpoint;
  - E. Steps taken to inform motorists of reason for stop; and
  - F. Duration of individual stop.

*"Don't forget impairment starts with the first drink and driving impaired is a crime"*  
-NHTSA radio script, July 2003

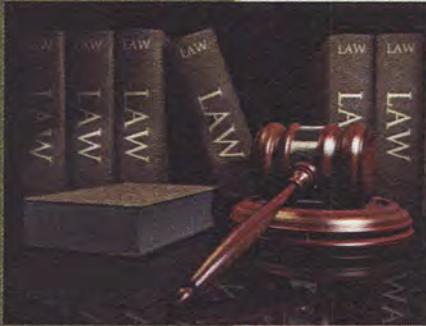


### Alleged Drunk Driver Ironically Drives Self to, and Into, "Sober Living" House

When an "alleged" drunk driver crashed his car into the side of a house one night in Los Angeles, it turned out to be "allegedly" ironic, as the building the man hit was a sober living facility, injuring four residents. The driver was charged with felony DUI, and if he returns to the facility, we all hope that next time, he does so a bit slower.

To read full article see: [http://www.trutv.com/dumb\\_as\\_a\\_blog/gallery/20-dumbest-alleged-drunks.html?curPhoto=13](http://www.trutv.com/dumb_as_a_blog/gallery/20-dumbest-alleged-drunks.html?curPhoto=13)

## *Michigan v. Bryant*, No. 09-150, Decided February 28, 2011



A deceased individual's statements to police are not testimonial and does not violate the Confrontation Clause if their "primary purpose [is]...to enable police assistance to meet an on-going emergency." *Davis v. Washington*, 547 U.S. 813. The opinion clarifies what the *Davis* court meant by "the primary purpose of the interrogation is to enable police assistance to meet an on-going emergency." *Id.*, at 822. The court held that in order to determine the "primary purpose", the court must consider the circumstances of the encounter between the police and the individual and the parties' statements and actions. "The terms 'on-going emergency' focuses not on prov[ing] past events potentially relevant to later criminal prosecution, but on end[ing] a threatening situation."

"The end of law is not to abolish or restrain, but to preserve and enlarge freedom. For in all states of created beings capable of law, where there is no law, there is no freedom."

-John Locke

## *Carrell v. State*, M-2010-0646 (Unpublished) Decided April 4, 2011

After trial by jury, Carrell was sentenced to one year to serve and a \$1,000 fine. He appealed his conviction based upon the State's admission of the deceased witness' statement, alleging a violation of his right to confrontation. The State alleged that any error in admitting the oral statement was harmless and cumulative in that Carrell admitted the deceased witness' written statement. The Court held that the statement made by the deceased witness was testimonial hearsay. In *Crawford v. Washington*, 541 U.S. 36, 68, the Court held that testimonial hearsay statements may only be admitted at trial if the declarant is unable to testify and defendant had a prior opportunity to cross-examine the declarant. In *Hammon v. Indiana*, 547 U.S. 813, 822, the Court held statements made during a police interview are testimonial unless the circumstances objectively indicate that there is no on-going emergency and the primary purpose is to gain information to be used in later criminal prosecution. In this case, there was no on-going emergency, and the statements offered were testimonial. Therefore, the statements are subject to *Crawford*. Due to Carrell's inability to cross-examine the decedent, admission of the statements constituted a violation of the Confrontation Clause. However, due to the fact that Carrell offered written statements by the decedent, and other evidence was present which sufficiently supported the guilty verdict, the error was found harmless beyond a reasonable doubt.



## Shelton v. State, RE-2010-205 (Unpublished), Decided March 14, 2011



Defendant was given a three year suspended sentence for Driving Under the Influence, Transporting an Open Container of Beer, and Driving with License Cancelled/

Revoked. The State filed an Application to Revoke, alleging he violated his probation by committing several new offenses and failing to pay fines and costs. After a hearing on the Application, the court revoked his sentence in full.

Defendant appealed the revocation alleging the trial court abused its discretion by not only revoking his sentence, but revoking it in its entirety.

The Court held it is at the discretion of the trial court to re-

voke a sentence in whole or in part, and the decision to do so will not be disturbed absent an abuse thereof. *Jones v. State*, 1988 OK CR 20. In this case, the decision of the trial court to believe police over the defendant was not an abuse of discretion. *Tapia v. State*, 1988 OK CR 82. Further, the Court's decision to revoke in full did not shock the conscience of the Court. *Stigall v. State*, 1871 OK CR 270. Affirmed.

**"A tree never hits an automobile except in self defense"**  
-American Proverb

## Byrd v. State, M-2010-158 (Unpublished), Decided May 12, 2011

Byrd was arrested for DUI after he almost collided with a police cruiser coming out of a bar in Tulsa, OK. Byrd had difficulty getting out of his car, staggering and swaying back and forth, had a strong odor of alcohol on his person, had bloodshot eyes and slurred speech. Byrd refused to take any SFST's or breath tests. Upon arrival at the county jail, Byrd began to throw up. About halfway through his throwing up, Byrd stated he would like to take the breath test. He again threw up. By the time he was done, there was not time left for a fifteen minute deprivation period, so law enforcement was unable to properly administer the test. Byrd was subsequently convicted by a jury of DWI.

The Court of Criminal Appeals held police do not have a statutory or constitutional duty to perform particular tests on evidence. Therefore, it is not a denial of due process, failure to preserve evidence, or destruction of evidence when tests are not performed. The breath test could not have been accurately or properly administered due to the defendant's vomiting, and he did not request a blood test. Affirmed.

## Blountville Lawnmower Driver Arrested for DUI; Allegedly Drove on Wrong Side of Road, Refused to Stop for Police

**By Rain Smith**

A Blountville [Tennessee] man has been arrested and charged with DUI after allegedly riding his lawnmower on the wrong side of the road -- ignoring police sirens and loudspeakers for a half mile before stopping.

An arrest report at the Sullivan County Sheriff's Office says the incident occurred at about 11 p.m. Friday, on Harr Town Road. A deputy reports passing a man, later identified as Martin Junior McMurray, 46, of 729 Harr Town Road, riding a mower down the roadway.

The deputy turned his squad car around to follow the mower, with McMurray allegedly steering into the opposite lane of traffic. The deputy activated his blue lights, which McMurray reportedly ignored, before giving commands on the squad car's loudspeaker to pull over. The report says McMurray continued driving.

The deputy says that after following the lawnmower - which continued traveling on the wrong side of the road -- for about a half mile, McMurray finally pulled

over. The report states McMurray was unsteady on his feet, with police detecting a "strong odor" of alcoholic beverage[s].

When asked if he'd been drinking, McMurray allegedly replied he'd, "had a few beers with dinner." While searching McMurray police located an unopened 12-ounce can of cold beer in his jacket pocket.

McMurray was given field sobriety tests, allegedly performing poorly. A check of his driver's license status revealed it had been revoked.

McMurray was arrested and charged with driving under the influence, driving on a revoked license and being a habitual motor offender. He was booked into the Sullivan County jail, where a check of his blood alcohol content allegedly came back as 0.15.

To read full article see: <http://www.timesnews.net/article.php?id=9022142>



# NDAAs Training Opportunity!

## Lethal Weapon

Advanced Trial Advocacy Course

September 12-16, 2011, Columbia, SC



- \* Learn how a crash reconstructionist determines speed from skid marks and vehicle damage
- \* Determine how vehicle and occupant kinematics assist in cases involving driving identification
- \* Understand the prosecutor's role at the scene of a traffic fatality
- \* Calculate BAC by learning alcohol absorption and elimination and making use of Widmark's formula
- \* Improve trial advocacy skills, particularly conducting direct and cross-examination of expert witnesses

*"An average drunk driver has driven drunk 87 times before first arrest"*

*-Zador, 1997\*\**

### Who Should Apply:

- \* Prosecutors with an experience level of four or more years trying impaired driving cases preferred
- \* Prosecutors who currently handle vehicular fatality cases
- \* Experienced prosecutors who want to increase their understanding of the technical evidence required to prove guilt in cases involving vehicular fatalities, and improve their trial advocacy skills

For more information see: [http://www.ndaa.org/ntlc\\_training.html#courses](http://www.ndaa.org/ntlc_training.html#courses)

## SCRAM Program

Transdermal continuous alcohol monitoring devices, commonly referred to as SCRAM ankle monitors, have become increasingly popular in the world of prosecution. They are often used as a condition of pre-trial release as well as used post-sentencing. So, how do they work?

"After a person ingests alcohol, the substance is then diffused through the human body by urine, blood, breath and perspiration."\* The device, when attached to the ankle, collects a sample of the subject's perspiration, testing it for ethyl alcohol. This testing process is generally repeated more than 50 times in a 24 hour period. The unit is then plugged into a landline in the offender's home, then all information including the presence of alcohol and tamper alerts are uploaded and reported to law enforcement.

*In a ranking system where 1 is having the lowest percentage of DUI related deaths and 51 is the highest, Oklahoma is rated 27*  
**-2009 FARS/NHTSA**

\*Swift, R. (2000). Transdermal Alcohol Measurement for Estimation of Blood Alcohol Concentration. *Alcoholism: Clinical and Experimental Research* 24 (4): 422-423.

\*\*Zador, Paul, Sheila Krawchuk, and B. Moore, *Drinking and Driving Trips, Stops by Police, and Arrests: Analysis of the 1995 National Survey of Drinking and Driving Attitudes and Behavior*, Rockville, MD: ESTAT, Inc, 1997.

## Field Sobriety Testing



There are three field sobriety tests that are commonly used by law enforcement to determine if probable cause exists to arrest someone on a charge of driving under the influence of alcohol or drugs. The first is the Horizontal Gaze Nystagmus test. In this field test an officer takes either his

finger or a pen and asks the offender to, without moving his head, follow the implement with his eyes. Generally, a sober driver's eyes will follow smoothly. However, an impaired driver will demonstrate a horizontal "jerking" of the eye. This is referred to as Nystagmus.

The second field test is walk and turn. This test is again administered by an officer, who will ask a driver to stand with his arms to his sides, and walk in a straight line, heel to toe seven to nine paces. The driver is then asked to turn taking three to four small steps, and return down the same line in the same manner. An inebriated driver will likely be unable to maintain balance or struggle following those basic instructions.

The third is the one leg stand test, where the driver is asked to stand with one foot about six inches off the ground, keeping his eyes fixed on his raised foot and count until instructed to stop. The intoxicated driver will likely demonstrate poor balance, either hopping to stay in one spot, using his arms to keep balance, or putting his foot down before instructed to.

An officer should still always offer the State's test to the driver.

*"Alcohol-impaired driving takes an enormous toll in the US, killing approximately one person every 40 minutes."*

*-NHTSA 2008*

## Ignition Interlock Devices

Any person convicted of a second or subsequent felony offense for driving under the influence will likely be using an ignition interlock device. There is also a new law that would require an ignition interlock for every aggravated DUI conviction. So, what is an ignition interlock? It is a device, similar to a breath analyzer that is installed in a motor vehicle. Before the vehicle can be started, the offender must blow into the device. If the device detects alcohol, the engine will not start. The NHTSA model specifications, adopted in 1992 provide that an ignition interlock must prevent a car from starting 90 percent of the time if the BAC is .01 g/dL greater than the preset limit.\* Many interlocks have a "running test", which at random, require repeated breath tests once the vehicle has been started. According to NHTSA, this reduces the likelihood that an "alcohol-free" bystander will provide the breath test. If a driver fails to provide a retest an alarm will be activated and authorities will be alerted.

Studies (Beirness, 2001; Jones, 1993; Popkin et al., 1993; Coben & Larkin, 1999; Marques et al., 2001; DeYoung, 2002; Raub et al., 2003) have shown ignition interlocks reduce recidivism from 50 to 90 percent while installed on vehicles. After removal of the device, recidivism rates return to pre-ignition interlock levels.\*\*



\*Mothers Against Drunk Driving [MADD], 2009

\*\*MADD, 2009; NHTSA, 2007; NHTSA 2009

## Just Like Marijuana?

By Jennifer Messick - TSRP for City of Anchorage, Alaska

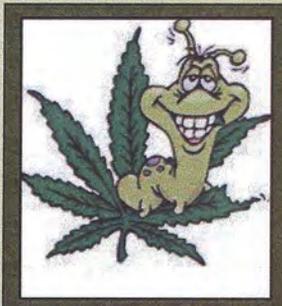
Spice, also known as K2, is a green leafy plant material that has been sprayed with a combination of research chemical failures that behave like THC. Packaged in psychedelic-colored foil packets, it is marketed as "incense" and can be bought at head shops, smoke shops and the internet. It can also be bought at some convenience stores, right next to the 5-hour energy drinks that are currently popular among teenagers. While it may look like cheap marijuana, its effects are more like PCP or the drug evaluation and classification category of dissociative anesthetics. As a result, users of this drug pose a safety risk to officers, paramedics, parents and anyone else around them.

### WHERE DID IT COME FROM?

In the mid 1990's, pharmaceutical companies were competing to isolate the good, medicinally desirable properties about marijuana from the non-desirable effects. This led to the creation of a synthetic cannabinoid without all the other health risks of the real thing. As with any research, mistakes were made along the way. JWH-018, one of the most common compounds found in Spice, is one of those mistakes. Researchers went on to publish their work on these efforts and unfortunately gave basement scientists access to dangerous recipes.

In 2008, German scientist Vokl Aurwater, along with others, analyzed several samples of Spice/K2 and identified 5 psychoactive

compounds: JWH-018, HU-210, CP 47-497, JWH-073 and JWH-210.1 This work was verified by a DEA lab in the USA. Some samples contained all 5 while some only had one or two. However, at 3 - 800 times the potency of marijuana, a trace amount of just one of these compounds can have adverse effects. Since 2008, manufacturers have continued to make additional compounds which have been identified in Spice products.



### EFFECTS

Like PCP or LSD, the effects are cyclic and vary from user to user and even the same user can have very different effects the next time. Based on information provided by law enforcement, EMS, poison control centers and user blogs, the most common effects are very high blood pressure (200+/100+), hallucinations, delusions of death, numbness and tingling, low body temp (94.6), completely garbled, incoherent speech, unconsciousness, memory loss and seizures. The same user may cycle through symptoms several times during the high so you can expect that things like HGN may be present at one point, and then disappear, only to return later. The high can last anywhere from 20 minutes to over 30 hours. Some effects are permanent. At least two users killed themselves while high on Spice and several traffic fatalities have resulted from high drivers.\*

\*To read full article see: <http://www.ndaa.org/pdf/BTL%20MarApr%202011%20Vol19%20No2.pdf>

## K2/Spice in Oklahoma

The Oklahoma Legislature was relatively quick to address K2 and Spice, and their potentially devastating effects as noted in the above article. House Bill 3241 was passed in 2010, legally defining them as Schedule I Controlled Dangerous Substances. The law became effective November 1, 2010. If you are attempting to locate them in your statute book, see Title 63 O.S. 2-204(A), they may be properly referred to as one of the following:

- 1-Butyl-3-(1-naphthoyl)indole
- 1-Pentyl-3-(1-naphthoyl)indole
- (6aR,10aR)-9-(hydroxymethyl)-6, 6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol

It is important to note that not all states have passed such laws. While these are now controlled substances in Oklahoma, they still find their way onto the streets and can be found online.



## DPS Set Aside Orders

By Brian K. Morton, Assistant General Counsel, and Joanne Horn, Assistant General Counsel, Oklahoma Dept. Of Public Safety

One day a defense attorney comes to your office to persuade you to dismiss your DUI/APC case against his/her client, or at least come off your initial plea bargain recommendation. To support his/her position, the defense attorney advises you that the Department of Public Safety (DPS) has set aside the driver's license revocation that resulted from the DUI/APC arrest, and returned their client's driver's license. The defense attorney may even produce an order from DPS to that effect. However, be sure to read the order closely, things may not be as they seem.

At a DPS implied consent administrative hearing a driver's license revocation may be set aside for any number of reasons: if an officer does not appear at the administrative hearing; if the arresting officer is not sufficiently prepared to testify; or if an essential witness was not listed by the arresting officer and thus not present to testify. All of these conditions, and more, would result in the revocation being set aside. The DPS order generally states the reason why a revocation is being set aside.

In some instances a revocation order is set aside because of a problem in the case. Even then, DPS' basis for setting aside the revocation order may have no effect on the viability of the criminal case. DPS may set aside the revocation on the issues where: 1) the wrong officer signed the Officer's Affidavit and Notice of Revocation; 2) the officer failed to read the Oklahoma Implied Consent Advisory, or misadvised the defendant as to the advisory; or 3) the breath or blood alcohol testing was not done in accordance with Board of Test rules.

Under Title 47 O.S. §753 and §754, a sworn report from the arresting officer submitted to DPS confers jurisdiction to take action against a person's driver's license. If it is determined that a person other than the arresting officer signed the sworn report, such as the breath analysis operator, then the affidavit is facially insufficient. See, *Chase v. State, ex rel., Dept. of Public Safety*, 199 OK 78, 795 P.2d 1048. This situation, however, should not affect a prosecutor's case because the requirement under Sections 753 and 754 only apply to DPS. Section 754 also requires the officer advise the arrested person their driver's license is subject to revocation if they test over 0.08 if over 21 years of age, or 0.02 if under 21 years of age, or if they refuse to take the State's test. Officers accomplish this by reading the Oklahoma Implied Consent Advisory. Failure to read the advisory would result in the revocation being set aside, but this only applies to license revocations at DPS. The failure of the officer to read the advisory does not affect a prosecution case.

If the State's test was not done in accordance with Board of Test rules, the prosecution's case could be substantially hampered, but it's not necessarily destroyed. If the evidence at the DPS hearing shows an invalid test due to failure to substantially comply with the Board of Test rules, the prosecution will not be able to rely on the test in the criminal case. However, issues in the administrative hearing are not the same as the prosecution's elements in a criminal case. DPS makes a finding the person either tested over the legal limit or refused to take the State's test. Prosecutors, on the other hand, must prove the person actually operated a vehicle under the influence. Pursuant to Title 47 O.S. §757, other competent evidence can be admitted to show that the person was under the influence. Thus, the prosecutor can still have a good case using an officer's observations, just as if the person refused to test.

The next time a defense attorney attempts to use the DPS administrative hearing order to persuade you to dismiss or come off your plea bargain recommendation, remember to read the order carefully and determine whether the issues at the administrative hearing represents actual problems in the criminal case.

### ← FAQ: →

**Does it violate a defendant's 5th Amendment right against self-incrimination to have to choose whether to take the State's test?**

—No. The Court of Criminal Appeals has held in *State v. Neasbitt*, 1987 OK CR 55, a defendant's refusal to take the state's test is not coerced and does not violate the 5th Amendment. The Court has reasoned that breath/blood test results are physical evidence, not testimonial, and therefore is analogous to taking fingerprints after arrest.

## A Missing Tool in DWI Trials (continued from page 1)

### 2. New things are hard and judges don't like new things.

Sure, new things are hard. Get over it. Sure, new things scare judges. Get them over it. The defense will object that "PowerPoint is more prejudicial than probative." Take a careful look at Rule 403. Does PowerPoint create an unfair prejudice or confusion or mislead the jury? No—as long as you make sure that everything that goes into your presentation is not objectionable to talk about. Most of what goes in it will be presented to the jury, just not as well. And while it will have an impact of prejudice, it is not an unfair impact; PowerPoint actually clarifies points and does not obfuscate (that's what talking lawyers do).

Secondly, does it create "needless presentation of cumulative evidence?" At first blush PowerPoint seems cumulative, but actually it allows simultaneous presentation of lots of different facts and massively speeds things up. My experience in Lubbock County was that one judge used it, the remainder demanded it within weeks if not months.

Prepare the court for the shock. Ask the bailiff to work with you in setting it up in the courtroom; call on his expertise and then implicit ratification. Consult with your judge and make sure she can see your presentation from the bench. Make handouts for the court reporter, the bench, and defense counsel. Make it smooth, and you'll overcome any objections (official or otherwise).

### 3. I am a good enough speaker that I don't need PowerPoint.

Vanity, thy name is Old Prosecutor. Oh I know, the greats didn't use PowerPoint. That is not what made them great. It was an obstacle they overcame, not an obstacle they avoided. If they practiced now, they would have both PowerPoint and laptops with Wi-Fi in the courtroom. They would also no longer smoke cigars in front of the jury. Things change. Great speakers are aided by the subtle and minimal use of visual prompts. The media uses it, politicians use it, entertainers use it, even preachers use it. Bad speakers overuse it, and that's because they are bad speakers.

### 4. If I use it, so will the defense.

Communicating clearly and accurately is the realm of prosecution. If, during trial, a jury is lost, inattentive, or confused, it rarely if ever helps the State. Clear communication helps the side relying on truth and facts, not misunderstanding, conjecture, or doubt. If a tool "clears things up," it is not for the defense—if they beat you with PowerPoint, they were beating you anyway. Never plan your trial around what the defense will do.

Finally, my experience has been that defense counsel adapts more slowly than we do.

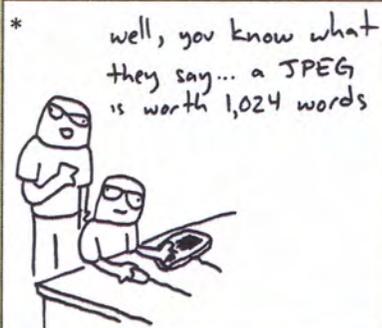
#### Tips

Far brighter folks than I have discussed the "how tos" of creating visual trial presentations. The one thing they all agree on, and I do too, is that less is better. The first time you use PowerPoint in trial, shoot for just three or four slides—and make them count. My old trial partner, George Leal, was a fanatic for visual presentations, long before PowerPoint. Every trial he prepared for he made sure he had flip charts for voir dire, maps and charts for direct, and posters for close. He rarely had more than four or five. Like every trial tactic and every new thing, follow the K.I.S.S. rule: Keep it simple, stupid. In addition to simplicity:

#### 1. Use cover slides to keep track of your presentations.

Your document will automatically be named what you put on a cover slide, so

(Continued on page 11)



*"A picture is worth a thousand words."*

-Frederick R. Barnard

\*<http://robinadelson.blogspot.com/2011/01/picture-is-worth-thousand-words.html>

## A Missing Tool in DWI Trials (continued from page 10)

put the case name and cause number on the cover slide of your PowerPoint. Make a brand new presentation for every trial. I'm telling y'all this as someone who once introduced photos of the wrong burglary in trial. Create it new every time; don't work off an old file. Now this does not mean you can't cut and paste. Just remember the "carefully" part. It is also never a bad idea to keep a copy of everything you do in a trial. (Slide 1.)

**Editor's Note:** To view the slides referenced in this article go to [www.tdcaa.com/sites/default/files/newsletter/DWI%20Template%20slides.ppt](http://www.tdcaa.com/sites/default/files/newsletter/DWI%20Template%20slides.ppt).

### 2. Element charts were made for PowerPoint.

The element chart is a basic staple of the State's voir dire. Covering the elements says we are thorough, prepared, fair, and knowledgeable. Showing it as well as talking about it demonstrates that we care that the jury understands it. An example of a DWI element chart is DIRECTIONAL. (Slide 2.) When the jury sees and hears what the issues are in trial, these issues are set in stone in their memories. Never pass up the chance to reinforce such parts verbally and visually.

Use this slide to emphasize elements that will be in contest. Here the word "intoxicated" is set out in red (I know it's gray in the photo, but trust me that in real life it is fire-engine red). The bright color helps me explain that this element will likely be an issue in trial. Reveal each element one at a time with a "text animation." I suggest simply using "appear" rather than anything fancier—remember that less is more.

### 3. Don't read a statute without letting the jury read along.

Remember I told my DWI jury the issue was intoxication? Well, now I better tell them what intoxication means under the law in Texas. They need to read the law. And while it is good to hear it, it is much better to hear and see it at the same time. (Slide 3.) In DWIs we have to explain the unexplainable: implied consent. Read them the law, but more importantly let them read along in PowerPoint. As you become more comfortable in PowerPoint, animate the text as you go to help your explanation. (Slide 4.) Almost every trial will include a legal definition or explanation so let the jury read along. Creating this slide is easy. Find the statute ... select the part you want, copy it, and then paste it on your slide. Couldn't be easier.

### 4. When you have a great story, the book should have pictures.

Imagine this from a State's attorney at trial: "Ladies and gentlemen, 'beyond a reasonable doubt' is not beyond all doubt. When you work a jigsaw puzzle, at first you don't know what the picture looks like. But as you go, it becomes clearer, and sometime before you put that last piece in you know what the picture is. You know beyond a reasonable doubt. Sure, a couple of pieces fell on the floor or were hidden by the family jokester, but you know. Trials are like that too. Sure, some minor pieces may be left out, and some small details may be unclear—that's unavoidable. But you know without a doubt what the picture is."

This is a great voir dire story. But it works better with pictures. (slides 5 and 6) Every great analogy or bit you do on voir dire or on close works better with pictures. Think about it: Even adults will gather up for a reading of "The Cat in the Hat," but you lose even the most dedicated book clubbers while reading "Atlas Shrugged" out loud for more than a minute or two. Ayn Rand may be more literary than Dr. Seuss, but his pictures help tell a story. (Special thanks to Todd Smith, a CDA investigator in Lubbock County, for these great pictures.)

#### State of Texas v. Otis T Drunk

- 1) In Lone Star County, Texas
- 2) The defendant, Otis T Drunk
- 3) On or about April 25<sup>th</sup>, 2009
- 4) Operated
- 5) A Motor Vehicle
- 6) In a Public Place
- 7) While Intoxicated

Slide 2

*"I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."*

-Thomas Jefferson

(Continued on page 12)

## A Missing Tool in DWI Trials (continued from page 11)

### 5. Comparisons, maps, and timelines work better in PowerPoint.

If you want the jury to see something, PowerPoint is your tool. Want them to see and compare the book-in photos? (slide 7). How about signatures on the DL (sober), booking in (intoxicated), and booking out (hungover but not intoxicated)? (Slide 8).

Maps work far better and easier on PowerPoint than on chalkboards or flip charts. Are you tired of officers not knowing scale or that "north is always up?" Well, PowerPoint is your answer. (Slide 9) Timelines of your crime or punishment priors are easy and visually persuasive. All of these demonstrative exhibits are easier, faster, and cleaner when they are created and displayed on the computer.



### 6. A visual trial, like all other parts of trial work, is a work in progress.

Start simple and work up. Drop stuff that doesn't work. Steal great ideas from other prosecutors. Refine your presentation. One of the nice things about being a prosecutor is that we are a team. Scared of animation? Do it the first time without and then add a little slowly. Soon you will find dozens more applications than I have discussed here. When you do, share them with the rest of us!

While we are talking about sharing, if you have a great slide (or four) for DWI trials, send them to me, one slide at a time, at [abbott@tdcaa.com](mailto:abbott@tdcaa.com). I will start compiling them and adding them to the slides in this article on the DWI Resource page at [www.TDCAA.com](http://www.TDCAA.com).

### 7. Just because you CAN do something doesn't mean you should.

OK here we are again. As my friend Todd Smith says at our Train the Trainer program, "Power corrupts and PowerPoint corrupts absolutely." Avoid fancy animations, colors, fonts, and clip art. Avoid like a contagious disease SOUNDS in your animations. Keep it simple, keep it short, and keep the number of words on a screen to an absolute minimum. Show your PowerPoint around and be ready to take advice.

In closing, each lawyer is charged with being competent in a matter they undertake for a client. Prosecutors are no different. The need to make our trials visual is profound. The ease of doing so using modern presentation software is astounding. The fact we are not using this technology in criminal trials, the most important communications taking place in our communities, is unacceptable. Take a cue from the country's fifth graders and give PowerPoint a whirl.

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### NHTSA 4th OF JULY PLANNER

NHTSA has provided free promotional materials available at the link below. It includes marketing tools, such as press releases and animated banners for e-marketing, posters. Please feel free to share this info. with law enforcement in your community!

<http://www.stopimpaireddriving.org/planners/July4th2011/index.cfm>

## Dates to Remember!

- June 5-11: National Tire Safety Week
- June 19: Father's Day
- June 20: National Ride Your Motorcycle to Work Day
- June 21: First Day of Summer
- July 4: Independence Day
- July 26-29: ODAA/DAC Summer Conference
- July 31-August 3: International Forum on Traffic Records and Highway Safety Information Systems
- September 15-16: Experts of DUI Training, OKC

## CROSSWORD!

E	W	Y	K	J	Y	J	N	K	M	N
L	Y	R	U	J	N	F	B	Q	O	G
I	C	B	V	Y	I	Z	G	I	I	Y
F	K	O	Y	V	L	F	T	D	Y	L
A	V	B	U	B	B	A	E	Y	E	J
J	F	D	K	R	L	E	G	D	U	J
R	M	G	E	S	T	C	Z	I	S	N
E	O	U	I	D	R	R	P	E	Z	D
R	J	G	Q	M	I	N	O	X	X	I
O	E	V	W	P	Z	R	P	O	E	A
L	X	O	J	B	T	Z	Y	X	M	E

- Courtroom
- File
- Judge
- Jury
- Legislation



### Man arrives to Sullivan court for DWI hearing drunk, carrying beer

**-by Victor Whitman, Times-Herald Record**

MONTICELLO - A Swan Lake man facing a felony driving while intoxicated charge showed up to Sullivan County Court on Monday with a bag full of beer and was promptly thrown in jail without bail.

Keith Gruber, 49, had a scheduled 10:30 a.m. pretrial hearing.

Gruber came to court about an hour and a half late carrying a black bag that contained four cans

of Busch beer. He also was carrying an open can of Busch beer and was drunk, authorities say.

He tried to throw away the can.

The bag was confiscated by court officers at the security check and was produced to Judge Frank LaBuda. Before Gruber arrived in court, LaBuda relieved Gruber's attorney from the case. Gruber has

been represented by the Greenwald law firm but hadn't cooperated with them.

LaBuda asked Gruber if he enjoyed his "liquid lunch."

Gruber indicated he did and said he was sorry.

"It was obvious he was intoxicated," LaBuda said.

Gruber, who has prior DWI convictions, was arrested on Dec. 27 in the town of Liberty and was out on \$30,000 cash bail.

LaBuda put Gruber in jail on no bail.

To see full article: <http://www.recordonline.com/apps/pbcs.dll/article?AID=%2F20110321%2FNEWS%2F110329956>

## Understanding 0.08

**(MADD)**—Alcohol decreases a person's ability to drive a motor vehicle safely. The more you drink, the greater the effect. The amount of alcohol required to become impaired differs according to how fast you drink, your weight, your gender, and how much food you have in your stomach. Because of these variables, the safest choice is always not to drink and drive.

Blood Alcohol Concentration (g/dL) <sup>1</sup>	Typical Effects	Predictable Effects on Driving
.02	<ul style="list-style-type: none"> <li>• Some loss of judgment</li> <li>• Relaxation</li> <li>• Slight body warmth</li> <li>• Altered mood</li> </ul>	<ul style="list-style-type: none"> <li>• Decline in visual functions (rapid tracking of a moving target)</li> <li>• Decline in ability to perform two tasks at the same time (divided attention)</li> </ul>
.05	<ul style="list-style-type: none"> <li>• Exaggerated behavior</li> <li>• May have loss of small-muscle control (e.g., focusing your eyes)</li> <li>• Impaired judgment</li> <li>• Usually good feeling</li> <li>• Lowered alertness</li> <li>• Release of inhibition</li> </ul>	<ul style="list-style-type: none"> <li>• Reduced coordination</li> <li>• Reduced ability to track moving objects</li> <li>• Difficulty steering</li> <li>• Reduced response to emergency driving situations</li> </ul>
.08	<ul style="list-style-type: none"> <li>• Muscle coordination becomes poor (e.g., balance, speech, vision, reaction time, and hearing)</li> <li>• Harder to detect danger</li> <li>• Judgment, self-control, reasoning, and memory are impaired</li> </ul>	<ul style="list-style-type: none"> <li>• Concentration</li> <li>• Short-term memory loss</li> <li>• Speed control</li> <li>• Reduced information processing capability (e.g., signal detection, visual search)</li> <li>• Impaired perception</li> </ul>
.10	<ul style="list-style-type: none"> <li>• Clear deterioration of reaction time and control</li> <li>• Slurred speech, poor coordination, and slowed thinking</li> </ul>	<ul style="list-style-type: none"> <li>• Reduced ability to maintain lane position and brake appropriately</li> </ul>
.15	<ul style="list-style-type: none"> <li>• Far less muscle control than normal</li> <li>• Vomiting may occur (unless this level is reached slowly or a person has developed a tolerance for alcohol)</li> <li>• Major loss of balance</li> </ul>	<ul style="list-style-type: none"> <li>• Substantial impairment in vehicle control, attention to driving task, and visual and auditory information processing</li> </ul>

<sup>1</sup> Information in this table shows the BAC level at which the effect usually is first observed, and has been gathered from a variety of sources including the National Highway Traffic Safety Administration, the National Institute on Alcohol Abuse and Alcoholism, the American Medical Association, the National Commission Against Drunk Driving, and [www.webMD.com](http://www.webMD.com).

\*To see full article: <http://www.madd.org/drunken-driving/understanding-08.html>



*“Promoting  
'responsible drinking  
and driving' is like  
promoting  
'responsible drive-by  
shootings'.”*

—MADD's Driven  
Magazine, Fall, 1997

## *Blind Man Files Discrimination Suit Over Law School*

### *Admission Test*

**By Phillip Rosenbaum**

**(CNN)** -- A blind Michigan man, rejected by three law schools after scoring poorly on the Law School Admission Test, is suing the American Bar Association, arguing that the group's exam requirements discriminate against the visually impaired.

In a suit filed Tuesday in the U.S. District Court for the Eastern District of Michigan, Angelo Binno alleges the Chicago-based ABA prevents law schools from waiving the admission test, known as the LSAT, for blind applicants. The suit alleges that visually impaired students face considerable difficulties with visually-oriented parts of the exam.

The association's rules require students to take a "valid and reliable" test. Binno's lawsuit counters that the LSAT is the only widely used, commercially available exam for assessing law school applicants, leaving, in effect, no alternative.

The suit says according to ABA policy, schools could face sanctions, be put on probation, or lose accreditation if they fail to comply. Binno says this violates protections for the disabled provided by the Americans with Disabilities Act of 1990.

"I want to help disabled and disadvantaged people who otherwise would struggle to have their voices be heard," Binno said.

A spokesperson for the ABA said its lawyers have not yet seen the lawsuit, nor been served with documentation, and the association could not comment at this time. The Law School Admissions Council, a private not-for-profit group based in Newtown, Pennsylvania, administers more than 100,000 LSATs annually, according to its website. Before 1997, law schools could decide whether blind people must take the exam, according to Binno's lawyer, Richard Bernstein, who is also blind. The LSAT was waived for Bernstein in 1995. He graduated from Northwestern University School of Law in 1999.

The litigation focuses on the analytical reasoning or so-called logic games section of the test, which requires "spatial reasoning and diagramming of visual concepts for

successful completion by most applicants," according to the suit.

The complaint includes a copy of logic games from an LSAT given in 2007.

The directions atop the section of the test say "it may be useful to draw a rough diagram" in figuring out the answers to some questions.

"It's a situation where blind or visually impaired people can't interpret a diagram since they don't have spatial perceptions," Bernstein said.

"So how is it fair to require that type of question to get into law school? At the end of the day, blind people can't draw."

According to Binno's lawsuit, "being unable to competitively answer questions on a quarter of the exam causes plaintiff substantial embarrassment, emotional distress, and mental anguish during the exam, which adversely impacts his overall performance."

Binno, who is not suing for monetary damages but retains the right to do so, wants the ABA to change its policies on blind applicants and the LSAT.

"I want the American Bar Association to stop telling blind people that they have to draw pictures in order to go to law school," Binno said.

Binno, 28, is fluent in three languages, finished high school in three years, graduated from Wayne State University in Detroit and worked with a unit of the U.S. Department of Homeland Security with a high-level security clearance handling applications and credentials of immigrants, according to the lawsuit.

He was laid off in 2008 and has focused on getting into law school for the past three years. Binno is blind from birth with a condition called retinitis pigmentosa.

"We're fighting so we can have more disabled attorneys who are going to create more disabled rights," said Bernstein, who teaches social justice at the University of Michigan, and said he runs marathons and has completed an Iron Man triathlon.

\*To see full article: <http://www.cnn.com/2011/US/05/24/>

